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## LEGAL NEEDS OF MILITARY VETERANS, SERVICEMEMBERS, AND THEIR FAMILIES

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## **APPOINTMENT PRACTICE UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT: The Duties of Court-Appointed Counsel**

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Jennifer and John Henderson married in Virginia in 1998, and shortly thereafter John enlisted in the U.S. Army. The couple gave birth to a boy in 2000 and a girl in 2002. By 2003 multiple deployments to Iraq and Afghanistan and frequent moves throughout the country had begun to take a toll on the Hendersons' marriage. Jennifer struggled to raise the couple's children during John's deployments and found that when John was home, he took little interest in her and their children. Despite John's unraveling family life, John continued to excel in the eyes of his commanders and steadily rose through the Army's ranks.

In 2005 Jennifer and John agreed that a separation would be in the best interests of the family. Jennifer moved from Fort Bragg, North Carolina, to Richmond, Virginia, the couple's home state, so that she could live with her parents. As soon as the couple separated, they stopped communicating with each other. In May 2006 John was deployed to Iraq, his third deployment since joining the Army. By December 2006 John had not communicated with his wife and children in nearly a year, although Jennifer continued to receive \$900 in Army-mandated monthly support payments via an automatic allotment arranged by John.

By January 2007 Jennifer had met another man, and the two were becoming quite serious. Jennifer decided it was time to file for divorce, custody, and child support. She met with a family law attorney who prepared documents for an uncontested divorce, and in April 2007 her attorney mailed the documents to John's last known address. John never responded to the documents. In June 2007 Jennifer's attorney filed for divorce and rendered service of process in accordance with Virginia's procedure for serving process on out-of-state residents.

John never received notice of the pending divorce action because of his deployment and because process was rendered at John's old address. Jennifer's attorney completed the required Servicemembers Civil Relief Act (SCRA) affidavit indicating that John was an active-duty servicemember.<sup>1</sup> Pursuant to the SCRA, the Virginia family law judge appointed an attorney to represent John. Consistent with informal, local practice, Jennifer's attorney paid an up-front flat fee of \$75 to John's appointed attorney for services rendered to his client, John.

John's appointed attorney mailed to John a letter using the same address as in the service of process. In the letter the attorney explained John's right to request a stay of proceedings pursuant to the SCRA.

When the appointed attorney did not receive a response to the letter, he filed a report of the guardian *ad litem* with the court. The report stated that, after exercising due diligence as required in the SCRA, the attorney was unable to contact his client or otherwise determine if his client had a meritorious defense. The appointed attorney requested that the court (1) lift the stay of proceeding, (2) use its discretion in considering the defendant's interests, and (3) discharge the attorney from his duties as a guardian *ad litem*.

After considering the report of the guardian *ad litem*, the Virginia family law judge entered a final decree of divorce and awarded Jennifer sole legal and physical custody of the parties' children. John was ordered to pay \$1,300 in monthly child support. A few months later John received, through his chain of command, paperwork notifying him that the Defense Finance and Accounting Service was involuntarily allotting \$1,300 per month from his military pay for child support pursuant to a Virginia court order. John never saw this coming.

Scenarios like this one—in which a court acts against an absent servicemember—unfold too often. While many judges and

attorneys are aware that the SCRA entitles an absent servicemember to court-appointed representation, they are uncertain about the scope of the appointed attorney's duties. Take for example the divorce action between Jennifer and John. What was the court-appointed attorney's proper scope of representation of John and what duties did he owe to John? Was the scope of representation simply to make contact with John to determine whether a stay of proceeding was needed? If so, what efforts was the attorney required to make to contact John, and did the attorney have any other responsibilities to his client?

The scope of representation is "the purpose for which the attorney is hired or appointed."<sup>2</sup> The American Bar Association's Model Rules of Professional Conduct state that the client has "the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."<sup>3</sup> When an attorney is appointed under the SCRA, however, the attorney may be unable to confer with his client to determine the scope of representation and the client's objectives. Looking to the SCRA for answers is of little help to the attorney because the SCRA does not explicitly define the scope of legal representation.

Here I seek to identify the scope of representation and the duties of attorneys appointed under the SCRA. I outline the appointment requirements of the SCRA and propose a framework to analyze the SCRA-appointed attorney's scope of representation. I review case law that has addressed representation issues related to SCRA-appointed counsel. And I analyze the Model Rules of Professional Conduct and set forth proposed duties of SCRA-appointed attorneys. I conclude by reiterating the responsibilities of SCRA-appointed attorneys and propose a step-by-step plan that appointed attorneys may use to locate and contact their absent servicemember-clients.

<sup>1</sup>Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. §§ 501 et seq., § 521.

<sup>2</sup>Annette R. Appell, *Response to the Conference: Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 *FORDHAM LAW REVIEW* 1955, 1962 (1996).

<sup>3</sup>MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (1983), [www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

## I. The Servicemembers Civil Relief Act

In 1918 Congress enacted the Soldiers' and Sailors' Civil Relief Act to protect servicemembers from civil litigation. This law had a sunset provision and expired after World War I. Congress took up the issue again a little more than two decades later and passed the Soldiers' and Sailors' Civil Relief Act of 1940 "to prevent soldiers and sailors from being harassed by civil litigation 'in order to enable such persons to devote their entire energy to the defense needs of the Nation.'"<sup>4</sup> In 2003 Congress significantly amended the Act and renamed it the Servicemembers Civil Relief Act.

The SCRA strengthens the 1940 Act's provisions requiring courts to appoint attorneys to represent servicemembers who are named as defendants in actions when servicemembers do not or are unable to appear in court.<sup>5</sup> The SCRA provides servicemembers with a number of rights and protections. For example, the SCRA gives servicemembers the right to early termination of residential and automobile leases and cellular telephone contracts for certain military-mandated moves.<sup>6</sup> The SCRA permits servicemembers to reduce the interest rate on debts incurred prior to military service to 6 percent per year.<sup>7</sup> Other key SCRA provisions are procedural protections related to evictions, foreclosures of mortgages, and certain liens and the right of servicemembers to be taxed only in the state where they entered active duty regardless of where they currently reside.<sup>8</sup>

Decades have passed since the enactment of the Soldiers' and Sailors' Civil Relief Act of 1940, and SCRA-appointed attorneys have still little guidance on

the parameters of the scope of representation required under the SCRA and on their professional responsibilities to their servicemember-clients. Moreover, attorneys are appointed under the SCRA in two different circumstances. The SCRA provides that a court must appoint an attorney to represent an absent servicemember (1) before it may enter a judgment when a servicemember has not made an appearance and (2) when it denies an "additional stay" of the case. The scope of representation and professional responsibilities of attorneys appointed under the first provision of the SCRA may differ from that required of attorneys appointed under the second SCRA provision. Below I offer a framework to use in determining the SCRA-appointed attorney's scope of representation.

### A. A Court May Not Enter a Judgment Until After It Appoints an Attorney to Represent an Absent Servicemember

Given the nature of military service, servicemembers regularly move throughout the world and may reside at a given location for only a few years. This itinerant lifestyle together with deployment requirements means that service of process may be rendered at old addresses and that servicemembers may never receive actual notice of pending legal actions in which they are parties. To protect servicemembers against default judgments in actions in which they have had no notice, Section 201 of the SCRA states:

[T]he 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 can-

<sup>4</sup>*Boone v. Lightner*, 319 U.S. 561, 578 (1943) (Black, J., dissenting) (quoting the Soldiers' and Sailors' Civil Relief Act of 1940).

<sup>5</sup>Similar right-to-counsel provisions benefiting servicemembers have been enacted at the state level (see Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REVIEW 245, 269–70 (July–August 2006)).

<sup>6</sup>50 U.S.C. app. §§ 535, 535a. The provision relating to cellular telephone contracts was added by Section 805 of the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145 (2008).

<sup>7</sup>*Id.* § 527.

<sup>8</sup>*Id.* §§ 531, 537, 533, 571, respectively. For more information about the SCRA, see generally Mark E. Sullivan, A Judge's Guide to the Servicemembers Civil Relief Act (n.d.), [www.abanet.org/family/military/scrajudgesguidecklist.pdf](http://www.abanet.org/family/military/scrajudgesguidecklist.pdf).

not locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.<sup>9</sup>

The SCRA does not explicitly define the appointed attorney's scope of representation of his servicemember-client. But the SCRA does state that the appointed attorney may request a stay of the action on behalf of his client. The SCRA stay mechanism sheds some light on the implied scope of representation. The SCRA states that the court will grant the stay request (for at least ninety days) if the court determines that (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant, or (2) after due diligence counsel has been unable to contact the defendant or otherwise determine if the defendant has a meritorious defense.<sup>10</sup>

The appointed attorney's scope of representation may be summarized as follows: The appointed attorney should request a stay of proceedings if, after exercising "due diligence," the attorney is unable to contact the defendant or determine if the defendant has a meritorious defense. Moreover, the SCRA indicates that a court may require the appointed attorney to present defenses if the servicemember's presence is not required for the defense. When the court-appointed attorney cannot locate the servicemember, the attorney's actions will not waive any defenses or bind the servicemember.<sup>11</sup> The nonbinding nature of the representation creates some confusion as to whether this SCRA provision serves to narrow or widen the scope of represen-

tation. On the one hand, the nonbinding nature suggests that the scope of representation is limited to making contact with the servicemember and to requesting stays since any other action will not bind the servicemember. On the other hand, the nonbinding nature indicates that the attorney may be required to use due diligence to identify meritorious defenses and to present defenses not requiring the servicemember's presence. The nonbinding nature should alleviate the appointed attorney's concern that he will be pursuing a course of action without his client's consent, potentially in violation of the Model Rules of Professional Conduct.<sup>12</sup>

## **B. A Court Must Appoint an Attorney to Represent a Servicemember When It Denies an Additional Stay Under the SCRA**

When a servicemember has notice of an action, the servicemember's military duty requirements may prevent him from appearing in court for several reasons. For example, the servicemember may be deployed to a combat zone or the servicemember may be preparing for deployment and unable to miss mission-critical training.

In matters where the servicemember's military duty materially affects his ability to appear in court, Section 202 of the SCRA permits the servicemember to request a stay of the court action.<sup>13</sup> When a court receives a stay request, the court must stay the action for at least ninety days when (1) the servicemember writes a letter to the court explaining that his

<sup>9</sup>50 U.S.C. app. § 521(b)(2). The SCRA provides a mechanism to set aside default judgments against servicemembers. Motions to set aside may not always be successful because of the requirements that servicemembers must meet when making those motions. As a result, the level and the quality of the representation of SCRA-appointed attorneys are critical to ensuring that servicemembers' rights are adequately protected.

<sup>10</sup>50 U.S.C. app. § 521(d). The provision states in full: "[T]he court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that—(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists."

<sup>11</sup>*Id.* § 521(b)(2).

<sup>12</sup>MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983) (governing the scope of representation and giving the client the authority to determine the attorney's course of action).

<sup>13</sup>50 U.S.C. app. § 522.

military duty requirements materially affect his ability to appear before the court and the letter gives the date that the servicemember will be available to appear in court and (2) the servicemember's commanding officer writes a letter stating that the servicemember's duty requirements affect his ability to appear in court and leave is not authorized as of the date of the letter.<sup>14</sup>

Section 202 also provides that, at the time of the initial stay request or after the initial request is made, the servicemember may request the court to stay the action beyond ninety days if the servicemember's duty requirements continue to affect the servicemember's ability to appear in court.<sup>15</sup> If the court denies the additional stay, "the court *shall* appoint counsel to represent the servicemember in the action or proceeding."<sup>16</sup> The SCRA does not address compensation of the appointed attorney.

Section 202 of the SCRA is silent on the scope of representation by the appointed attorney. However, unlike Section 201, where the attorney may not have contact with the servicemember-client, an attorney appointed under Section 202 should have at least e-mail and telephone contact with the client. This contact allows the attorney and the client to define and limit appropriately the scope of representation, provided that the "limitation is reasonable under the circumstances and the client gives informed consent."<sup>17</sup>

## II. Case Law on Appointed Attorneys' Responsibilities and Duties

For the most part, case law demonstrates that the representation by attorneys appointed pursuant to the SCRA should

not simply be limited to making contact with absent servicemembers. There is little case law on SCRA appointments. Moreover, the cases discussed below do not differentiate between the duties of attorneys appointed to protect servicemembers from default judgments and the duties of attorneys appointed because a servicemember's request for an additional stay was denied. While most of the cases discussed below were decided under the 1940 Act, they are relevant in analyzing the SCRA and illustrate the varying degrees of representation by attorneys appointed to represent absent servicemembers.

Before reviewing the cases below, we need to understand how the 2003 SCRA amendments to the 1940 Act illuminate the duties of court-appointed attorneys. The SCRA omitted Section 200 of the 1940 Act and replaced it with Section 201.<sup>18</sup> Section 200 protected servicemembers from default judgments. Now Section 201 protects them from default judgments. Sections 200 and 201 differ materially in two respects. First, Section 200 stated that if an affidavit did not state that the defendant was not in the military service, the court "*shall* appoint[] an attorney to represent defendant and protect his interests" before entering judgment.<sup>19</sup> Section 200 went on to state that when a person was in the military service and did not personally appear, "the court *may* appoint an attorney to represent him."<sup>20</sup> Accordingly Section 200 was ambiguous as to whether the appointment of an attorney was mandatory or permissive. The mandatory and permissive nature of the appointment turned on the contents of the affidavit indicating the party's military status and whether the court had affirmative information of the party's military status. By

<sup>14</sup>*Id.* § 522(b).

<sup>15</sup>See *id.* § 522 (d) (the SCRA refers to a stay beyond the ninety-day period as "additional stay").

<sup>16</sup>*Id.* § 522(d)(2) (emphasis added).

<sup>17</sup>MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983).

<sup>18</sup>Section 200 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 520 (omitted by Section 1 of the SCRA, 50 U.S.C. app. § 501); Section 201 of the SCRA, *id.* § 521.

<sup>19</sup>50 U.S.C. app. § 520(1) (omitted by Section 1 of the SCRA, 50 U.S.C. app. § 501) (emphasis added).

<sup>20</sup>*Id.* § 520(3) (omitted by Section 1 of the SCRA, 50 U.S.C. app. § 501) (emphasis added).

contrast, the current default protection provision (Section 201) makes clear that a court may not enter a judgment until after the court appoints an attorney to represent the absent servicemember.<sup>21</sup> Second, Section 200 did guide a court-appointed attorney in requesting a stay of action or the court in granting such a request. But, as pointed out above, Section 201 provides specific requirements for requesting and granting a stay. Critically these stay requirements illuminate the scope of representation and the duties of court-appointed attorneys.

With the exception of *United States v. Payton-Hubbard*, the case law on the responsibilities of court-appointed attorneys predates the SCRA.<sup>22</sup> As a result, those cases should be reviewed with the 1940 Act in mind. Note also that many courts refer to an attorney appointed pursuant to the SCRA and its predecessors as a “guardian *ad litem*.” But the SCRA and its predecessors specifically state that an appointed attorney is to “represent” the servicemember, quite a different function from that of a guardian *ad litem*. While the courts may have blurred the distinction between an appointed attorney and a guardian *ad litem*, this does not affect their findings and discussions as to the scope of representation and duties of the court-appointed attorney.

In *Payton-Hubbard* the United States filed a complaint seeking to foreclose on a mortgage secured by real property. The district court entered a default judgment when no defendants appeared at the hearing. One of the defendants filed a motion to vacate the default judgment. The motion asserted that the property at issue had been transferred by quitclaim deed to Albert Jones, a person in the military. In response, the United States requested that the court appoint an attorney to represent Jones pursuant to the SCRA.

The court granted the government’s motion. The appointed attorney was directed to indicate to the court “(1) whether Jones was on active duty at any time within 60 days prior to entry of the judgment of foreclosure on February 8, 2008; and (2) if so, whether Jones has a meritorious claim or defense to the foreclosure proceeding.”<sup>23</sup> The court stated that after receiving the attorney’s report it would determine whether an evidentiary hearing was necessary to rule on the defendant’s motion to vacate the default judgment.

*Payton-Hubbard* differs from most cases involving attorneys appointed for absent servicemembers because the court made the SCRA appointment to protect an absent servicemember’s interest in a motion to vacate a default judgment. Nevertheless, *Payton-Hubbard* demonstrates how at least one court interpreted the scope of representation under the SCRA to require an appointed attorney to investigate meritorious defenses for his client.

*Syracuse Savings Bank v. Brown* is a case in which the court defined the appointed attorney’s scope of representation to be broader than merely requesting a stay of legal proceedings.<sup>24</sup> In *Brown* the court-appointed attorney served as guardian *ad litem* to represent absent, unknown defendants who might have been in the military service. The court instructed the appointed attorney to “make a full investigation of all matters pertaining to the foreclosure proceedings.”<sup>25</sup> The attorney was to present evidence of the value of the property involved, the amount of the mortgage and “whether or not ... the interests of any defendant who may be in the military service will be materially affected by granting a judgment of foreclosure and sale.”<sup>26</sup>

In *Rutherford v. Bentz* the court-appointed attorney undertook a broad scope of rep-

<sup>21</sup>*Id.* § 521(b)(2).

<sup>22</sup>*United States v. Payton-Hubbard*, No. 2:07-cv-2030-MPM-DGB, 2008 U.S. Dist. LEXIS 23628 (C.D. Ill. March 25, 2008).

<sup>23</sup>*Id.* at \*3.

<sup>24</sup>*Syracuse Savings Bank v. Brown*, 42 N.Y.S.2d 156 (Sup. Ct. 1943).

<sup>25</sup>*Id.* at 159.

<sup>26</sup>*Id.*

resentation.<sup>27</sup> There the defendant notified the court that he was in military service and requested the court to protect his interests. Upon plaintiff's motion, the Illinois circuit court appointed an attorney to serve as "guardian *ad litem* and attorney" for the defendant pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.<sup>28</sup> The court-appointed attorney submitted an answer and asserted a special defense for his client. The matter went to trial and the appointed attorney "examined witnesses and acted as attorney for the defendant."<sup>29</sup>

*State ex rel. Burden v. Smith* is perhaps the strongest example demonstrating an attorney's duty to contact an absent servicemember.<sup>30</sup> Like John Henderson, the defendant in *Burden* was absent from the legal proceedings. The Ohio trial court appointed an attorney to represent the defendant. The attorney mailed two letters to the defendant and, when he received no response, requested to withdraw from representation. The trial court allowed the attorney to withdraw and later entered a default judgment against the defendant. On appeal, the defendant "argue[d] that the trial court failed to comply with the protections of the [Soldiers' and Sailors' Civil Relief Act of 1940] by allowing her attorney to withdraw prior to the default proceeding, thus leaving appellant without representation."<sup>31</sup>

The Ohio Court of Appeals set aside the default judgment and noted that,

after careful review of the record, we find that the trial court erred in allowing appellant's at-

torney to withdraw. Initially, we note that, while the Act does not provide that appointed attorneys appear for service-persons on the merits of a case, courts have an obligation to appoint an attorney to invoke rights under the Soldiers' and Sailors' [Civil] Relief Act. One such right is the right to a stay of proceedings where military service affects a service-person's defense against an action.<sup>32</sup>

The court went on to note that the appointed attorney "failed to avail himself of the methods provided by both the Navy and the Red Cross for locating service persons."<sup>33</sup>

In contrast to the foregoing cases, *In re Ehlke's Estate* and *Alaska ex rel. Dew v. Superior Court* suggest a narrower scope of representation.<sup>34</sup> In *Ehlke* the servicemember's court-appointed attorney sought compensation from Ehlke's estate for services rendered. The court found that the attorney was entitled to some compensation, but not compensation for all services rendered, because some services were unnecessary under the Soldiers' and Sailors' Civil Relief Act of 1940. The court stated that "[w]e perceive no need and no authority under the [Soldiers' and Sailors' Civil Relief Act] for [the attorney] to do anything further for [the servicemember] than to apply for a stay of proceedings in his behalf."<sup>35</sup>

In *Dew* the Supreme Court of Alaska proposed a list of duties for appointed attorneys. According to the court, an appointed attorney has the following duties:

<sup>27</sup>*Rutherford v. Bentz*, 104 N.E.2d 343 (Ill. App. Ct. 1952). See also *Federal Home Loan Mortgage Corporation v. Taylor*, 318 So. 2d 203, 207 (Fla. Dist. Ct. App. 1975) (where attorney *ad litem* requested to stay proceedings and, when stay expired, continued to appear and participate in the hearings).

<sup>28</sup>*Rutherford*, 104 N.E.2d at 345.

<sup>29</sup>*Id.*

<sup>30</sup>*State ex rel. Burden v. Smith*, No. 94APF06-877, 1994 Ohio App. LEXIS 5881 (Ohio Ct. App. Dec. 22, 1994).

<sup>31</sup>*Id.* at \*4-5.

<sup>32</sup>*Id.* at \*5.

<sup>33</sup>*Id.* at \*6.

<sup>34</sup>*In re Ehlke's Estate*, 27 N.W.2d 754 (Wis. 1947); *Alaska ex rel. Dew v. Superior Court*, 907 P.2d 14 (Alaska 1995).

<sup>35</sup>*In re Ehlke's Estate*, 27 N.W.2d at 757.

1. contact the defendant and assure that the defendant has actual notice of the lawsuit,
2. advise defendant of the protections of the Soldiers' and Sailors' Civil Relief Act,
3. advise defendant of the possibility of entry of default judgment and of the consequences of such a judgment,
4. ascertain whether defendant's ability to appear and defend his or her legal interests is affected in any way by defendant's military status, and
5. if the defendant wishes, move for a stay of the proceedings to enable defendant to obtain counsel or prepare a defense on the merits of the case.<sup>36</sup>

These cases illustrate the degrees of representation by attorneys appointed to represent servicemembers.

### III. Applying the Model Rules of Professional Conduct to Attorneys Appointed Under the SCRA

Although the SCRA may not explicitly require court-appointed attorneys to assume certain duties, such attorneys are nevertheless bound by their states' rules of professional conduct. The following are some basic professional responsibilities applicable to court-appointed attorneys as outlined in the American Bar Association's Model Rules of Professional Conduct:

On accepting appointments, a lawyer

shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the

client is likely to result in violation of the Rules of Professional Conduct or other law; (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.<sup>37</sup>

On competence, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>38</sup> Competent handling means an "inquiry into and analysis of the factual and legal elements of the problem...."<sup>39</sup>

On scope of representation, an attorney "shall abide by a client's decisions concerning the objectives of representation" and may take action as impliedly authorized to carry out the representation.<sup>40</sup> Furthermore, "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances *and* the client gives informed consent."<sup>41</sup>

On diligence, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."<sup>42</sup> This means that

[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedica-

<sup>36</sup> *Dew*, 907 P.2d at 15 n.2.

<sup>37</sup> MODEL RULES OF PROF'L CONDUCT R. 6.2 (1983).

<sup>38</sup> *Id.* Rule 1.1

<sup>39</sup> *Id.* Rule 1.1 cmt. 5.

<sup>40</sup> *Id.* Rule 1.2(a).

<sup>41</sup> *Id.* Rule 1.2(c) (emphasis added).

<sup>42</sup> *Id.* Rule 1.3.

tion to the interests of the client and with zeal in advocacy upon the client's behalf.<sup>43</sup>

On communication, a lawyer shall promptly inform the client of any decision or circumstance requiring the client's informed consent. The lawyer "shall reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "keep the client reasonably informed about the status of the matter."<sup>44</sup>

On conflict of interest regarding current clients,

[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.<sup>45</sup>

#### A. Protecting Servicemembers from Default Judgments

Model Rules of Professional Conduct 6.2 and 1.16 direct that the duties of an attorney appointed under the SCRA begin at the moment of appointment.<sup>46</sup> An attorney appointed under the SCRA Section 201 to represent an absent servicemember to protect the servicemember from default judgment should accept the appointment absent justification to avoid the appointment as stated in Rule

6.2. The court-appointed attorney should continue to represent his client until the attorney's duties within the scope of representation are fulfilled or until the attorney terminates representation, as provided in Rules 1.2 and 1.16.

The SCRA is silent as to who bears the burden of compensating the court-appointed attorney. States have dealt with this issue in various ways. The Alaska Supreme Court in 1995 and the Colorado Court of Appeals in 1991 ordered plaintiffs to pay the costs of court-appointed attorneys.<sup>47</sup> Other courts have analogized the appointment of an attorney under the SCRA to the appointment of a guardian *ad litem*. These courts awarded attorney fees pursuant to guardian *ad litem* statutes.<sup>48</sup> At least one state enacted a statute specifically on compensation of attorneys appointed under the SCRA.<sup>49</sup>

Before accepting compensation for a SCRA appointment, attorneys should turn to Rule 1.8, which governs conflicts of interest. Rule 1.8 states that a lawyer shall not "accept" compensation from a party other than his client without the client's informed consent. Based on this rule, there may be a conflict of interest when the defendant's court-appointed attorney accepts payment from the plaintiff for services rendered—as in the Hendersons' divorce action—unless there is a court order directing the plaintiff to pay the defendant's attorney fees, a statute allowing such payment, or informed consent of the client.

As noted above, the scope of representation under Section 201 of the SCRA may

<sup>43</sup>*Id.* Rule 1.3 cmt. 1.

<sup>44</sup>*Id.* Rule 1.4(a)(1) and (2).

<sup>45</sup>*Id.* Rule 1.8(f).

<sup>46</sup>See *id.* Rule 6.2 (appointments) and Rule 1.16 (declining or terminating representation).

<sup>47</sup>See *Dew*, 907 P.2d 14 (ordering the plaintiff state to pay the appointed attorney's fees); see also *Barnes v. Winford*, 833 P.2d 756 (Colo. Ct. App. 1991) (remanding the case to order plaintiff to pay the appointed attorney's fees).

<sup>48</sup>*In re Ehlike's Estate*, 27 N.W.2d at 758; *Heimbach v. Heimbach*, 53 Pa. D. & C. 350, 351 (1944); *Weynberg v. Downey*, 25 N.Y.S.2d 600 (Sup. Ct. 1941); *In re Cool's Estate*, 18 A.2d 714, 715, 717 (1941).

<sup>49</sup>Virginia law gives courts the authority to assess attorney fees against any party, but the state may not be required to compensate an attorney unless the state is a party to the action (VA. CODE ANN. § 8.01-15.2(B) (2005), [www.courts.state.va.us/forms/district/dc418.pdf](http://www.courts.state.va.us/forms/district/dc418.pdf)).

be defined to include the duty to request a stay of proceedings.<sup>50</sup> Based on the text of the SCRA, a stay will likely be granted only if, after exercising due diligence, the appointed attorney is unable to contact the defendant or otherwise determine if the defendant has a meritorious defense. Moreover, according to the SCRA, a court may require an appointed attorney to present defenses if the servicemember's presence is not required for the defense. Below I analyze the SCRA-appointed attorney's scope of representation in relation to the Model Rules of Professional Conduct.

### 1. Using Due Diligence to Contact the Defendant

Comment 1 on Rule 1.3 states that “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”<sup>51</sup> Accordingly at a minimum the SCRA’s requirement of due diligence to contact an absent servicemember may require the attorney to use legal research databases such as Lexis and Westlaw and to run credit reports and request state department of motor vehicle records to determine the defendant’s current address and telephone number. The attorney should send correspondence to the most current address and call the most current telephone number.

The appointed attorney risks violating the professional responsibility of “reasonable diligence” if the attorney’s only effort to contact the absent servicemember is mailing a letter to the same address used to serve process on the servicemember. As in the case of John Henderson, the simplest explanation as to why a servicemember is absent from a legal proceeding is lack of notice of the action.

When an attorney’s attempts to make contact by mail and telephone are unsuccessful, due diligence may require the appointed attorney to use military channels to contact the servicemember, such as contacting the inspector general or a legal assistance attorney at the servicemember’s last known duty assignment. The inspector general and legal assistance attorney may be able to track down the servicemember’s current duty station and pass messages through the servicemember’s chain of command. Note that these individuals may not release the servicemember’s contact information to the appointed attorney and may not be able to assist in all cases.<sup>52</sup> Appointed attorneys should have a copy of the appointment order available to give to the legal assistance attorney or inspector general to facilitate contact with the servicemember through these channels. Also, appointed attorneys may utilize the military locator service of each service branch to determine the duty address of servicemembers.<sup>53</sup> Appointed attorneys may pass messages through the Red Cross to notify servicemembers of child custody and other emergency family law matters.

Once the attorney contacts the servicemember and notifies the servicemember of the pending action, the attorney may have fulfilled his responsibilities under the SCRA and the Model Rules of Professional Conduct. The court-appointed attorney should inform the court of the details of his contact with the servicemember and request withdrawal from appointment or seek further instructions from the court. Notably, when a servicemember has notice of the action, the servicemember may retain counsel, choose *pro se* representation, request the court to stay the action pursuant to SCRA Section 522 if military duty requirements materially affect the ability to appear before the court, or do nothing at all.

<sup>50</sup>50 U.S.C. app. § 521.

<sup>51</sup>MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (1983).

<sup>52</sup>Military personnel may have contact information regarding a servicemember but may be prohibited from releasing that information because of Privacy Act (5 U.S.C. § 552a) restrictions and military regulations.

<sup>53</sup>U.S. Department of Defense, Requests for Military Mailing Addresses (n.d.), [www.defenselink.mil/faq/pis/PC04MLTR.html](http://www.defenselink.mil/faq/pis/PC04MLTR.html).

## 2. Using Due Diligence to Determine Whether the Servicemember Has a Meritorious Defense

The SCRA implies that the court-appointed attorney may be required to use due diligence to determine whether the servicemember has a meritorious defense. According to Comment 5 on Rule 1.1, an attorney's competent handling of a legal matter includes an "inquiry into and analysis of the factual and legal elements of the problem."<sup>54</sup>

Accordingly what "due diligence" requires will be determined on a case-by-case basis and may require the appointed attorney to analyze the plaintiff's claims and the facts asserted in the complaint, to perform reasonable legal research, and to use simple, inexpensive discovery tools such as interrogatories or to subpoena appropriate documents to flesh out meritorious defenses. The attorney may be required to identify and assert available affirmative defenses.

## 3. Defending the Action in the Servicemember's Absence if the Servicemember's Presence Is Not Necessary to the Defense

As discussed above, the court may require the SCRA-appointed attorney to determine whether the servicemember has a meritorious defense to the legal action. But the SCRA goes a step further and implies that the court-appointed attorney may be required to present defenses in the servicemember's absence if the servicemember's presence is not required for the defense.<sup>55</sup>

The attorney's ethical obligation to assert such defenses is outlined in Model Rule of Professional Conduct 1.1, which requires competent representation, and Rule 1.3, which requires diligence. Asserting defenses without the client's knowledge or permission may seem to conflict with Rule 1.4's communication requirements. Rule 1.4, however, prescribes the

communication responsibility as one of "reasonableness." Since the attorney is unable to contact the servicemember and the attorney's actions will not waive any defenses or bind the servicemember, the attorney's good-faith actions should not violate the communication requirement of Rule 1.4.

## B. When a Court Denies an Additional Stay

Under Section 202 of the SCRA, when a court denies a servicemember's request for an additional stay, the court "shall" appoint an attorney to represent the servicemember. The SCRA does not define the scope of representation.

Unlike Section 201, where communication with the client may not be available, under Section 202 communication between the attorney and the client should be available. Accordingly the attorney and the client may appropriately define the scope of representation as long as any limitation on the scope is reasonable under the circumstances and the client gives informed consent. Once the scope is defined, the attorney must carry out his responsibilities, especially the responsibility of competence and diligence, in accordance with the Model Rules of Professional Conduct.

## IV. Checklist

When a court appoints an attorney to protect a servicemember from a default judgment, the attorney should request a stay of proceedings, but a court should grant a stay only if, after "due diligence," the appointed attorney has been unable to contact the defendant or otherwise determine if the defendant has a meritorious defense. Moreover, the court may require the appointed attorney to present defenses in the servicemember's absence.

In order to exercise "due diligence" in contacting the absent servicemember, the attorney takes the following steps: (1) attempt to make contact with the service-

<sup>54</sup>MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (1983).

<sup>55</sup>See 50 U.S.C. app. § 521(d)(1) (the court may stay the proceeding if "there may be a defense to the action and a defense cannot be presented without the presence of the defendant").

member via first-class mail to the address where service of process was rendered or other last known addresses; (2) call or e-mail the servicemember at the telephone numbers and addresses obtained from the other party if applicable; (3) review department of motor vehicle records to identify the servicemember's current address and mail correspondence to that address; (4) run a credit report to identify the servicemember's current address, and mail correspondence to that address; (5) call the local military legal assistance office of the servicemember's branch and request that a legal assistance attorney forward a message to the servicemember (a legal assis-

tance attorney may have—unavailable to civilians—internal e-mail addresses or other contact information for forwarding messages); (6) utilize the military locator service, [www.defenselink.mil/faq/pis/PCo4MLTR.html](http://www.defenselink.mil/faq/pis/PCo4MLTR.html); and (7) call the American Red Cross to pass an urgent message to a servicemember regarding emergency family law matters such as child-custody disputes. The outcome in the Henderson case might have been different if John's attorney had followed these steps.

#### **Author's Note**

*The views expressed here are mine alone and do not necessarily reflect the positions, views, or opinions of the U.S. Army.*

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—The Editors

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