

DUTIES OF THE GUARDIAN AD LITEM WHEN REPRESENTING A SERVICEMEMBER

Military life and laws that protect servicemembers exist outside of the life experience of most civilian attorneys serving as Guardian Ad Litem (GAL) and the judiciary. It is vital for attorneys serving as GALs to servicemembers to fully understand their responsibilities and to have an appreciation of military life and, duties and the laws established to protect servicemembers' rights. Three bodies of law provide guidance on the duties of the GAL representing a servicemember: the Servicemember's Civil Relief Act (SCRA),¹ the statutory duties of the GAL under Virginia law,² and the Virginia Rules of Professional Conduct.³ When attorneys executing their duties as GALs for servicemembers fail to comply with these standards of conduct, the consequences for the client can be devastating.

The purpose of the SCRA is to provide for, strengthen, and expedite the national defense through protection extended to servicemembers. The SCRA ensures that servicemembers are able to devote all of their energy to the defense needs of the Nation. Moreover, the act provides for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.⁴ A similar statute has been in effect to protect servicemembers from harm or disadvantage to their legal or financial affairs by virtue of military service since the Civil War.⁵ The SCRA establishes the requirements for representatives and counsel to be appointed when the servicemember can not be present in court. The Act also contains numerous provisions to protect the legal and financial rights of servicemembers. A significant portion of these protections are provided in the default protection and stay provision of section 521 and in the stay provision of section 522.⁶

The requirements of Section 521 apply to any case where the defendant is a servicemember and does not make an appearance.⁷ In civil suits, Section 521 requires every plaintiff to file an affidavit stating, whether or not the defendant is in the military and to support the conclusion with facts or in the alternative that the plaintiff is unable to determine the military status of the defendant.⁸ Section 521 requires that the court appoint counsel as representative for the defendant-servicemember.⁹ Under this Section, the court may require that the plaintiff post a bond to protect the defendant-servicemember from loss or damage if the judgment is later set aside.¹⁰ If the court determines that there may be a defense to the action that cannot be presented without the defendant-servicemember or if after **due diligence** counsel has been **unable to contact** the defendant-servicemember or **determine if there is a meritorious defense**, Section 521 provides for a 90-day stay.¹¹ (Emphasis added.)

¹ 50 USC Appx 501 et seq

² VA Code Ann 37.2-1000 – 37.2-1018, and 8.01-2, 8.01-9, 8.01-15.2

³ VA Sup. Ct. R. pt. 6, sec. II

⁴ 50 USC Appx 502

⁵ 37 ALR Fed 2d 1

⁶ 50 USC Appx 521 and 522 see also VA Code Ann 8.01-15.2

⁷ 50 USC Appx 521 (a)

⁸ 50 USC Appx 521 (b)(1)

⁹ 50 USC Appx 521 (b)(2)

¹⁰ 50 USC Appx 521 (b)(3)

¹¹ 50 USC Appx 521(d)(1), (d)(2)

Section 522 provides for a stay in civil cases where the servicemember has actual notice of the proceeding.¹² The court must grant a stay of not less than 90 days upon proper application by the servicemember.¹³ The court may grant an additional stay upon the servicemember's request.¹⁴ If the court denies this request the court must appoint counsel to represent the servicemember in the action or proceeding.¹⁵

In Virginia, a servicemember who is unable to appear in court due to military duty is considered a person under disability.¹⁶ The status as a person under a disability provides the servicemember the right to representation by a GAL.¹⁷ The GAL for a person under a disability has a **duty to faithfully represent the interests of the client, to communicate with the client, to conduct an investigation of the facts** of his or her case, and to **present that information** to the court.¹⁸ (Emphasis added.)

The Virginia Rules of Professional Conduct set forth the requirements for the ethical execution of the duties as GAL for a person under a disability. Rule 1.14 requires that the lawyer strive to maintain a normal client-lawyer relationship. A lawyer who is appointed has the same obligations to the client as retained counsel.¹⁹ In a normal client-lawyer relationship, counsel has a duty of competence, to make inquiry, and to analyze the factual and legal elements of the problem.²⁰ In that same relationship, counsel has a duty to use due diligence when representing a client despite opposition, obstruction or personal inconvenience, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.²¹

Everyday servicemembers do something extraordinary; they rise with a commitment to serve the nation, if necessary, with their lives. In their service, they will leave their homes, families, businesses, and employers for months or years. They will face harsh environments, physical threats, and armed enemy combatants. To assist the servicemember in meeting the civil challenges left behind, Congress established the SCRA. Like any law or regulation the SCRA is only as effective as those who implement and enforce it. Many GALs represent servicemembers with competence, diligence, and passion. However, every time a GAL minimizes his or her duties, they reduce the effectiveness of the SCRA and diminish its and the servicemember's ability to fulfill their mission. They deprive that servicemember of the very rights the servicemember is sworn to protect. If we can ask the servicemember to place his or her life in harm's way for the Nation's interests and demand that he accept and pursue that mission with diligence and competence, can we ask any less of the attorneys who represent the servicemember? Virginia can do better for our servicemembers. We can require that GALs apply and fulfill established standards and duties when representing servicemembers, we can

¹² 50 USC Appx 522(a)

¹³ 50 USC Appx 522(b)

¹⁴ 50 USC Appx 522(d)(1)

¹⁵ 50 USC Appx 522(d)(2)

¹⁶ VA Code Ann 8.01(6)(e)-

¹⁷ VA Code Ann 8.01-9(A)

¹⁸ VA code Ann 8.01-9(A), Ruffin v. Commonwealth, 10 Va. App. 488, 393 S.E. 2d 425 (1990), Baby Doe v. Doe, 15 Va. App 242, 421 S.E. 2d 913 (1992)

¹⁹ Va. Sup. Ct. R. Pt.6 sec II, Rule 6.2 Accepting Appointments, Comment (3)

²⁰ Va. Sup. Ct. R. Pt.6 sec II, Rule 1.1 Competence

²¹ Va. Sup. Ct. R. Pt.6 sec II, Rule 1.3 Diligence, Comment (1)

require that judges appoint diligent GALs, we can provide guidance on GAL standards, and we can assist in locating servicemembers.

This is an actual case:

A young servicemember purchased a vehicle. On the purchase and finance documents he used his soon to be ex-wife's address. Approximately three weeks later, he was shot in the head. The servicemember was gravely wounded and not expected to live. He survived, but was incapacitated and in hospitals for over a year.

While he was in the hospital, the divorce was finalized. The servicemember's command and ex-wife decided to return the vehicle to the lien holder who accepted it as a voluntary repossession. No one was authorized to act on the servicemember's behalf. The vehicle was later sold at auction pursuant to the security interest and lien. During the collection process the lien holder was aware of the servicemember's injury and status. The lien holder was in contact with the servicemember's command and ex-wife during the period between the shooting incident, the sale, and collection actions. The lien holder mailed the notice of sale to the servicemembers post-divorce address. The sale resulted in a deficiency, and the lien holder proceeded to collect the deficiency filing a warrant in debt against the servicemember.

The lien holder served the servicemember at the address listed on the contract. The lien holder complied with the SCRA and filed the affidavit of service with the court indicating that the defendant was a servicemember. This invoked the servicemember's rights under section 521 of the SCRA. Pursuant to the SCRA and Virginia law, a GAL was appointed for the servicemember. There was a 90 day stay and a new trial date was set. During the stay, the GAL sent the notice of the suit and his representation to the same address used for service of process by the lien holder. The servicemember did not respond. Sometime prior to trial, the ex-wife sent correspondence to the court indicating that the servicemember had been gravely injured, that the lien holder was aware of the injury, that the servicemember was in a local hospital, and that he would not be available for trial.

The GAL sent a preprinted letter to the address on the warrant in debt. At trial, the GAL asserted that the defendant had not responded to his inquiry, that the commanding officer had not replied pursuant to the SCRA, and that he did not find a legal basis for a defense or a stay. The default judgment was entered and the servicemember's bank account and pay were garnished.

In this case, the servicemember had defenses discoverable in the court's record -from the plaintiff, from the family members and ex-wife, and in the law - that were not presented. The rules for representation by a GAL under federal law, state law, and the Rules of Professional Conduct are clear and had they been followed this injustice would not have occurred. GAL representation for servicemembers is not a sub-category of representation. Counsel should assume these duties with a professional level of diligence. Criminal defendants get better representation. Our servicemembers deserve better representation.

By Dwain Alexander, II

Mr. Alexander is an attorney with the Naval Legal Service Office Mid-Atlantic in Norfolk, Virginia where he serves as a legal assistance attorney. He is also a Captain in the United States Naval Reserve. Mr. Alexander is a frequent speaker on military issues relating to consumer and family law and has made presentations to: The National Conference of Juvenile and Family Court Justices, Managing Military Family Law Issues; Virginia Bar Association, Untying the Knott" Uniform Services Former Spouses Protection Act and Service of Process in the Military; The Virginia Women Attorneys Association, Military Issues in Family Law; The National Consumer Law Center Litigation Conference, The Servicemembers Civil Relief Act A Consumer Protection Statute; and The Joint Services Consumer Law Symposium, The Servicemembers Civil Relief Act and Consumer Law. Mr. Alexander is also a contributing editor for the National Consumer Law Center's publication, Collection Actions. The views expressed in this article are those of Mr. Alexander and not those of the Department of Defense, Department of the Navy, or any other government agency.

**REPORT OF GUARDIAN AD LITEM
SERVICEMEMBERS CIVIL RELIEF ACT**

Commonwealth of Virginia

- Case No.

Circuit Court General District Court
 Juvenile and Domestic Relations District Court

.....
CITY OR COUNTY

.....v./In re:

I _____, having been duly appointed by this court on _____ as representative/counsel pursuant to 50 USC Appx. 521 or 522 and who acting as Guardian Ad Litem for the defendant, a person under a disability, in the above referenced case report as follows:

1. _____ I verified that the defendant is/ is not in the military and the certificate of service is/is not attached.
2. _____ I reviewed all documents in the court file for defenses to the action and contract information for the defendant.
3. _____ I interviewed the plaintiff and reviewed its/his or her records related to the case for contact information on the defendant.
4. _____ I reviewed the SCRA GAL Due Diligence Standards for Contact of Servicemembers and employed numbers _____ in attempting to contact the defendant.
5. _____ I was/was not able to contact the defendant
6. _____ The defendant is currently located at _____ and is able/unable to be present for these proceedings.
7. _____ The defendant has the following defenses to assert on his/her behalf: or See attached:

.....
8. _____ The defendant may/may not have defenses to this action, including but not limited to, lack of personal jurisdiction, failure of plaintiff to comply with SCRA or other state or federal law, no liability, culpability of other parties, value of property, or amount of damages. Based upon my review of the file I assert the following defenses on behalf of the defendant _____

.....
9. _____ Based upon my review of the file I recommend that the plaintiff file a bond pursuant 50 USC Appx. 521(b)(3) to protect the servicemember in the event the judgment is vacated pursuant to 50 USC Appx. 521(g).

10. _____ Based upon my review of the file, I recommend that the Plaintiff be awarded possession and control of the property, but that the damage portion of the trial be stayed until _____ or the return of the defendant.

11 _____ Based upon my review of the file the plaintiff's interest will not be substantially or materially prejudiced and the defendant's interests will be protected, if the trial is further stayed until _____.

Guardian Ad Litem for Defendant

Date

**GUARDIAN AD LITEM DUE DILIGENCE LIST
FOR CONTACT AND DEFENSES**

CONTACT

1. United States Post Office inquiry through Freedom of Information Act for current address or any relocations.
2. Last known command, including name and address of commanding officer.
3. Names and addresses of relatives. Relatives include, but are not limited to: parents, brothers, sisters, aunts, uncles, cousins, nieces, nephews, grandparents, and former in-laws.
4. Information about the Respondent's possible death and, if dead, the date and location.
5. Telephone listings in the last known locations of Respondent's residence.
6. Internet people finder tools.
7. Law enforcement arrest and/or criminal records in the last known residential area.
8. Highway Patrol records in the state of Respondent's last known address.
9. Department of Motor Vehicle records in the state of Respondent's last known address.
10. Department of Corrections records in the state of Respondent's last known address.
11. Department of Child Support Enforcement records in the state of last known address.
12. Hospitals in the last known area of Respondent's residence.
13. Utility companies, in the last known area of Respondent's residence.
14. Contact the local legal assistance office for help in locating the servicemember at www.legalassistance.law.af.mil. Provide the legal assistance counsel a copy of the appointment order.
15. Send letters to the servicemember's branch of the Armed Forces.

Air Force	Army	Navy	Marine Corps	Coast Guard
HQ AFPC/DPDXIDL, 550 C St West Ste 50 Randolph AFB, TX 78150-4752 210-652-5774/5	Commander U.S. Army Enlisted Records & Evaluation Center ATTN: Locator 8899 East 56th Street Fort Benjamin Harrison, IN 46249-5301 866-771-6357	Navy World Wide Locator Navy Personnel Command PERS 312E2 5720 Integrity Drive Millington, TN 38055- 3120 901-874-3388	Commandant of the Marine Corps Headquarters, USMC Code MMSB-10 Quantico, VA 22134- 5030 703-640-3942/43	Coast Guard Personnel Command (CGPC-adm-3) 2100 Second St, SW Washington, DC 20593- 0001 202-267-0581

DEFENSES

1. Jurisdiction
2. Virginia Consumer Protection Act
3. Virginia Residential Landlord Tenant Act
4. Virginia Commercial Code
5. Servicemember's Civil Relief Act