The Servicemembers Civil Relief Act: A Guide for Family Law Attorneys

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Introduction

From time to time domestic lawyers encounter a lawsuit in which one of the parties is in the armed forces, either on active duty or else as a member of the Reserve or National Guard. Over 100,000 Guard and Reserve personnel are currently mobilized pursuant to military orders, and the number of active duty personnel in the Persian Gulf region is likewise over 150,000, and the operational tempo of "peacetime" military and naval missions has never been higher.

These military personnel carry no exemption from the domestic travails which visit their civilian brothers and sisters. Many of them are separated or divorced. Some have custody of their children, some wish to exercise visitation rights, some are paying too much child support (or none at all) and some need help with adoption, paternity or property division. This Guide focuses on several issues related to the impact of military service on civil litigation, financial obligations, mortgages, leases, and other matters. Its specific emphasis is on family law issues and the Servicemembers Civil Relief Act.

The Soldiers' and Sailors' Civil Relief Act (SSCRA), as the statute was initially known, was passed by Congress at the start of World War II to provide protection to those serving in the armed forces. The first major revision of the SSCRA since 1940 occurred after the 1991 Gulf War. As of 2003, however, it was still largely unchanged from the initial version. Congress passed the Servicemembers Civil Relief Act (SCRA) at the end of 2003 to clarify the language of the SSCRA, to incorporate a half-century of court interpretation of the SSCRA and to update the SSCRA to reflect changes in American life and lifestyles since 1940.

The SCRA was signed into law December 19, 2003. It not only protects those on active duty, it also affords protection for Reservists, as well as for members of the National Guard when activated under Title 10,

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United States Code.[1] The current law can be found at 50 U.S.C. App. § 501 *et seq.* As a general rule, the courts have interpreted the SSCRA liberally to protect those in the armed services, and this should continue with the SCRA. As one post-World War II U.S. Supreme Court opinion stated, the statute should be read "with an eye friendly to those who dropped their affairs to answer their country's call."[2] In their work applying and interpreting the SCRA, judges should remember the purposes of the Act. The SCRA was enacted to enable those serving in the armed forces 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 servicemembers during their military service.[3]

Stay of Proceedings

When servicemembers[4] are involved in a lawsuit, it may be difficult for them to participate in the proceedings while they are involved in the defense of the nation. While some sailors may be accustomed to months of shore duty at a time, working regular office hours most weeks, there are also members of the 10th Special Forces Group who work "24/7" in sub-Saharan Africa training the soldiers of Mauritania to identify, track and root out terrorists, and who don't see their families for months on end. Training exercises, short or long deployments, undercover missions, duties at sea or in distant climes – all these make it unlikely that servicemembers can turn their full attention to the prosecution or defense of legal proceedings. The primary remedy under the SCRA for halting the lawsuit is a "stay of proceedings" issued by the tribunal.[5] This is the most important provision of the SCRA for the domestic judge or practitioner.

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[1] The protections of the Act are extended to members of the National Guard and Reserve from receipt of orders to report for duty to the date that they report. 50 U.S.C. App. § 516.
[2] *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).
[3] 50 U.S.C. App. § 502.
[4] Servicemembers who are covered include 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), 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, and commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration. 50 U.S.C. App. § 511.
[5] A tribunal is any court or administrative agency of the United States, or of a state or a political subdivision thereof. 50 U.S.C. App. § 511(5). Criminal proceedings are excluded. 50 U.S.C. App. § 512(b). Whenever "court" or "judge" is used in this article, it means "tribunal" in the broadest sense.

These stay orders are uniquely useful in domestic litigation. They provide a means for suspending a civil case until the member of the military who is a party is available to participate. This, in general, results in a fuller exploration of issues, more testimony or evidence before the court, and a fairer trial. It also benefits the armed forces in that military personnel are not constantly required to take leave from pressing operational duties in order to answer calendar call. Examples of domestic cases that are covered include divorce (*Smith v. Smith*,[6] holding that it was an error to deny a stay in a divorce action where alimony was an issue), custody (*Lackey v. Lackey*,[7] reversing a trial court which changed custody in a case involving the servicemember's children in which he had requested a stay and then was denied same), and paternity (*Mathis v. Mathis*,[8] holding that a servicemember's absence in a paternity action materially affects his ability to defend, unless specific findings are made otherwise).

Verifying Military Status

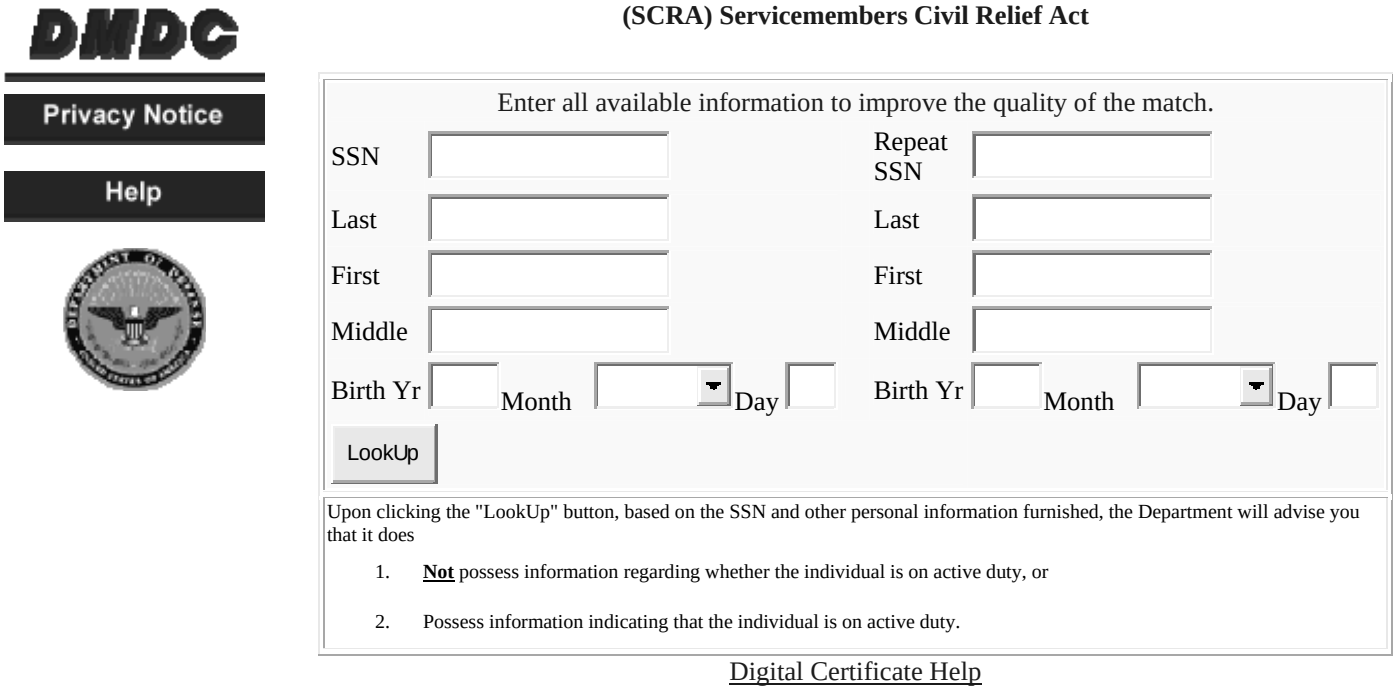
When a party has been served but has made no appearance, the first step should be to determine his military status. Is the individual is not in the military, then the SCRA is probably not applicable and the case may proceed as with other "default" cases. In order to determine whether a party is in the military, either side or the court may request information from the Department of Defense (DOD), and DOD must issue a statement as to military service.[9] 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
1600 Wilson Blvd., Suite 400
Attn: Military Verification
Arlington, VA 22209-2593
[Telephone 703-696-6762 or -5790/ fax 703-696-4156]

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

[6] *Smith v. Smith*, 222 Ga. 246, 149 S.E. 2d 468(1966).
[7] *Lackey v. Lackey* 236 So. 2d 755 (Va. S. Ct. 1981).

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. Here is what the dialogue box looks like:



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

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[8] *Mathis v. Mathis* 236 So. 2d 755 (Miss. S. Ct. 1970).
[9] 50 U.S.C. App. § 582.

the DOB of the individual instead of the SSN. You must send a stamped, self-addressed envelope with your mail request.

Deciding on a Stay Request

When the SM *has not made an appearance*, the court's next step is to decide on a stay of proceedings. For a military defendant, the Acts says that 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 there may be a defense to the action and a defense cannot be presented without the presence of defendant. This also applies if, after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.[10]

When 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), different rules apply. The Act states that 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 information required by the statute for the court to determine whether a stay is needed.[11] This information is: a statement as to how the SM's current military duties materially affect his ability to appear, and also stating a date when he will be available to appear; and a statement from his commanding officer stating that the SM=s current military duty prevents his appearance, and stating that military leave is not authorized for him at the time of the statement. A sample motion for stay of proceedings is found at ATCH B below. While this motion contains a simple letter from the individual's commanding officer, a more detailed missive would be best since counsel wants the court to truly see and feel the difficulties which the member is facing as to his or her participation. When crucial details are left out and the letter seems to be too baic and conclusory, ask the commander for more details – or provide them in the client's own communication, which you can draft for him or her.

The request for a stay may be from the SM himself or from his legal representative, which is his lawyer

[10] 50 U.S.C. App. § 521(d).

or one who holds his power of attorney. The first statement may be from anyone with knowledge of the facts in the statement. There is no requirement that either statement be an affidavit or, for that matter, in any specific format whatsoever. A letter, a formal memo or even an e-mail message should suffice. The two statements may be combined into a single statement from the individual's commanding officer.

Before the SCRA was passed, a common concern of military members and the lawyers who represented them was that the stay request would mean entering a general appearance before the tribunal, thus subjecting the member to the court's jurisdiction. This concern was addressed in the SCRA. The request, according to the SCRA, does not expose the SM to the risk of losing valid objections or defenses that may be available to him or her. A request for a stay does not constitute an appearance for jurisdictional purposes, nor does it constitute a waiver of any defense, substantive or procedural.[12]

Furthermore, a ninety-day stay does not exhaust the arsenal of the military member. The SM may request an *additional stay* based on the continuing effect of military duties on his ability to appear. He may make this request at the time of his initial request or later, when it appears that he is unavailable to defend or prosecute. The same information as given above is required.[13]

The additional stay is discretionary; in order to allow the additional stay, the court must find that the member's ability to prosecute or defend is "materially affected" because of his or her active duty service. Once the court makes this finding of material effect, the member is entitled to a stay.

This does not mean, however, that counsel for the servicemember should demand a stay of proceedings in each case. A wise attorney will consider the procedural posture of the case and the benefits, as well as detriments, flowing from a continuance of all pending matters. Questions to ask the client include: Why is this delay necessary? Is it possible to move the case forward without a stay and still do justice to the client? Is a delay desirable, or will it lead to a further accrual of arrears, citations for contempt, orders to comply with

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[11] 50 U.S.C. App. § 522.
[12] 50 U.S.C. App. §522(c).
[13] 50 U.S.C. App. § 522(d)(1).

discovery, and so on? Even if a delay is helpful at present, will a stay of proceedings merely put off the day of reckoning in the long run, to the detriment of the client? The attorney who moves for a stay should consider the consequences carefully. What are the risks and rewards? The benefits disadvantages and dangers?

A Gap in the SCRA

Note that there is a gap between the two provisions for a stay, Sections 521 and 522 of Title 50, U.S. Code Appendix. The first of these covers members who *have not made an appearance*. Section 522 covers members who *have notice of the proceedings and have requested a stay*. These are not mutually exclusive. The drafters of the SCRA failed to account for members who have made an appearance and have not requested a stay.

How could this happen? While it is hard to imagine in the ordinary civil case, which usually proceeds in a straight line from pleadings through discovery to dismissal or entry of judgment, this is seldom the situation in a family law case. An order for custody, visitation, alimony or child support is not a final judgment, which concludes the matter. Domestic cases can remain active for years, or even decades, with the parties continuing to litigate through post-divorce motions and counter-motions for modification or enforcement of spousal support, property division, custody, child support and visitation.

Consider this scenario: A SM has already entered an appearance in a domestic case months or years previously. It does not matter whether he was in the military at that time. He has filed an answer, served and responded to motions and participated in person, all of which mean that he has entered an appearance. The litigation resulted in a divorce judgment and an order for child support and custody.

He receives orders sending him to Kuwait. While he is en route to his destination, or when he is in Kuwait, his former wife (not knowing of his deployment) files a motion to increase child support, institute a wage garnishment and modify custody and visitation. She sends the notice of hearing to her ex-husband's last known address, which is his pre-deployment location. This is perfectly legal, since is it what the state rules of civil procedure demand – first-class mail to his address for all motions, notices and orders to be served on the other party after the initial complaint or petition. She shows up for the duly calendared hearing several weeks

later and obtains from the judge the relief she has requested, all in the absence of the ex-husband SM. The judge, of course, demands to see proof of service, and the ex-wife produces her certificate of service, showing that she served her former husband in the manner shown above. Child support is increased, his pay is garnished, and her custody/visitation order is amended.

Has there been a violation of the Act? No. She was not required to notify the court of the military status of the ex-husband, as would ordinarily be required in a default situation, since he had already entered an appearance in the case. There is no general rule which requires individual appearances for each motion filed. In the absence of a federal definition of "appearance," state rules apply. Once an appearance has been initially entered, the other party is fully involved in the case and further notices of appearance are not necessary.[14] Section 521 of Title 50, U.S. Code Appendix did not apply, so there was no need to have the court enter a stay on its own or appoint an attorney if the case proceeded; all of those steps are required in a case where the SM has not entered an appearance, and that is not the situation here.

Nor is Section 522 involved. The SM did not move for a stay of proceedings, and Section 522 is triggered when a stay is requested. Under these circumstances, the first the SM would have known about the ex-wife's motions would be when his forwarded mail arrived in Kuwait some weeks later, or else when his first military paycheck was garnished for child support.

It should be pointed out that the failure to assert a stay request is *not* a waiver. Waivers are covered specifically 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.

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[14] For example, in *Seeley v. Seeley*, 690 S.W.2d 626 (Tex. Ct. App. 1985), the Texas Court of Appeals reviewed a case in which the non-domiciliary SM filed a special appearance to contest the court's jurisdiction over the spouse's claim for military pension division. Before the court ruled on that motion, however, the member's attorney allowed the court to proceed with the issue of divorce. Then the court proceeded to divide the member's retired pay. On appeal, the Court of Appeals ruled that the objection to jurisdiction under 10 U.S.C. 1408 (c) (4) was waived because the SM had entered an appearance. In *Gowins v. Gowins*, 466 So.2d 32 (La. 1985), the Louisiana Supreme Court reviewed a case in which the member had consented to the court's jurisdiction over divorce, custody, visitation and child support several years before the non-military spouse brought a separate partition action for division of his military retired pay. The Court ruled that the member had impliedly consented to the court's jurisdiction over the new matter since he had consented to jurisdiction over the divorce and his consent continued over all incidental matters.

The only relief in this case for the SM might be a motion under 50 U.S.C.App. § 582, which allows the reopening of a judgment if the member can prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service (which clearly is the case here) and that he has a meritorious defense to the claim (which he might or might not have). This is, however, manifestly unfair to the SM, who is now is standing on the sandy ridges of Kuwait, trying to figure out how he can file a motion to reopen the decree during his deployment, take leave and appear in court (or hire an attorney to appear for him). In the meantime the relief granted to the ex-wife is already in place and continues in effect.

Length of Stay, Appointed Counsel

The period of the stay, according to the SCRA, may be for the period of the SM's military service or any part of that period.[15] As a practical matter, the courts usually grant a stay of proceedings for such period as is necessary *until the material effect is removed*. While there is no explicit language stating this in the SCRA, it was the rule with the SSCRA and most likely will remain so with the current Act as well. Counsel for the stay applicant must be reasonable in requesting additional time under Section 522. A stay cannot last forever.[16] In addition, since most judges would be concerned about granting lengthy stays of proceedings, they usually require a stay applicant to demonstrate good faith and due diligence in his efforts to obtain military leave in

[15] 50 U.S.C. App. § 525.

[16] In *Ensley et al. v. Carter*, 245 Ga. App. 453, 538 S.E.2d 98 (2000), counsel for the SM wrote to opposing counsel, "This case will be stayed until Slade Ensley is discharged from the military, whenever that date occurs. If my memory is correct, Slade and I discussed in past conversations that he intends to make a career of military service. Therefore, this case will probably be in a posture for trial sometime in the next 30 to 40 years." In another letter the same attorney noted that his client "expressed a desire to have a long term career in the military. Unfortunately, it appears that this case will not be tried until we are well into the 21st century." 245 Ga. App. at 455, 538 S.E.2d at 100. Needless to say, the court did not grant a 30-year stay. In light of the earlier depositions of the plaintiffs (one of whom was the SM) and the lack of evidence that the SM-plaintiff sought military leave to attend the trial, no stay was allowed. 245 Ga. App. at 456, 538 S.E.2d at 100.

order to appear in court.[17] A flow chart illustrating the process for the "additional stay" from the judge's standpoint is at ATCH A at the end of this paper.

Granting a further stay at this stage of the proceedings is often the easier of two courses for a judge to take. This is because, if the additional stay is denied, the court must appoint an attorney to represent the SM in the action or proceeding.[18] The Act, however, is silent as to what the appointed attorney is supposed to do. 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? About the only realistic option for the attorney is to renew the request for a stay. Otherwise, how can a defense be prepared and presented? It would seem obvious that a stay is mandated by this unsolvable problem.

Furthermore, there is nothing in the Act about compensation for the appointed attorney. Does the hitherto unrepresented SM pay for an attorney whom he didn't even hire? Does the court award attorney's fees from the other side to pay for the SM's attorney? Can the court tax as costs the fee of the appointed attorney? Or is the attorney supposed to embark on the course of representation, which might include motions, trial and appeal, as a *pro bono* endeavor, regardless of whether the absent SM is a private or a general, a sailor or an admiral, indigent or wealthy? Unfortunately, the SCRA provides no answers to these questions.

Default Judgments

The SCRA also spells out the rules for entry of a judgment or order in the SM'S absence. A default judgment may not be lawfully entered against a SM in his absence unless the court follows the procedures set

[17] In *Palo v. Palo*, 299 N.W.2d 577 (S.D.1980), a South Dakota divorce and property division case, the parties were both in the 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.

[18] 50 U.S.C. App. § 522(d)(2).

out in the SCRA. As noted above, when the SM *has not made an appearance*, 50 U.S.C. App. § 521 governs. There is no federal definition of "appearance" in the Act. The court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment or order for the moving party (usually the plaintiff), the movant must file an affidavit. The affidavit states "whether or not the defendant is in military service and showing necessary facts in support of the affidavit." Criminal penalties are provided for filing a knowingly false affidavit.[19]

If the court cannot determine whether the defendant is in military service, then the court may require the moving party to post a bond as a condition of entry of a default judgment. Should the nonmovant 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).[20]

When the filed affidavit states that the party against whom the default order or judgment is to be taken is a member of the armed forces, no default may be taken until the court has appointed an attorney for the absent SM.

> If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.[21]

If the court fails to appoint an attorney then the judgment or decree is voidable.

The statute does not say what tasks are to be undertaken by the appointed attorney, but the probable duties are to protect the interests of the absent member, much as a guardian *ad litem* protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and to ask whether that party wants to request a stay of proceedings. Counsel for the SM should always renew the request for a stay of proceedings, given the difficulty of preparing and presenting a case without the

[19] 50 U.S.C. App. § 521(c).
[20] 50 U.S.C. App. § 521(b)(3).
[21] 50 U.S.C. App. § 521(b)(2).

client's participation.

The statute also leaves one in the dark about the limitations of the appointed attorney. Her actions may not waive any defense of the SM or bind the SM. What is she supposed to do? How can she operate effectively before the court with these restrictions? Can she, for example, stipulate to the income of her client or of the other party? Can she agree to guideline child support and thus waive a request for a variance? Without elaboration in this area, the Act could mean that she must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the SCRA. Such conduct is, of course, at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The purpose of this is to protect those in the military from having default judgments 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 move to reopen a default judgment. To do so he must apply to the trial court that rendered the original judgment of order.[23] In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter.[24] Reopening or vacating the judgment does not impair right or title acquired by a bona fide purchaser for value under the default judgment.[25]

To prevail in his motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service.[26] In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of judicial effort and resources in

[22] *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).
[23] *Davidson v. GFC,* 295 F. Supp. 878 (N.D. Ga. 1968).
[24] 50 U.S.C. App. § 521(g).

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 dealt with the "meritorious defense" issue in *Smith v. Davis*.[27] 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."[28]

Requirements for the Moving Party

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.[29] 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

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[25] 50 U.S.C. App. § 521(h).
[26] *Bell v. Niven*, 225 N.C. 395, 35 S.E.2d 182 (1945).
[27] *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).

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.[30] 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 did not prejudice him.[31]

Execution of Judgments

What happens when the attorney for the SM gets involved late in the lawsuit? This is typically at the stage where the court has entered an order to seize and sell the member's beautiful Pontiac Trans Am or to attach his bank account. Even when a court order or judgment has already been entered and the court is ready to proceed with execution or attachment, it is still not too late for the SM. 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) –

- stay the execution of any judgment or order entered against him, and
- vacate or stay any attachment or garnishment of property, money or debts in the possession of the SM or a third party regardless of whether it is before or after judgment.[32]

Opposing a Stay Request

It is clear from the above explanation that there are abundant protections which are afforded to the SM by the SCRA. However, domestic attorneys will be quick to recognize that these protections, especially the stay

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[28] 364 S.E.2d at 159.
[29] *Millrock Plaza Associates v. Lively*, 153 Misc. 2d 254, 580 N.Y. S. 2d 815 (1990).
[30] *Burgess v. Burgess*, 234 N.Y.S. 2d 87 (N.Y. Sup., 1962).
[31] *Wilterdink v. Wilterdink*, 81 Cal. App. 2d 526, 184 P.2d 527 (1947).
[32] 50 U.S.C. App. § 524.

of proceedings, can work a hardship in many family law cases.[33] Delays in discovery, unpaid support, custody or visitation problems – all of these and more may confront the lawyer for the nonmilitary party. What are the tools and resources available to her to challenge the SCRA's protections, to oppose the request for a stay of proceedings? For the practitioner who wants to contest a stay request, here are some questions, suggestions and strategies.

Be sure to ask 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, North Carolina or Ft. Lewis, Washington (so that others may deploy overseas), working a comfortable day shift with weekends off? Counsel for the non-moving party will sometimes hit paydirt by challenging the explanation (or lack of explanation) of military necessity.

Has the SM specified a reason why he cannot participate in the lawsuit? In *Power v. Power*,[34] the Texas Court of Appeals affirmed the trial court's denial of a stay motion for lack of evidence that the SM's military service required a stay of proceedings. The SM, responding to a motion to increase child support, filed a "plea in abatement" which stated basically that he was a major in the U.S. armed forces, he was stationed in Germany for the next three years, and that he was asserting his rights under the SSCRA and requesting that the court abate the action.

Noting that the Act was not to be used to delay the prompt resolution of lawsuits when the SM's rights would not be materially affected, the Court of Appeals stated that the trial has wide discretion in deciding whether a stay should be granted under the circumstances of a particular case and which party should bear the burden of proof as to prejudice. The Court added that "[s]uch latitude in fixing the burden of proof based on the

[33] Query: 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? 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? Note that Congress made no restrictions as to domestic cases in writing and passing the SCRA. And in January 2008, it passed the 2008 National Defense Authorization Act which emphasized that custody is included in the cases covered by Section 521 (basically, all "default cases," where the SM has not entered an appearance) and those involving an initial stay request (for at least 90 days).

facts of the case is especially appropriate where the trial court has the duty to protect the interest of children."[35]

The Court of Appeals pointed out that the SM "at all times appeared by counsel, yet he presented no admissible evidence in support of his plea."[36] Except for the bare allegation that he was in the armed forces and stationed in Germany for the next three years, he offered no proof to assist the court in the exercise of its discretion in determining whether a further stay should be granted. We note that during the 10 month pendency of appellee's motion to increase child support, appellant never presented proof that he was unable to obtain leave in order to appear at trial, or that his defense was otherwise adversely affected by reason of his military service."[37]

The Court of Appeals found that the trial court acted within its discretion in placing, under the facts of this case, the burden of proof on the SM, "who had greater access to the evidence supporting his position."[38] The SM's appeal was denied and the trial court's order, granting an increase in child support for the two children from $375 to $900 a month, was affirmed.

Counsel for the opposition may find that a SM intentionally exaggerates the amount of time needed to be in court so that his request for leave will be denied. Even if the case can be heard and resolved in a few hours, what would happen 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? The commanding officer would almost certainly refuse the request, stating that the SM's duty requirements prevent appearance and that he is not authorized leave. This might be called

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[34] *Power v. Power*, 720 S.W.2d 683 (Tex. App. 1986).
[35] *Id.* at 684.
[36] *Id.*
[37] *Id.* at 684-685. The Georgia Court of Appeals in *Vlasz v. Schweikhardt et al.,* 178 Ga. App. 512, 343 S.E.2d 749 (1986) took the opposite approach: "When the application is made it is imperative that the stay be granted unless it is made to appear further, by relevant evidence touching the question of impairment to prosecute or defend resulting from military service, that there is no material impairment…. An applicant might well rest his request for a stay upon the bare statement that he is at the time actively in the military service, and, with nothing more appearing as evidence touching the question of his impairment by virtue of his service, the trial judge would be required, as a matter of law, to grant the stay." 178 Ga. App. at 513, 343 S.E.2d at 750, quoting from *Gates v. Gates*, 197 Ga. 11, 15-16, 28 S.E.2d 108 (1943).
[38] *Id.* at 685.

"absence by design." [39] Sometimes the SM's stay request is motivated by tactical considerations instead of purely military demands. Counsel for the nonmilitary party may want to preempt this approach by specifying in the pleadings what is requested of the SM's time and approximately what amount of time will be required in court. Such a statement might read:

> The defendant will need to attend one deposition, lasting about three hours, and the plaintiff intends to schedule a hearing on temporary alimony and child support for one-half day in June or July. The final hearing on equitable distribution and support will take about two days and will be no earlier than December.

While this is practically unheard of in normal civil pleadings, it is a useful strategy in the military case. Counsel for the nonmilitary party should also conduct limited initial discovery in order to determine what information was given to the SM's commanding officer before leave was denied.

The lawyer opposing a stay should also examine whether the SM's actual presence is necessary.[40] In some hearings, the issues are presented to the court by pleadings, not by live testimony. In a hearing on summary judgment, for example, evidence is ordinarily presented to the court by affidavit, not by *viva voce* testimony.

In the alternative, when the servicemember's testimony is necessary, counsel for the nonmilitary party can argue that this does not require personal presence. It may be possible to convince the court that technology

[39] "While absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial, in some cases absence may be by design to delay the proceedings, rather than being the result of military service." *In the Matter of Day and Day*, 2003 Ohio App. LEXIS 1185 (2003).

[40] *See, e.g., In re Jesusa V.*, 32 Cal. 4th 588, 85 P.3d 2, 10 Cal. Rptr. 3d 205 (2004) (holding that an imprisoned biological father does not have a right to be personally present at a hearing on paternity).

makes testimony by videoteleconference or by use of the Internet almost as good as live testimony.[41]

Sometimes the case can proceed on an interim basis with a temporary hearing. The Georgia Supreme Court determined in 1989 that orders granting temporary changes in child support, as a general rule, do not significantly affect the rights of the servicemember since they are interlocutory decrees and subject to modification in the future.[42] Other courts have used different but likewise creative approaches to avoid granting stays requested in SSCRA motions.[43] Counsel should be careful with the argument for this approach, however. It is not correct to argue that the SCRA doesn't apply to temporary orders. The 2004 amendments to the Act added a new section to the SCRA in 50 U.S.C. App. 511 which reads as follows: "(9) JUDGMENT- The term `judgment' means any judgment, decree, order, or ruling, final or temporary." The right way to use this argument is in conjunction with inequitable conduct of the servicemember, such as wrongful removal of a minor child, failure to pay child support, or placement of the parties' children with a third party to the exclusion of the other parent. In such circumstances, counsel can show the court that some form of interim relief is necessary, that equitable considerations bar the member from raising the SCRA as a defense, that an interim order is necessary to correct an injustice that the member created, and that the order is not a final adjudication of the member's rights and thus not prejudicial.

The Child Support Case

One uniquely problematic area is in cases involving the initial determination of child support. The laws

[41] 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. In *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 (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) and pointing out that "Court reporters may take depositions in Germany including videotape depositions for use in trials in this country." In *In re Diaz*, 82 B.R. 162, 165 (Bankr. M.D. Ga. 1988), the court found that the debtor, stationed in Germany, was not entitled to an indefinite stay until he returned from his assignment inasmuch as videotape depositions and telephone communication were available. Servicemembers today have ready access to military-sponsored e-mail accounts at all but the most remote locations. In the Army, for example, every active duty soldier is required to have an e-mail account through AKO, or Army Knowledge Online.

[42] *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989).

of all states and territories require "expedited process" in child support determinations,[44] which is at odds with the concept of a stay of proceedings while the SM-parent is unable to appear in court due to military duties. 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. In a North Carolina child support case, for example, the absence of a request for a variance by the SM means that the only evidence needed by the court is the income of the parents, the cost of medical insurance and the cost of work-related day care.

The presence of the SM is not necessary to show what his income is; pay tables for military personnel are found at "Military Pay" on the DFAS (Defense Finance and Accounting Service) website, www.dfas.mil. 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." 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.

The custodial parent can testify to her own income and to the cost of work-related child care if she is the primary custodian. There is no premium for the military form of medical insurance, TRICARE Standard. Thus the entire guideline child support case can be made without the presence of the military member. With all these tools available for an expedited and straightforward determination of child support (at least on a temporary basis), especially where there is no present payment of child support, it is difficult to envision a judge's granting

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[43] The military member may be nominally involved but is not a "necessary party" to the contested litigation. In *Bubac v. Boston*, 600 So. 2d 951, (Miss. 1992), the father was in the military. The court found, however, that he was not a necessary party to the litigation, which involved the mother's habeas corpus challenge to the maternal grandmother's retaining custody of the children. Another court held that there is no "substantial prejudice," to the military member when a temporary order or an interlocutory decree is involved.

[44] *See, e.g.*, N.C. Gen. Stat. § 50-32.

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.

To be sure, there are some valid defenses in child support proceedings, as shown in *Smith v. Davis, supra*. As a general rule, "[a]bsence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial."[45] In *Smith v. Davis*, the N. C. 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.[46]

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 any of these issues. To persuade the judge to grant a stay of proceedings for a reasonable period, the attorney for the SM should make a clear statement of the defense which is sufficient to give notice of it to the other side.

Inquiring into "Material Effect"

Nothing in the Act requires the court to grant a stay motion without a hearing. The non-moving party is entitled to her day in court, her opportunity to challenge the request. Perhaps she can establish that the information provided is false. Perhaps she wants to challenge a stay letter, which contains only vague and conclusory statements.[47] The cases and decisions recognize that merely wearing the uniform is not, in itself, a

[45] *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also Chenausky v. Chenausky*, 128 N.H. 116, 509 A.2d 156 (1986).
[46] *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).
[47] "As such, some Courts have summarily denied requests for a stay in circumstances… where the service-person has only related that he is unable [to] defend an action, without any real evidence to support the contention." *The Antioch Co. v. Scrapbook Borders, Inc. et al.*, 210 F.R.D. 645 (D. Minn. 2002).

material effect that prejudices the member's ability to defend or prosecute.[48] Perhaps the member has exaggerated the length of time he would need for the trial in order to ensure that his leave request will be denied. Whatever the situation, the court should afford the non-moving party an opportunity to be heard in determining whether there is an adverse material effect caused by military duties.

"When will the temporary unavailability be over?" is the question most judges will ask. 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.

When the judge inquires into "material effect," there are several points that he or she ought to consider in trying to arrive at a just solution for all parties. There is no one definition of "material effect." The court should make a finding of material effect when a SM's ability to prosecute or defend a civil suit is impaired by military duties, which prevent the SM from appearing in court at the designated time and place, or from assisting in the preparation or presentation of the case. An adverse material effect might also be found when military service impairs substantially the SM's ability to pay financial obligations.[49]

The first point is burden of proof. 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,

> 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.[50]

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[48] "The mere fact of service in the armed forces of the United States does not entitle a party to a stay of proceedings against him as a matter of right." *Gross v. Williams*, 149 F.2d 84, 86 (8th Cir. 1945).

[49] If the court is not convinced of "material effect," it has the discretion to demand a copy of the SM's LES (Leave and Earnings Statement) to find out how much leave is available to the SM. A SM receives two such statements each month. The LES will show the SM's Base Pay, Basic Allowance for Housing, Basic Allowance for Subsistence, tax withholdings, voluntary allotments to pay bills or support, and accrued leave. This document can be a treasure trove of useful information.

[50] *Boone v. Lightner*, 319 U.S. 561, 569 (1943).

Although it is logical to require the burden of proof to be on the movant (*i.e.*, the SM who is requesting a stay of proceedings) because he has more information in his possession to show why he cannot be present and why his presence is necessary, some courts have stated that *both parties* may be required to produce evidence on the issues.[51]

The duty of the court is to examine the reasons why the material effect should or could have that impact, and it is within the court's power to require information and justification for the stay request from the SM. After all, the SM is the party who is best able to explain the nature of the material effect and how it impacts detrimentally on the lawsuit's progress and the member's participation.

Instead of simply presuming such an effect because the member is on active duty, the court should inquire into the nature of the material effect to ensure that justice is done for all parties. The court may allow discovery by the non-moving party for the limited purpose of uncovering facts to determine the nature and effect of the claimed material effect. The defendant, for example, might request copies of the member's current LES (Leave and Earnings Statement), his or her military orders, any leave request recently submitted by the member to his commander, and the response thereto.

As a condition of granting a stay, the judge can require the member to submit a detailed statement as to how the member's military service has a material and adverse effect on his or her ability to prosecute or defend, such as an affidavit setting out all the facts and circumstances of the alleged disability. This would be executed by the member since he would have the best knowledge of his disability, limitations and constraints in participating in the lawsuit. The court needs to know, for example, whether the member is on duty every day, including weekends, having no time for personal affairs, or whether his duties are from 7:30 to 4:30, the normal "military day," with most weekends free. Mere conclusory statements, such as "I request a stay because my military service has a material effect on my ability to participate in this lawsuit," are worth little in determining material effect. Such statements should be supported by facts, reasons and details of "how" and "why."

[51] *Id.*

The Danger of Conclusory Statements

A case under the Soldiers' and Sailors' Civil Relief Act illustrating the problem with broad, conclusory averments is *Booker v. Everhart.*[52] In March 1974 the plaintiff, an attorney who had represented the plaintiff-wife, sued for his fees on a note from defendant-husband. The husband's parents guaranteed the note. In May 1975 the defendant joined the Navy and was sent to the Philippines, where he remained through trial. In January 1976 the defendants (the husband and his parents) moved that that case be "entirely removed from the trial calendar" pursuant to the SSCRA on the ground that the husband would be absent from trial.

In response, the judge denied the motion and set the trial for April 1976. A month after that order and a month before the trial date, the defendants noticed plaintiff for the taking of the deposition of the defendant-husband *in the Philippines* two weeks before the trial. The judge granted a protective order to plaintiff, and the deposition was not taken. At the trial the court granted a directed verdict for plaintiff and the defendants appealed.

The Court of Appeals, in ruling on defendants' claim that the trial court erred in denying the stay request, noted that the Act mandates a continuance where military service would cause a party to be absent, but it also allows the judge to deny a continuance if, in his opinion, the SM's ability to conduct his defense is not materially affected by reason of his military service. The Court then noted, among other factors against granting the stay, that:

- There was no showing in the SM's affidavit that he requested leave or would not be able to obtain leave to be present at trial; and
- There was no showing in his affidavit, beyond a mere conclusory statement, that his defense would be prejudiced or his rights impaired materially by his absence.

The Court of Appeals upheld the trial judge's order, which found that the SM's absence would not materially prejudice his defense. The Court noted that the SM's use of the SSCRA was likely based on policy and strategy,

[52] *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977).

rather than on the necessities of military service.

The lessons of the *Booker* case are that the member must present more than a vague and conclusory affidavit; he should make a clear and detailed showing how he will be prejudiced by his inability to appear and defend. There should also be a statement as to whether leave was requested and the results of such a request.

Contested Claims, Stages

The judge may inquire regarding which claims are contested and which are not, to allow uncontested issues to be resolved, leaving for further consideration those which are contested. If there is no factual dispute, why postpone the matter? If a custody case is before the court, perhaps the absent SM will not be contesting custody but only challenging child support. Most divorces granted in every state are uncontested; the defendant who does not contest the granting of a dissolution of the marriage should not be allowed a stay of proceedings for the divorce hearing itself (as opposed to other contested claims).[53] Nothing in the Act says that a stay must apply to *all* claims and issues in a lawsuit, regardless of contested status. When a matter is uncontested, there is, by definition, no material and adverse effect on the rights of the SM in defending that claim.

Likewise, the judge may inquire into which *stages* of the lawsuit should be stayed and which should proceed, based on the facts adduced by the member. The first part of a lawsuit is "filing pleadings." After the suit is filed comes the stage of the lawsuit involving *answering the complaint.* This typically means that the member-defendant needs to respond to each factual allegation with "Admitted," "Denied," or "Denied for lack of knowledge or information sufficient to form a belief." If the member complains that he or she cannot participate in the lawsuit because of the material effect that military duties impose, it would be appropriate for the court to inquire what difficulties are imposed by the simple answering of the complaint, so that the issues may be joined and the court may know what issues are uncontested and which are in dispute. With this known, arguably the court can allow the uncontested matters to proceed and examine more closely the issues that are contested.

Another initial stage of many domestic actions is often termed "mandatory disclosure" in local or state rules. This usually involves such actions as filling out a financial affidavit, completing an inventory of marital and separate property for equitable distribution purposes, or exchanging expense and income documents. Suppose, for example, that the local rules require each party in a child support case to produce a current pay statement and serve it on the other side within thirty days of the start of the lawsuit. The applicable document for a servicemember is the LES (Leave and Earnings Statement). Whether the member is an activated Reservist who is serving in Hawaii, an active duty member performing peacekeeping duties in Kosovo, or an activated Army National Guard soldier stationed in Japan, there is usually no reason why he or she cannot produce a current LES, which is provided at mid-month and the end of the month to all servicemembers. This would not be true, of course, if the member were fighting at the front lines in Iraq or participating in a covert mission in Somalia or Peru. Thus in some cases it might be appropriate to inquire as to the specific material effect cause by military duties in complying with mandatory document disclosure and to move forward with the initial disclosure requirements for the military member if no detailed showing can be made.

Discovery and the Stay Request

Consider a document request under Rule 34 that demands production of the member's last two federal tax returns. A servicemember stationed far away from his books and records might have difficulty in complying with this request, one might assume. However, this might not be a valid assumption if, for example, the soldier's current spouse has the books and records back at their home and could easily provide them to him or to the court. The court could also require the member simply to request a copy of the tax returns from the Internal Revenue Service, rather than producing copies that he has in storage at his now faraway home. Once again, there would be a difference in the court's response if the member were fighting at the front lines or on a secret mission.

A good example of a case in which the court specifically tailored the denial of the stay request to the

[53] *See, e.g.*, *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980) (court allowed uncontested divorce to proceed, denying SM's

facts of the case and allowed discovery to proceed is the trial magistrate's opinion and order in *Dalenberg v. City of Waynesboro.*[54] There the court examined a fairly detailed affidavit of Captain Brown, the plaintiff's commanding officer, who stated:

> 1. "[As] recently activated reservists [which includes Plaintiff], none of the members [of the 345th military intelligence battalion] have accrued more than a few days of leave."
> 2. "The current operational tempo makes the decision to grant leave problematical. As commander, I cannot afford to release any of my personnel for any matter short of a significant family crisis."
> 3. "I must insist that all soldiers in my command exercise their rights under the Soldiers['] and Sailors['] Civil Relief Act to defer any pending civil matters until such time in the hopefully near future that we may be demobilized…. I need every man-hour I can get from members of this unit…."
> 4. "I am currently working this [plaintiff] some 12 to 14 hours every day. I cannot now release him from his duties to tend to private litigation matters. As it stands now, the work load appears to be getting more heavy, not less."[55]

The defendants filed a response opposing the plaintiff's stay request. The response pointed out that the plaintiff's mobilization had brought him closer to his attorney in Augusta, Georgia (the home of Fort Gordon, which was the mobilization site of plaintiff) from his home in White County, over 100 miles away. In addition, the defendants argued that his schedule at Fort Gordon still left him free time after he finished work at 5:00 p.m. each weekday, he did not work weekends and he was free to leave the base in his spare time. The defendants argued:

> The time commitment that would be required for Plaintiff to prosecute this case during the next several months should be sporadic and relatively light. Plaintiff would need to spend a few hours looking through documents and assisting his attorney to prepare written discovery responses and get ready for witness depositions. Plaintiff's own deposition will take less than a day and Defendants would be happy to take it on a Saturday for Plaintiff's convenience. Should a trial date arise before Plaintiff's military service ends, a continuance could be considered if appropriate.[56]

The court pointed out several facts that favored the defendants' position in the litigation. First of all, the plaintiff had not pursued discovery diligently. He filed the lawsuit in May 2001 and the defendants served their discovery requests (11 interrogatories and 16 document requests) on October 3, 2001. On October 29,

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request for a stay of proceedings).
[54] *Dalenberg v. City of Wayesboro*, 221 F.Supp. 2d 1380 (S.D. Ga. 2002).
[55] *Id.* at 1382.

2001, the plaintiff requested a six-week extension of time for responding to discovery, stating he was getting married and changing residences. The defendants agreed to an extension until December 15, 2001 but the plaintiff was notified on December 6 that he was being activated, and his reporting date was December 9. The plaintiff did not respond to the discovery requests by December 15, the plaintiff had over two months to respond to the limited discovery tendered by defendants before his activation date of December 9, and his "explanation for his failure to complete discovery is inadequate."[57]

The court further noted that, according to his affidavit, the plaintiff's commanding officer

> …appears to contemplate that he would need to "release" Plaintiff to tend to this litigation. However, Plaintiff would not need to be "released" to complete Defendants' discovery requests; Plaintiff could complete discovery when not working. Defendants assert that Brown informed them that Plaintiff finished work at 5:00 PM and that his weekends are free. Defs.' Response, p.5. Brown's affidavit is unfortunately sparse on details. The affidavit says nothing about the actual work schedule that plaintiff maintains or whether he works on weekends. [footnote omitted] Notably, Plaintiff has not submitted a work schedule or other information to supplement his own motion or Brown's affidavit…. Given that Defendants are apparently attempting to secure discovery at the convenience of Plaintiff, surely Plaintiff can (1) cooperate in attempting to arrange a time to have his deposition taken and (2) work to complete discovery interrogatories and production requests of which he has been aware for more than a half year as of the date of this Order.[58]

The court noted that the physical location of the plaintiff helped instead of hindered him, since he was now located at Fort Gordon in Augusta, Georgia, the location of his attorney and of the trial court. "Hence, Plaintiff's location is not a hindrance to his going forward with this litigation."[59]

As a last point, the court noted that the plaintiff offered no alternative suggestions for conducting discovery. In contrast to the proffered flexibility of the defendants, the plaintiff "has failed to offer an alternative solution. Hence, Plaintiff has not attempted to aid his own cause."[60]

As a result of these factors favoring the defendants, the court denied the plaintiff's motion for a stay and

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[56] *Id.* at 1383.
[57] *Id.* at 1384.
[58] *Id.* The court cited with approval *Comer v. City of Palm Bay*, 265 F.3d 1186 (11th Cir. 2001), in which the appellate court upheld the trial court's denial of a stay motion and noted that the SM-plaintiff had failed to address whether other means of conducting discovery, such as telephone depositions or written interrogatories, were available.
[59] *Id.* at 1385.
[60] *Id.*

extended the discovery period. The lessons of *Dalenberg* for those opposing stay requests are several:

- "Location is everything," as realtors constantly remind us. The close proximity of the plaintiff to the place of trial and his attorney's office tipped the scales for defendants. This case would have had a far different outcome if the plaintiff had been stationed in Germany, Iraq, Japan or, for that matter, Ft. Lewis, Washington.
- Start with discovery. Do not demand an immediate trial. Use written discovery as the starting point, since it is relatively easy to complete if the requests to the SM are modest, as in this case. Test the water and see what *limited* interrogatories and document requests produce.
- Wait, wait and wait. If there is no reply on the specific date to proffered discovery by the appointed day, do not file motions to compel and for sanctions the following week. Let the default in answering "ripen" for several weeks or months before demanding an accounting and a response. Unanswered discover is like a good cheese or a fine wine; it needs to age and mellow before it is ready for presentation. In this case, the court's order came after six months of unresponsiveness by the plaintiff, enough to upset any jurist.
- Be generous, be flexible. The defendants in *Dalenberg* agreed to the initial extension of time for responses to interrogatories and production requests. They offered to cooperate in scheduling the deposition of plaintiff on a Saturday, and they submitted that it would take less than a day.[61] They admitted that a stay might be appropriate if the trial came up while the plaintiff was still on active duty. Being reasonable helps put the one on the side of the angels when opposing a stay motion.
- File a response and ask for a hearing. Too many opponents, when faced with the unfamiliar "stay motion" filed pursuant to the unfamiliar Servicemembers Civil Relief Act, simply toss in the towel.

There is nothing in the SCRA that bars a response opposing the stay motion. Nothing in the Act forbids a hearing on the initial application of the SM so that it can be tested to determine if it complies with the statute. How can the court exercise its discretion without hearing from the non-moving party? Without their aggressive response opposing the stay, the defendants in this case would have gotten nowhere.

- Send the judge to "boot camp." Without some "basic training" for the court, most judges would not have a clue as to what a SM's daily schedule might be. The court may need to inquire as to the duty hours (and days) for the SM. For most members in the Gulf region, it would be accurate to describe their duties as "24/7," whereas a SM assigned to a garrison unit at Fort Lee, Virginia, or Shaw Air Force Base, South Carolina, might have duty from 8:00 a.m. to 5:00 p.m., with weekends free. Members of the armed forces are entitled to 30 days of leave each year (accruing at the rate of 2.5 days per month) although military necessity may limit when the leave is allowed.[62] 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. A member who is attending basic or advanced training may not be able to appear in court due to the training schedule; there are no extra days built into the schedule to accommodate court dates, depositions or family emergencies. Absence from training due to court ordinarily means that the trainee must be "recycled," or repeat the same training program from the start. Since the unavailability of the SM depends largely on his assigned duties, his duty hours, his available leave and his location, the court may want to find out whether he can respond to limited discovery, even if he is unavailable for a court appearance. Thus the court might inquire as to any and all scheduling reasons why the SM cannot respond to written

[61] The concept of cooperation and "working together" also came up in *The Antioch Co. v. Scrapbook Borders, Inc., et al.*, 210 F.R.D. 645, 649 (D. Minn. 2002). The court there denied a stay of discovery (but noted that a trial would be stayed), stating that Luis DeBonoPaula, the SM, was on active duty in the Air Force and stationed in the United States. Although he currently was absent on service missions about two weeks a months, the court pointed out that he was present in the United States at least two weeks a month. "Certainly, the parties to this action can work together so as to assure that scheduling of depositions, or discovery deadlines, provides Luis with enough time and notice to appropriately accommodate his military schedule." The court also noted that there was no showing that the SM would not be able to obtain leave for depositions.

interrogatories, document requests (if the documents are accessible to the SM) or requests for admissions in the pending case. Such responses require much less time and involvement by the SM than, say, a deposition, motion hearing or trial.

Guidelines for the Judge

The job of the judge is to demonstrate fairness to both sides, to consider liberally a proper stay request, to move the case along when this may be done in fairness to the SM, and to stay those portions of the litigation that cannot proceed due to the SM's military duties. In each stay motion presented to the court, the judge should:

- examine the contemplated action (e.g., trial, deposition of the SM, written interrogatories),
- determine whether the action or request is reasonable and necessary,
- decide what actions the member must take in response,
- scrutinize how his response may be affected prejudicially by his military duties, and
- determine whether the response is easy, difficult or impossible to accomplish under the SM's circumstances.

In other words, the court should examine *whether* and *how* the member is prejudiced by the material effect alleged in his request for a stay. If the responsive action expected of the member (such as appearance in court or obtaining documents) is shown to be difficult or impossible, then a stay may be in order. If neither of these is involved, the court may find that the response should be required but more time allowed to the member. In the alternative, perhaps substituted actions should be allowed, such as a member's executing a release to allow the non-military member to obtain bank records or tax returns directly from the institution or agency involved, rather than have the military member himself produce them. Creativity and flexibility are not forbidden by the SCRA.

The court may request that the SM or his commanding officer file an affidavit setting out the facts and

[62] *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E.2d 905 (1982) (court can take judicial notice of annual leave allowed to

circumstances justifying the delay.[63] Such an affidavit should:

- state with specificity the efforts of the SM to participate in the case or appear in court as well as the next court date when he or she would be available;
- specify what the SM has done to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial in this court, as well as the results of these efforts;
- address how much leave the SM requested and when he requested leave; and
- identify the commanding officer who denied the leave request.

The court should also inquire as to what leave, if any, the SM has recently taken (and for what purposes). It would be manifestly unfair for the SM to regularly take leave for vacations or pleasure trips and yet declare himself unavailable when court calls.[64] Military policy is to grant leave for the purpose of attending to important matters, which include court appearances. If leave was requested and denied, the court can 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 support hearings.[65] The applicable 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.

A stay is not expected to last forever. Contrary to the opinion of some servicemembers and civilian lawyers, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. A stay is intended to last only as long as the material effect lasts. Once this effect is removed,

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servicemembers).

[63] Hooper, *The Soldiers' 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).

[64] If the LES has been provided to the court, this information as to amount of leave taken recently can easily be verified, since that is contained on the face of the LES.

[65] Pub. L. No. 104-193 § 363, 110 Stat. 2105 (1996) and DOD Dir. 1327.5, "Leave and Liberty," Change 4 (September 10, 1997).

the nonmilitary party may request that the stay be lifted. Judges usually require that the requested stay must be for a reasonable period of time. In *Plesniak v. Wiegand,*[66] 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. In *Keefe v. Spangenberg*,[67] 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.

Good faith

Counsel for the non-military party should request that the court examine whether the member has acted in good faith. Most courts hold that a member must exercise due diligence and good faith in trying to arrange to appear in court.[68] When a servicemember demonstrates bad faith in his dealings with the court, no stay will be

[66] *Plesniak v. Wiegand*, 31 I11. App.3d 923, 335 N.E.2d 131 (1975).
[67] *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 (W. D. Okla. 1981).
[68] 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).

granted. This rule has been upheld in cases involving paternity,[69] contempt[70] and discovery noncompliance.[71]

An affidavit or statement supporting the stay request should be carefully prepared by counsel to survive any possible scrutiny and skepticism of the trial court. A sound affidavit will not only state that the SM cannot be present at trial but also indicate why the SM needs to be present, why he is unavailable, what steps he has taken to attend trial, and when he will probably be able to be present.

Prevention of Problems

The SCRA does not require breach or default before offering protections to covered individuals. A remedy may be found in 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.

These 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 to pay the other party on a timely basis.

Other Provisions of the SCRA

There are additional provisions of the statute that may be helpful to the SM and his or her attorney. The SCRA contains numerous other protections for those serving in the armed forces. Here are brief overviews of just a few of these:

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[69] *Riley v. White*, 563 So. 2d 1039 (Ala. App. 1990) (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).

[70] *Hibbard v. Hibbard*, 230 Neb. 364, 431 N.W. 2d 637 (1988) (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).

1. The SCRA allows military members to obtain an interest rate reduction for a pre-service loan or obligation, down to 6%. Any interest over 6% per year is forgiven.[72] The member must request the reduction in writing and must include a copy of his military orders.[73] Once the lender receives this notice, it must grant the relief effective as of the date on which the SM is called to active duty. This forgiveness of any interest over 6% will result in a decrease in the amount of periodic payments that SM makes.[74] The lender may challenge the rate reduction if it can show that the military member's military service has not materially affected his ability to pay.[75] The decrease in payments may be a factor in setting or modifying alimony or child support.

2. Under the SSCRA, a landlord was prohibited from evicting, without a court order, a SM or his dependents from a residential lease when the monthly rent was under $1200. 50 U.S.C. App. § 531(a) changes this protection by prohibiting evictions, without a court order, from premises occupied by military members 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 2009 monthly rent ceiling is $2,932,31. You can easily check this for the current year by doing an Internet search using "Servicemembers Civil Relief Act" and "maximum monthly rental amount" as the search terms.

3. The SCRA allows members 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.[76] It also extends coverage to leases entered into by active duty servicemembers who later get orders for a permanent change of station (PCS) or a deployment for a period

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[71] *Judkins v. Judkins*, 113 N.C.App. 734, 441 S.E.2d 139 (1994) (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).
[72] 50 U.S.C. App. § 527(a) (2).
[73] 50 U.S.C. App. § 527(b) (1).
[74] 50 U.S.C. App. § 527(b) (2).
[75] 50 U.S.C. App. § 527(c).
[76] 50 U.S.C. App. § 534.

of 90 days or more.[77]

4. Pre-service motor vehicle leases (for the business or personal of a SM or his dependents) may be terminated if the SM receives orders to active duty for a period of 180 days or longer. Motor vehicle leases entered into while the SM is on active duty may be terminated if the SM receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more.[78]
5. The SCRA protects servicemembers against a lender's foreclosing on a mortgage, deed of trust or similar security devices, so long as these conditions are met:
    - The security interest, on real or personal property, originated before entry upon active duty;
    - The property was owned by the SM or his dependent before entry on active duty;
    - It is still owned by the SM or dependent at the time relief is sought;
    - The ability to meet the financial obligation is *materially affected* by the member's active duty obligation.[79]

A court may issue a stay of proceedings until the SM is available to answer, extend the mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by the SM, or extend the period of redemption by a period equal to the member's military service.

Internet Resources

One good resource is the Army JAG Corps public preventive law and legal information site, http://www.jagcnet.army.mil/legal. Click on "Servicemembers Civil Relief Act." You can find a guide to the SCRA at the website of the Army JAG School, http://www.jagcnet.army.mil/TJAGLCS. When you get there, click on "TJAGLCS Publications," 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. You'll find "A Judge's Guide to the Servicemembers Civil Relief Act" at

[77] 50 U.S.C. App. § 535(b) (1) (B).
[78] 50 U.S.C. App. § 535(b) (2).
[79] 50 U.S.C. App. § 532.

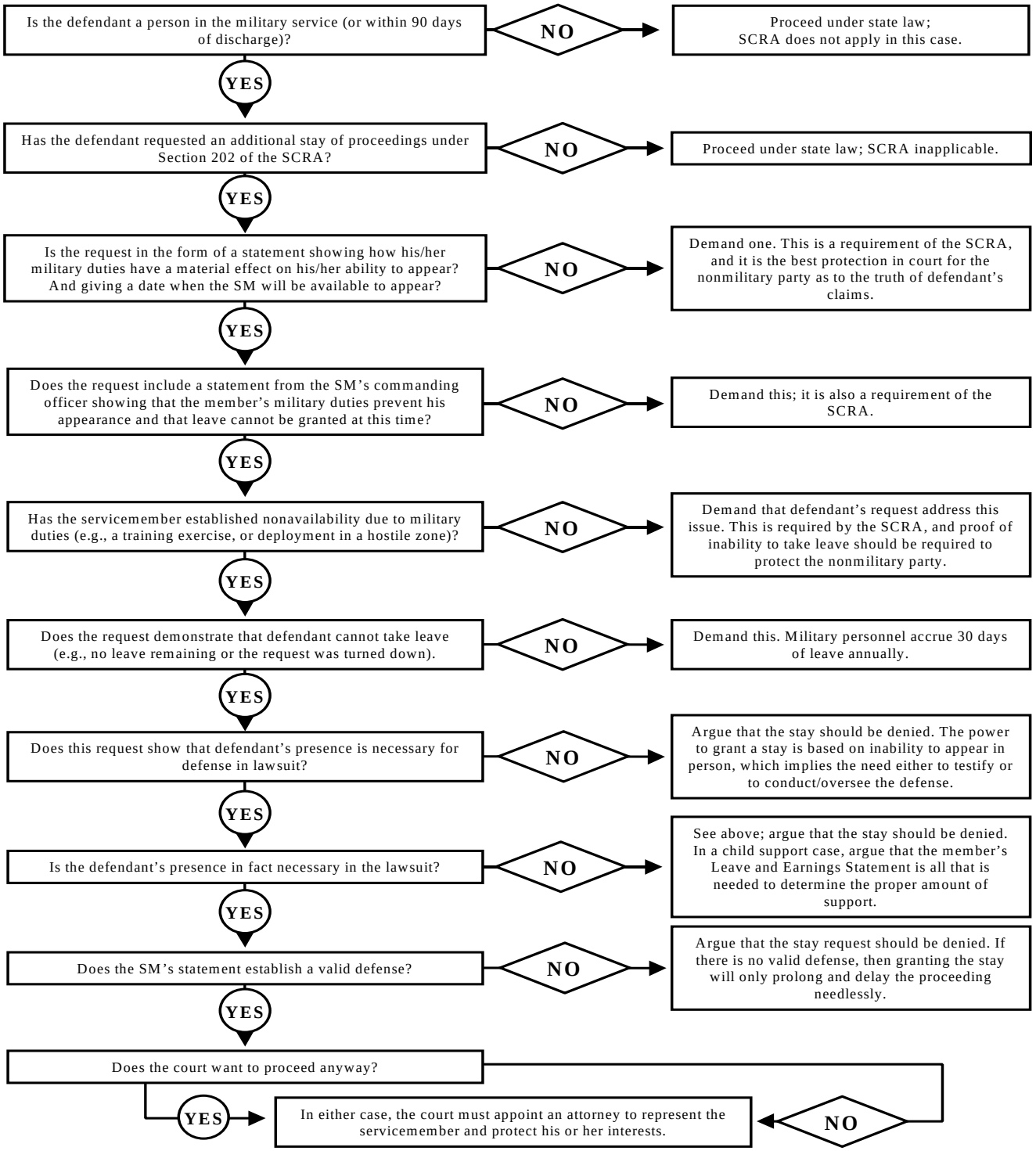
"Resources," www.nclamp.gov, the website of the North Carolina State Bar's military committee. You can also find there a "Silent Partner" info-letter on the SCRA, providing a general overview of the statute.

Conclusion

The attorney who is involved in a military case, whether representing the servicemember or the non-military party, needs help and usually needs it fast. These tips and suggestions will help to get fair and accurate information before the judge and will assist counsel for either party in understanding a new statute based on an old Act. Associating competent co-counsel, reading the statute itself, and researching the SSCRA cases in one's own jurisdiction are essential to effective advocacy in this area.

ATCH A

SCRA Flow Chart for "Additional Stay"



ATCH B

Sample motion for stay of proceedings under Servicemembers Civil Relief Act (SCRA)[80]

[CASE CAPTION]

MOTION FOR INITIAL STAY OF PROCEEDINGS [Note: for additional stay request, substitute "a further stay of proceedings" for "an initial 90-day stay of proceedings" in the text below]

The defendant moves the court, pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. § 522, for an initial 90-day stay of proceedings, showing that his ability to defend himself in this case is materially impaired by his military duties. Attached to this motion and incorporated herein by reference are:

Exhibit 1, a communication which 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

Exhibit 2, a communication from the defendant's commanding officer stating that his military duties prevent his appearance before this court and that he is not authorized military leave.

THEREFORE the defendant requests a stay of proceedings until [date] and such further relief as this court may grant to him.

_____ Date:
Beverly Jones, Attorney for Defendant
202A Newport Drive, Bristol, RI 10234
Telephone 401-555-1234

.....

Exhibit 1[81]

Airman First Class Victor Hobgood, SSN 111-22-3333
Squadron C, 45th Fighter Wing
Bagram Air Base, U.S. Air Force Element

[80] 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.

[81] The statute appears to call for two statements, but the information required may be combined for convenience into a single statement from the SM's commanding officer. While the examples here are two statements that 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.]

APO AE 91919

[date]

TO WHOM IT MAY CONCERN:

My current military duties materially and adversely affect my ability to appear for a hearing or trial in this case in the following manner:

I am currently serving as a command vehicle driver for our Wing Commander, Colonel Alice Williams. I am on duty every day, Monday through Sunday, and it is rare when I receive a "pass" that allows me to take a day off.

I cannot appear in court on [date] for the scheduled alimony hearing. I have requested of Colonel Williams that I be granted leave for one week so as to return to Rhode Island to appear in court, but she has denied my request.

My personal presence is required for this court appearance so that I can testify about my current pay and living expenses, and also about some expenses and bills of my ex-wife that I have assumed, at her request, which should have an impact on the amount, if any, which I might have to pay as alimony. I also need to be available to assist in her cross-examination. I will be available to appear after [date] to attend the court hearing.

[signature of defendant]
.....
Exhibit 2

Colonel Alice Williams, Commander
45th Fighter Wing
Bagram Air Base, U.S. Air Force Element
APO AE 91919

[date]

TO WHOM IT MAY CONCERN:

1. I am the commanding officer of Airman First Class Victor Hobgood, SSN 111-22-3333.

2. His current military duty prevents his appearance in court on [date].

3. He has requested that I grant him one week of leave for this court appearance; due to current operational requirements, I have denied his request, and military leave is not authorized for him at this time.

[signature of commanding officer]