



## From the Chair...

by Donald J. Guter, RADM, USN (Ret.)

### Chair of the ABA Standing Committee on Legal Assistance for Military Personnel

I am pleased to report substantial progress in the efforts of the Standing Committee on Legal Assistance for Military Personnel (LAMP) to encourage enhanced enforcement powers for the Servicemembers Civil Relief Act (SCRA) (50 U.S.C. App. §§ 501-596). On February 16, 2009, at the ABA Midyear meeting, the ABA House of Delegates unanimously adopted Resolution No.114, as proposed by the LAMP Committee.

The SCRA is the great statutory repository of substantive and procedural protections for servicemembers and their dependents, designed to ensure that creditors, landlords and litigants do not take unfair advantage of individuals who are away serving their country. The new ABA policy embodied in Resolution 114 brings the full support and persuasive power of the ABA to bear in urging Congress to amend the SCRA "to authorize the Attorney General of the United States to commence a civil action in any United States District Court when the Attorney General has reasonable cause to believe that a violation of the SCRA has occurred, on a matter of general public interest." The new policy further urges that such amendment "(i) clarify that a private right of action exists under the SCRA, pursuant to which servicemembers or covered dependents may bring

civil suits, independently or in conjunction with Department of Justice enforcement actions, for damages or injunctive relief arising from violations of the SCRA, and (ii) provide that a prevailing plaintiff in such an action may recover reasonable attorney's fees."

Neither the SCRA as originally enacted in 2003 (replacing the venerable but outdated Soldiers and Sailors Civil Relief Act) nor the amendments to the Act in 2004 and 2008 explicitly spelled out what should have seemed obvious—that the essential servicemember protections codified in the Act are subject to enforcement by court action. Now, Congress should take its cue from the ABA House of Delegates and move quickly to strengthen the Act by making manifest the right of both the Department of Justice (DOJ) and individual servicemembers to enforce their rights under the Act. Among other things, those protections require creditors to obtain court orders before taking adverse actions such as evictions, repossession of automobiles or other property, foreclosure on mortgages, termination or suspension of cell phone contracts, and enforcement of storage liens against covered servicemembers.

The new ABA policy restates two simple propositions that should be self-evident: That the SCRA's vital protections of our servicemembers can only be as strong as the opportunity to enforce them in court, and that there is no reasonable basis for disallowing public and private enforcement of its servicemember protections.

Indeed, for years the majority of federal courts have taken it as a given that an implied private right of action was part of the SCRA.<sup>1</sup>

But LAMP and the ABA were spurred to action by a recent case in Michigan where a federal court

dismissed a servicemember's suit brought under the SCRA, holding that no private cause of action exists to enforce the SCRA.

In this case, Sgt. James Hurley was mobilized and deployed to Iraq. His mortgage company was so notified, but allegedly proceeded to ignore his demand for an interest rate reduction pursuant to 50 U.S.C. App. section 527; the company allegedly caused a non-judicial mortgage foreclosure to be executed on his property in violation of 50 U.S.C. App. section 533; and subsequently initiated eviction proceedings against Hurley's family and sold his property.<sup>2</sup> Fortunately, in an interesting and unusual action, on March 13, 2009, Judge Quist, on a motion to reconsider, reversed and vacated his previous decision, holding, *inter alia*, that the SCRA does contain an implied enforcement right and that Hurley was entitled to summary judgment on his wrongful foreclosure claim.

The Hurley reversal should not induce complacency, however, because as that case illustrates, counting on continued court recognition of an implied right of action going forward is an unsound strategy in a cause as important as preservation of SCRA enforcement. There is a not insignificant risk that, absent congressional action to cement enforcement powers, a federal appeals court or the Supreme Court could hold (as the Supreme Court has recently held in federal securities cases and other areas) that no private enforcement right is implicit in the SCRA.

LAMP and the ABA are not suggesting, and the ABA policy statement does not state or imply, that Congress must act because as currently written the SCRA does not support private or public enforcement. On the

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contrary, the ABA is asking Congress to clarify that these enforcement powers are essential elements of the statute, and

have been all along. That said, contingency planning should always be part of sound military and legal strategy.

### Endnotes

- <sup>1</sup> See, e.g., *Marin v. Citibank, N.A., Inc.*, 2000 U.S. App. LEXIS 3789 (2nd Cir. 2000); *Engstrom v. First*

*National Bank of Eagle Lake*, 47 F. 3d 1459 (5th Cir. 1995); *Marin v. Anderson*, 1998 WL 1765716 (N.D. Tex 1998).

- <sup>2</sup> See *Hurley v. Deutsche Bank Trust Company Americans*, 2008 WL 4937906 (W.D. Mich. (11/14/2008) and 2008 WL 4539478 (W.D. Mich. 9/30/2008).

## LAMP CLE Content

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and Professionalism, and several members of the El Paso County (Colorado Springs) court staff, on Colorado Family Law Practice & Procedure. A separate paralegal ethics class was presented by LAMP CLE veteran Pat Lyons of the Roger Williams University.

The Army JAG attendees at Fort Carson were complemented by a strong turnout from neighboring Air Force installations, including the U.S. Air Force

Academy, Peterson Air Force Base, Schriever Air Force Base and Buckley Air National Guard. Lt. Col. James Durant III, an Air Force Academy faculty member and current Chair of the ABA General Practice, Solo and Small Firm Division, was the Committee's special guest.

The Fort Carson CLE presenters collectively hit the mark set by LAMP CLE Chair Seidler for balancing strong traditional offerings with new presenters on cutting-edge subjects. As the Committee continues to fine-tune its LAMP content to reflect

the particular legal landscape confronting today's soldiers, the more beneficial and lasting the LAMP CLE experience will be for the Judge Advocates and paralegals who attend.

### Endnote

- <sup>1</sup> For an article surveying major changes in the PEB/MEB process and its implications for legal assistance attorneys, see: Frost, Major John. 2008. "Wounded Warrior Update," *Dialogue* Vol. 12, No. 3, p. 20. <http://www.abanet.org/legalservices/dialogue/downloads/dialsu08.pdf>.

## Grantee Spotlight

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of them are Latino; both of these factors help to foster a culturally sensitive and familiar environment for EC's clients. EC considers linguistic and cultural competency issues in every aspect of its work including staffing, advocacy, community education, community organizing and the provision of services.

EC's innovation goes well beyond these essential services. The organization engages its clients in a process of leadership development. Former victims are trained to become community educators and organizers in an effort to advance their rights as victims of domestic violence and as immigrants. Although EC's

primary focus is on assistance to immigrant victims of domestic violence, it recognizes that Albuquerque's immigrant community has several pressing concerns stemming from isolation, poverty and neglect. EC's mission is to give a voice not only to women like Marta but also to Albuquerque's immigrant community at large.<sup>3</sup>

*Claudia Medina is a co-founder and the executive director of Enlace Comunitario (EC) in Albuquerque. She is also a co-founder of El CENTRO de Igualdad y Derechos, an organization working to advance immigrant rights in New Mexico.*

### Endnotes

- <sup>1</sup> See Amy Farmer and Jill Tiefenthaler, "Explaining the Recent Decline in Domestic Violence", *Contemporary*

*Economic Policy*, Vol. 21, No. 2, April 2003.

- <sup>2</sup> See [www.legalmomentum.org](http://www.legalmomentum.org). Legal Momentum: Advancing Women's Rights is the nation's oldest legal advocacy organization dedicated to advancing the rights of women and girls; it was originally founded as NOW Legal Defense and Education Fund in 1970.
- <sup>3</sup> In recognition of its innovative and comprehensive work EC was honored recently with the University of New Mexico's Mexican American Law Student Association's Fighting for Justice Award; the Samaritan Counseling Center's New Mexico Ethics in Business Award and the New Mexico Peace and Justice Center's Peace and Justice Award. In addition, EC's lead attorney, Elizabeth Rourke, was honored last year by the New Mexico Hispanic Bar Association with the Liberty and Justice Award.