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Soldiers' and Sailors' Civil Relief Act Expanded To Cover National Guard Members Responding to a National Emergency

The SSCRA (50 U.S.C. app. §§ 501-594, (2000)) was enacted in 1940 to protect the legal rights of active duty service members while away from home in service. It provides for continuances of civil judicial proceedings and covers a number of civil matters to include rental agreements, installment contracts, interest rates, mortgage foreclosures, and income tax payments. Until a recent amendment it covered the National Guard only when in active federal service. The amendment expanded the definition of active federal service for the National Guard to "… include service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code for purposes of responding to a national emergency declared by the President and supported by Federal funds." (50 U.S.C. §511(1))

The amendment was prompted by the fact that many National Guard members provided airport security after 9/11 for extended periods of time, but were not afforded the protections of the SSCRA. As a matter of fairness and in anticipation of future emergency security duties for National Guard members, legislation granting them the protections of the SSCRA in these circumstances was enacted. Currently, there is pending legislation to modernize and further expand SSCRA benefits and protections for all members of the military.

It is important when advising National Guard members or the family of National Guard members to be alert to any SSCRA implications of the matter. Failure to do so could be malpractice. More important, by assuring that National Guard members receive the protection to which they are entitled you have eased some of the hardship of hazardous service.

Source: "Solders' and Sailors' Civil Relief Act Now Applicable to the National Guard…Sort Of," June 2003 The Army Lawyer · DA PAM 27-50-362, p.17.

LIMITED SCOPE REPRESENTATIONS MUST BE CAREFULLY RISK MANAGED

Lawyers often leverage their practice by accepting clients on a limited scope of representation basis. A New Jersey lawyer recently dodged a bullet when his sloppy management of a limited scope representation resulted in a $10,000,000 malpractice claim. He had agreed to review the settlement agreement for a wealthy client's divorce that was mediated by the corporate counsel for her husband's closely held company. She was to get $500,000, three of four houses, $100,000 annually in alimony, and 15% of the stock of the husband's company. The lawyer took the matter with the written understanding that he would only review the agreement to interpret the settlement conditions. He would not conduct discovery, review company tax records, review case documents, or recommend whether the settlement should be accepted. Subsequently, the lawyer had the client sign his standard retainer agreement that included boilerplate language indicating he would perform "legal research and factual investigation." Shortly after the client signed the settlement agreement the husband's company went public at a value of $100,000,000 more than he had represented. The wife got the settlement agreement revoked and obtained an upward adjustment. As a result of a drop in share price, however, she received $10,000,000 less in stock value than if she had received the shares with the original settlement. She then sued the lawyer for malpractice claiming $10,000,000 in damages.

The client argued that a lawyer cannot simply be a "potted plant" and that even a limited scope representation in a divorce matter must involve more than a bare reading of a document. Luckily for the lawyer the New Jersey Superior Court had no trouble with the propriety of limited scope representations and ruled that the standard of care required in such a matter is determined by the limited service agreement. The Court observed that the conflicting boilerplate retainer agreement was a mistake, but found that the document reflecting service limitations was the undisputed operative understanding between the lawyer and the client. Thus, the lawyer had not malpracticed.

Normally, following routine client intake procedures is the safest way to practice. This case is a good example of getting trapped by blindly using a standard retainer agreement in a special situation thereby opening the door to a risible malpractice claim. To avoid this problem one risk management expert recommends that limited scope letters of engagement contain the following information:

- The client's situation and goals.
- The tasks the lawyer will accomplish.
- The available options and opportunities.
- The anticipated costs of various tasks necessary to achieve the client's goals.
- Tasks not assigned the lawyer.
- The benefits and risks of the tasks that the lawyer will undertake.
- Tasks the client has agreed to perform.

For more information on risk managing limited scope representations read "Limited Scope Representation — "Where L.A. Law Meets Home Improvement" on our web site at **www.lmick.com** in the Avoid Malpractice Section, Bench & Bar Articles.

Sources: Lerner v. Laufer, 819 A.2d 471(N.J. Super. App. Div. 2003); " Lawyer May Limit Scope of Representation to Surface Analysis of Mediated Settlement," ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, Vol. 19, No. 9, p.226, 4/23/03; "Avoiding Malpractice In Unbundled Services," Katja Kunze, Director of Claims, Wisconsin Lawyers Mutual Ins. Co.

"Nothing is so fatiguing as the eternal hanging on of an uncompleted task."
William James

INDIANA COURT OF APPEALS ADOPTS THE CONTINUOUS REPRESENTATION RULE FOR LEGAL MALPRACTICE SUITS

The continuous representation rule tolls the statute of limitations for a legal malpractice suit as long as a lawyer continues representing a client in a particular matter after malpractice has been discovered. (See generally §22.13, Vol. 3 Legal Malpractice 428, 5th Ed (Mallen & Smith)). The Indiana Court of Appeals in *Biomet Inc. v. Barnes & Thornberg* (Ind. Ct. App., No. 02A05-0205-CV-197, 7/8/03) adopted the continuous representation rule citing the judicial policy of avoiding disruption of the attorney-client relationship, giving an attorney an opportunity to repair a mistake, and avoiding premature malpractice suits by clients.

Claims repair is a primary risk management tool. The continuous representation rule gives an erring lawyer the opportunity to conduct claims repair by correcting an error without disadvantage to the client's claim if the lawyer is unsuccessful. It is equally important to avoid the rule if there is no hope of repair. Better to withdraw and start the statute of limitations than to drag out a losing situation with the probable result of increasing damages. Policyholders are encouraged to call Claims Counsel Jane Broadwater Long at 1-800-800-6101 for advice concerning continuous representation situations.

The Kentucky Supreme Court recognized the continuous representation rule in *dicta* in several decisions. For more information on this rule in Kentucky and our malpractice statute of limitations read "The Kentucky Malpractice Statute of Limitations – *The Supreme Court Clears the Air*" on our web site at **www.lmick.com** in the Avoid Malpractice Section, Bench & Bar Articles.

Source: "Indiana's Continuous Representation Rule Tolls Malpractice Statute of Limitations," ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, Vol. 19, No. 15, p.397, 7/16/03.

"A man who has committed a mistake and does not correct it is making another mistake."
Confucius

IS IT TIME FOR YOUR FIRM TO START ONLINE DATA BACKUP?

In a *Lawyers' Weekly USA* article Bud Stoddard, president of Amerivault Corp., advises law firms to backup computer files everyday, make sure that the backup is stored off-site everyday, and be sure that the off-site backup procedures have the reliability and speed to restore the firm's entire database within 24-hours or less if the system crashes, is hit by a virus, or is destroyed by fire or other disaster. He stresses that the old fashioned system of having a trusted employee take home each night a backup of firm electronic files is just not good enough anymore for practice continuity or file security. Stoddard writes that it is naïve to think a disaster will never happen to your electronic files – it is inevitable in his opinion.

Amerivault is one of several data storage services that offer encrypted online data storage services for law firms of all sizes. While we do not endorse service providers, we can suggest that you contact Amerivault at **www.amerivault.com** or call (800) 744-0235 to learn more about online data backup.

Source: " The Importance Of Data Backup," Bud Stoddard, Lawyers' Weekly USA, 2002 LWUSA 804, 12/9/02.

"When we ask advice we are usually looking for an accomplice."
Marquis de la Grange

For more information about Lawyers Mutual, call (502) 568-6100 or KY wats 1-800-800-6101 or visit our web site at www.lmick.com

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Malpractice Avoidance Update

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