

SILENT PARTNER

ANSWERING A LAWSUIT: TEN RULES

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain basic concepts about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

Overseas legal assistance attorneys are often faced with the client who brings in “suit papers” and asks how to respond to the lawsuit that’s been filed against him or her. What can you do to provide honest, accurate and helpful advice to the client? What the client doesn’t need is a brush-off like this: “Gee, Mrs. Smith, I guess you need to hire a civilian lawyer back in Podunk, Iowa.” Here’s a checklist for possible actions and/or responses when you examine the court papers your next client brings in. Keep a copy on your desk for quick reference:

PLEADINGS CHECKLIST:

___ 1. **Is Your file complete?** Get copies of all documents. A lawsuit in most states begins with the issuance of a summons, which is basically a cover sheet saying “You have been sued” and stating how much time is available in which to answer. Attached to the summons is a petition or complaint, which lays out the factual basis for the lawsuit and states the relief requested.. Make sure your client, Mrs. Smith, has absolutely everything that was served on her so you can pull out your “magnifying glass” and look over the pleadings. If you need it, get a copy of the entire court file from back in Idaho!

___ 2. **Proper service?** First check out service of the summons and complaint or petition. How were the papers served... Sheriff? Process-server? Certified mail? Was the client served properly? Did Mrs. Smith receive the papers, or was it a roommate, a friend, a co-worker or a child? Check the state rules of civil procedure to see if service was proper [Example: North Carolina allows a roommate to be served at the residence of defendant, but doesn’t allow a co-worker to be served at her/his place of employment, or a child to be served at the residence! Tacking a summons and complaint on the residence door is “legal service” in Florida but not in North Carolina -- you have to serve a person or else do it by publication. And service by publication can’t be effected simply because you don’t know your wife’s address -- you must swear in an affidavit that you’ve made diligent efforts to obtain it without success!] If she was served overseas, did the plaintiff follow the requirements of the Hague Convention on International Service of Civil Process?

___ 3. **Read the allegations.**

| Check the county where the suit was filed. Proper venue is normally the place where either plaintiff or defendant is a legal resident. Was the proper venue alleged?

| Read the allegations in the complaint/petition closely. What are the facts? What is admitted, and what is denied? Mark everything in the factual allegations as “A” for Admitted, “D” for Denied, or “DKI” for Denied for lack of Knowledge or Information (in other words, you can’t admit or deny the answer -- you do not know).

___4. **Prayer for relief.** Read this section closely; it usually starts with “Relief Requested,” or “Wherefore the plaintiff requests...” It’s the section where the plaintiff states what he or she wants the court to do. What is the relief requested? Damages? Injunction? Adjudication of paternity?

___5. **Setoff or counterclaims.** If damages are requested, find out if there are any ways to reduce them. A setoff is an amount already paid by your client toward the potential judgment for money damages. A counterclaim is a claim the defendant has against the plaintiff. It may either be for a related legal issue (a mandatory counterclaim -- this must be pleaded in response or else it may be lost), or for an unrelated issue (a permissive counterclaim). In a landlord’s suit for damages to an apartment, for example, a mandatory counterclaim might be the landlord’s wrongful retention of the security deposit or of the personal property of the tenant-client. A permissive counterclaim might be the landlord’s writing a bad check to the tenant as to a matter outside the lease. In a child support case, a setoff might be the previous support payments made by check to the plaintiff, rather than paid through the court.

___6. **Potential witnesses.** Ask the client about potential witnesses; get their addresses and phone numbers, if possible. Also get a short summary from the client of what each would say. This can be very persuasive in obtaining an attorney to whom the case may be referred, since few attorneys enjoy taking cases where there are no corroborating witnesses and the only defense is “No, I didn’t!”

___7. **Exhibits.** Likewise note any evidence, documents or exhibits that may be helpful to the client. Offer to copy the lease, the canceled check or other papers for the client and forward them to the attorney to whom you refer the case. Outline in your cover letter the nature and importance of these potential exhibits.

___8. **Should you refer out the case?** In most cases, there’s so little money involved that you’ll question whether to refer out the case. Another concern is that your client has little money (or none!) to spend on retaining an attorney. Then there’s the risk of a default judgment against your client -- what will it mean? You must analyze and weigh these factors before making a client referral to a civilian attorney. Just because the client is broke doesn’t mean that you shouldn’t attempt a referral -- a Special Legal Assistance Attorney or a legal aid lawyer may be persuaded to look into the case if there’s a meritorious defense for the client. If there’s a viable counterclaim, you might find a lawyer who could take the case on a contingent fee basis. Try to explain to the client the possible consequences of not responding. If the suit is for money damages, the judgment may hurt his or her credit rating. If the client is still in the same locale as the place where the suit is pending, there’s a good chance that the judgment creditor may try to collect on the judgment by levying against the personal property or bank assets of the client. If it’s a domestic matter, explore the possible problems that failure to respond could cause -- loss of Mrs. Smith’s claim for military pension division or alimony, adjudication of paternity against SGT Smith, determination of a high amount of child support to be paid, loss of visitation rights, and so on. Even if you don’t do a referral, at least call and consult with local counsel to find out possible risks for the client and to discuss whether a pro se response and defense would be viable options for the client. Don’t try to guess -- odds are, you’re not licensed to practice there and you don’t really know the “upsides and downsides” of going it alone without a civilian attorney.

___9. **Lawyer referral -- how to do it.** There’s an excellent guide to lawyer referral in the **SILENT PARTNER** on that subject. Download it from the JAGCNET files or contact the author at the address below for a copy.

___10. **Litigation support.** After referral, offer additional assistance to the civilian lawyer. What could help the client and (possibly) reduce his or her legal expenses? How about some research on legal issues that will arise in the litigation? You can do it for free for Mrs. Smith -- offer to

prepare a memorandum on any legal issues that might help civilian counsel. What about witness summaries? Even if there's only one witness -- the client -- you can prepare an accurate summary that civilian counsel can use for trial preparation. Go the extra mile.

These ten rules should help in analyzing the lawsuit papers your next client bring to you. Follow this checklist to provide the best help possible when your client has been sued.

[rev. 1/24/08]

* * *

SILENT PARTNER IS PREPARED BY COL MARK E. SULLIVAN (USAR, RET.). FOR REVISIONS, COMMENTS OR CORRECTIONS, CONTACT HIM AT 2626 GLENWOOD AVENUE, STE. 195, RALEIGH, N.C. 27608 [919-832-8507]; E-MAIL – MARK.SULLIVAN@NCFAMILYLAW.COM