

Mandatory Rule #4: If defendant does not appear for trial, the SCRA prohibits the court from entering judgment in the absence of a legally-sufficient affidavit attesting to the defendant's military status.

**If the  $\pi$  is present and  $\Delta$  is not present**, verify that the  $\pi$  has provided a legally sufficient SCRA affidavit pertaining to whether  $\Delta$  is a member of the military. The affidavit must have the general form and contain the same information as AOC-G-250.

Q: What is a legally sufficient affidavit?

A: Plaintiff must have sworn to the truth of the statements before an official authorized to administer oaths and filed the completed document with the clerk. The  $\pi$  must select one of three alternatives:

- ✓  $\Delta$  is in the military
- ✓  $\Delta$  is not in the military
- ✓ I am unable to determine whether  $\Delta$  is in the military

If either of the last two alternatives are checked, the affidavit must contain specific facts in support of the selected alternative.

Q: Who determines whether an affidavit is sufficient?

A: The federal requirement applies to the judicial official conducting the trial—not to the  $\pi$ —and it is the judicial official who violates the law by proceeding to trial and entering judgment in the absence of an adequate affidavit. For this reason, it is the small claims magistrate who determines whether an affidavit is sufficient.

Q: Does the law require the  $\pi$  to check the DoD website and supply the results to the court?

A: No. If the  $\pi$  has sufficient information (SS# and/or DOB) to obtain a definitive result from the DoD website, few if any additional facts are likely to be necessary for the affidavit to be accepted by the magistrate. But the website is not a mandatory source of information, and in fact is not helpful in the absence of sufficient identifying information about  $\Delta$ . The  $\pi$  may rely on other evidence to support a conclusion that  $\Delta$  is not a servicemember.

Q: What should the magistrate do if the affidavit simply states that the  $\pi$  is unable to determine  $\Delta$ 's military status?

A: This, without more, is an insufficient affidavit. The affidavit should state facts in support of the conclusion that the  $\pi$  is unable to make this determination.

Q: If  $\Delta$  is in the military, what should the magistrate do?

A: The law requires that an attorney be appointed in this circumstance to contact  $\Delta$  to make sure  $\Delta$  knows both of the lawsuit and about  $\Delta$ 's rights to request a stay of proceedings under the SCRA.

	<p><b>Local Practice Alert:</b> The procedure for appointing an attorney when required by the SCRA is established by each county or judicial district. Because the SCRA applies to all civil cases, clerks and trial judges also encounter this requirement and should be able to answer any questions.</p>	
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**Mandatory Rule #5:** Unless  $\Delta$  is present and waives a continuance, the magistrate must continue an action in which service of process was not accomplished a minimum time before trial.

Determine whether the statutory requirements for minimum notice to  $\Delta$  have been satisfied:

- ≈ For summary ejectment cases: GS 42-29 requires sheriff's office to serve T "at least two days prior to the day of trial."
- ≈ All other small claims cases: GS 7A-214 requires a magistrate to continue the case if trial date is less than five days after  $\Delta$  is served.

Q: What should the magistrate do if  $\Delta$  is present but the minimum notice requirements have not been met?

A: The magistrate should inform  $\Delta$  that the law entitles the  $\Delta$  to additional time to prepare for trial if the  $\Delta$  wishes. If the  $\Delta$  waives the right to a continuance, the magistrate should proceed as usual with the case. If the  $\Delta$  prefers a continuance, the magistrate should continue the case for a time long enough to provide the  $\Delta$  with the minimum notice period.

## AT THE BEGINNING OF TRIAL

Identify the parties present and resolve any issues raised by the Pretrial Checklist.

Deal with any *last-minute developments*. These are perhaps most likely to come up at the beginning of trial, but they sometimes arise as the parties present their evidence.

Mandatory Rule #6: Every action must be brought in the name of the real party in interest. If the named plaintiff is not the rpii, the court must allow the plaintiff an opportunity to correct the error, continuing the case if necessary.

**Real party in interest (rpii) requirement:** The law requires that the person bringing a lawsuit be the person who is entitled to the relief sought. If at any point during the trial it becomes clear that someone other than the  $\pi$  is actually the injured party, the magistrate must offer the  $\pi$  an opportunity to add or substitute the “real party in interest,” continuing the case if necessary.

The most common instance of a rpii violation occurs when a property management company files a summary ejectment action in its own name, rather than in the name of the property owner.

**Plaintiff requests a voluntary dismissal.** (Sometimes this happens before trial as well.)

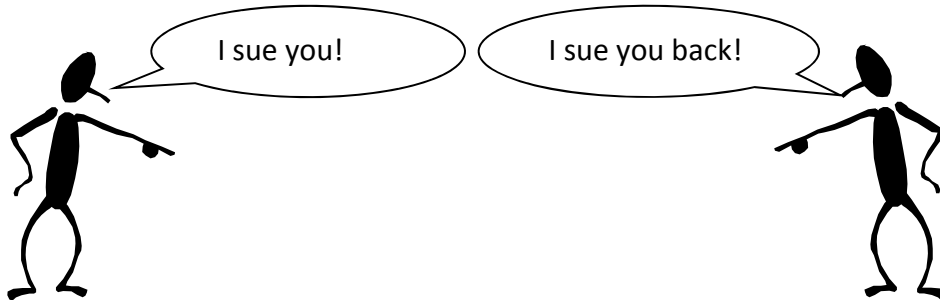
Rule:  $\pi$  can dismiss the case at any point before s/he has finished presented evidence. Use AOC-G-108 to record the dismissal.

**$\Delta$  has filed (or says she wants to file) a counterclaim.**

Q: What’s a counterclaim?

A: A counterclaim is simply a document (very similar to a complaint) in which  $\Delta$  asserts a claim against the  $\pi$ . Generally, a counterclaim is filed as part of an answer, and the document should ideally be titled “ $\Delta$ ’s Answer & Counterclaim.” Sometimes it may not be completely clear whether a  $\Delta$  intended to file a counterclaim or merely an answer. A counterclaim is different from an answer because it goes further. Instead of simply defending against  $\pi$ ’s claim, a  $\Delta$  is essentially saying, “Not only do I not owe  $\pi$  money. Plaintiff owes ME money!” A

$\Delta$  is required to pay court costs for filing a counterclaim, just as a  $\pi$  is for filing a complaint. Counterclaims will be discussed again in the *Trial* section of this document.



Q: What should I do if  $\Delta$  files the counterclaim at the last minute and then brings a copy to trial, surprising the  $\pi$ ?

A: Assuming counterclaim meets above conditions, tell  $\Delta$  to give  $\pi$  a copy. If  $\pi$  needs time to prepare a defense, grant a continuance.

Q: What if  $\Delta$  asks to file counterclaim after the time case is set for trial?

A: Tell  $\Delta$  that s/he may file it as a separate action, but has missed the deadline for having the claim heard in this action.

Q: What if counterclaim is for more than \$10,000?

A:  $\Delta$  has two choices:

- ≈ reduce the amount so that the counterclaim can be heard today, or
- ≈ take a voluntary dismissal and refile in district or superior court.

NOTE: Be sure to inform  $\Delta$  that claim-splitting is not allowed, and that  $\Delta$  should accurately state all the damages s/he wishes to recover for the alleged wrongful act of the  $\pi$ . Example:  $\Delta$  can't reduce a \$18,000 counterclaim to \$10,000 and then bring another action for the \$8,000 excess.

Q: What's the procedure if  $\Delta$  chooses to reduce the amount of damages?

A: This requires  $\Delta$  to amend her counterclaim. The magistrate need only write something like the following in the *Other* section of the judgment, under *Findings*: " $\Delta$  filed a counterclaim in this action in the amount of \$18,000" but amended her complaint in open court to reduce the amount claimed to \$10,000."

#### Rules for Counterclaims

Must not exceed \$10,000.

Must be in writing.

Must be filed with clerk before the time the trial is scheduled to begin.

Q: What's the procedure if  $\Delta$  chooses to take a voluntary dismissal of her counterclaim?

A: Be sure to state that in your judgment.

Q: What happens to  $\Delta$ 's counterclaim if  $\pi$  voluntarily dismisses his case?

A: Verify that  $\pi$  has received notice of the counterclaim, and then hear the counterclaim just as though it had been filed as a small claims action in the first place.

### **One of the parties requests a continuance.**

If both parties are present and agree to a continuance, the law favors—but does not compel—allowing it.

If one party's request for a continuance is opposed by the other party, the party seeking a continuance must show good cause.

“[T]he trial court must pass on ... the question whether the moving party has acted with diligence and good faith. . . . The chief consideration to be weighed in passing on [the request] is whether the grant or denial of a continuance will be in furtherance of substantial justice.”  
Shankle v. Shankle, 289 N.C. 473 (1976).

### **There is reason to believe the $\Delta$ has filed for bankruptcy.**

Mandatory Rule #7: If  $\Delta$  files a petition for bankruptcy, the small claims judge must stop the trial, discontinuing the action (using G-108) until the automatic bankruptcy stay is lifted.

When a person files a bankruptcy petition, it triggers an *automatic stay* under federal law which prohibits creditors from attempting to collect debts from the person, including pursuing legal actions against the debtor. The stay goes into immediate effect when the petition is filed, and

any action taken by a state court thereafter is void, assuming the stay is applicable. (Criminal cases, for example, are not actions by a creditor and are not subject to the stay.)

Q: Is the small claims judge subject to the stay even if the  $\Delta$  takes no action to inform the court that a bankruptcy petition has been filed?

A: Yes. The stay goes into effect automatically, and judgments entered in violation of the stay—whether knowingly or not—are void.

Q: What should a magistrate do upon learning that a bankruptcy petition has been filed?

A: Fill out the bottom portion of AOC-G-108, discontinuing the action until the stay has been lifted. Do not dismiss the action.

Q: Does the stay apply to actions for summary ejectment?

A: Yes, unless judgment was entered prior to  $\Delta$ 's filing the bankruptcy petition. A landlord is not without a remedy in this situation, however; the landlord may ask the bankruptcy court to lift the stay in regard to the tenant's obligation to pay rent.

## HEARING THE EVIDENCE

Place both parties and any witnesses under oath at the outset.

Explain to both parties that you will make a decision only after hearing from them both. Because the  $\pi$  has the burden of proving the case by the greater weight of the evidence,  $\pi$  must testify first.

If only the  $\pi$  is present, administer the oath to  $\pi$  and any witnesses and hear testimony just as you would if  $\Delta$  were present. This situation is handled exactly as though  $\Delta$  were present, but presented no effective defense. **Exception: In summary ejectment actions  $\pi$  may request a judgment on the pleadings and thereby avoid the requirement that  $\pi$  prove entitlement to relief.**