

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 (Section 2)

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? (Section 101)

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 in absent fm active duty for one of the above reasons]
3. Under Section 106, 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. Section 101(5) – any court or administrative agency of the United States, a state or a political subdivision thereof
 2. Criminal proceedings are excluded under Section 102(b)
 3. Does this mean the Puerto Rico Department of Environmental Protection? The Cabo Rojo Board of Housing Appeals? The Zoning Commission of San Sebastian? The answer is YES to all the above!
- D. What about the SM's lawyer? Under Section 109 of the Act, whenever "servicemember" is used, it includes the attorney and/or the agent (under a power of attorney) of the SM
- E. Can the SM waive his rights?
1. This is covered in Section 107. A waiver of SCRA rights is only effective if it is made during the period of military service.
 2. In addition, certain waiver must be made in writing.
- 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, Section 201 governs. A stay of proceedings under 201(d) is not be controlled by the procedures under Section 202, 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 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 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. 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:
 - (i) there may be a defense to the action and a defense cannot be presented without the presence of deft, or
 - (ii) 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
 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. Section 202 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
 - (i) the SM's current military duty prevents his appearance and
 - (ii) military leave is not authorized for the SM at the time of the statement.
- c. Caveat #1: There is no indication that the first of these statements need be from the SM himself. It could be from his commander, his first sergeant, his attorney, his JAG officer, or anyone else with knowledge of the facts in the statement.
- d. Caveat #2: 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.
- e. A sample motion for stay of proceedings can be found at ATCH-2.
- f. A request for a stay does not constitute –
 - (i) an appearance for jurisdictional purposes, or
 - (ii) a waiver of any defense, substantive or procedural.
- 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.
- h. If the court refuses an additional stay, then the court must appoint an attorney to represent the SM in the action or proceeding.
 - (i) 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?
 - (ii) 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?

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

V. REQUEST FOR ANTICIPATORY RELIEF

- A. The SCRA doesn't require breach or default before offering protections to covered individuals
- B. Example – Section 701's anticipatory relief provisions:

SEC. 701. 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 SE2d 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 *Keeffe 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). *See also* Conrad, "Child Support and Paternity Case Stay Actions Impacted by the Welfare Reform Act of 1996", The Army Lawyer, June 1998, at 13.
 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).
 12. See ATCH-4, "Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical," for more information.

VII. INTERNET SSCRA RESOURCES:

1. There's not much on the Internet at present about the SCRA since it's so new. But there's a lot about the SSCRA (Soldiers' and Sailors' Civil Relief Act, the SCRA's predecessor).

2. 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/TJAGSA>. When you get there, click on "Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Soldiers' and Sailors' Civil Relief Act Guide," a thorough examination of every section of the SSCRA by the faculty of the Army JAG School (updated in July 2000).
3. You can also find useful material on the SSCRA (still useful when dealing with the SCRA) at these URL's:
 - a. "Soldiers' and Sailors' Civil Relief Act Provides Umbrella of Protection" - Department of Defense article, Armed Forces Information Service: http://www.defenselink.mil/specials/Relief_Act/
 - b. Coast Guard article on SSCRA:
<http://www.uscg.mil/mlclant/LDiv/soldiers1.htm>
 - c. Air Force Academy article on SSCRA:
<http://www.usafa.af.mil/10ja/ssra.htm>
 - d. Coast Guard Fact Sheet on SSCRA:
http://www.uscg.mil/legal/la/topics/sscra/SSCRA_Factsheet.htm
 - e. Article by Carreon and Associates, Cypress, CA, on SSCRA:
<http://www.carreonandassociates.com/soldiersact.html>
 - f. Office of Child Support Enforcement's "A Caseworker's Guide to Child Support Enforcement and Military Personnel" - section on SSCRA:
<http://www.acf.dhhs.gov/programs/cse/fct/militaryguide2000.htm#relief>
 - g. Legal Services, <http://www.jagcnet.army.mil/legal>, the Army Judge Advocate General's Corps public preventive legal information site (Soldiers' & Sailors' Civil Relief Act information center).

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.

2. Section 109 of the SCRA 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. Section 101(4) of the SCRA 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).
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.

[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. If the court refuses to grant an additional stay, then the court must appoint counsel to represent the SM in the action or proceeding.

[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. Section 202(c) of the SCRA 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. Section 201 of the SCRA 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. It also specifies that a SM must request this reduction in writing and include a copy of his/her military orders. 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. 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.

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. Section 301 of the SCRA 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 2004 monthly rent ceiling is \$2465.
12. A substantial change is found in Section 305 of the Act. 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 section 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, Section 402, 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.

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 Section 592 of the SCRA 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.

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/tjagsa. Click on Publications, then scroll down to Legal Assistance, and then look for JA 270, which is the SSCRA Guide.

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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. Code Appendix §500 *et seq.*, 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 --

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

2. As ATCH 2, a letter or other communication from the defendant's commanding officer stating that:
 - a. the defendant's current military duty prevents appearance, and
 - b. 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

.....
ATCH 1

[While this example is written by the defendant, the letter, affidavit, e-mail or other communication may be written by the defendant’s military legal assistance attorney (JAG officer), the supervisor or commander of the servicemember, or someone else in a position to know and relate the facts required. It may be addressed to the court, the clerk, the presiding judge, the defendant’s attorney, opposing counsel or even, as below, “To Whom It May Concern.” While the example here gives 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, 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.]

SSG 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:

1. My current military duty requirements materially affect my ability to appear in the following manner:
 - a. 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.
 - b. 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.
 - c. 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.
2. I will be available to appear on or after September 10, 2004

[signature of defendant]

.....
ATCH 2

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

[date]

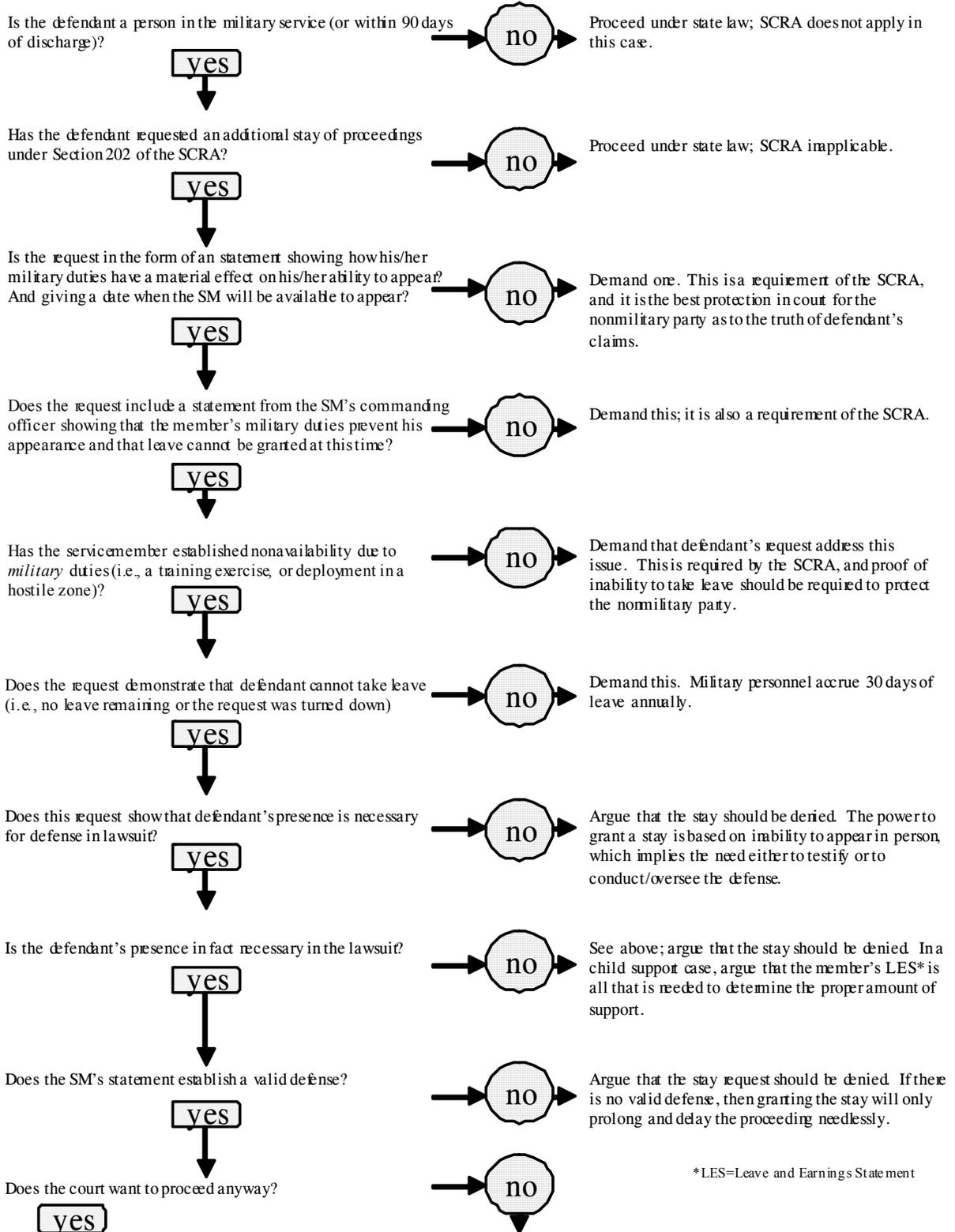
TO WHOM IT MAY CONCERN:

1. I am the commanding officer of SSG 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]

[ATCH-3 follows on next page]

SCRA Flow Chart for “Additional Stay”



*LES=Leave and Earnings Statement

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.

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."¹

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.² (See flow chart below on stay of proceedings.)

¹ *Boone v. Lightner*, 319 U.S. 561 (1943).

² *Boone v. Lightner*, *supra*.

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*.³ 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 SSCRA.

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.⁴

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.⁵

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.⁶ 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.

The stay is, in fact, 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 of further resistance by the military member, the court should require submissions upon affidavit for deciding the issue.

³ *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).

⁴ *Boone v. Lightner*, *supra*.

⁵ *Gates v. Gates*, 197 Ga. 11, 25 S.E.2d 108 (1943).

⁶ *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E.2d 905 (1982).

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*,⁷ 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*,⁸ 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.

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.

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.⁹ The author has added several additional inquiries, and these are formatted as interrogatories to the defendant (as opposed to questions by the court):

⁷ *Palo v. Palo*, 299 N.W.2d 577 (S.D.1980).

⁸ *Plesniak v. Wiegand*, 31 Ill. App.3d 923, 335 N.E.2d 131 (1975).

⁹ 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).

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)?
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 the servicemember probably be transferred?
15. (If the SM is an enlisted person) What is the date of the servicemember's 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 an all reasons why you cannot respond to written interrogatories in this case.
21. State any an 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 an 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.

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.¹⁰ 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:

¹⁰ *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).

- # The member must apply to the trial court that rendered the original judgment of order.¹¹
- # 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.¹²
- # The member must show that there is a meritorious or legal defense to the initial claim.

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. As part of a well-drafted petition to reopen under Rule 60, movants should clearly delineate their 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*.¹³ 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 petition¹⁴."

¹¹ *Davidson v. GFC*, 295 F. Supp. 878 (N.D. Ga. 1968).

¹² *Bell v. Niven*, 225 N.C. 395, 35 S.E.2d 182 91945)

¹³ *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).

¹⁴ *Id.*, 364 S.E.2d at 159.

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 laws of all states and territories require "expedited process" in child support determinations.¹⁵ 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."¹⁶ In *Smith v. Davis*, the Court of

¹⁵ N.C.G.S. 50-32.

¹⁶ *Boone v. Lightner*, 319 U.S. at 575; see also *Chenausky v. Chenausky*, 128 N.H. 116, 509 A.2d 156 (1986).

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.¹⁷

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

- # Death of emancipation of the child;
- # Transfer of physical or 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).

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, and it contains provisions for the appointment of an attorney for the absent service member. It also provides for the posting of a bond in the discretion of the court.

¹⁷ *Smith v. Davis, supra.*