

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

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Veterans Law CLE

Missoula, Montana

March 20-21, 2019

Alexander Blewett III

SCHOOL OF LAW

UNIVERSITY OF MONTANA



FRONTIERS IN DISCHARGE UPGRADE ADVOCACY

Dana Montalto
Attorney & Clinical Instructor
Veterans Legal Clinic



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
 - <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-esper>
 - <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/manker-v-spencer>



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

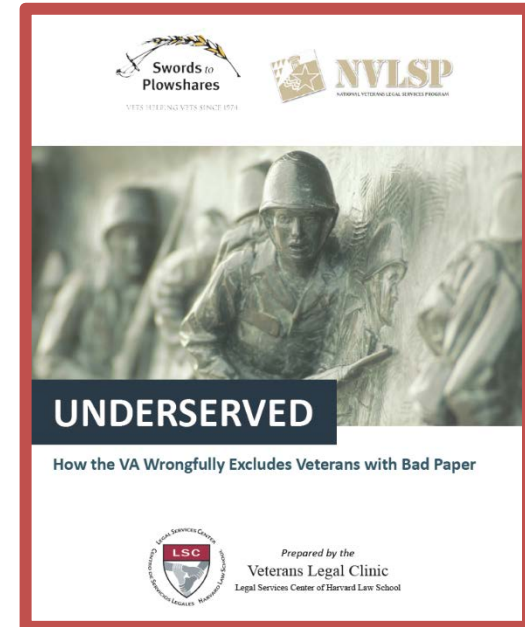
<https://www.swords-to-plowshares.org/wp-content/uploads/Underserved.pdf>

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



DISCHARGE UPGRADE MANUAL

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



Rose Carmen Goldberg

SWORDS TO PLOWSHARES

March 21, 2019



VETS HELPING VETS SINCE 1974

Direct Services & Impact Work

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!

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CONLEY F. MONK, JR., JAMES)
BRIGGS, TOM COYNE, WILLIAM)
DOLPHIN, JIMMIE HUDSON,)
SAMUEL MERRICK, LYLE OBIE,)
STANLEY STOKES, AND WILLIAM)
JEROME WOOD II, on behalf of)
themselves and all others similarly situated,)
Petitioners,)
v.)
DAVID J. SHULKIN, M.D.,)
Secretary of Veterans Affairs)
Respondent.)

Case No. 15-1280

AMICUS CURIAE BRIEF OF SWORDS TO PLOWSHARES, CONNECTICUT
VETERANS LEGAL CENTER, NEW YORK LEGAL ASSISTANCE GROUP,
VETERAN ADVOCACY PROJECT, AND LEGAL AID SERVICE OF
BROWARD COUNTY IN SUPPORT OF PETITIONERS

Reforming VA's Evidentiary Burden for MST

BATTLE FOR BENEFITS

VA Discrimination Against Survivors of
Military Sexual Trauma

➤ 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!

OPINION | COMMENTARY

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



Recommended Videos

1. Steve Bannon on the Path to Success in 2020
2. How the 737 MAX Became Boeing's Fastest-Selling Plane
3. Trump Vetoes Resolution on Emergency Declaration
4. Tesla Reveals Model Y: Elon Musk's Big Bet on Electric SUV
5. The Downfall of Sears, Told From the Inside

Most Popular Articles

1. Facebook, YouTube, Twitter Scramble to Remove Video of New Zealand Mosque

Use the Media for Advocacy!

STARS AND STRIPES

Front Page Theaters ▾ Branches ▾ Veterans ▾ Special Reports ▾ History ▾ Lifestyle ▾ Travel ▾

Home

VA announces new policy to prioritize Purple Heart recipients for VA claims

A photograph of a man with short brown hair and glasses, wearing a dark suit, white shirt, and striped tie. He is speaking into a microphone and pointing his right index finger forward. The background is a blurred wooden door.



Legal Services of Northern Virginia Veterans Law Project

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

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Project Attorney

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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



Background

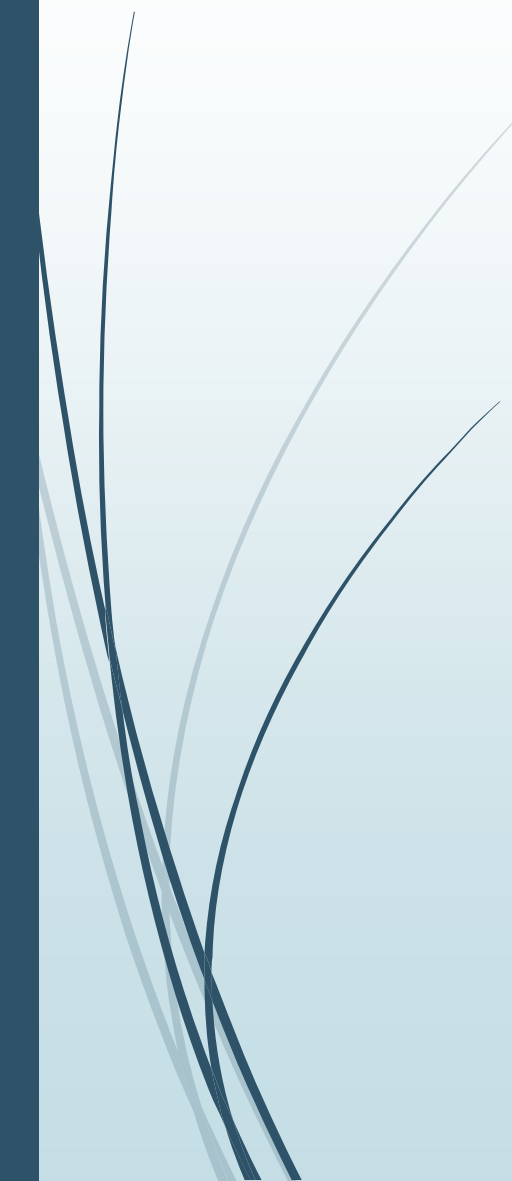
Established in 2018, the New York State Discharge Upgrade Advisory Board offers a first-in-the-nation opportunity for Veterans petitioning their character of service to a Discharge Review Board (DRB) or a Board for Corrections of Military Records (BCMR).

Benjamin Pomerance, Esq., is the Deputy Director for Program Development for the New York State Division of Veterans' Affairs.

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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.

A dark blue arrow points to the right at the top left. Below it, several thin, curved lines in shades of blue and grey sweep across the left side of the slide.

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>