

DIALOGUE

Fall 2009
VOL. 13, NO. 4

News and Perspectives from the ABA Division for Legal Services

[Home](#)

[LAMP Feature](#)

[LRIS](#)

A Roadmap for Appointed Counsel Under the Servicemembers Civil Relief Act

[Delivery](#)

By Mark E. Sullivan

[IOLTA](#)

[LAMP](#)

A Roadmap for Appointed Counsel

For civilian lawyers, one of the more vexing scenarios presented by the Servicemembers Civil Relief Act (SCRA) is what to do when appointed by a court to represent an absent servicemember under section 521 (b)(2) or (d) (2). Many lawyers have little knowledge of the Act, and often no clue as to how to take the necessary steps to find, notify and advise their new civil-law client. There are, however, a right way and a wrong way to perform as a court-appointed attorney under section 521. This "how-to" article by military legal assistance expert Mark E. Sullivan will walk you through every step required to do the job right, when a judge surprises you with a new client.

From the Chair

Military Pro Bono Project Update

You have just been appointed attorney for a servicemember under the Servicemembers Civil Relief Act (SCRA). So what do you do now?

[Pro Bono](#)

The SCRA, found at 50 U.S.C. Appendix §501, is the largest statutory source of civil-law protections and rights for service men and women, enacted to ensure that they do not needlessly lose their credit, home, car and other protected interests while away from home serving their country.

[SCLAID](#)

The statute provides that, under certain circumstances, an attorney must be appointed for a servicemember by the court.

Download this issue in PDF

This article will help you understand the relevant requirements and protections of the SCRA, the steps you should take to comply with your obligations under the Act, what you need to do to protect "your newest client" – the servicemember client you have never met – and how to complete your job and be discharged by the court.

Download this article in PDF

Your hypothetical new client is Sergeant Jake Wilson. Below we will walk through the steps of locating him, informing him of the court proceeding, and representing him under the SCRA. (Note that, although our hypothetical refers to a court, the SCRA also applies to all administrative

agency proceedings. Thus the “judge” in your case could be an “administrative hearing officer,” and the “trial” might be an “administrative hearing.”)

Orders and Duties

1. *First of all, get a copy of the appointment order.* Ask the clerk, magistrate or judge to provide you with a document appointing you under the SCRA. You will need it. Also ask the court if there is any other information about the new client, perhaps in the court file or in communications with the court by the servicemember or a Judge Advocate General (JAG) officer on his behalf.
2. *Determine your duties.* Under what section of the SCRA were you appointed? It could have been under either -
 - a. 50 U.S.C. App. Section 521(b)(2), if the servicemember has not entered an appearance, or
 - b. Section 522(d)(2), if request for “additional stay” has been denied.

Ask the court if there are any special instructions on what you need to do. The judge, for example, might instruct you, “Contact SGT Wilson, educate him on what’s going on, and tell him that I want to know his position in this litigation by three weeks from today. This looks like a simple uncontested divorce, but I don’t want to enter a judgment against him until I know what he’d like to do.”

Section 521

3. If the servicemember has not entered an appearance in the case, then you have been appointed counsel under Section 521. The court may not enter a default judgment against a servicemember who has not entered an appearance in the case without appointing an attorney for him. “Default judgment” means any order or ruling adverse to the servicemember’s interest. It does not only mean a final judgment on the merits as to the claims for relief alleged in the lawsuit.
4. Under Section 521, once counsel is appointed, the court needs to decide on a stay of proceedings. The court must stay the proceedings for at least 90 days (upon application of counsel or on the court’s own motion) if the court determines that:
 - a. there may be a defense to the action and a defense cannot be presented without the presence of the servicemember, or
 - b. after due diligence, counsel has been unable to

contact the servicemember or otherwise determine if a meritorious defense exists.

A flow chart illustrating what happens when there is no appearance by the servicemember can be found [here](#).

5. Under Section 521, counsel should ensure that the stay has been granted for at least 90 days. Remind the court that -
 - a. You cannot determine whether there is a defense, *since you were just appointed!*
 - b. And you have not yet had a chance to contact the servicemember or otherwise find out whether a meritorious defense exists – for the same reason.

The point to make with the court is that it will be virtually impossible for you to prepare and present the case without the assistance of the unavailable servicemember.

Section 522

6. When Section 522 of the SCRA is involved, it means that the court has denied a servicemember's additional (not initial) request for a stay of proceedings. The court must appoint an attorney to represent the servicemember in the action or proceeding when a Section 522 "additional stay request" has been denied. 50 U.S.C. App. § 522(d)(2).
 - a. Note that a stay request need not be in a particular format. Such a request need not be made in person, and often doesn't involve a motion filed by an "attorney of record" for the servicemember. The request could be made in a phone call to the judge's clerk, in a letter by a JAG officer to the court, or even by e-mail. It need not be a "motion for a stay."
 - b. You should find out how the stay request was made; this might provide valuable information on your client and how to contact him or her.
7. If you are appointed under Section 522, your first duty is to renew that stay request for your client. Ask the court to reconsider, after you've gotten the case file and combed through it to find out any information favorable to a stay. Here is what you need to know:
 - a. When the servicemember has made a request for a stay, 50 U.S.C. App. §522 states that the court may, upon its own motion, or shall, upon the application of the servicemember, enter a stay of

proceedings for at least 90 days if the motion includes information required by the Act for the court to determine whether a stay is needed.

- b. What information is needed? This “90-day stay” – although it can be for a longer period of time – requires four elements. Here are the requirements:

Punchlist for the Initial 90-Day Stay

Elements of a Valid 90-Day Stay Request.

Does the request contain...

- A statement as to how the servicemember’s current military duties materially affect his ability to appear...
 - and state a date when the servicemember will be available to appear?
 - A statement from the servicemember’s commanding officer stating that the servicemember’s current military duty prevents appearance...
 - and state that military leave is not authorized for the servicemember at the time of the statement?
- c. Don’t worry that your actions might expose your new client to the waiver of a defense, such as lack of personal jurisdiction. The Act makes it clear that a stay request doesn’t constitute an appearance for jurisdictional purposes or a waiver of any defense, substantive or procedural. 50 U.S. C. App. §522(c).
- d. The same section of the statute says that actions by the attorney in the case shall not otherwise bind the servicemember. Thus if you eventually receive instructions from the SM as to a stipulation or response, make sure that you can give the judge a written statement from the client to that effect, since *you* cannot bind the member.
- e. If the court has appointed you because of denial of an additional stay (after the initial 90-day stay), then you still need to request the court’s reconsideration of that stay request. The servicemember 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 any time when it appears that he is unavailable to defend or prosecute. He must provide the same information as given in the above punchlist. 50 U.S.C. App. §522(d)(1).

Getting Information

8. If you are in court when the appointment takes place, talk to opposing counsel. She is the one who represents the other party in the lawsuit, and she is likely in the best position to give you information about your new client.
 - a. If it is a domestic lawsuit, the odds are that her client will know something about your new client – last known address (preferably a military base!), Social Security number (SSN), rank, etc. Perhaps even an e-mail address or the name of a family member who might assist you in getting in touch with SGT Jake Wilson.
 - b. If the lawsuit involves something else, however – a personal injury matter, a contract claim or a commercial suit – it might take a lot of digging to find information about your new client. This is especially true with respect to the single item that, after the client's name, is most essential to the job of locating him – *the SSN*. You'll need this to contact him. Perhaps a trip to the state Department of Motor Vehicles will be needed. You might find the SSN on the lease he signed or in other documents available through discovery. Possibly a witness or one of the other attorneys may have information on Jake.

Communicating with the Servicemember

9. Once you are armed with your order of appointment and the name and SSN (and possibly Jake's rank – "sergeant"), you should contact any military base – but preferably a base of the same branch of service as Jake – for assistance in locating him. If you use a base from the same branch, you are more likely to be in the same network, so to speak.
 - a. Call the lawyers on base. They typically can be found in the staff judge advocate office, but it also might be listed as the "legal assistance office." You can find telephone numbers for military legal assistance offices at: <http://legalassistance.law.af.mil/content/locator.php>.
 - b. The lawyers in military legal assistance offices are known as "legal assistance attorneys." They may be either JAG officers or civilian attorneys employed by the U.S. government.
 - c. Ask the attorney you speak with – we can call her Captain Susan Clark – to help you locate and get

- in touch with your new client, SGT Jake Wilson.
- d. Captain Clark will probably ask you for verifying information, such as a copy of your court orders; be ready to fax them to her.
 - e. She will also need the full information that you have about Jake – full name, SSN and rank. If you know the place he was last assigned, give her that information as well.
 - f. Then let her go to work.
10. When CPT Clark next contacts you, she might tell you that, ever since 9/11, the military cannot provide outside individuals with information on the location of servicemembers. In that situation, she should offer to get a message to Jake that you are attempting to contact him. If this happens, then you should ask her to send Jake the order of appointment as well as a letter or e-mail from you regarding the situation in court – more on the latter below. You should ask that Jake initiate e-mail correspondence with you so that you can comply with your duties under the SCRA and give a report back to the court.
11. Of course, it is possible that when CPT Clark contacts you, she might have an answer which looks like this:

**Sergeant Jacob Wilson, 275-00-9087.
Company B, 3rd Battalion, 4th Mechanized Infantry
Brigade
Ft. Carson, Colorado 98765**

12. If the base is “stateside,” then use the phone, call the base locator at Ft. Carson, get the number for the above unit, place a call there and ask to speak to your client. In the alternative, write him a letter, letting him know the court has appointed you, the nature of your duties, what the court asked you to do, and what his options are.
13. But what if the information looks like this?

**Sergeant Jacob Wilson, 275-00-9087.
Company B, 3rd Battalion, 4th Mechanized
Infantry Brigade
APO AE 10765**

- a. In that case, it is a sure thing that he is in a foreign country. APO means Army Postal Office, which refers to Europe, Africa and Southwest Asia. FPO stands for “Fleet Postal Office,” and that is the Pacific and the Far East.
- b. Ask the captain if she can find out where he is and contact his servicing JAG office to determine

if that office can send a message to him about your appointment.

- c. Perhaps you can obtain his e-mail address. Maybe Captain Clark can fax or e-mail a copy of your appointment order to his nearest JAG office. Perhaps the office over there can arrange a time when he can phone you from the overseas JAG office to catch up on the litigation.
- d. If all those efforts fail to track down a current military address for your new client, you can use one of the military locator services found at: www.defenselink.mil/faq/pis/PC04MLTR.html. These services cost a nominal fee, and *it make take up to four weeks to get a reply* with your client's current military duty address.
- e. If all else fails, use the U.S. Postal Service.
- f. See if you can get an e-mail address for Jake. All servicemembers have military e-mail accounts. For example, an Army Knowledge Online – or "AKO" – account might have this address: jacob.q.wilson@us.army.mil. Many servicemembers also retain a "civilian" e-mail account.
- g. When writing Jake, you need to explain to him what is going on, what his options are, and what you need to report to the court. If possible, tell him what your opinions are regarding the litigation, and what position he might take (if you are able to do so from your limited review of the case). Don't invoke the SCRA if the only purpose is to incur delay. The SCRA was passed to try to protect servicemembers from the distractions of litigation when their full attentions should be on the military missions at hand. If there is no purpose in delay, or if the lawful delays of the SCRA will likely result in later adverse consequences for Jake, tell him so. Thus, in a child support case, you might advise the client that, if he is not contesting paternity, he should consider the likelihood that any further stay request will not be well received by the judge, as a stay would delay support payments for the client's child.

Directions from the Servicemember

14. If Jake does not want to delay the proceedings and wishes to proceed – after you have given him the pro's and cons – then make a record of his decision. If possible, ask him to confirm it in writing so you can tender to the judge that communication. Then submit a

report to the court. Your duties are over.

15. If, however, Jake wants you to make or renew a stay request, then tighten your seat belt and get ready. The details for the initial 90-day stay, which is mandatory if all elements are supplied, are found above. The "additional stay" requires the court to find that Jake's ability to prosecute or defend is "materially affected" by reason of his or her active duty service. Once this finding of material effect is made, the servicemember is entitled to a stay for such period as is necessary until the material effect is removed. While this is not explicitly stated in the SCRA, it was the rule under SSCRA (the Soldiers' and Sailors' Civil Relief Act, predecessor statute to the SCRA) and most likely will be the rule under the current Act as well. Finally, since courts are reluctant to grant long-term stays, they can and should require servicemembers to act in good faith and be diligent in their efforts to appear in court.

More Information Needed?

16. Here are some questions, ideas and comments that may be helpful in evaluating the strength of your additional stay request:
 - a. How much leave is available to Jake? Ask him. To verify, get a copy of his Leave-and-Earnings Statement (LES) to find out. It is one thing if he has no available leave. It might not go down well with the court, however, if there is plenty of leave, and he has even used some of it in the last few months (unless you can show that the reason for use of leave was a hardship or family emergency).
 - b. What is the nature of the "military necessity" that prevents Jake's attending a hearing or responding to discovery? Is he 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. Carson so that others may deploy overseas, working a comfortable day shift of 7:30 a.m. to 4:30 p.m., with weekends and holidays off?
 - c. Whatever the reason or reasons, make sure that you give a detailed request for the additional stay. Mere conclusory statements cannot help; you want to specify what Jake is doing, how he has applied for leave, who denied the request and when, what he said in the leave request, and so on. Avoid use of military terms and acronyms. "Civilian language" will be better understood by

the civilian judge. Thus "the infantry division's artillery unit" might be better than "division artillery" or, even worse, "DivArty." You should say "7:30 a.m.," not "0730 hours."

- d. When you return to court, make a record of the stay request and your evidence. Get all the documents admitted as part of your request. That means LES, military orders, communications from the servicemember, communications from the commanding officer, etc. Demand a written ruling from the court, whether as an interim order or as part of the final decree. In that small number of cases that involve an appeal, this kind of "due diligence" is essential.

17. What if the judge is not persuaded? If the court is not convinced of "material effect," it has the discretion to:
 - a. Request an affidavit setting out all the facts and circumstances, usually executed by the member or the member's commander.
 - b. Ask for a copy of the member's Leave and Earnings Statement (the military equivalent of a pay statement) to show his basic pay, Basic Allowance for Housing, Basic Allowance for Subsistence, other pay or allowances, tax withholdings, voluntary allotments to pay bills or support, and *accrued leave*.
 - c. Request a more specific affidavit detailing the member's efforts to appear in court, for example, and the next court date when he or she would be available.

18. Some courts require specific information whenever a stay application does not contain sufficient facts. One example is a set of questions to an individual's commander used by the courts in Monterey County, California; it is particularly useful in getting information to allow evaluation of a stay request.¹ The author has added several additional inquiries, and these are formatted below as interrogatories to the servicemember (as opposed to questions by the court):
 - a. What have you done to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial in this court?
 - b. What results did these efforts produce?
 - c. How much leave did you request?
 - d. When did you request this leave?
 - e. Give the name, rank, title, address and commercial telephone number (if available) of the individual who denied your leave request.

- f. Have you taken any leave in the last three months?
- g. If so, how much and for what purpose?
- h. How much leave do you currently have as reflected on your latest Leave and Earnings Statement?
- i. Provide a copy of your last three Leave and Earnings Statements with your responses to these questions.
- j. What have you done to obtain a transfer to a military installation near this court on either a temporary or permanent basis?
\
k. What results did these efforts produce?
 - l. When were you assigned to the present duty station?
- m. When are you due to be transferred on normal rotation or reassignment?
- n. To what station will you probably be transferred?
- o. (If the servicemember is an enlisted person) What is the date of your present enlistment contract?
- p. When does the enlistment expire?
- q. Do you intent to re-enlist?
- r. Does your service record contain a bar to re-enlistment?
- s. Is there any likelihood that you will obtain an early release from active duty and, if so, when is this expected to occur?
- t. State any and all reasons why you cannot respond to written interrogatories in this case.
- u. State any and all reasons why you cannot respond to written document requests in this case, so long as the documents requested are readily available to you.
- v. State any and all reasons why you cannot respond to written requests for admissions in this case.
- w. Give the location (and distance) of the nearest legal assistance office (JAG office or staff judge advocate office) to you.
- x. State your duty hours during the week.
- y. State your duty hours on weekends.
- z. State what means of communication are available between you and this court, specifically including telephone, e-mail, regular mail and videoteleconference (both individually and through your JAG office).

19. Note that members from all branches of military service, whether buck private or rear admiral, get thirty days of

leave annually, accruing at the rate of 2.5 days per month (although military necessity may limit when the leave may be taken).

20. Also keep in mind that members who are going through basic or advanced training may be unable 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, and being gone from training frequently means that the trainee will have to repeat the same training program from the beginning.

The End Is in Sight

21. When can the judge terminate the appointment? While there is nothing written on this, the logical explanation is that the judge may terminate the appointment when there is no longer a need or a desire for the appointment. And that, in turn, means –
 - a. *No need.* Either the case has concluded and there is no reason to continue the appointment, or else the original need for the appointment [default or denial of additional stay] no longer exists; -- OR ELSE --
 - b. *No desire.* The servicemember has signed a waiver (in at least 12-point typeface) specifying that he or she waives the appointment or continuation of the appointment.

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).

Mr. Sullivan is a retired Army Reserve JAG colonel and former chair of the LAMP Committee. He practices family law in Raleigh, NC, and has been a certified specialist in family law for over 20 years.

Dialogue is published by the ABA Division for Legal Services

Copyright © 2009 American Bar Association

ABA Privacy Statement | ABA Copyright Statement | ABA Reprint Permission