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Inside

California Courts on Active Duty

By Justice Eileen C. Moore

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In many ways, we Americans have progressed in the way we treat our service members and veterans. During the Vietnam War, it was not uncommon for people to spit on soldiers as they walked through airports. One wonders what Vietnam vets are thinking when they see current veterans being applauded in the same setting. At least

today's better treatment shows Americans have learned we can hate a war but still love our warriors.

The United States has more than a million members of the military and almost 22 million veterans. About ten percent are from California. With contemporary favorable attitudes about our military, it is little wonder legal issues involving members of the service and veterans are appearing in all areas of our courts.

Both federal and state statutes set forth procedures specially directed to those who are presently serving and those who previously served our country. The reasons service members and veterans deserve this special consideration are too numerous to list here. Suffice it to say, they had our back. This article is intended merely as a primer on military and veteran issues to alert lawyers and judges about matters most of us do not usually think about.

— Civil Law —

A 2003 federal statute, the Servicemembers' Civil Relief Act (SCRA, 50 U.S.C. App. § 501 et seq.) was called the Soldiers' and Sailors' Civil Relief Act when first passed in 1940. The SCRA provides many protections for members of the military, National Guard, and Reservists. As examples, section 526 states the period of military service may not be included in computing "any period limited by law." Section 527 places limitations on the amount of interest that may be charged, and mandates restrictions on when a member of the armed services may be evicted. Section 531 provides protections in contract and repossession situations. Sections 532 and 533 place limitations on foreclosures and property seizures.

The idea behind the SCRA is to ensure that service members can focus on accomplishing their mission. It is hoped they will do their best when they know their families are not being evicted from their homes, their property isn't being repossessed, their stored goods aren't being sold, and court judgments won't be entered against them while they are serving their country. Justice William O. Douglas explained the original statute's purpose in *Le Maistre v. Leffers* (1948) 333 U.S. 1: "the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call."

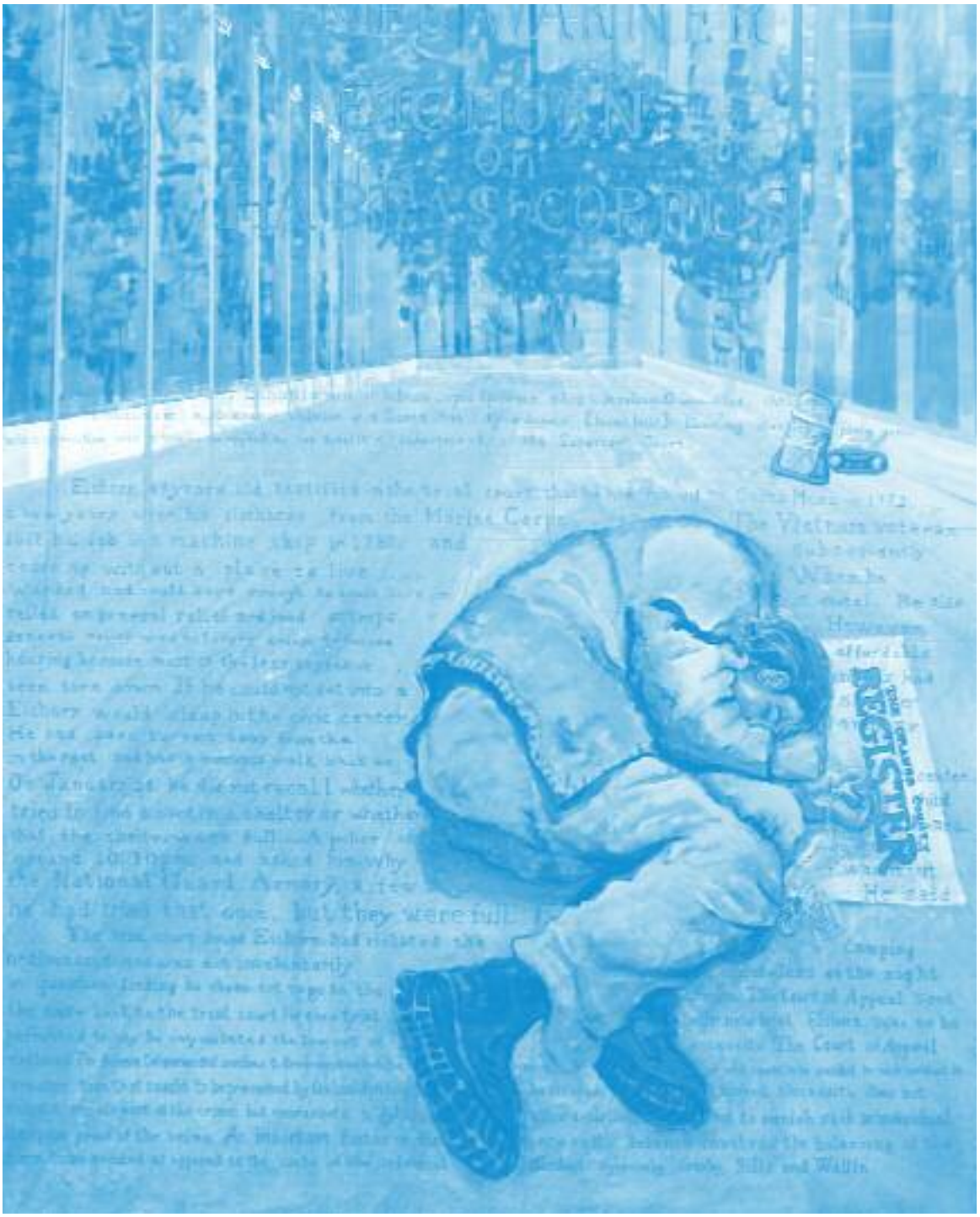
Some examples of cases applying the SCRA:

In *Gordon v. Pete's Auto Services of Denbigh, Inc.* (E.D.Va. 2012) 838 F.Supp.2d 436, the plaintiff was a member of the military who sought damages for the loss of his car. While deployed by the Navy, Gordon left his jeep in his apartment complex parking lot, and a representative of the complex requested the jeep be towed. Defendant, a towing company, sold the vehicle to itself at auction. Gordon sued the towing company under the SCRA and won his case, along with attorney fees.

Hurley v. Deutsche Bank Trust Co. Americas (6th Cir. 2010) 610 F.3d 334, involved a case brought by a member of the military service and his wife. Their action was against a lender for violating the SCRA by foreclosing on their home while he was serving in Iraq. The matter eventually settled following several years of litigation and summary judgment in favor of the plaintiff against the mortgage company.

The *Hurley* case may have been the driving force behind Congress's 2010 amendment to the SCRA, which now clearly provides for private rights of action in section 597(a). That section states any person aggrieved by a violation of the Act in a civil action may "recover all other appropriate relief, including monetary damages." It also provides for an award of costs and attorney fees.

It is unclear whether punitive damages are obtainable under the SCRA, but there have been hints that they might be available. First, sections 597 and 597a of the SCRA, both enacted as part of the 2010 amendment, do



This student artwork painting of a Vietnam vet is displayed at the Court of Appeal, 4th Dist. Div. 3,. reminding about Vietnam veteran habeas corpus case In re Eichorn *(1998) 69 Cal.App.4th 382.*

not limit other legal remedies. Second, in an earlier unreported *Hurley v. Deutsche Bank* decision, the federal trial judge denied defendants' motion to strike plaintiff's punitive damages claim. In that decision, the court stated punitive damages are available under the SCRA in appropriate cases. Third, in what is probably dictum in *Gordon*, as well as in several unreported cases, courts have noted that punitive damages are available under the SCRA. Lastly, in *Brewster v. Sun Trust Mortgage, Inc.* (9th Cir. 2014), 742 F.3d 876, 878 fn. 4, the Ninth Circuit asked for briefing on the issue, but ultimately did not decide it.

The SCRA has been used against a service member as well. In *First Tennessee Bank National Association v. Newham* (Neb. 2015) 859 N.W.2d 569, Newham borrowed money and bought property in California in 2005 while he was in the Air Force. Years later, when he was out of the service, an action was brought against him on the promissory note, and he argued the statute of limitations. Citing section 526(a) of the SCRA, the Nebraska Supreme Court found the statute of limitations was tolled while he was in the service.

Another federal statute, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. § 4501 et seq.) prohibits employment discrimination and is geared toward eliminating or minimizing the disadvantages to civilian careers and employment resulting from serving in the military. In *Staub v. Proctor Hospital* (2011) 131 S.Ct. 1186, the Supreme Court heard a case in which the supervisors of an Army Reservist were hostile to his military obligations. The plaintiff contended he was fired as a result of that hostility and brought an action under USERRA in which a jury awarded him $57,640 against the employer. The federal intermediate court reversed, finding instructional error because the jury was told a corporation can act only through its employees and the animus shown toward plaintiff due to his military obligations was not shown by the person who fired him. The high court said it was obvious the plaintiffs' supervisors acted within the scope of their employment when they took the alleged actions against the plaintiff, and the decision of the federal appeals court was reversed.

'As of January 1, 2015, under Penal Code section 858, all defendants arraigned in California courts must be personally informed by the court that there are provisions of law specifically designed for individuals who have active duty or veteran status.'

In *Paxton v. City of Montebello* (C.D.Cal. 2010) 712 F.Supp.2d 1007, Army National Guard members sued for violation of USERRA, claiming the city failed to employ them as police officers upon their return from active duty, with the same seniority and rate of pay, and by retaliating against them for taking military leave. The court awarded damages in the amount of their annual leaves

'The danger passed,

and all things righted,

God is forgotten the

and the soldier slighted.'

Rudyard Kipling

along with interest, costs and attorney fees.

California statutes also provide some protections to armed services members. Military and Veterans Code section 394 prohibits employers from discriminating against members of the armed forces. The statute allows service members to hold their employers liable for discrimination against them. For example, in *Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, the plaintiff was terminated when he returned after serving six months in Iraq. He was allowed to proceed against the employer, but not his supervisor.

Military and Veterans Code section 401 permits service members to apply for a stay, postponement, or suspension in the payment "of any tax, fine, penalty, insurance premium, or other civil obligation or liability" if unable to pay under previously agreed terms. The statute states that violators are liable "for actual damages, reasonable attorney's fees, and costs incurred by the injured party."

Section 395.06 of the Military and Veterans Code was recently amended to state that when a full-time employee is absent from work while performing active service in the National Guard of any state, the employer, if it is not "impossible or unreasonable," shall restore the employee to the former position or to a position of similar seniority status and pay, without loss of retirement or other benefits. The new law also provides the employer shall not discharge the former employee from the position without cause within one year after restoring the person to the position. Similar mandates cover part-time employees returning from National Guard duty. A specific mechanism for forcing the employer to comply with these requirements is set forth in the statute, and further, that a city prosecutor may appear and act as the employee's attorney.

Whenever there is a default, and before judgment is entered, a plaintiff is required to file a declaration setting forth that the defaulting defendant is not in the military, according to Military and Veterans Code section 402. Any period of military service shall be part of the period included in computing the time for redemption of real property sold or forfeited to enforce any obligation, tax or assessment under section 404, and section 405 limits the interest which may be charged members of the service to six percent in many instances. Eviction protection is provided in section 406, and in sections 407, 408 and 409 contract, mortgage and lease safeguards are set forth.

The Judicial Council has forms relating to present and former members of the military

for both mandatory and optional use. (http://www.courts.ca.gov/forms.htm?filter=MIL.) Forms MIL-010 and MIL-015 are mandatory forms to be used for relief from financial obligations during military service. Form MIL-020 is an optional form that may be used as a court order for relief from financial obligations during military service. There may be any number of reasons why a service member or veteran wishes the court or someone else to know about his or her military service. Form MIL-100, another optional form, may be used in any type of case to give notification of military or veteran status. It may be filed by a party or someone else on that person's behalf.

'When faced with a request for a civil restraining order against an active duty service member, lawyers should consider whether or not the tolling provisions of the Servicemembers Civil Relief Act apply.'

— Family Law —

Family law matters frequently concern veteran and service member issues. Numerous cases involve the community's interest in money earned or due as a result of military service. Others deal with custody issues.

Division of military pensions is a recurring issue. In *McCarty v. McCarty* (1981) 453 U.S. 210, the Supreme Court held that state courts were without jurisdiction to divide federal military pensions. Thereafter, Congress enacted the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408) providing that state courts may divide a service member's retirement pay according to the laws of that state. For cases involving the application of military pensions under California law, see *In re Marriage of Elfmont* (1995) 9 Cal.4th 1026 and *Fredericks v. Fredericks* (1991) 226 Cal.App.3d 875.

In *In re Marriage of Shea* (1980) 111 Cal.App.3d 713, the husband was a veteran receiving veterans' education benefits, which he used to make house payments. The trial court found the benefits the husband received during the marriage were community property. In reversing, the appellate court held that absent evidence of an agreement the husband's benefits were to be considered community property, they were his separate property.

Additional retirement credit was at issue in *In re Marriage of Green* (2013) 56 Cal.4th 1130. The husband, a veteran, had exercised his right to purchase four years' worth of additional retirement credit for his premarital military service. The Supreme Court concluded that, except for the community's contribution to the cost of obtaining the credit, the four years of additional credit were the husband's separate property.

In re Marriage of Babauta (1998) 66 Cal.App.4th 784, involves the division of voluntary separation incentive (VSI) payments, which are payments from the military as an incentive to leave the service. The court held the superior court had jurisdiction to divide the former husband's VSI payments.

'Many veterans are uniquely suited for law enforcement employment because of their combat experience, but cops carry guns, and once there is a restraining order, guns are not permitted.'

The Servicemembers Civil Relief Act applies in family law cases. Section 521 states the SCRA applies to any civil proceeding and requires the appointment of an attorney to represent the service member before entering a judgment under some circumstances. Under section 522, when a service member requests a stay of proceedings, the court "shall" stay the action for a period of not less than 90 days. The statute requires the member of the service supply the court with a "letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear" and a "letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter."

Sadly, sometimes service members lose custody of their children while they are deployed. Section 528 of the SCRA applies when deployment is between 60 and 540 days, and the service member is not permitted to take along family members. That section limits a court's considering that absence as the sole reason for modifying custody.

California law offers a little more in child custody situations. Family Code section 3047 provides that when military service has a material effect on a person's ability to exercise custody or visitation rights, any necessary modification of an existing custody order shall be deemed temporary, without prejudice and subject to review when the person returns from deployment. *In re Marriage of E.U. and J.E.* (2012) 212 Cal.App.4th 1377, illustrates the challenges faced by military parents upon returning home from serving their country. After returning from Afghanistan, the father found he lost primary custody of his child. Applying section 3047, the Court of Appeal held the family court judge erred by failing to enforce a court order that provided

that father's custody should be reinstated upon his return. Yet in a very similar situation, *Jane J. v. Superior Court* (2015) 237 Cal. App.4th 894, which involved a father who was a military pilot stationed stateside after serving three tours in the Middle East, the Court of Appeal reversed a family law judge's order permitting the children to live with their father, without ever discussing section 3047.

Family Code section 3044 provides that if a party has perpetrated domestic violence within the previous five years and is seeking custody of a child, there is a rebuttable presumption that an award of custody is detrimental to the best interests of the child. The family court judge must consider seven enumerated factors to decide whether the presumption has been overcome. Nothing in those seven factors addresses a person's condition as a result of serving in the military. Nor is there any catch-all factor, calling for the judge to do what is equitable or just under the circumstances. Thus, a service member or veteran, who acts out as a result of a mental condition from serving in the military, will probably lose custody of his or her children.

— Juvenile Dependency Cases —

Juvenile dependency proceedings come under the Servicemembers Civil Relief Act as well, as section 521 of 50 App. U.S.C. covers "any child custody proceeding." When juvenile court judges in two cases denied SCRA stays in California dependency proceedings, the Court of Appeal reversed in both. In *In re Amber M.* (2010) 184 Cal.App.4th 1223, the father was in the military service, and the trial court found a letter from the father's commanding officer did not satisfy section 522 of the SCRA because it did not demonstrate that active military duty prevented his appearance at the dependency proceedings. The appellate court liberally construed the application to stay and concluded the juvenile court abused its discretion in denying a stay.

In *In re A.R.* (2009) 170 Cal.App.4th 733, the social services agency argued the SCRA does not override statutory mandates regarding the expeditious resolution of juvenile dependency cases. But the appellate court disagreed, finding the principles set forth in the SCRA override juvenile court law because it was the intent of Congress "to strengthen national defense by providing for the temporary suspension of a court proceeding that might adversely affect the rights of an active military servicemember." The appellate court concluded the juvenile court erred in not granting a stay under the SCRA.

However, when a juvenile court judge granted a stay but later denied a request for an additional stay, the Court of Appeal affirmed the order denying the additional stay of juvenile proceedings in *George P. v. Superior Court* (2005) 127 Cal.App.4th 216. The appellate court found the juvenile court could reasonably deny the presumed father's request for an additional stay based on its finding his military service did not adversely affect his participation in the case.

In non-SCRA matters, some California courts are handling matters involving service members and veterans in creative ways. In Sacramento, for example, when the juvenile dependency judge realized a parent was a party in the veterans' court as well, the teams were able to coordinate their efforts and work together to try to meet the needs of the parents without duplication while keeping the children safe. Orange County has seen a number of dependency matters that involve a parent who is deployed. When the remaining parent is unable to handle matters alone, the juvenile court has found it beneficial to work directly with the military in finding appropriate services to try to keep the children in their homes.

— Probate Law —

Any number of issues involving active duty members of the military or veterans may pop

up in probate cases at times. Accordingly, Judicial Council form MIL-100, the optional form about notification of present or past military service, may be useful.

From time to time, probate courts have matters involving veterans who had been injured on active duty and were later discharged, and who need conservatorships. In the context of guardianships, probate courts see cases where the service person is a single parent sent to a war zone, and the children stay with relatives while the parent serves in the military. With regard to decedents' estates and trusts, a frequent concern arises in ensuring that active military personnel who are beneficiaries or intestate heirs have received the necessary notices.

> *'Never in the face of human conflict has so much been owed by so many to so few.'*
>
> Winston Churchill

In addition to the tolling provisions contained in the Servicemembers Civil Relief Act, California's tolling statute must be followed. Pursuant to Military and Veterans Code section 404, the period of military service shall not be included in computing any period for the bringing of an action by or against a service member's heirs, executors, administrators or assigns.

— Civil Restraining Orders —

Issuing a restraining order against a violent person is an effective tool. But once a restraining order is issued, job opportunities can be severely limited.

Along with veterans suffering from post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), mental health issues, drug usage, and military sexual trauma, the courts are seeing cases involving violent outbursts and rage. There has been discussion around the notion that all domestic violence might not be the same. That is, "traditional" power and control violence may be different from violent outbursts resulting from the effects of combat.

During and after the Women's Liberation Movement, women fought tooth and nail to force police and prosecutors to take violence against them seriously. Until then, it was common that the only domestic violence training given to police officers consisted of wisecracks from watch commanders, such as, "Remember, if you catch a fish, you gotta clean it." Women were largely successful in their quest for statutory and procedural changes across the country. Yet to a great extent, the improved methods of dealing with domestic violence address power and control violence, not violence resulting from combat service.

According to an April 2014 article in the San Francisco Chronicle, 21 percent of nationwide domestic violence is committed by combat veterans. Domestic abuse skyrocketed as an increasing number of soldiers returned from lengthy and repeated tours in Iraq and Afghanistan, and PTSD began to rise. Research has shown that 80 percent of those diagnosed with PTSD have committed at least one act of violence, almost half of which included strangulation, stabbing, or

shooting, a phenomenon 14 times higher than within the general civilian population. TBI also increases the likelihood of the aggression and impulsivity linked to domestic violence.

As research into this area continues, victims' groups are reluctant to cede any of their hard fought victories. At the same time, we are all concerned about permanently hindering the lives of veterans who have acted out as a result of their combat service.

Many veterans are uniquely suited for law enforcement employment because of their combat experience, but cops carry guns, and once there is a restraining order, guns are not permitted. Family Code section 6389(a) says a person subject to a protective order shall not own, possess, purchase, or receive a firearm or ammunition while the order is in effect. If violated, the person is subject to prosecution under Penal Code section 29825, which has a punishment of imprisonment for up to a year. While a restraining order is in effect, the name of the restrained person is listed in the Department of Justice's computer, the California Law Enforcement Telecommunications System (CLETS), and the restrained person will not be able to use or even possess a firearm.

A federal statute, having nothing to do with veterans, looms over the restraining order situation as well. An amendment to the federal 1996 Gun Control Act addresses domestic violence, restraining orders and guns. Known as the Lautenberg Amendment, it provides that once a court finds a restrained person "represents a credible threat to the physical safety of [an] intimate partner or spouse," and that person has a restraining order against him, or he has been convicted of misdemeanor domestic violence, it is unlawful for that person to possess a firearm.

The courts are faced with the prospect of issuing restraining orders to protect victims, while at the same time trying to avoid hampering those who served in our military. Family Code section 6389(h) does permit the court to grant an exemption if the restrained person can show a particular firearm is necessary as a condition of continued employment and that the employer is unable to reassign the restrained person to another position where a firearm is unnecessary. But that section does not help in the job search process. In non-law enforcement jobs, it is likely employers, aware that someone

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with a history of violence might "go postal," will simply skip over a person with a restraining order and select another job applicant.

At least one judge tries to be creative in a very careful way. When faced with a member of the military or a veteran who is the party to be restrained, this judge spends quite a bit of time with the victim. Often victims do not want to obstruct a violent vet's future; they just want to feel safe. While the temporary restraining order is in effect, the judge has the military person examined by mental health professionals to determine whether the violence was a result of the effects of combat. It seems that upon issuance of a temporary restraining order, the court makes a judicial finding and the restrained person's name does go into the CLETS computer system, following Family Code section 6380, but upon expiration of the temporary order, it is removed. At the next hearing date, usually the time to decide whether or not to issue a permanent restraining order, the judge, again after being assured the victim feels safe and with the victim's permission, once again issues only a temporary restraining order, sometimes for as long as a year. While the temporary order is in effect, the military person or veteran is treated for the effects of combat service. It cannot go unnoticed that this method allows the judge to avoid finding the person "represents a credible threat to the physical safety of such intimate partner or child," which also avoids the Lautenberg Amendment.

When faced with a request for a civil restraining order against an active duty service member, lawyers should consider whether or not the tolling provisions of the Servicemembers Civil Relief Act apply. Additionally, if a civil restraining order is issued and the military command is informed, some sort of military response will likely occur. The Armed Forces Domestic Security Act (18 U.S.C. § 2266(5)) states a civilian order of protection shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued the order. And practitioners should not be surprised if the military's ultimate response is to drum the restrained person out of military service. On the other hand, if the victim is the member of the military and the restrained person is a civilian, there is very little the military can do, except bar the restrained person from the military base.

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— Criminal Cases —

By far, the courts most impacted with military and veteran issues are the criminal courts. From watching the many pitiful men in tattered fatigues from the Vietnam War wandering our streets begging for money, the American people have learned they cannot expect all who served to simply slip back into civilian life without tribulations. In addition to the vast amount of civilian volunteer activities to help veterans, our government has been quite active. Statutes, court rules and court forms concerning veterans abound.

The most prominent California statute involving veterans in criminal law is Penal Code section 1170.9. First passed in 1982, purportedly to help Vietnam vets, no money or programs accompanied the statute, so it largely lay dormant for decades. During the last twelve years it has been amended numerous times, each amendment beefing it up to help veterans. Its present iteration contains lofty language, such as: "It is in the interests of justice to restore a defendant who acquired a criminal record due to a mental health disorder stemming from service in the United States military to the community of law abiding citizens."

For some reason, there is a common belief that section 1170.9 only applies to "official" veterans courts. Not so. The statute may be applied in any criminal case. If a defendant is otherwise eligible for probation, a court may restore a veteran to his or her pre-conviction status in ways not possible under other statutes. For example, with the exception of applying for a position as a peace officer, a defendant whose rights have been restored under this statute may indicate that he or she has not been arrested, let alone convicted of a crime, even when required to provide information under oath.

With regard to sexual assaults in the military, while California lacks control over what happens in the military, it does have some say in what happens in its own National Guard. Accordingly, Military and Veterans Code section 470.5 states that if a member of the active militia, when subject to the Uniform Code of Military Justice, commits or attempts a sexual assault crime, that service member is subject to prosecution by California authorities. Further, the Military Department of California's National Guard may claim jurisdiction if the district attorney or other prosecutors refuse to pursue a criminal prosecution. It further states "there is no statute of limitations for a member of the active militia to be charged with a qualifying sexual assault offense, when tried and punished by a general court-martial," apparently indicating civilian authorities will be waiting for the military chain of command to complete its response to sexual assaults.

As of January 1, 2015, under Penal Code section 858, *all* defendants arraigned in California courts must be personally informed by the court that there are provisions of law specifically designed for individuals who have active duty or veteran status. All arraignments must now include procedures for providing form MIL-100, which was amended to comply with section 858. The back of the form lists statutes specifically advantageous to veterans charged with a crime: Penal Code section 1170.9's main provisions are described; Penal Code section 1001.80's diversion programs are set forth; and Penal Code section 1170.91's requirement that the sentencing judge consider a veteran's suffering from certain conditions as a result of military service as a mitigating factor is described. Some believe that the Legislature's requirement that veteran defendants be personally advised of their rights is a result of criminal defense lawyers being unaware of statutes benefiting veterans.

Justice Eileen Moore heads the Veterans Working Group, a subcommittee of the Judicial Council's Collaborative Courts Advisory Committee. She is a veteran, having served as a combat nurse in Vietnam. Justice Moore is the author of two books: "Race Results" and "Gender Results."