Other Frontiers of State and Federal Advocacy: Litigation, Legislative Advocacy, Rulemaking

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Veterans Law CLE
Missoula, Montana
March 20-21, 2019
FRONTIERS IN DISCHARGE UPGRADE ADVOCACY

Dana Montalto
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FEDERAL LITIGATION

Discharge Upgrade federal class actions challenging boards’ adjudication of applications by veterans who experienced mental health conditions in service

- *Shepherd v. McHugh* & *Monk v. Mabus* ➔ Hagel Memorandum

- *Kennedy v. Esper* & *Manker v. Spencer* ➔ ongoing certified classes of post-9/11 Army and Navy/Marine Corps veterans with less-than-fully-honorable discharges

STATE LITIGATION

Brewster v. Ureña, Massachusetts Superior Court
▪ Access to state veterans benefits for a less-than-honorably discharged, disabled Korean War Era veteran

Machado v. Goldberg, Massachusetts Superior Court
▪ Right to Welcome Home Bonus for post-9/11 veterans who were honorably discharged from initial enlistments but less-than-honorably discharged from final enlistment
▪ Court held that state agency interpretation of law was “erroneous as a matter of law, arbitrary and capricious”
FEDERAL VA RULEMAKING

Petition for Rulemaking to amend regulations implementing 38 C.F.R. 101(2) and 5303

- Request to Department of Veterans Affairs to change regulations that govern which less-than-honorably discharged veterans can access basic VA benefits and services (e.g., compensation, health care) by Swords to Plowshares and National Veterans Legal Services Program

- VA granted Petition and is now preparing to issue a Proposed Rule (in 2019)
WHITE PAPERS

Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper

Human Rights Watch, Booted
Protect Our Defenders, Racial Disparities in Mil. Justice
YLS, Casting Troops Aside
YLS, Unfinished Business
LEGISLATIVE ADVOCACY

VAWA Reauthorization: Military & Veterans Subcommittee
VA Petition for Rulemaking on Character of Discharge Regulations
Comments on proposed legislation affecting access to VA mental health care
Connecticut Veterans Legal Center and the Veterans Legal Clinic at the Legal Services Center are partnering to create a Discharge Upgrade practice manual.

Swords to Plowshares also contributed to the manual.

Our work is generously supported by the Bob Woodruff Foundation, which is dedicated to ensuring that impacted post-9/11 veterans, service members, and their families are thriving long after they return home.
AMICUS BRIEFS:

- Use client stories to illustrate the human harms of bad laws, policies, and practices.
- These stories are compelling and can carry legal weight (e.g., due process inquiry of effect on private interests).

CLASS ACTIONS:

- The government has a habit of trying to render cases moot. Your clients may be able to help keep the case alive!
Reforming VA’s Evidentiary Burden for MST

POLICY REPORT REVEALING THAT:

• VA granted claims for PTSD caused by MST at significantly lower rates than PTSD claims arising from other causes.

• Disparate treatment by gender of claimant (lower grant rates for men) and dramatic variation between VA regional offices.

KEY RECOMMENDATION: Relax MST evidentiary standard to align with rule for combat PTSD → lay testimony & PTSD diagnosis suffice.

Yale Law’s Veterans Clinic, Service Women’s Action Network, ACLU.

Never-before-released data obtained through FOIA lawsuits.
Use the Media for Advocacy!

Use Various Tools to Push for Reforms:

→ *Don’t forget the power of the media to spread your message and to incite action:*

➢ Write an op-ed.

➢ Brief reporters covering military/veterans issues.

➢ Promote your efforts via press releases.
Use the Media for Advocacy!

He Has a Purple Heart, but the VA Wouldn’t Call Him a Veteran

Because he left the service with ‘bad paper,’ Alejandro Garcia was denied benefits for almost nine years.

By Rose Carmen Goldberg
Feb. 12, 2019 6:44 p.m. ET
Use the Media for Advocacy!

VA announces new policy to prioritize Purple Heart recipients for VA claims
Legal Services of Northern Virginia
Veterans Law Project

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March 2019
Another Area of Direct Advocacy

- Many veterans with less-than-fully-honorable discharges have co-occurring legal barriers that prevent them from accessing stable housing, income, and healthcare.

- Law students and other nonlawyer volunteers can represent veterans in administrative hearings to obtain emergency assistance and public benefits while discharge upgrade cases are pending.
Fair Hearing Advocacy

• Improper denials of public assistance, food stamps, and Medicaid could be challenged through administrative hearings called “fair hearings.”

• During my Equal Justice Works Fellowship from 2014-2016 in NYC, I trained 60 law students that represented veterans in fair hearings. These law students came from Brooklyn Law School, Columbia Law School, and the New York University School of Law.

  – Advocates recovered over $150,000 in lost benefits.
  – 21 veterans obtained, preserved, or increased Medicaid and/or Medicare coverage and services.
  – 43 veterans obtained public assistance and emergency assistance grants after benefits were improperly denied, reduced, or terminated.
  – 46 veterans obtained, preserved, or increased SNAP benefits (food stamps) following appeal of incorrect agency actions.
New York State Discharge Upgrade Advisory Board

Yelena Duterte,
Associate Teaching Professor, Syracuse University College of Law
Board Member of the NY State Discharge Upgrade Advisory Board
Established in 2018, the New York State Discharge Upgrade Advisory Board offers a first-in-the-nation opportunity for Veterans petitioning their character of service to a Discharge Review Board (DRB) or a Board for Corrections of Military Records (BCMR).

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Who is on the Board?

The Board consists of eight attorneys, including veterans advocates, former JAG prosecutor, former district attorney, and former Veterans Treatment Court judge.
What can the NY State Advisory Board Do?

If the evidence reveals that the Veteran’s application for a discharge upgrade is *meritorious*, then the Advisory Board will provide that Veteran with a written opinion advocating for the Discharge Review Board or Board for Corrections to grant that Veteran’s petition.

Requirements: Must be a NY state resident.
What Should the Veteran Submit to the Advisory Board?

- DD-214
- Separation Packet
- Service Treatment Records
- Official Military Personnel File
- Application to the Board (DD293 or DD149)
- Personal Statement
- Supporting Letters

* If mental health related, additional evidence may be required
Submission

Veterans wishing to submit a package of evidence for the Discharge Upgrade Advisory Board to review should mail all relevant documents to:

New York State Discharge Upgrade Advisory Board
New York State Division of Veterans’ Affairs
2 Empire State Plaza, Floor 17
Albany, N.Y. 12223

For More information:
https://veterans.ny.gov/content/discharge-upgrade-possibility-veterans