

# NEW JERSEY LAWYER

A black silhouette of a soldier in profile, saluting with his right hand. The background is a stylized American flag with vertical stripes and stars.

February 2022

No. 334

## MILITARY LAW & VETERANS AFFAIRS

America's Heroes Need Our  
Help. Here's What You Need  
to Know to Become a  
Veteran's Advocate

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War Stories: One Attorney's  
Experience Serving in the  
Military and Building a Life  
as a Civilian

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# PRESIDENT'S PERSPECTIVE

DOMENICK CARMAGNOLA

## Honoring Justice LaVecchia's Distinguished Service and Commitment to Public Service

### Her Departure Highlights Critical Need to Fill Vacancies on Bench



When New Jersey Supreme Court Justice Jaynee LaVecchia, as highly respected and regarded a member of the bench as we have known, announced this summer that she would delay her retirement after it became clear that her replacement would not be named promptly, it was a move that spoke volumes to

her selfless nature and dedication to public service.

Justice Lavecchia concluded her term on the high court in December as one of the most consequential justices of modern history, sitting longer than any woman and leaving an incredible body of jurisprudence and procedures having authored more than 240 opinions, all with the noble pursuit of advancing justice in an imperfect world.

Her decision to stay on temporarily was also a move that highlighted the judicial vacancy crisis facing the New Jersey courts. Judicial vacancies are an endemic issue always simmering in the New Jersey legal community; but too often in recent history—such as in this moment—it grows to a full boil of crisis. While some view this as an esoteric issue, it has very real consequences on the members of the public and business owners who turn to the courts to resolve disputes. With too few judges serving the bench, too many must wait for justice.

It is laudable that a package of seven judges was recently approved. They will be welcome additions to the bench, especially in Essex County where the vacancy crisis is profound. However, that barely makes a dent in the overall vacancies throughout the state. The New Jersey State Bar Association has always been proud of the role it plays in vetting judicial and prosecutorial candidates. We remain committed to doing our part to ensure as many qualified candidates are reviewed in a timely fashion. I urge, in the strongest terms, that the Governor nominate and the newly organized

Senate provide thoughtful advice on as many qualified judicial candidates as it takes to eliminate this shortage of judges and ensure our courts are working at full capacity. The residents of this state deserve nothing less.

This is an issue that deserves commitment, energy and vigilance, and those are precisely the characteristics Justice LaVecchia embodied during her long and illustrious career in public service. As much as the judicial vacancy issue requires attention and action, so does her career deserve reflection and gratitude.

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### An Inspiring Career of Service

Justice LaVecchia's inspiring career of public service allowed her to gain an understanding of the intricacies of the three branches of government and how they interact. It included working as a deputy attorney general in the Division of Law in the Department of Law and Public Safety and eventually serving as its director, and being responsible for the legal work of all lawyers assigned to the civil side of the New Jersey Attorney General's Office. She also served in the Office of Counsel to Gov. Thomas H. Kean, was Director and Chief Administrative Law Judge for the Office of Administrative Law, and sat as the New Jersey Commissioner of Banking and Insurance.

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# FROM THE SPECIAL EDITORS

## How the Legal System Affects Military Service Members and Veterans

Just as the persons who decide to enter the military to serve their country are unique, so are the legal issues which they encounter. This issue of *New Jersey Lawyer* focuses on the military and veterans and different legal issues which arise caused by events during and after their service.

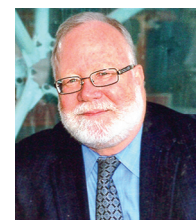
Melissa Strickland discusses an issue which unfortunately is not unique to the military—sexual assault. Nancy Y. Morgan discusses the need for veterans advocates to help navigate post-service disability claims.

While disability is not unique to the military, certain issues surrounding disability are. Eric A. Gang discusses challenges facing veterans in securing disability compensation caused by the toxic water discovered at Camp Lejeune. Nebojsa Zlatanovic discusses the disability claims caused by the use of mefloquine to treat malaria.

The stress of war and battle is unique to soldiers. Unfortunately, that stress may lead to post-service criminal involvement. Robert A. Ebberup discusses the issues representing veterans who suffer mental health disorders who are involved in civilian criminal proceedings. David Culley offers an article advocating for a veterans' treatment court within the New Jersey Superior Court system, a program that has been adopted in a majority of other states. In a similar vein, Robert Hille, Thomas Rougheen and Edward M. Neafsey offer an article advocating for expansion of the veterans' diversion program to divert some veterans out of the criminal justice system altogether.



**BRIAN R. LEHRER** is with *Schenck, Price, Smith & King, LLP*. He is a member of the editorial board of *New Jersey Lawyer*. His practice focuses primarily on civil trial litigation.



**HON. EDWARD M. NEAFSEY (RET.)** served as a U.S. Army Judge Advocate Captain during peacetime. He is Chair of the NJSBA Military Law and Veterans Affairs Section, and Past-Chair of the NJSBA Criminal Law Section. He is a volunteer mentor in the Veterans Diversion Program and has mentored veterans facing criminal charges in Monmouth and Atlantic county Superior Court. He has been an adjunct professor at Rutgers Law School for the past decade.

Certainly, like civilians, service members face the ordinary issues involving families and taxes. Sally Stenton discusses New Jersey's property tax exemption for 100% disabled veterans. Mike Fleres discusses the issues service members face in family law disputes. Finally, Christopher J. D'Alessandro concludes with an article

discussing his personal experiences intersecting with military and civilian life.

Certainly, the armed forces are made up of people like any other—they have virtues and they have flaws. The stress of military service is certainly something to be considered for veterans reentering society after experiences which the aver-

age person cannot comprehend. However, some of the issues involving veterans are common issues that civilians face as well. This issue of *New Jersey Lawyer* attempts to offer a broad scope of legal challenges faced by those intimately involved in protecting a nation governed by the rule of law. ☪

## PRESIDENT'S PERSPECTIVE

*Continued from page 5*

She joined the Supreme Court in 2000 and earned a reputation for treating all who appeared before her with respect, probing each legal issue with skill and thoughtful questions and authoring analytically sound decisions that exhibited an overriding sense of fairness and a healthy dose of common sense.

Justice LaVecchia provided a voice and rights to those in need of affordable public housing, one such instance being the 2015 decision in the *Mt. Laurel* line of cases that judges would take over the regulation of affordable housing in New Jersey after government officials in the administration repeatedly failed to comply with an order to establish a new set

of guidelines. She supported access to education for New Jersey schoolchildren in the 2011 *Abbott XXI decision*, authoring the opinion ordering the state to fulfill its promise and return nearly \$500 million in educational funding to primarily urban school districts with large minority populations. And she protected the New Jersey public against civil rights abuses and discrimination in many cases, including, most recently, in *Richter v. Oakland Board of Education* where she authored the Court's majority opinion finding an adverse employment action is not required for a New Jersey Law Against Discrimination Claim to be made, as well as over a decade earlier writing the opinion in *Alexander v. Seton Hall University* that found each payment of unequal wages to female law professors was a separate action under the law.

Beyond her jurisprudence, Justice LaVecchia leaves a legacy on the profession through administrative endeavors as chair and member of various Supreme Court Committees, subcommittees, and other Court-assigned projects, including one that led to New Jersey adopting the Uniform Bar Exam. She also shared her time and expertise generously with members of the legal profession, including speaking at NJSBA events and New Jersey Institute for Continuing Legal Education seminars.

Over four decades of public service, including two on the high court, Justice LaVecchia's intelligence and efforts to advance the fair and impartial administration of justice enriched the lives of every citizen of this state. We are profoundly grateful. ☪

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# PRACTICE TIPS



## WHAT I WISH I KNEW

### 8 Valuable Lessons

By Jeralyn L. Lawrence  
*Lawrence Law*

1. I wish I knew about Zoom way before March of 2020. Zoom has been the silver lining of this pandemic. If I never have to go back to court for an Early Settlement Panel, Case Management Conference, Uncontested Divorce hearing or other routine court appearance, I would be thrilled. To avoid the rush to court, the stress of the commute and parking, packing and unpacking litigation bags to sit and wait in court is blissful. Being home every night with my family has been a blessing of epic proportions.
2. I hope we all think long and hard about what practices would be worth returning to once this pandemic ends. While I certainly miss the social aspects of our profession and endless happy hours, I plan to make Zoom a more permanent fixture in my practice as it has added markedly to the quality of my personal and professional life.
3. I wish I knew how precious and valuable time really is. It is our most prized commodity. We cannot manufacture more. We need to be really protective over our time and choose how we

spend our time wisely. We must learn to say “no” to things that do not inspire us, or we are not passionate about. I wish I knew earlier in life how to set better boundaries and choose my time more wisely regarding who to spend it with or how to best spend it.

4. Who I surround myself with is crucial to my happiness and my success. We need quality people, not a quantity of people. You need a village with no weak links. You need four quarters instead of 100 pennies.
5. I wish I knew that being a lawyer is synonymous with a consensus-builder and a problem solver; not that of a gladiator.
6. People will not remember what you did or said, they remember how you made them feel.
7. Make yourself and your health a priority. This profession will eat you alive if you let it. Take good care of yourself both mentally and physically.
8. Delete the word “I” from your vocabulary. Use “we.” Rewrite your sentence to avoid using the word “I.” Change how you speak to avoid saying “I.” There is nothing more alienating than spending time with someone who is an “I” person.
9. You do not have to be the smartest in the room, but be the hardest working.

I love being a lawyer. It is an incredibly rewarding, yet demanding career. Hopefully these life lessons resonate and are meaningful for you.

## WRITERS CORNER

### Editing to Improve Readability

By Veronica J. Finkelstein and Jack Foley

Last time you learned how to assess readability, a key consideration for good legal writing. How can you improve the readability of your writing? Here are five editing strategies to try.

First, use simpler, shorter words. Read your brief aloud and circle any word over two syllables long, as well as any legalese or jargon. Go back and look at what you have circled. For any longer words, decide if a simpler and shorter word would suffice. A longer word is acceptable where that single word replaces a phrase. Otherwise, replace each long word with a simple one. Instead of “aforementioned,” consider “prior.” Use Word’s thesaurus tool to suggest simpler synonyms. In addition, use single

words that convey a lot of meaning, including good active verbs in lieu of overuse of adjectives and adverbs. Instead of saying “the car stopped in an abrupt manner,” try “the car halted.” In addition, replace legalese and jargon. They necessarily require explanations, which make your writing less pithy. Say what you mean in plain English.

Second, use simpler, shorter sentences. Scan through your brief looking for any sentence over two lines long. Circle those sentences. Then go back and review each one. Challenge yourself to do one of two things: either reduce the number of words in the sentence (using the suggestions above), or split that long sentence into multiple, shorter sentences. Look for ways to change long sentences into smaller chunks. You can do this by changing a paragraph comprised of full sentences into a bullet point or numbered list where each entry is a phrase.



Third, replace passive voice with active voice. Scan through your brief looking for passive voice manually or use Word’s grammar and style proofing tool to check for it. Change any passive voice into active voice unless you have a strong justification otherwise. Passive voice can be intentional and effective but it should not be your default writing style. Passive voice inherently lengthens sentences because it adds a form of the verb “to be” to the sentence. Passive voice also creates confusion by hiding the action. Convert passive voice sentences to active voice sentences when you find them.

Fourth, use simpler, shorter paragraphs. Scan through your brief looking for any paragraph that is more than half a page long. Also scan for any pages that have no paragraph breaks. Paragraphs longer than half a page are probably too long. For each long paragraph, write the thesis of that paragraph in the margin. If you cannot write a simple thesis for a paragraph in your brief, the judge and clerk will be similarly unable to discern the point.

Once you have a clear thesis written, read each sentence and ask whether it relates to the thesis. If it does not, either reorganize, remove, or consolidate redundant sentences. Find natural breaks in your writing. Mark them with hard returns. Give the reader’s eye a rest.

Fifth, add headings. Headings create additional natural breaks in your writing. They make a long brief seem shorter, as they provide natural rest points for the reader. A 10-page brief becomes five two-page briefs. Headings also keep your writing organized. If you ramble or go on tangents, headings get you back on track. If you struggle to add a heading to a section of your brief, it may be because you have some off-topic material that you could delete or at least move to a different section of the brief. Using headings means the writing in each section can be simpler because your heading has already oriented the reader to what follows.

You should see an immediate difference in your readability score using these five editing strategies. Test it and see! Take a brief you have filed, extract a few pages, set up Word to test readability, run spellcheck to get your readability score, edit the document, and then run spellcheck again to get the new readability score. You will be amazed how much more readable your brief is using just these simple editing techniques. Take advantage of modern technology to let go of any antiquated writing style. Stop shoveling smoke. Leave your vacuous verbiage, redundant run-ons, and worthless words behind.

*Veronica Finkelstein is an Assistant United States Attorney for the Eastern District of Pennsylvania. Jack Foley is a legal intern working for the U.S. Attorney’s Office.*

## TECHNOLOGY

### Stop Waiting for Computers to Die Before Replacing Them

By Affinity Consulting

Replacement through attrition is the most expensive, disruptive and time-wasting method of handling that task. In spite of that, most law firms only replace computer hardware when it finally dies. The useful life of a computer is three years, if you didn’t buy a bargain, low-end computer in the first place. If you buy behind the curve and get a discontinued or under-powered computer, you’ve just handicapped your efficiency and shortened the useful life of the computer. Here’s why you need to schedule the replacement of hardware before the hardware actually stops working:

#### Data Loss

Unless you’re backing everything up on every computer, every day, then you’re likely to lose something that was stored on the computer that stopped working or crashed.



## PRACTICE TIPS



### Pay Too Much

You have no time to research, plan, or find the best price from the best vendor. You have to run out and buy a new computer, printer, etc. as quickly as you can. This will cost you lots of money because you're going to get the worst deal possible simply because you can't wait.

### Inappropriate Configurations

Most bricks and mortar computer sellers cater mostly to the home market for computers. Their selection of business-oriented computers will be limited, and they'll likely have very little good advice regarding what you should buy. Instead of getting Microsoft Office included with the new computer, you'll end up with games. Instead of a smaller hard drive appropriate for an office computer, you'll pay extra for a 3 TB drive you'll never even fill 10% of. Instead of simple speakers, you'll pay extra for 3D Surround Sound with a powered sub-woofer. You get the idea.

### Down Time

It is very expensive for you or any of your employees to sit at their desks, unable to work. If your computers don't work, then you don't work.

### Charitable Deductions

If your old computer actually works, then you could donate it to charity and take a legitimate tax deduction. If it doesn't work, then it'll probably sit in your computer graveyard closet until you finally have to pay someone to take it away.

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# Eradicating Sexual Assault in the Military

## Current Support for Future Reform

By Melissa Strickland



**MELISSA STRICKLAND, ESQ.** is a First Lieutenant in the New Jersey Army National Guard. The views and opinions expressed in this article are the author's own and do not reflect the official policy or position of the Department of Defense or any of its components, including but not limited to the United States Army, the National Guard Bureau or the New Jersey Army National Guard.

**T**he word “scourge” is not one that is often heard in daily conversation. However, in the articles, journals, testimony and other mediums which address sexual assault in the military, this particular word is constantly repeated. It references either a “whip used as an instrument of punishment” or “a cause of wide or great affliction.”<sup>1</sup> The latter succinctly describes the gravity of this serious and complex issue.

This topic garnered national attention in April 2020 after news reports broke that 20-year-old Army Specialist (SPC) Vanessa Guillén, who was stationed at Fort Hood, Texas, was missing.<sup>2</sup> Her family publicly expressed concern that SPC Guillén’s disappearance may have been connected to her disclosure that she had been sexually harassed by a higher-ranking soldier at Fort Hood.<sup>3</sup>

In a tragic turn, SPC Guillén’s murdered remains were recovered over two months later, on June 30, 2020.<sup>4</sup> SPC Aaron Robinson, who allegedly admitted to his girlfriend he bludgeoned SPC Guillén with a hammer in a Fort Hood arms room, committed suicide as law enforcement officials approached him a day later.<sup>5</sup> A subsequent Army investigation into Guillén’s disappearance and allegations of sexual harassment confirmed SPC Guillén was sexually harassed and that, although she reported the conduct to leadership on at least two occasions, they “failed to take

## Several former service members, who were victims of sexual assault in the course of their service, gave gripping testimony about their experiences. Their accounts of sexual violence, and the subsequent response by their respective chains of command, were alarming.

appropriate action.”<sup>6</sup> The report also found that Robinson sexually harassed another female specialist (“not SPC Guillén”).<sup>7</sup> Protesters decried the Army’s handling of Guillén’s disappearance and sexual harassment claims, publicly illuminating an issue that military and political leaders have made historic attempts to address.<sup>8</sup>

Many concerns arise out of the discretion the Uniform Code of Military Justice (UCMJ) extends to the military chain of command when confronting a service member’s alleged misconduct.<sup>9</sup> Serious offenses allegedly committed by service members are often adjudicated via a legal proceeding called a court martial.<sup>10</sup> The critical role that commanding authority and the military justice system serve cannot be underscored. Ultimately, they are both interconnected with national security. The preamble to the Manual for Courts Martial clearly explains this point well:

Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to non-judicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.<sup>11</sup>

Concerns have been raised, however, that this discretion is sometimes abused.

For example, reports suggest that

commanders, who have the authority to administratively convene courts martial, “handpick members to deliver desired court-martial results.”<sup>12</sup>

This issue is not novel and has been addressed in a variety of ways over many years. For example, the Department of Defense’s Sexual Assault Prevention and Response Office (SAPRO) was established in 2004 to provide oversight to the DoD on sexual assault policy and has a goal of eliminating sexual assault from the military.<sup>13</sup> Its efforts are largely guided by a strategic plan which focuses on “prevention, victim assistance and advocacy, investigation, accountability and assessment.”<sup>14</sup> The Department of Defense’s oversight in this matter is not plenary. Any proposed reforms to the UCMJ require an act of Congress.<sup>15</sup>

On March 13, 2013, members of Congress’ Committee on Armed Services’ Personnel Subcommittee heard testimony on sexual assault in the military.<sup>16</sup> Headed by Sen. Kirsten Gillibrand (D-NY), the committee members were tasked with addressing the adequacies of the military’s approach to handling allegations of sexual assault made against service members.

Several former service members, who were victims of sexual assault in the course of their service, gave gripping testimony about their experiences. Their accounts of sexual violence, and the subsequent response by their respective chains of command, were alarming. For example, the statement of Brian K. Lewis, former Petty Officer, Third Class,

U.S. Navy and Advocacy Board member of the human rights organization Protect Our Defenders, highlighted the need for reforms in this area. Lewis stated:

I enlisted in the Navy in 1997 and advanced to the rank of petty officer third class. During my tour on the USS Frank Cable, I was raped by a superior NCO [non-commissioned officer]. I was ordered by my command not to report this crime. After the crime had taken place, I was misdiagnosed with a personality disorder by the current director of the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury. I filed retaliation claims to no avail. I was given a general discharge for a personality disorder in August 2001.<sup>17</sup>

Testimony of other service members during the hearing confirmed that Lewis’ experience was not unique. In fact, the Department of Defense (DoD) estimated that 19,300 military sexual assaults occurred in 2010 alone.<sup>18</sup> The statistics in the most recent DoD Annual Report on Sexual Assault in the Military reveal that in fiscal year 2020, “Military Services received 7,816 reports of sexual assault involving service members as either victims or subjects” which was “less than a 1 percent decrease from reports made in FY19.”<sup>19</sup> Coupled with the renewed public focus on the issue, additional pressure was placed on top military and political leadership to address this matter.



Consequently, Gillibrand recommended that she and her contemporaries in Congress consider all viable options for addressing this matter “including moving this issue outside of the chain of command so that we can get closer to a zero tolerance reality in the armed services.”<sup>20</sup> Gillibrand has worked since 2013 to accomplish just that through her sponsorship of the proposed Military Justice Improvement and Increasing Prevention Act.<sup>21</sup> The bill seeks to transfer the decision to prosecute serious crimes from the chain of command to independent, trained military prosecutors, increase training for commanders, and improve physical security measures.<sup>22</sup>

The bill, however, has been met with some criticism. Sen. Jim Inhofe (R-Okla) a ranking member of the Armed Services Committee, requested that the seven most senior U.S. military officials review the bill and provide him with their personal opinions on it.<sup>23</sup> Their feedback was insightful. Although these leaders acknowledged the impact military sexual assault has had on the readiness of the armed services, they expressed serious concerns about the bill’s contents.<sup>24</sup> They warned against any reforms which might impede a commander’s ability to effectively execute during missions or to maintain ordered and disciplined ranks.<sup>25</sup> Their responses included recommendations that “any changes to a commander’s authority be “narrow in scope, limited only to sexual assault and related offenses,”<sup>26</sup> and that additional attention be given to sexual assault prevention.<sup>27</sup>

On Jan. 22, 2021, the Senate confirmed Lloyd Austin III as the 28th Sec-

retary of Defense by a vote of 93-2.<sup>28</sup> After serving in uniform for 41 years, Austin retired as a four-star general.<sup>29</sup> During his confirmation hearing before the Senate Armed Services Committee, he expressed his belief that the military’s handling of sexual assault cases needed reform: “I certainly believe that we need to do...a lot of things better in terms of investigation and prosecutions.”<sup>30</sup> He affirmed his commitment to initiating any necessary changes to address issues related to reporting and prosecution of sexual assaults in the military. When questioned by Gillibrand about an Independent Review Commission investigation into the matter, Austin stated that he looked forward to it: “I won’t wait for ninety days to get after this. As I indicated, this starts with me and you can count on me getting after this on day one.”<sup>31</sup>

Austin did not fail to deliver on that promise. On his first full day in office, he issued a memorandum to senior Pentagon, Military and DoD leadership. This memo echoed his previous sentiments that “[w]e simply must admit the hard truth: we must do more. All of us.”<sup>32</sup> He requested that they each provide “a summary of the sexual assault and sexual harassment prevention and accountability measures you have taken in the last year that show promise, as well as a frank, data-driven assessment of those which do not.”<sup>33</sup>

Soon thereafter, President Joe Biden, the Commander in Chief of the armed forces,<sup>34</sup> ordered Austin to establish a 90-day Independent Review Commission (IRC) with a focus on Sexual Assault in the Military. On Feb. 26, 2021, Austin

ordered the establishment of the IRC, with a focus on accountability, prevention, climate and culture.<sup>35</sup>

The commission members earnestly began work in March 2021. Their task was herculean—12 civilian experts with broad experience in “criminal justice, victim advocacy, policy and program development for sexual violence prevention and response, public health, and research”<sup>36</sup> were given 90 days to gather input from military leadership, enlisted members and sexual assault survivors. The resulting report, issued in June 2021, included over 80 recommendations and identified additional common themes which required focused attention.

The IRC’s report received the support of Biden who signaled his agreement with efforts to “prioritize effective prevention strategies; promote safe, healthy, and respectful climates; and improve services to address the trauma that sexual assault victims experience and to facilitate their healing and recovery.”<sup>37</sup>

The IRC’s recommendations included UCMJ reform. Their report called on Congress to enact these reforms in the 2022 National Defense Authorization Act (NDAA) with a 2023 implementation plan.<sup>38</sup> The NDAA authorizes “appropriations...for military activities of the Department of Defense” and other related authorizations.<sup>39</sup> That bill, S.2792, is presently before the Senate and includes portions of Gillibrand’s proposed Military Justice Improvement and Increasing Prevention Act.<sup>40</sup> As of this writing, it is uncertain what reforms, if any, may be included in the final version of the bill.

Nevertheless, the IRC made clear that

**The IRC’s report received the support of Biden who signaled his agreement with efforts to “prioritize effective prevention strategies; promote safe, healthy, and respectful climates; and improve services to address the trauma that sexual assault victims experience and to facilitate their healing and recovery.”**

reform efforts should include “accountability, climate and culture, prevention, and support and care of victims. These pillars are equally important—and therefore interdependent—in stopping sexual harassment and sexual assault in the military. Each must receive constant attention by commanders and enlisted leaders.”<sup>41</sup> Ultimately, the IRC’s encouragement to stakeholders that “[b]y harnessing the strengths of commander leadership, investing in prevention, and building a qualified workforce, real progress can be made” offers hope that a comprehensive, methodical, informed approach to this issue can lead to positive change. ☺

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**NANCY Y. MORGAN** is a partner and Director of Legal Operations at Finkelstein and Partners, LLP, and the founding partner of the Veterans' Services Group there. The firm has New Jersey offices in Newark and Edison. Her recognitions include: the designation of Super Lawyer for the past 10 years, National Trial Lawyers Top 100, and has a top (AV) rating by Martindale. She was the President of the Orange County Bar Association in 2020. She was the chair of the NJSBA Military Law and Veteran Affairs Section (MLVAS) and was recently awarded the MLVAS Colonel Sandy Radar Award for the work she has done for veterans across the country.

## Here's What You Need to Know to Become a Veteran's Advocate

By Nancy Y. Morgan

**U**nited States veterans who suffered injuries or contracted an illness while in service are entitled to disability benefits from the Department of Veterans Affairs (VA). Over 5.2 million veterans have filed claims for benefits. There are currently over 475,363 pending claims. Unfortunately, the process can be difficult, arduous, and frustrating for many veterans. Legal assistance is needed to support these veterans by

helping to guide them through the claims process. Presently, the ratio of representatives to pending claims is woefully low. Representing veterans is a way to give back to those who served and can be very rewarding. This article will summarize the claims process, a legal representative's role, and will hopefully inspire you to get involved and become accredited with the VA as a veteran's advocate.

Two functions of the VA are to provide health care via the Veterans Health Administration (VHA) and, to provide benefits and compensation to veterans and their dependents, via the Veteran's Benefits Administration (VBA). Under the VBA, there are two types of benefits programs for veterans: (1) service-connected disability compensation, and (2) non-service-connected disability pension, which is a needs-based program like supplemental Social Security income (SSI). This article will focus on the claims process for veterans seeking service-connected disability compensation.

As a preliminary matter, a veteran must determine if they are eligible to file a claim for service-connected benefits. As a threshold requirement, the veteran must first determine if they are a "veteran" for claims purposes pursuant to the VA's definition of a veteran. A veteran "*is a person who served in the military, naval, or air services and who was discharged or released under a condition other than dishonorable.*"<sup>1</sup> Active service means full-time service as a member of the Army, Navy, Air Force, Marine Core, Coast Guard, and other categories listed at 38 U. S. C.S. 101(21). This can include members of the Armed Forces Reserves or National Guard if they served on active duty.<sup>2</sup>

To determine a veteran's discharge status, one need only look at the DD-214. This is a document given to every veteran upon discharge from service. It will specifically indicate whether the veteran's discharge was honorable, other than honorable, or dishonorable. If the

veteran's service was dishonorable, they are not entitled to disability benefits with the VBA.

Once a veteran's eligibility status has been established, the second question to consider is whether the veteran is entitled to disability compensation. Title 38 of the Code of Federal Regulations provides that veterans are eligible for compensation for service-connected disabilities if they were wounded, injured, or became ill while on active duty, or have been diagnosed with a disease related to

**Presently, the ratio of representatives to pending claims is woefully low. Representing veterans is a way to give back to those who served and can be very rewarding.**

their service in the armed forces. Pre-existing injuries that were aggravated while in service are also covered.<sup>3</sup> If a veteran can satisfy these two requirements, they can file a claim with the VBA for service-connected disability benefits.

For a veteran's claim to be granted, the veteran must prove the following:

1. Medical evidence of a current disability,
2. Evidence of a disease or injury or event coincident with military service, and,
3. A nexus between the current disability and the in-service disease, injury or event.<sup>4</sup>

Bearing this in mind, there are also instances where some medical conditions are presumed to be service connected.<sup>5</sup> An example would be a veteran who served in the Republic of Vietnam making a claim for Type 2 diabetes. The VBA has decreed that a veteran who served in the Republic of Vietnam is presumed to have been exposed to Agent Orange, and therefore, certain illnesses, such as Type 2 diabetes, are presumed service connected.

Once eligibility is established, a veteran can file a claim at VA Regional Office (RO). The VA claims adjudication process for compensation benefits has two levels. Claims are filed and first adjudicated at the RO. The second administrative level is the Board of Veterans Appeals (BVA). There are 58 ROs across the United States and the ROs are known as agencies of original jurisdiction. If a veteran's claim is denied, or the veteran is otherwise dissatisfied with the decision of the RO, the veteran may seek legal representation to assist in challenging the RO's determination. Typically, if a claim is denied, one of the three basic requirements for service connection is missing. A legal representative should review the decision with these requirements in mind to determine the viability of an appeal and the appropriate avenue to challenge the decision.

A representative should first review the decision for the presence of a current diagnosis. This can easily be confirmed by medical records or a medical opinion by a treating doctor.

The second thing to determine is if there is evidence of an in-service event that caused the disability. Such evidence can be established through the veteran's service records, medical records, or lay evidence. Moreover, a veteran who was injured or became ill during a period of active duty need not show they were performing service-related duties for purposes of compensation. If an injury or illness occurs while a veteran is in



service, it is considered to be service-related. An example would be a veteran who suffers an injury while skiing on the ski slopes in Garmisch during a tour in Germany. The injury would be considered to have occurred in-service, and any resulting disability would entitle the veteran to service-connected benefits.

The final thing to review is evidence of a nexus or medical opinion. This is normally the missing link. A veteran must have a written opinion from a medical expert that states it is *at least as likely as not* (that there is a 50/50 chance) the veteran's current diagnosis and resultant disability is related to service.

If all the above requirements are supported by the evidence, the veteran should appeal the decision. The type of decision, reason for denial, specifics of a grant, and stage of the claims process affects a veteran's options for an appeal.

On Aug. 23, 2017, the President signed into law the Veterans Appeals Improvement and Modernization Act of 2017.<sup>6</sup> This established appeals reforms for veterans claims and took effect early 2019. It provides veterans with three options for review known as Decision Review Requests. A veteran can file a Supplemental Claim (VA Form 20-0995), a Higher-Level Review (VA Form 20-0996), or a Board Appeal (Notice of Disagreement-VA Form 10182). The statute of limitations to file an appeal under any avenue is one year from the mailing date of the RO's decision.

A Supplemental Claim requires new and relevant evidence to file the appeal. The RO maintains its duty to assist the veteran in obtaining that evidence. The veteran can keep filing additional supplemental claims if denied or can select a different appeal option.

A Higher-Level Review does not preserve the VA's duty to assist and is merely a review of the current claim based on the evidence at the time of the decision by someone at the VA with more experience. The benefit of this path is that the

veteran is afforded an informal conference to discuss possible errors in the prior decision.

If choosing to appeal to the BVA, there are three available "lanes." The first lane is for a direct review by a veterans law judge who reviews the RO's decision based only on evidence already submitted. The second lane is an evidence submission lane, where a veteran can provide additional evidence within

## **Legal work performed on behalf of veterans does not have to be *pro bono*. A favorable decision based on an appeal at the RO or BVA entitles a legal representative to reasonable attorney fees.**

90 days, for review by a veteran's law judge. The third lane is for the veteran to request a hearing with a veterans law judge. This lane affords the veteran an opportunity to submit testimony and additional evidence within 90 days after the hearing.

If the veteran does not receive a favorable BVA decision from one of the options above, the veteran can either file a Supplemental Claim or file an appeal at the Court of Appeals for Veterans Claims (CAVC).

By contrast, if a veteran received a favorable decision from the RO or BVA,

which granted service connection, it should still be evaluated. In such circumstances, there are two goals: (1) to ensure that the veteran received the highest possible disability rating and, (2) to ensure that the veteran was assigned the earliest effective date for their disability.

Ratings are based on the impact of the disability set forth in the schedule for rating disabilities.<sup>7</sup> There can be multiple service-connected disabilities that would fall under the combined ratings table. There can be direct service connection or secondary service connection for conditions that flow from the initial service-connected disability. The effective date is based on the date VA received the claim or the date entitlement arose, whichever is later.

An RO decision should also be examined to determine if a veteran is entitled to any additional benefits. For example, special monthly compensation is a higher rate of compensation (over 100%) paid due to special circumstances such as blindness or loss of an arm or a leg.<sup>8</sup> Aid and attendance is available if the veteran needs regular assistance with the activities of daily living.<sup>9</sup>

In addition to the foregoing, if a veteran passes away during the pendency of a claim, there are two options to beneficiaries that survive the veteran. A claim can be made for accrued benefits.<sup>10</sup> Alternatively, a claim can be made for dependency and indemnity (DIC) benefits.<sup>11</sup>

Accrued benefits are monetary benefits owed to a deceased veteran that were not paid at the time of their death. Eligible survivors may be the surviving spouse, child, or other dependents. DIC benefits are a tax-free monetary benefit generally payable to a surviving spouse, child, or parent of service member who died while on active duty, active duty for training, or who died from their service-connected disabilities.

Legal work performed on behalf of veterans does not have to be *pro bono*. A favorable decision based on an appeal

at the RO or BVA entitles a legal representative to reasonable attorney fees.<sup>12</sup> An attorney may seek 20% of past due benefits as a contingent fee. In such an instance, the VA will deduct the attorney's fee from the veteran's award and remit it to the attorney directly. If an attorney seeks a 30–33% contingency fee, they must collect the fee directly from the veteran after a successful appeal. Most attorneys practicing in this area select the former option. At the CAVC level, if the veteran's appeal is successful, the legal representative may move for legal fees and expenses pursuant to the Equal Access to Justice Act (EAJA).<sup>13</sup>

Legal representatives are needed to assist veterans with their claims. To become an accredited attorney with the VA, simply go to [va.gov](http://va.gov) and complete VA Form 21A online, attach a recently dated

certificate of good standing from your State Bar and submit the papers to the office of the general counsel (OGC). It can be faxed to OGC at 202-495-5457. Once you receive notice of accreditation, you have one year to complete a 3-hour qualifying Continuing Legal Education program. The Military Law and Veterans Affairs Section of the New Jersey State Bar Association (NJSBA) offers this three-hour program each year at their NJSBA veterans symposium for free. You then need to complete three hours of qualifying CLE not later than three years from the date of initial accreditation, and every two years thereafter.

To use one's legal knowledge to assist disabled veterans with their claims is a great service and very rewarding. I sincerely hope that this article has inspired you to get involved and become a veteran's advocate. ☺

## Endnotes

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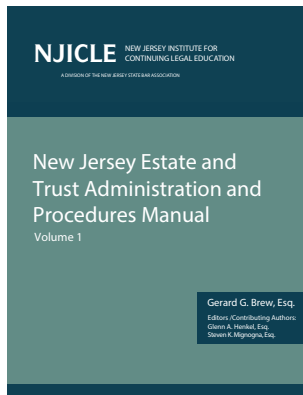
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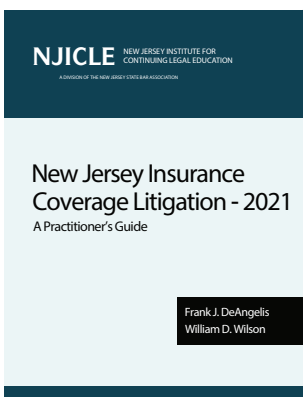
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# Proving VA Disability Compensation Eligibility for Camp Lejeune Veterans with Non-Presumptive Diseases



**ERIC A. GANG** is a litigator who represents U.S. veterans in a variety of VA disability claims and appeals. Founder and lead attorney at Gang & Associates, LLC, in Washington, D.C., he is an accredited representative with the U.S. Department of Veterans Affairs, affiliated with the National Organization of Veterans' Advocates, serves as executive director of the nonprofit veterans advocacy group Disabled Veterans Resource Center, Inc., and regularly lectures and authors publications on the topic of veterans benefits law.

By Eric A. Gang

**A** major challenge facing thousands of U.S. veterans today is securing disability compensation for diseases caused by the toxic water discovered at Marine Corps Base Camp Lejeune. Much of the difficulty lies in a misunderstanding of eligible conditions on the part of advocates, veterans, and the Department of Veterans Affairs (VA) itself.

VA claim reviewers may erroneously deny eligibility, reasoning that the veteran's disease is not among the eight conditions on the presumptive list. Veterans and advocates often fail to recognize opportunities for disability compensation for non-presumptive diseases or opt not to appeal a VA decision. All involved parties tend to lack familiarity with the legal rationales offering disability benefits for non-presumptive diseases.

When a Camp Lejeune veteran's condition is not on the presumptive list, how do advocates effectively determine and prove disability compensation eligibility?



# Between the 1950s and the late 1980s, Marines and their families living at Camp Lejeune in Jacksonville, North Carolina, drank, cooked with, and bathed in water containing chemical waste from a nearby dry-cleaning company and runoff from military equipment cleaning stations.

## Water Toxicity at Camp Lejeune

Between the 1950s and the late 1980s, Marines and their families living at Camp Lejeune in Jacksonville, North Carolina, drank, cooked with, and bathed in water containing chemical waste from a nearby dry-cleaning company and runoff from military equipment cleaning stations.

Tests conducted by the U.S. Army Environmental Hygiene Agency in the early 1980s revealed that drinking water supplied by two of eight Camp Lejeune water treatment facilities—Tarawa Terrace and Hadnot Point—contained volatile organic compounds. Of primary concern, well water contained the solvents benzene and perchloroethylene (PCE), the degreaser tetrachloroethylene (TCE), and the TCE byproduct vinyl chloride at levels exceeding current U.S. Environmental Protection Agency (EPA) maximums.

For example, the current maximum EPA limit for PCE and TCE in water is 5 parts per billion (ppb). In 1982, investigators measured Hadnot Point drinking water TCE levels at up to 1,400 ppb. Tarawa Terrace water contained up to 215 ppb. The most polluted Hadnot Point wells shut down in early 1985, while the Tarawa Terrace plant continued service until 1987.<sup>1</sup>

## Diseases Associated with Camp Lejeune Water Exposure

Estimates suggest that up to 1 million individuals could have been exposed to contaminated water at Camp Lejeune.<sup>2</sup> In 2017, studies by the Agency for Toxic

Substances and Disease Registry (ATSDR)<sup>3</sup> on the health effects of exposure to PCE, TCE, benzene, and vinyl chloride found sufficient evidence for causation for seven conditions: cardiac defects, kidney cancer, Non-Hodgkin lymphoma, bladder cancer, leukemia, and liver cancer.

Four conditions did not have sufficient evidence for causation but had a “least as likely as not” level of causation: multiple myeloma, Parkinson’s disease, end-stage renal disease, and scleroderma. For these, ATSDR suggests a connection between exposure and disease, but could not definitively conclude causation based on available research.

Finally, ATSDR found 25 conditions for which least one study reported a positive association with exposure to the chemicals present in Camp Lejeune water, including aplastic anemia, brain cancer, breast cancer, cervical cancer, choanal atresia, esophageal cancer, eye defects, fetal death, Hodgkin’s disease, impaired immunity, liver cirrhosis, low birth weight, lung cancer, congenital malformations, miscarriage, myelodysplastic syndromes, neural tube defects, neurological deficits, oral cleft defects, ovarian cancer, prostate cancer, rectal cancer, generalized hypersensitivity skin disorder, small gestational size, and soft tissue cancer.

## VA Presumptive Camp Lejeune Conditions

Based on the strength of causation evidence, VA has established two classes of conditions with presumed connec-

tion to Camp Lejeune service: those presumptive for disability compensation and those presumptive for VA health care.

For disability compensation, VA published a final rule in January 2017 amending 38 C.F.R. §§ 3.307, 3.309 to establish presumption of service connection for Camp Lejeune veterans diagnosed with any of the following eight conditions:<sup>4</sup> adult leukemia, aplastic anemia/myelodysplastic syndromes, bladder cancer, kidney cancer, liver cancer, multiple myeloma, Non-Hodgkin lymphoma, and Parkinson’s disease.

For health care compensation, the 2012 Janey Ensminger Act<sup>5</sup> amended title 38 of the United States Code to establish presumption of service connection for Camp Lejeune veterans and family members diagnosed with any of 15 conditions:<sup>6</sup> bladder cancer, kidney cancer, breast cancer, esophageal cancer, female infertility, hepatic steatosis, leukemia, lung cancer, miscarriage, multiple myeloma, myelodysplastic syndromes, neurobehavioral effects, Non-Hodgkin lymphoma, renal toxicity, and scleroderma.

For both, veterans with qualifying service were stationed at Camp Lejeune for at least 30 days between Aug. 1, 1953, and Dec. 31, 1987.

## Establishing Direct Service Connection

The Camp Lejeune presumptive list for disability compensation is ever-expanding as new evidence of causation becomes available. Veterans organiza-



# The Camp Lejeune presumptive list for disability compensation is ever-expanding as new evidence of causation becomes available. Veterans organizations continue to pursue inclusion of diabetes mellitus, Hodgkin's disease, sleep apnea, depression, throat cancer, prostate cancer, colon cancer, mesothelioma, brain cancer, gastrointestinal cancers, endocrine disorders, urinary tract conditions, and other conditions.

tions continue to pursue inclusion of diabetes mellitus, Hodgkin's disease, sleep apnea, depression, throat cancer, prostate cancer, colon cancer, mesothelioma, brain cancer, gastrointestinal cancers, endocrine disorders, urinary tract conditions, and other conditions.

Until then, those diagnosed with a condition outside of the eight listed under the final rule can still obtain disability compensation by establishing direct service connection. Veterans with qualifying service at Camp Lejeune and a current diagnosis can demonstrate direct service connection by supplying a medical nexus opinion stating that it is "as least as likely as not" that the veteran's disease is connected to exposure to contaminants in the water at Camp Lejeune based on sound medical and scientific evidence.<sup>7</sup>

## Using 2012 Act to Support Causation

Advocates should note that attempting to show a positive association between a non-presumptive diagnosis and Camp Lejeune service using the rationale that the diagnosis is listed among the 15 diseases included in the Janey Ensminger Act is not adequate to demonstrate direct service connection—for several reasons.

First, additional scientific data has been gathered on the 15 conditions since the act was signed into law in

2012. This additional data could strengthen or weaken an argument for causation. Therefore, the VA must consider new data before granting direct service connection.

Second, the scientific rationale and evidence supporting causation under the act differs significantly from the rationale and evidence required to support causation for the purposes of VA disability compensation.

For example, after reviewing multiple scientific findings and hazard evaluations for the chemicals of interest, the VA determined not to include seven of the 15 conditions listed in the act on its 2017 final rule presumptive list. The VA noted that the review did not find a significant association between exposure and esophageal cancer, lung cancer, breast cancer, neurobehavioral effects, or scleroderma, stating that it did not seek to ascertain the specific risks of exposure to contaminated water at Camp Lejeune.<sup>8</sup>

Likewise, the VA found strong evidence of a causal relationship between exposure at Camp Lejeune and two diseases not included in the act—liver cancer and Parkinson's disease. It is therefore clear that the medical nexus opinion should not rely on a disease's inclusion in the 2012 Janey Ensminger Act for the purposes of establishing direct service connection.

## Standard of Proof for Service Connection

In establishing direct service connection for non-presumptive diseases, veterans need a compelling medical nexus opinion. Importantly, the standard of proof required to show causation in the opinion is significantly lower than the standard of proof used by the scientific community.

The language of the 1991 Agent Orange Act aids in discerning the standard of proof VA requires to show causation for service connection. Recognizing the unacceptable hardships veterans suffered from Agent Orange exposure, Congress lowered the burden of proof in the presumptive process used to determine whether a condition is service connected.

As VA Secretary Eric K. Shinseki stated in 2010,<sup>9</sup> the statute specifies that "...a positive association exists whenever the Secretary determines that the credible evidence for an association is equal to or outweighs the credible evidence against an association." Shinseki further explained that "the language and legislative history of this act made clear that it did not require evidence of a causal association, but only credible evidence that herbicide exposure was statistically associated with increased incidence of the disease."

Shinseki describes the lower standard

of proof as providing a compromise between the desire for scientific certainty and the need to address the legitimate health concerns of veterans exposed to herbicides in service. “By establishing an evidentiary threshold lower than certainty and lower than actual causation, Congress required that presumptions will be established when there is sound scientific evidence, though not conclusive, establishing a positive association between a disease and herbicide exposure.”

The VA seeks a similar standard of proof in medical nexus opinions supporting causation for direct service connection in Camp Lejeune veterans diagnosed with non-presumptive diseases. Using sound medical and scientific rationale, the medical nexus opinion must show that credible scientific evidence of a connection is equal to or outweighs any credible scientific evidence against an association.

According to Shinseki, a medical nexus opinion incorporating (1) strong evidence of dose-response relationship, (2) the number of statistically significant findings, and (3) the degree to which the relevant studies controlled for risk factors like age would potentially satisfy the requirements for service connection without regard to other independent risk factors.

This “at least as likely as not” or 50% standard of proof is significantly lower than the standard of proof required to demonstrate causation in the scientific community. Understanding this difference—and educating medical experts on this distinction—is vital to success in these cases. Medical nexus opinions should incorporate “at least as likely as not” in the language.

## Establishing Secondary Service Connection

Furthermore, many veterans and advocates do not seize the opportunity to establish secondary service connection

for conditions associated with exposure to contaminated water at Camp Lejeune. The VA grants secondary service connection for qualifying veterans whose service-connected condition has caused or aggravated another, secondary medical condition.

Many of the diseases on the final rule presumptive list can cause or aggravate secondary diseases or disabilities. For example, radiation treatment for cancer may cause cataracts, secondary cancers, hearing loss, or radiation fibrosis. In another example, between 40 and 50% of people diagnosed with Parkinson’s disease experience clinically significant depression.<sup>10</sup> The VA requires the “at least as likely as not” standard of proof for secondary service connection just as that of direct service connection.

## Conclusion

In sum, advocates, qualifying veterans, and the VA should consider any disease, disability, or condition as potentially eligible for Camp Lejeune disability compensation. Because VA staffing shortages and time constraints can result in erroneous decision-making, particularly for claims surrounding non-presumptive health conditions, veterans should consider appealing VA denials or refiling claims.

Camp Lejeune veterans should seek advocates who understand how to demonstrate causation for all types of conditions that could potentially result from qualifying service. Advocates should appreciate the lesser standard of proof of causation required in veteran disability compensation claims and be familiar with the level of medical and scientific evidence needed to create a persuasive medical nexus opinion. ☪

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# Mefloquine

## Health Concerns and VA Disability Claims

By Nebojsa “Vic” Zlatanovic



**NEBOJSA “VIC” ZLATANOVIC** is an associate at Gang & Associates, LLC, which focuses on representing veterans and surviving spouses before the Department of Veterans Affairs and the Court of Appeals for Veterans Claims. He is a former Chair of the New Jersey State Bar Association's Military Law and Veterans Affairs Section. He also had deployed to Iraq and Afghanistan with the Army's 173rd Airborne Brigade.

As early as the 1950s, at least one of the several parasitic species of *Plasmodium* developed resistance to the antimalarial standard of care at the time, i.e., chloroquine.<sup>1</sup> Twentieth-century warfare was marked by military operations in tropical battlespaces and by an effort by policymakers to ensure “force health protection,” and southeast Asia was no different.

To understand how mefloquine toxicity relates to a Department of Veterans Affairs (VA) disability claim, one should keep in mind two important concepts: first, how appropriate screening medical procedures can identify contraindications and, similarly, in deciding to discontinue the use of a drug when symptoms arise; second, most VA disability claims generally require a finding of a nexus between an in-service occurrence and a current diagnosis.

For background, *P.falciparum*, *P. vivax*, *P.malariae*, *P. ovale*, and *P.knowlesi* can spread malaria to humans in certain parts of the world.<sup>2</sup> During the Vietnam War, many U.S. military personnel became infected with malaria, hindering combat operations. Despite the use of chloroquine, such preventative measures became less effective, prompting the Department of Defense (DoD) to look for other ways to treat infection. The Walter Reed Army Institute of Research examined thousands of alternative compounds, and from this research emerged mefloquine.<sup>3</sup>

Despite being approved by the Food and Drug Administration in 1989 under the brand name Lariam, the first major randomized controlled trials of mefloquine that provided doctors and scientists a better understanding of the drug's side effects did not occur until over a decade later.<sup>4</sup> Indeed, the deployment of U.S. military personnel to Afghanistan in 2001 and Iraq in 2003 and its widespread use there led to reports of adverse reactions.

### Contemporary Use of Mefloquine as First-Line Prophylaxis

A Canadian deployment to Somalia in the 1990s may have been an early red flag that should have alerted policymakers about the risks of mefloquine toxicity. The Canadian Airborne Regiment was deployed to Somalia in support of stability operations by an international coalition. During the deployment, two soldiers beat and killed a Somali, leading to an inquiry that found poor leadership and lack of discipline to be the root causes. The incident led to the dissolution of the unit.

By early 2002, an Interagency Working Group on Antimalarial Chemotherapy was examining practices and policies related to the use of mefloquine to prevent infection. The Working Group found various flaws in research related to drawbacks to mefloquine, such as the reliance on self-reported symptoms,

sampling bias and the lack of randomized controlled studies, and later that year the DoD reported to the chairman of the House Subcommittee on Military Personnel that a once-weekly regimen promoted compliance and that the cost of the drug ruled out other alternatives but acknowledged that further study specifically focused on a military patient population may have been warranted by questions related to safety.<sup>5</sup>

By the time the U.S. invaded Iraq in March 2003, DoD policy continued to favor mefloquine as the preferred prophylaxis for chloroquine-resistant *P.falciparum*. Personnel were instructed to begin taking mefloquine prior to a deployment to Iraq or Afghanistan, taking it once a week until several weeks after redeploying from these war zones. The package insert for Lariam in use at the time cautioned users of nausea, vomiting, diarrhea, dizziness, depression, hallucinations, severe anxiety, paranoia, persecutory delusions, difficulty sleeping, thoughts of suicide, bad dreams and problems related to the liver or eyes, and that people with a recent history of depression, anxiety disorder, schizophrenia, psychosis, or seizures should not take it. Although DoD policy recognized that depression and anxiety were contraindications for mefloquine use and had alternatives to mefloquine—specifically Malarone and doxycycline, rarely were service members screened for contraindications.

One of the earliest VA guidance on mefloquine was a 2004 Veterans Health Administration information letter to clinicians discussing that adverse reactions may continue even after a person stops taking mefloquine and symptoms include insomnia, mood changes, depression, dizziness, and “strange thoughts.”<sup>6</sup>

Interest in mefloquine has grown in the scientific community in the past 20 years. According to the National Library of Medicine, there have been over 2,600 journal articles and online books that

reference mefloquine since 1994, with over 1,800 being published after the U.S. invaded Afghanistan.<sup>7</sup> Based on medical research indicating adverse side effects, in July 2013, the FDA issued a black box warning for serious neuropsychiatric symptoms that can last years after its use has stopped or can become permanent. These symptoms can include dizziness, balance problems, tinnitus, convulsions or seizures, insomnia, anxiety, paranoia, hallucinations, depression, restlessness, and confusion.<sup>8</sup>

One researcher explained:

[M]any of the lasting adverse neurological effects of mefloquine are consistent with the chronic sequelae of a well characterized but idiosyncratic central nervous system (CNS) toxicity syndrome (or toxidrome) common to a number of historical antimalarial and antiparasitic quinolines and associated with a risk of permanent neuronal degeneration within specific CNS regions including the brainstem.<sup>9</sup>

At the request of the VA, the National Academies of Sciences (NAS) convened a committee to evaluate the long-term effects of mefloquine use in 2019 and a year later, NAS released its findings that there was inadequate or insufficient evidence of an association with neurological, psychiatric, and eye disorders, and that there was no empirical basis related to gastrointestinal or cardiovascular adverse events.<sup>10</sup> Although the NAS reported that there was insufficient evidence linking mefloquine intoxication to certain adverse health effects, its standard is higher than the benefit of the doubt standard that must be met in most VA disability claims.<sup>11</sup>

### Adverse Reactions to Mefloquine Toxicity as Basis for VA Disability Claims

Generally, disability claims require a nexus between military service and a current condition. The benefit of the

doubt goes to the veteran. Importantly, exposure to mefloquine is not a claim. Exposure is merely the in-service occurrence. Rather, the claim relates to the health effects arising from exposure.

Information indicating that there may be an association between a medical condition and military service includes, “medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits, or credible evidence of continuity of symptomatology such as pain or other symptoms capable of lay observation.”<sup>12</sup> The VA is required to assist the claimant in obtaining a medical opinion when

(1) there is competent evidence of a current disability or persistent or recurrent symptoms of a disability [...], and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.<sup>13</sup>

When evaluating a case for health effects related to mefloquine intoxication, advocates should first begin with the veteran's claims file from the VA, which typically contain service treatment records. These records may contain a passing reference to mefloquine, which could appear as a handwritten “mef,” “meflo,” or “Lariam.” Absent explicit reference to mefloquine, there may be references to complaints of dizziness or headaches, which could be interpreted as prodromal symptoms by a medical expert. An advocate should be watchful for evidence that the service member was taken off mefloquine *before*

the deployment was over, because this can suggest an adverse reaction that caused a medical professional to advise the service member to stop taking mefloquine. In addition, post-deployment health assessments completed at the end of a deployment may contain helpful information.

However, most service treatment records unlikely contain explicit written reference to mefloquine. Written informed consent or a counseling statement in one's health records, similar to the type of advisory information given for asbestos exposure or the benefits of wearing ear plugs to mitigate hazardous noise exposure, will likely not be found. Lay statements by the veteran or buddy letters can help inform the VA about any problems during mefloquine use, and such statements should contain information adequately describing the use of the drug and its contemporaneous impact on their health.

Where a veteran who had deployed to a combat zone experiences PTSD or PTSD-like symptoms, the advocate should first consider whether an argument for an acquired psychiatric disorder incorporates the effects of mefloquine toxicity as a practical matter. Generally, the VA prohibits assigning more than one rating for the same disability.<sup>14</sup> However, there may be circumstances where mefloquine intoxication can form the basis for a claim independently of one for an acquired psychiatric disorder.

Although mefloquine intoxication can produce psychiatric symptoms that overlap with a service-connected PTSD diagnosis, it may also lead to other problems, such as migraines or vertigo. A peripheral vestibular disorder may be rated at 10% for occasional dizziness or as high as 30% for dizziness and occasional staggering.<sup>15</sup> A rating for migraines can be as high as 50%, depending on the severity and frequency of migraines.<sup>16</sup> Together with a com-

pensable rating for PTSD, a veteran's combined rating can lead to additional compensation.

## Lessons Learned

The military should have implemented better screening procedures to identify contraindications and better informed service members and their chain of command of the possible adverse health effects. The military should not favor a drug that lacks randomized clinical trial data in lieu of safe and effective alternatives, while at the same time asserting that use should continue for lack of randomized clinical trial data to support discontinuance.

The VA should adopt a policy conceding mefloquine exposure, at the very least, for the time that mefloquine was the top line preference. The VA, in partnership with the DoD, should research the long-term health effects of mefloquine exposure. ☞

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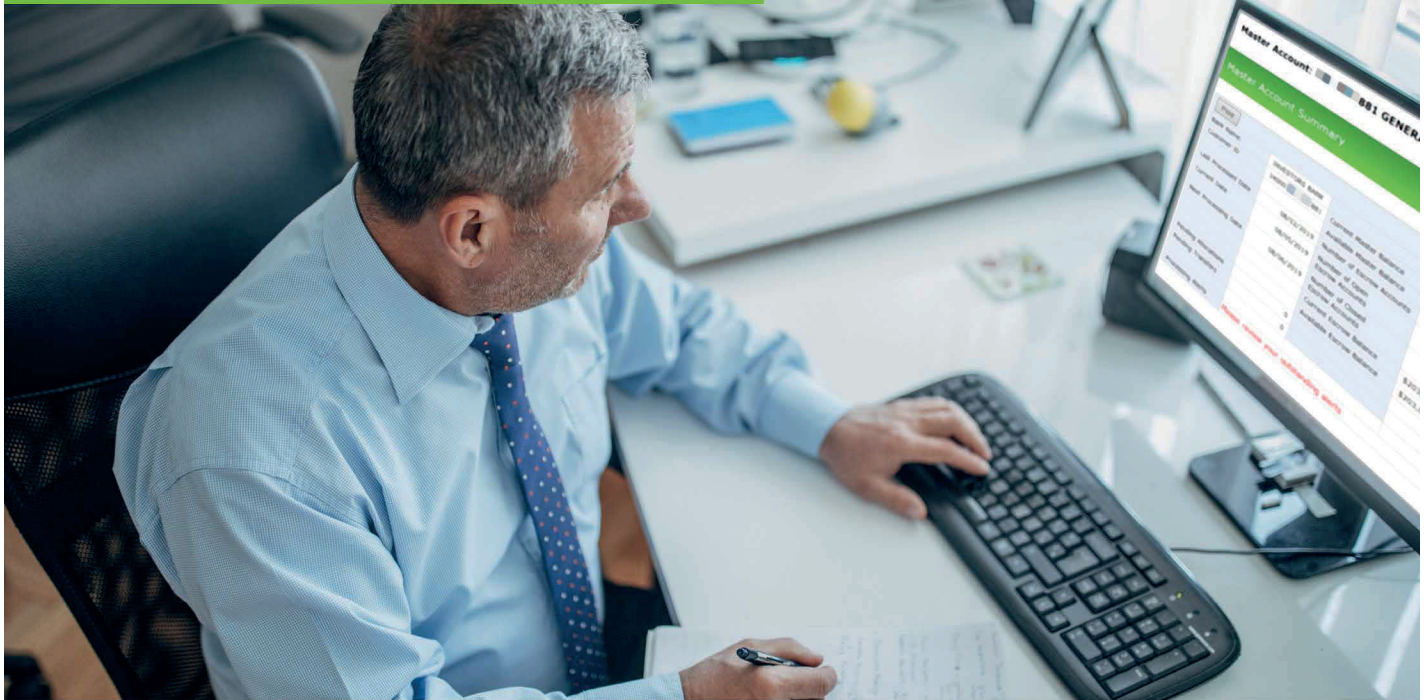
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# **The Importance of Using Military, Medical Records in Criminal Proceedings for Veterans with Mental Health Disorders**

**By Robert A. Ebberup**



When defending a veteran who suffers from a mental health disorder such as Post-Traumatic Stress Disorder (PTSD) in a criminal case, understanding the issues and circumstances of the veteran's mental condition is paramount when developing a defense strategy. That point hit home to me when I represented a veteran of the Iraq war, who suffered from severe PTSD issues and faced criminal charges which included multiple violations of a domestic violence restraining order. I found that the court did not possess all the information about the veteran's mental condition it needed to properly decide the state's motion for pretrial detention. I was brought into the case as co-counsel with Thomas Roughneen following the initial detention hearing. After the court granted the state's motion, we provided information concerning the veteran's mental condition to the court, resulting in the veteran's release after being jailed for nearly two months. When deciding to release the veteran from custody, the court noted that the information was revealing and that it would view future criminal matters involving veterans with PTSD in a different light. It is important to know the basics of the New Jersey Criminal Justice Reform Act to understand how the veteran in my case spent so much time in jail.

#### **Criminal Justice Reform: 'Bail Reform'**

The Criminal Justice Reform Act (CJRA) became effective in New Jersey on Jan. 1, 2017. It is more commonly known as "Bail Reform," and it has all but eliminated the cash bail system in New Jersey. The goal of the act is pretrial release of individuals who have been charged with criminal offenses on the assurance that they will appear in court, are not a danger to any other person or to the community, and that they will

not obstruct or attempt to obstruct the criminal justice process.<sup>1</sup>

In criminal matters, a charging instrument can either be a Complaint Summons or a Complaint Warrant. However, criminal charges may be brought via a direct indictment. If the charge is placed on a Complaint Summons, the defendant is usually released on their own recognizance, occasionally with restrictions.

When a Complaint Warrant is used, the defendant is incarcerated without the opportunity to post a monetary bail.<sup>2</sup> The decision to charge someone using a Complaint Warrant is based on a Public Safety Assessment (PSA). The PSA assists in determining the risk of a defendant failing to appear in court, commit a new crime, or commit a violent crime. The PSA uses a numerical scoring system that ranges from one, a low risk, to six, a high risk. The risk assessment is an empirical assessment of various factors, including the age of the defendant, whether the offense is a violent crime, whether the defendant had other pending charges at the time of the offense, whether the defendant failed to appear at prior court proceedings, among other factors.<sup>3</sup> This information is gathered from various sources including the National Crime Information Center (NCIC), Computerized Criminal History (CCH), Promis/Gavel, and the Automated Complaint System (ATS).<sup>4</sup> In this instance, the veteran's risk score was in the middle to upper range as a result of multiple contempt violation charges and his in-patient months-long stay at various Veterans Administration treatment facilities throughout the country while an arrest warrant existed for him and his failing to appear in court.

A statewide Pretrial Services Program exists to, among other things, assess a defendant and make recommendations to the court concerning a pretrial release decision.<sup>5</sup> Within 48 hours of a defendant's incarceration, a court shall



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A statewide Pretrial Services Program exists to, among other things, assess a defendant and make recommendations to the court concerning a pretrial release decision. Within 48 hours of a defendant's incarceration, a court shall consider the risk assessment and recommendations of Pretrial Services before deciding whether the defendant should be released.

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consider the risk assessment and recommendations of Pretrial Services before deciding whether the defendant should be released.<sup>6</sup> However, the prosecutor may by motion seek the detention of the defendant, but must demonstrate by clear and convincing evidence that no condition or combination of conditions can assure the defendant will appear in future court proceedings, or releasing the defendant does not pose a danger to anyone or to the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process.<sup>7</sup>

A prosecutor may file a motion for pretrial detention at any time,<sup>8</sup> but if the motion is filed after the defendant's first appearance, the detention hearing must be heard within three working days after the motion is filed unless the prosecutor and defense counsel request a continuance.<sup>9</sup> A defendant may present witnesses, cross-examine state witnesses and present other information at the detention hearing.<sup>10</sup> The rules of evidence for a criminal trial do not apply at a detention hearing.<sup>11</sup>

In determining whether to grant the state's motion for detention, the court must consider factors enumerated in N.J.S.A. 2A:162-20, which include the nature and circumstances of the alleged crime, weight of the evidence, history and characteristics of the defendant, the nature and seriousness of any danger the defendant poses on others or to the community, the risk that the defendant would obstruct or attempt to obstruct the criminal justice process.<sup>12</sup>

A detention hearing may be reopened by the defendant at any time prior to trial; however, the court must determine that the information which the defendant wishes to proffer was not known by the prosecutor or defendant at the detention hearing and that such information has a material impact on whether the defendant would attend future court proceedings, public safety,

and whether the defendant would obstruct the criminal justice process.<sup>13</sup>

### **Court Decision to Grant Detention Motion**

After the initial detention hearing for the veteran I (subsequently) represented, the court found that no condition or combination of conditions could assure that he would appear in future court hearings or, if released, would not pose a danger to anyone or to the community or that the veteran would not obstruct or attempt to obstruct the justice process. In deciding to grant the state's motion for detention, the court considered the factors outlined in N.J.S.A. 2A:162-20 and, among those factors, found multiple restraining order violations, specific threats to kill the victim in the past, continuous contact with the victim, ignoring the restraining order, and that the veteran was a flight risk. However, the court lacked essential information about the veteran's mental condition and treatment during the violation period which was previously unavailable.

### **The Veteran's Unfortunate Plight**

The veteran joined the United States Army after graduating from high school when the World Trade Center was attacked, and one of his first assignments was to respond to ground zero and to the Arthur Kill Landfill in Staten Island, New York, where he collected human remains found among the trade center rubble. Later, the veteran was deployed to Iraq where he was assigned to the 101st Airborne Division as a member of a gun truck team which undertook over 150 missions. The veteran witnessed unspeakable and horrific acts of carnage which led to several mental health diagnosis, including PTSD with panic attacks and Major Depressive Disorder (MDD).

Upon his return home from Iraq, the veteran experienced difficulties in his

personal relationships with women, which included a failed marriage and a toxic long-term relationship with a woman he fathered a child with. It was during that relationship that the veteran's PTSD became severely acute. It was also during that relationship that the veteran encountered the criminal justice system. After years of trying to deal with his PTSD issues alone, the veteran agreed to enter in-patient treatment programs. However, just prior to entering the first program, his ex-girlfriend obtained a restraining order against him.

The veteran entered in-patient Veteran's Administration (VA) treatment facilities for his PTSD issues and for a drug dependency problem he developed from a duty-related truck accident which required pain management that, of course, resulted in the additional problem. It was during this period of treatment that the veteran made several attempts to contact his ex-girlfriend. However, none of the attempts were of a violent nature. Nor were there any threats of violence. Nevertheless, the veteran's ex-girlfriend reported the violations, resulting in arrest warrants. Upon returning home from months of in-patient treatment, the veteran was arrested and incarcerated.

### **Defense Strategy**

Upon entering the case, it became immediately apparent that the court had to be educated about the veteran's mental condition and that the veteran's behavior which resulted in the criminal charges was a byproduct of that condition. Additionally, since his months long in-patient treatment and current outpatient treatment, the veteran was not a risk of flight, or a threat to the victim or the community, or that he would obstruct or threaten to obstruct the criminal justice process. To that end, we obtained (and submitted to the court) the veteran's medical records from the VA treatment facilities he was admitted

to, as well as progress records from his outpatient treatment program. Additionally, we obtained certifications from the veteran's command sergeant, his Veterans Service Officer (VSO), and his ex-wife with whom he maintained a good relationship, all of which were willing to provide in-person testimony to the court.

### What is Post-Traumatic Stress Disorder?

Post-Traumatic Stress Disorder is a mental health disorder which arises from exposure to a traumatic event, including physical injury, and is characterized by symptoms such as re-experiencing the traumatic event via flashbacks, nightmares, avoiding people, insomnia, and exaggerated startle.<sup>14</sup> There are also behavioral issues resulting from PTSD, especially in veterans who return home from theaters of combat. I interviewed Robert J. Delaney, a retired New Jersey State Trooper who suffered PTSD stemming from infiltrating top New Jersey mobsters for over two years in the most successful undercover investigation in the history of the New Jersey State Police. Bob went on to become a successful NBA referee and, later, an expert on PTSD issues. He made numerous trips to Iraq and Afghanistan to meet with troops and help them with their PTSD issues. Bob learned from his interactions with soldiers deployed to combat regions of their 0 to 100-mile-an-hour cycles of boredom to intense combat fighting, and of the horrific scenes and experiences they endured. Upon their return home from combat tours, veterans sometimes found adjusting back to the norms of a civil society in some respects difficult. For example, speeding on the highways became second nature to returning veterans from the necessity of speeding "in-country" to avoid ambushes. Often, veterans diagnosed with PTSD who served in combat areas

had difficulty with interpersonal relationships.

### Judicial Recognition of Veterans Suffering from Mental Health Issues

The Hon. Wendel E. Daniels, Presiding Criminal Judge in Ocean County, has a clear understanding of veterans' mental health issues such as PTSD. Since 2016, when a Veterans Diversion Program was initiated in Ocean County, Judge Daniels has presided over that program in his court. Since the inception of the program, Judge Daniels immersed himself on the various causes and effects of PTSD and its impact on veterans. Judge Daniels' approach to veterans who appear before him is to give them every chance to rehabilitate and become productive citizens again. "We owe a debt of gratitude for their sacrifices, which has kept us safe," Judge Daniels said. He also presides over detention hearings which occasionally involve veterans. Along with the statutory factors, the Judge also considers what incarceration does to a veteran who suffers from PTSD, as well as what it does to the veteran's family, and balances those issues with the requirements of the CJRA. Judge Daniels teaches new judges about the VDP and veterans' PTSD issues.

### Conclusion

When representing veterans who suffer mental health issues such as PTSD in criminal matters, it is vitally important to educate the court and prosecutor about those issues, and to obtain the veteran's military and medical records to support your arguments on behalf of the veteran. ⚖️

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3. Executive Order 211, Criminal Justice Reform Study 2016
4. *Id.*
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# **Justice-Involved Veterans With PTSD Can be Supported Through Veterans Treatment Court**

**By David Culley**





**DAVID CULLEY** is an attorney and a former assistant prosecutor for Hunterdon County. He is also a U.S. Navy veteran, serving from 2002 to 2009 as a naval flight officer in the patrol and reconnaissance community in various capacities worldwide. Currently, he is Senior Vice Commander of Spruce Run Memorial VFW Post 5119 and Superintendent of Veteran's Haven North, a transitional housing facility for homeless veterans.

Looking back on this challenging year for the veteran community, we all should take a moment to think about how the criminal justice system handles military veterans in New Jersey. In less than six months, we saw the full withdrawal of U.S. forces from Afghanistan and the planned departure of all combat forces in Iraq. Over the past 20 years, 4.59 million men and women served in the U.S. military and were discharged as veterans, with upwards of between 2 million and 3 million serving directly in combat theaters.

Many of these service members will return to New Jersey and face challenges to their reintegration. Some may face legal problems and become what we call a “justice-involved veteran” within our criminal justice system. As of Nov. 22, 2021, 429 self-identifying veterans were incarcerated in state prison and 330 in federal facilities within New Jersey. There are also roughly 1,000 veterans under the supervision of our State Parole Board.<sup>1</sup> Many of these crimes could have been prevented or mitigated had a court intercepted the justice-involved veteran at a critical juncture early on.

Now is the time for New Jersey to join the majority of other states and implement a Veterans Treatment Court within the Superior Court system to intercept justice-involved veterans in a uniform and organized manner. The VTC model is over 30 years old and is based on mental health and drug courts. It seeks to intercept the veteran at an early juncture and ensure that they are directed to specialized veteran clinical and non-clinical treatment networks.

#### **VA Studies Support the Veterans Treatment Court Model**

Studies show that these returning veterans are increasingly vulnerable to the cycle of suicide, homelessness and incarceration due to a multitude of service-connected disabilities. Indeed, post-9/11 veterans are more likely to have suffered a severe disability than in any previous war, including more than 1 million that the U.S. Department of Veterans Affairs (VA) has rated seriously disabled – a number that will undoubtedly increase as reintegration continues.<sup>2</sup> This could be attributed to the fact that over 77% of post-9/11 veterans were deployed to war zones at least once, compared to 58% of pre-9/11 veterans.<sup>3</sup>

As a result, justice-involved veterans tend to struggle with mental health, substance use disorders, and other medical conditions.<sup>4</sup> To address this, the federal Veterans Health Administration started Veterans Justice Programs, which connect justice-involved veterans with appropriate services. These programs report that more than half of this population are diagnosed with mental health or substance use disorders.

A recent VA study indicates that veteran Post-Traumatic Stress Disorder (PTSD) can be linked with involvement in the criminal justice system.<sup>5</sup> The data illustrates a higher probability of criminal justice involvement and arrest for violent offenses for veterans with PTSD than veterans without. Military veterans have higher levels of PTSD due to trauma such as combat exposure or military sexual trauma, with some figures indicating up to 30% of all veterans who served during certain time periods may be afflicted.<sup>6</sup>

Within this analysis, justice-involved veterans were found to have higher rates of PTSD than the justice-involved population at large. Thus, much like what we see with addiction in drug courts, addressing service-connected disabilities like PTSD could lead to a healthier veteran and recidivism. This is why Veterans Treatment Courts have been established nationwide.

Justice-involved veterans also historically suffer from homelessness. According to the VA's Veterans Justice Outreach Program, about one-half of all homeless veterans participating in VA homeless assistance programs were somehow involved with the criminal justice system.<sup>7</sup> When veterans are released from prison, many struggle to find stable housing, which can exacerbate underlying disorders, especially among veterans who are registered sex offenders.<sup>8</sup> This is compounded by the fact that they may be burdened by legal barriers to employment and rejection due to criminal background checks.

Tragically, this reality can lead down a dark path for our brothers and sisters. At least four times as many post-9/11 veterans have died by suicide than died in combat. As of May 2021, an estimated 30,177 post-9/11 veterans took their own life. These numbers are the highest among the U.S. male population ages 18–34 and are over 2.5 times higher than the rate in the general public. In total, there were 89,100 veteran suicides between 2005 and 2018, including veterans from all wars. Factors such as trauma, physical and mental health disorders, PTSD and moral injury have been linked as contributing to this epidemic. These are staggering statistics and show us that there is so much more that can be done to address this issue immediately.<sup>9</sup>

### **A New Path Forward**

Although the VA provides an array of medical and disability benefits to veterans, it is not able to intercept them at critical junctures. Situations arise where a veteran's PTSD or substance use disorder comes into the open—like an arrest, or a domestic violence or alcohol/drug-related incident in the community. These calls for help often lead to the cycle of homelessness, incarceration and suicide—the vast majority of them do not lead to treatment. This intercept

**In total, there were 89,100 veteran suicides between 2005 and 2018, including veterans from all wars. Factors such as trauma, physical and mental health disorders, PTSD and moral injury have been linked as contributing to this epidemic.**

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point is where the criminal justice system is most critical.

Currently, the statewide Veterans Diversion Program is the legislature's answer to the justice-involved veteran issue. Enacted in 2017, it places all of the responsibility for criminal complaint diversion and treatment referrals on an overburdened county prosecutor and local law enforcement, without any mechanism to support additional funding and training.<sup>10</sup> Many county prosecutors do not have the time or resources to dedicate staff to this complicated task, let alone network with VA and other veteran service organizations such as the NJ Veterans Justice Outreach Initiative, the VFW, and American Legion, among many others.

Moreover, every county runs the diversion program at their discretion, which in reality translates to a wide disparity in implementation. Some have done very well with it, but this is not universal. One county may divert and refer a justice-involved veteran to appropriate treatment programs, while another seeks incarceration for the same offense. Given such disparity, accurate statistics on diversion and treatment success are rare.

Veterans deserve more than this inconsistent, decentralized approach. It is time to move on to a marriage

between pre-indictment prosecutor diversion with a more robust DMAVA mentorship program,<sup>11</sup> and a Superior Court Veterans Treatment Court. This will ensure consistency and provide the combined leverage and resources of a J.S.C. with the opportunity for pre-indictment dismissal of the complaint.

Veterans Treatment Courts have a proven track record all across the nation. In 2018, the VA analyzed data on 7,931 veterans connected to 115 Veteran Justice Outreach Coordinators within the 461 VTCs in existence at the time. This data revealed that although 20% of VTC participants received a jail sanction, only 14% experienced any new incarceration, compared to 23% to 46% recidivism rate generally.<sup>12</sup> In addition, VA data taken between 2011 and 2013 illustrates that veterans who participate in VA services experienced a 30% increase in stable housing a year after VTC admission and an 88% reduction in arrests.<sup>13</sup>

Notably, the study also indicated that VTCs led to substantial gains in housing and VA benefits for participants. The majority had obtained their own housing by the end of the program, and at least 50% started receiving VA benefits.

New Jersey Courts have shown exceptional progress and resilience in recent years and are well-poised to establish an



effective program. The New Jersey Drug Court Program is one of the most respected in the country and runs in all 21 counties. Importantly, it is organized and managed centrally through the Administrative Office of the Courts, with standard operating procedures and oversight to ensure consistency and accountability. A similar model, but on a smaller scale, could be introduced for a Veterans Treatment Court.

Indeed, the remarkable success of the Criminal Justice Reform Act clearly shows how well-suited the Superior Court system is to positive progressive change in this field. Such momentum speaks to the resiliency of our evolving principles of crime and punishment. Veterans deserve the same respect and attention, just as they have across the nation.

Given the relative size of any prospective veteran docket and the resources already available, the funding needed to run a Veterans Treatment Court could be significantly smaller than a Drug Court. The VA provides Veterans Justice Outreach Coordinators throughout New Jersey, who are uniquely trained and motivated to assist courts and attorneys with justice-involved veterans as members of the VTC treatment teams at all stages of the criminal process. They can help the court and court staff navigate the vast network of resources available to veterans, including substance abuse and mental health counseling, medical care, disability benefits, housing services, and a myriad of other programs that courts can rely upon to hold veterans accountable.<sup>14</sup>

In addition, there is federal funding and technical assistance available to state and local courts via the U.S. Department of Justice Veterans Treatment Court Grant Program. In 2020, Congress passed the Veteran Treatment Court Coordination Act of 2019, directing the Attorney General to enact and implement a grant program specifically designed for VTCs nationwide.<sup>15</sup> These

grants may not be necessary in every county, depending on resources and veteran populations, and the court could determine the consolidation of VTCs by region or Vicinage to reduce strain on court calendars. The path to success here is paved—we just have to take the first steps.

### A Moral and Ethical Duty

Our society has an obligation to care for veterans, including justice-involved veterans. This is not just a moral question, but a practical one, given that intervention programs nationwide have proven effective in mitigating the factors that contribute to criminal behavior within this population. We can do more to break the cycle of veteran incarceration, homelessness, and yes, suicide. Doing all we can for our brothers and sisters returning home should be the duty of every attorney in New Jersey.

Veterans Treatment Courts have long proven to be in the *best interest of the veteran*. That's a legal standard that we all should embrace. ☪

### Endnotes

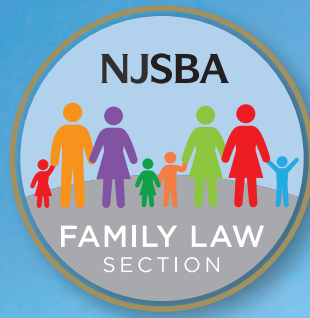
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# New Jersey's Veterans Diversion Program

## Program's Success Calls for Time for Formalization and Standardization—Will New Jersey Answer the Call?

By Robert Hille, Thomas Roughneen, and Hon. Edward M. Neafsey



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**T**he United States and its people and institutions are protected by an all-volunteer military. These trained professionals adopt as their vocation service to us all.

This year is the first within the last 20 years without an “active” war. That fact underscores the sacrifices these exceptional Americans and their families have made for us and our country. They ask for little in return. Yet, we owe all of them and their families a debt of enduring gratitude that should go beyond a yellow ribbon and a “thank you for your service.”

### **The Challenge**

As our adversaries, and there are many, seek to upend our freedoms and our commitment to the Rule of Law, it is our service members who stand in harm’s way. It is they who run toward every threat. And it is they who preserve the precious freedoms that we sometimes take for granted.

The U.S. has increasingly been challenged. And the men and women in our armed forces have stepped up every time so that we may continue to enjoy the fruits of their sacrifice.

Unfortunately, many pay a dear price that is difficult for us to fathom. Service often takes a toll in varying degrees on those engaged in our protection. The transition from war zone to home front can be difficult. Often unseen by veterans are war’s harmful effects on them.

Whether it is reliving traumatic events in the night, reacting to a car backfire as if it were a roadside bomb, trying to engage ordinary people without fear, dealing with broken relationships or falling into alcohol and substance abuse as an escape, these drivers of behavior often expose service members, past and present, to conflict with the law.

Indeed, the U.S. Department of Veterans Affairs (VA) estimates almost one

**...[T]he U.S. Department of Veterans Affairs (VA) estimates almost one out of five veterans suffers from some form of Post-Traumatic Stress Disorder (PTSD). This condition includes depression, detachment, irritability, anger and the inability to concentrate. Unstructured “free” society can amplify these disabilities as there is no structured organization to control them.**

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out of five veterans suffers from some form of Post-Traumatic Stress Disorder (PTSD). This condition includes depression, detachment, irritability, anger and the inability to concentrate. Unstructured “free” society can amplify these disabilities as there is no structured organization to control them.

The significance here is that these problems were created by what we asked our service members to do for us. Therefore, we have a special obligation to rehabilitate these valuable members of our society from the problems caused by their commitment to our country.

To successfully address the problems of justice-involved veterans, we need to recognize (1) but for their service these problems would not have occurred and (2) special considerations should be made to address behavioral triggers.

This is the aim of the Veterans Diversion Program (VDP).

### **Origins**

The idea for diverting veterans out of the criminal justice system originated with a Judge in Buffalo, New York. When he became alarmed at the growing number of veterans before the city’s drug and mental health courts, he began working with local medical providers associated with veterans and volunteers to create a Veterans Diversion Court for veterans charged with non-violent crimes. By 2017, 40 states had similar courts that successfully diverted approx-

imately 10,000 veterans away from jail annually.

### **Passage and Structural Organization and Administration**

In 2014, New Jersey’s effort was led by then State Sens. Jeff Van Drew (D-Cape May) and Diane Allen (R-Burlington). With the support and assistance from veterans’ groups and the New Jersey State Bar Association’s Military Law and Veteran’s Affairs Section, the Legislature passed and Governor Chris Christie signed Public Law 2017, c. 042. The law supplemented Title 2C, and New Jersey’s Veterans Diversion Program was born.<sup>1</sup>

New Jersey chose not to create a Veterans Diversion Court as many other states had done. Instead, the law was modeled after the concept of case grouping and specialized administration as with New Jersey’s “Drug Court.” However, while Drug Court is administered through the Superior Court system, the Veterans Diversion Program is primarily left in the hands and discretion of the county prosecutors. Consequently, the effectiveness of the program is dependent on the commitment of 21 prosecutors, and the law’s implementation has not been uniform.

### **Promising Start**

In those counties where the VDP is embraced, it has proven very successful. For instance, Atlantic County has made

the program a priority. There to date, 46 veterans have enrolled, 36 graduated, three were terminated for non-compliance and seven others are currently participating. The resulting 92% graduation rate underscores the value of the VDP. Cape May County is another success story. That program has nine graduates, no terminations and six current enrollees. In both counties, no VDP graduate has returned to court with new charges. These individuals have once again become productive members of the society they served in uniform.

An added benefit has been community recognition. Atlantic County Assistant Prosecutor Rick McKelvey notes, “by working together—prosecutors, defense counsel, the courts and the VA—we show veterans that the community at large not only respects their service, but understands their struggle and is rooting for their success.”

### How VDP Works

Veterans are afforded hard-earned care from the VA. The VDP links justice-involved veterans to the care they deserve. The VDP is available to active, retired and reservist service members accused of non-violent crimes. They must be diagnosed with a mental illness or demonstrate such symptoms to law enforcement, friends or family members. That illness or condition must be related to the offense charged. Enrollment into the Program is voluntary, but the willingness to participate is required.

The law establishing the VDP requires the State Department of Military and Veterans Affairs to work with state and county law enforcement, the State Department of Human Services that oversees community mental health providers, and federal veterans’ agencies to compile a directory of appropriate treatment services.<sup>2</sup> Mentors are assigned to veterans who are diverted into the program. Mentors are active-duty service members or veterans who successfully completed a state training program. They provide support to the veteran throughout the VDP process.

The law requires the New Jersey Attorney General in cooperation with the Director of the Administrative Office of the Courts (AOC) to issue annually a report to the Governor on the Program’s performance.<sup>3</sup> The AOC is tasked with developing a differentiated mental health supervisory case type for its Probation Division and—resources allowing—assign probation officers with experience in behavioral health and therapeutic interventions targeted to military culture.<sup>4</sup>

Police can recommend a veteran for the VDP at any point after the veteran has been charged, and defense counsel can seek their client’s admission at any point prior to the disposition of the charge(s). Generally, veterans who commit petty disorderly or disorderly persons offenses, or fourth- and third-degree crimes can qualify for enrollment. Some examples of these are

drug possession, criminal mischief, shoplifting, trespassing and prescription fraud. The prosecutor, however, has the sole discretion to determine if an eligible veteran qualifies.<sup>5</sup>

In making a decision on admission, the prosecutor considers the nature of the eligible offense, the causative relationship between the veteran’s diagnosis or apparent mental illness and the commission of the offense, the veteran’s amenability to participation in services, and whether diversion will promote recovery, prevent future criminal behavior and protect public safety.<sup>6</sup>

The veteran must agree in writing to the prosecutor’s terms for admission.<sup>7</sup> The period of supervised treatment shall not exceed two years.<sup>8</sup> If the veteran successfully complies with the terms and conditions of the diversion agreement, the prosecutor will move for dismissal of the charges.<sup>9</sup> Unlike other diversionary programs, such as the Pre-Trial Intervention Program, a veteran may be admitted into the VDP more than once.<sup>10</sup>

### VDP Benefits Veterans and the Community

John Walter, the U.S. Department of Veterans Affairs Justice Outreach Specialist for southern New Jersey, helped start two treatment courts in California. That makes him an ideal judge of the benefits of the VDP in New Jersey. He also plays a critical role in Atlantic County’s VDP. He serves as a clinician who assesses treatment needs and connects veterans to

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**Veterans are afforded hard-earned care from the VA. The VDP links justice-involved veterans to the care they deserve. The VDP is available to active, retired and reservist service members accused of non-violent crimes. They must be diagnosed with a mental illness or demonstrate such symptoms to law enforcement, friends or family members. That illness or condition must be related to the offense charged. Enrollment into the Program is voluntary, but the willingness to participate is required.**



services, and he advises the prosecutor and court each month on a veteran's progress.

Walter understands that individuals will do what is required to have their charges dismissed. But he has also seen transformative interactions with the court that he describes as "magical." They stem from the court, as an authority figure, showing interest in the veteran by providing support when the person before them is doing well and criticism when necessary. He says these interactions lead to "epiphany moments" for veterans who decide it's time to put their "life back in order." For those veterans, the case is no longer merely about getting the charges dismissed. It's about making real changes in one's life.

Atlantic and Cape May counties Presiding Criminal Part Judge Bernard E. DeLury, Jr. heads the VDP in those counties. He is a retired U.S. Navy Captain. Judge DeLury notes veterans respond to leadership. He credits the collaborative leadership of the VDP team for Atlantic County's accomplishments. He says, "we show the veteran where he or she can go with their life, and instill in them a desire to get there."

Here are what some recent Atlantic County graduates had to say about the program. One graduate called herself "living proof that you can go down a bad path. But you don't have to stay there." Her lawyer told the court the VDP helped "turn her life around." Another graduate said the program "saved my life" and thanked the team "for giving me a second chance." A third urged other VDP participants to "keep believing and trust people who are trying to help you. They will help you turn your dreams into reality."

For these graduates, the program was truly transformative. When veterans like them rejoin society as law-abiding and productive members, everyone benefits.

There is no reason why these results cannot be achieved in every county.

### Room For Improvement

In just over four years, the program has demonstrated great success where it has been embraced. Yet, it is capable of so much more. What is needed, however, is a statewide commitment and comprehensive administration.

Institutionalizing the approach in the Superior Court, as with the Drug Court, would increase utilization through a statewide mechanism to draw attention to the program as an option, and in the municipal courts similarly through Central Municipal Court Management.

At the same time, a commitment from the New Jersey Attorney General to implement the program statewide is necessary. Counties like Atlantic, Bergen, Cape May, Hunterdon, Middlesex and Ocean have shown a commitment to VDP. Directing all County Prosecutor Offices to implement the program is critical to its expansion, its effectiveness and to ensure its availability to all qualified New Jersey veterans.

Achieving the full potential and maximizing the immense value of the VDP should be a statewide goal. President Abraham Lincoln said it best in his Second Inaugural Address delivered near the end of the Civil War: government has an obligation "to care for [those] who shall have borne the battle."<sup>11</sup>

### Conclusion

While service members are dedicated to the proposition that they leave no fallen comrade behind, our system of justice should do no less for those who place everything on the line to preserve our freedoms and our Rule of Law. Let us strive to improve on this rehabilitative lifeboat. Because in the end, as Atlantic County's VDP has shown us, we all will be better for it. ♡

### Endnotes

1. *N.J.S.A.* 2C: 43-23, et seq.
2. *N.J.S.A.* 2C: 43-24.
3. *N.J.S.A.* 2C: 43-29.
4. *N.J.S.A.* 2C: 43-28.
5. *N.J.S.A.* 2C: 43-26b (1).
6. *Id.*
7. *N.J.S.A.* 2C: 43-26d.
8. *N.J.S.A.* 2C: 43-26e.
9. *N.J.S.A.* 2C: 43-26n.
10. *N.J.S.A.* 2C: 43-26m.
11. President Abraham Lincoln, Second Inaugural Address, Washington, D.C. (March 4, 1865). The U.S. Department of Veterans Affairs (VA) adopted these words as its motto and had them inscribed on the front of its headquarters at 810 Vermont Avenue, NW, Washington DC. (VA Fact Sheet, "Celebrating America's Freedoms").



# The Good, The Bad and the Ugly

## New Jersey's Property Tax Exemption for 100% Disabled Veterans

By Lt. Col. Sally Stenton USAF (Ret.)

**T**he good: New Jersey is one of only 17 states that gives a property tax exemption for 100% permanent and total (P&T) rated disabled veterans.<sup>1</sup> This is especially good news as New Jersey has the highest effective real estate property taxes in the country.<sup>2</sup> According to a June 2021, NJ Spotlight News article, "Last year, the average property-tax bill in the state rose to a record high of \$9,112, according to the state Department of Community Affairs."

The bad: The time it takes, sometimes years or decades, for the Veterans Administration (VA) to grant the 100% P&T rating. The ugly: New Jersey law, both statutory and case, decrees the property tax exemption starts from the date the VA notifies the veteran of their 100% P&T rating and is not retroactive to the actual effective date of the rating.

The good deal New Jersey gives 100% P&T disabled veterans (there is a 100% temporary rating that can last up to five years), is prospective in nature. Consequently, it's bad news for veterans who have had to argue for more than a year to get this rating, because with New Jersey's extremely high property taxes, they rarely will get reimbursed for past property taxes. For example, a veteran files a claim Jan. 1, 2015 and through the process finally gets rated 100% on June 30, 2020. The VA makes their effective date for compensation purposes Jan. 1, 2015. However, for New Jersey property exemption purposes it starts on June 30, 2020. Clearly this will save the veteran a sig-

nificant amount of money for tax year 2020 and in the years ahead. Conversely, because of the five-year delay in the rating, the veteran has now paid likely thousands of dollars in property tax that they will likely never recoup. Why is this, can anything be done about it, and should anything be done about it?

In New Jersey until 2020 the property tax exemption applied only to a veteran whose 100% rating was from a "wartime service-connected disability." Thereby, it excluded any New Jersey veteran who served our nation honorably from the exemption, despite their 100% rating, if their service was during "peace time" (the Cold War, for example). Thus, the New Jersey Legislature in January 2020 broadened the exemption (via passage of P.L. 1971, c.398) concerning the character of the qualifying service and expanded from "wartime service-connected disability" only and added the phrase "or from other service-connected disability declared by the U.S. Veteran's Administration or its successor to be a total or 100% permanent disability and not so evaluated solely because of hospitalization or surgery or recuperation." This is good news for the 100% disabled veteran who also was a New Jersey resident and paying property tax on their home. However, regardless of how long the "non-wartime service" veteran had had that rating, the property tax exemption started in 2020 and was not retroactive. It has and will likely lead to litigation for these veterans who have had this rating before 2020 and want the years of property taxes refunded.



Another group to consider is the “Blue Water” Vietnam veterans who are finally being compensated for their presumptive conditions (diseases the VA presumes were caused by exposure to Agent Orange). Many fought for years and decades to be rated for diseases including ischemic heart disease, prostate cancer, diabetes and others. The VA is processing these “Blue Water” claims. Regardless of the rating, the effective date may go back to the initial claim for the presumptive condition(s). Both the New Jersey 100% disabled veteran from the newly expanded definition or the “Blue Water” Vietnam veteran who gets rated 100% years after the fact will have to sue, (if their taxing municipality does not grant retroactive exemption prior to the notification date, which is rare). Bluntly stated, they will lose.

New Jersey property tax is governed by the state law. It’s administered by Title 54 Taxation, Subtitle 2, Taxation of Real and Personal property in General. Federal law controls veterans’ compensation benefits. It’s the VA which determines the veteran’s disability rating. The VA is the second largest department, after the Defense Department, in the federal government. The VA is a monolith, and veterans law extremely com-

plex and complicated. Filing a claim or appeal is a maze of forms, deadlines, and offices. To any veteran trying to navigate the claims and appeals processes alone: good luck. Even what seems to be the simplest of VA benefits claims can and often does turn into a long and drawn-out effort. The goal is not to get every veteran a 100% P&T rating. The U.S. Census 2019, found just fewer than 322,000 veterans living in New Jersey in 2019. In 2018 there were an estimated 1,500 New Jersey veterans entitled to the property tax exemption. Again, according to the U.S. Census in 2021 New Jersey had a population of just over 8.8 million people and 64% of them were homeowners. This means between .03% and .04% of New Jersey’s homeowner population is exempt from property tax based on being a 100% P&T disabled veteran. However, the goal is to get every New Jersey veteran who applies to the VA the rating they are entitled to, as quickly as possible. Also, the goal is to ensure each New Jersey veteran gets the benefits they are entitled to under New Jersey law in accordance with their VA rating.

Truly New Jersey is a veteran-friendly state, but our veteran population has been shrinking. A 2018 Veteran’s Day article on NJ.com stated New Jersey had over “400,000 veterans” making up nearly 5% of our population and ranking 19th in the nation in total number of veterans. According to the 2019 census, in about a year, our veteran population decreased by about 80,000, and by June 2021 our veteran population was 302,000. We want to keep the veterans we have, and as those in service get ready to separate, we need to give them incentive to stay here. New Jersey has many military installations. In fact, it has the world’s only tri- service installation: Joint Base McGuire-Dix-Lakehurst. New Jersey has many veteran benefits. The property exemption makes New Jersey a more affordable place to buy a home. More-

over, if the veteran is retired, their retirement pay is not taxed here. New Jersey has the third-highest median household income right behind Maryland and Massachusetts, and it’s ranked No. 2, second only to Massachusetts, for the best public school system in the nation.<sup>3</sup>

Here’s where it gets ugly. Why does New Jersey law, statutes and case law, continue to fight for the municipality and not the veteran on retroactive repayment of property taxes when it’s the VA, that has been the cause of the delay in the 100% rating? New Jersey is such a veteran-friendly state, the population of 100% disabled P&T veterans is so small, and state statutes are written so the property taxes may be returned to the date of the rating. “The governing body of each municipality, by appropriate resolution, may return all taxes collected on property which would have been exempt had proper claim in writing been made therefor in the manner provided by P.L.1948, c.259 (C.54:4- 3.30 et seq.). The governing body of each municipality, by appropriate resolution, **may** also return to the veteran ...all property tax payments made since the time of the veteran’s actual disability....”<sup>4</sup> (Emphasis added). Moreover, the VA, according to [benefits.va.gov](https://benefits.va.gov), presently has over 600,000 pending claims. The vast majority with a 100% P&T rating will take over a year and likely many years to finalize. This will cost a homeowning veteran thousands and maybe tens of thousands of dollars in property taxes.

The veterans property tax exemption was enacted more than 70 years ago and has had more than a dozen amendments. Unlike other taxes breaks, the veterans exemption is not paid by the state, but is absorbed by all the other taxpayers in the municipality. In 2018, “[The] data shows that 10,163 households received the disabled veterans’ exemption last year. The average value of the exempt homes was just over \$250,000, meaning about \$2.6 billion in



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homes were excused from property-tax payments. New Jersey had more than \$1 trillion in taxable property.”<sup>5</sup>

There are only two cases on point with the issue of denying retroactive refunds: *McDowell v. Pine Hill*<sup>6</sup> and *Del Priore v. Edison Twp.*<sup>7</sup> In *McDowell* the plaintiff was granted 100% P&T rating on March 16, 1989, with an effective date of April 22, 1980. In 1989, Mr. McDowell requested for the property tax exemption to retroactive to April 22, 1980. The borough denied the application. Plaintiff filed a complaint in federal district court alleging the borough violated his due process rights and violation of the equal protection clause under the 14th amendment because his property rights were extinguished solely due to the delay in the VA’s decision-making process. The Court found McDowell’s cause of action was not extinguished by the delay in the VA’s decision-making process, because he had recourse. He could apply directly to the borough for retroactive application of the exemption. The borough asserted the monies collected from the plaintiff during the 1980s had been distributed to other taxing authorities or spent as part of the budget. The borough was not on notice of the plaintiff’s request for retroactive exemption. Therefore, the taxes were spent as part of the yearly budget, rather than segregated in anticipation of McDowell’s retroactive claim. The Court held “New Jersey’s statutory procedure, by which the VA’s finding of total disability conclusively determines the applicability of the homestead exemption and by which municipalities determine its retroactive applicability, does not violate the due process or equal protection clauses of the fourteenth amendment to the United States Constitution.”<sup>8</sup> Perhaps most importantly for our purposes, the Court determined, “The Borough, therefore, properly retains discretion to deny plaintiff’s request for retroactive application for

the homestead exemption under N.J. Stat. Ann. § 54:4- 3.30a.”<sup>9</sup> They based this on N.J. Stat. § 54:4- 3.32, return of certain taxes collected on exempt property, which states in pertinent part, “The governing body of each municipality, by appropriate resolution, **may** return all taxes collected on property which would have been exempt had proper claim in writing been made therefor in the manner provided by P.L.1948, c.259 (C.54:4-3.30 et seq.).” (Emphasis added).

In *Del Priore* the facts are a bit different, but the same result. Mr. Del Priore was granted his 100% rating in 2004 retroactive to 1997. He applied to Edison Township for the retroactive exemption but was denied. He sued, claiming other veterans similarly situated had been granted the retroactive exemption. This had been the case, but with the plaintiff’s application the township changed its previous policy to grant fully retroactive refunds of taxes paid by 100% disabled veterans. The Court found this change had a rational basis and didn’t violate the equal protection clause of the U.S. Constitution. The Court also found it had to balance the special deference accorded war veterans in New Jersey’s state constitution with the deference given to municipal governments to manage its financial affairs. Succinctly stated, “There may be and frequently is a gap in time between the effective date of disability and the date of the eventual VA determination of total disability. The Legislature has nevertheless given each municipality the discretion to determine to what extent a veteran will be refunded taxes prior to the date of his application. N.J.S.A. 54:4- 3.32.”<sup>10</sup>

In the end, it’s a good thing that New Jersey is one of an only a handful states that honors those who served and sacrificed, with the property tax exemption. While it might seem bad that the VA can take years to grant the 100% rating, realistically it’s not. It’s important they get each veteran the correct rating. Those

with the 100% rating get the most compensation. In FY2020 the VA paid out \$9.9 billion in compensation to disabled veterans, including \$3.6 billion to the 100% rated. They may not get back years of property taxes, but they do get their past-due VA compensation. At first glance it might appear ugly that law, the court, and the taxing authorities don’t automatically retroactively exempt these disabled veterans to their rating effective date. It is not. Each municipality must be fiscally fair and responsible to all its taxpayers. If they gave back this money years after being spent, all the other taxpayers in that community must make up the deficit. The repayment may create a windfall for one while burdening the rest unnecessarily. What appeared ugly is actually attractive for all. The veteran is exempt from the property tax burden and the municipality can plan to absorb that cost in future budgets, and still be fair and just to all their taxpayers. ☺

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## Endnotes

1. NJ Constitution, Article VIII Section 1, Para.3 as amended November 3, 2020; N.J.S.A. 54:4- 3.30 et seq; N.J.A.C. 18:28- 1.1 et seq.
2. Hubbard, Kaia. “States with The Highest Property Taxes.” *U.S. News and World Report*, February 23, 2021.
3. Morad, Renee. “States with The Best Public School Systems.” *Forbes*.
4. 54:4- 3.32 Return of certain taxes collected on exempt property.
5. O’Dea, Colleen. “The List: Thank You for Your Service —Property-Tax Relief for Disabled Vets.” *NJ Spotlight News*, March 8, 2018.
6. *McDowell v. Pine Hill*, 736 F. Supp. 1313 (D.N.J. 1990).
7. *Del Priore v. Edison Twp.*, 26 N.J. Tax 502.
8. *McDowell*, *Supra*, at 1321.
9. *Del Priore*, *Supra*, at 522.
10. *Del Priore*, *Supra*, at 522.





# Military Minefields in Family Law Cases

By Patricia E. Apy and Michael J. Fleres

**A**t first blush, representing a current or former member of our armed forces may seem to present little challenge. The vast majority of military members rarely present with the type of matrimonial case that most attorneys would label as substantively “complex.” You will rarely find “high assets,” closely held business interests, or strategically written lengthy pre-nuptial agreements. As a result, you may take a quick look and decide that this is a case that your youngest and most inexperienced associate will be able to cut their teeth on.

However, there are unique considerations present in cases which involve military members, and missing these issues is the equivalent to walking into a minefield—the damage can be catastrophic for both the client and the attorney.

Here is a map of the minefield, identifying where the danger lies, and pointing the way toward a safe traverse.

- **Remember to look first to federal law:** Title 10 of the United States Code outlines the role of armed forces in

the United States Code. It provides the legal basis for the roles, missions, and organization of each of the services as well as the United States Department of Defense. Title 10 of the United States Code contains the enabling legislation for the Army, Navy and Marine Corps, Air Force and Space Force, and Reserve Components. Title 32 outlines the related but different legal basis for the roles, missions, and organization of the United States National Guard in the United States Code. Also, effective March 1, 2003, the United States Coast Guard became part of the Department of Homeland Security. However, under 14 U.S.C. § 3 as amended by section 211 of the Coast Guard and Maritime Transportation Act of 2006, upon the declaration of war and when Congress so directs in the declaration, or when the President directs, the Coast Guard operates as a service in the Department of the Navy.

You will remember from law school that federal law is preemptory; therefore, it is quite likely that federal legislation exists that at least informs, if not governs, any issue which may be in question. If you look only to New Jersey



law, not only will you not be giving accurate legal advice, but you may also be inadvertently alienating assets or waiving rights on behalf of your client.

- **Military legal issues impact on both service members and their former spouses:** There are rights and privileges which may be available to current and former service members and, independently, to their spouses and dependents. Whatever side of the case you find yourself on, there are unique steps which must be taken to protect each party's interest. Keep in mind that tools you might normally use—standard agreement language and even child support guidelines, cannot be used without review and modification. The Army, Navy, Marine Corps, Air Force, and Coast Guard all have their own family support requirements which all differ in some way from New Jersey's child support guidelines. All branches of the Armed Forces provide for administrative sanctions and/or discharges, as well as criminal sanctions for non-payment of family support.
- **Know that what the Service-members Civil Relief Act (SCRA)** is and evaluate the steps which you must take to address its protections. The SCRA is a federal law that provides protections for military service members as they enter active duty. It applies also to Reservists and members of the National Guard when activated under Title 10. The SCRA states that for civil court proceedings where a defendant service member has not made an appearance and it seems that they are in military service, a court may not enter a default judgment against that defendant until after it appoints an attorney to represent the interests of that defendant service member.<sup>1</sup> The court must stay a civil court proceeding for at least 90

days if that appointed attorney has been unable to contact the defendant service member, or if there may be a defense to the action that requires that the defendant be present.<sup>2</sup> The act states that a stay shall be granted upon the service member's application.<sup>3</sup>

The SCRA provides a host of protections, from an automatic stay of proceedings, to relief in the area of housing and mortgages, as well as a cap on the accrual of interest. The act applies to any civil action or proceeding, including any child custody proceeding. When not complied with, relief can take the form of a complete reversal of orders and vacating of judgments, to significant money damages.

- **Every child custody case should be treated as an interstate case:**

Care must be taken in cases involving active-duty service members to address the inevitable interstate, and sometimes international, relocation of a military parent (or parents). Where to pursue a custody order is often a key concern for the service member. Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the court with original jurisdiction over the child typically will retain jurisdiction for purposes of later modification. "Home state" is defined under the UCCJEA as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." Where will depend on what type of order the service member is seeking: (e.g., modify an existing order, take temporary emergency jurisdiction, enforce an existing custody determination, or make an initial custody determination).

Many states, including New Jersey, have passed laws addressing the

unique circumstances around military divorce or custody that tend to impact families with active duty servicemembers. Significantly, New Jersey's Military Custody Statute prevents courts from making final child custody decisions when a parent is deployed for 30 or more days due to active military duty or extended service-related treatment.<sup>4</sup>

You should review (and request in discovery) the DoD required Family



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Care Plan. The Family Care Plan prepares the servicemember and the family in advance for the servicemember's deployment and reassures a deployed servicemember that everything is taken care of at home, minimizing family-related stress and enabling the servicemember to concentrate more fully on his/her mission. You should ensure that the intended instructions given in the Family Care Plan regarding the care of dependents during training, deployment or extended service-related treatment is legally sound and enforceable.

- **Family Support requires specialized knowledge and care in drafting:** Military regulations and federal law have a significant impact on issues of family support not applicable to the civilian population. You must be able to understand the Leave and Earning Statement (LES); to quantify the provision of services and military benefits; and to excise a case from the New Jersey child support guidelines recognizing the military cost of living, benefits, and housing issues. Health care, taxable and non-taxable income and wage withholding are all subject to specific rules. For example, the common device of securing the payment of family support through life insurance can be very tricky. The United States Supreme Court, in *Ridgway v. Ridgway* directs that a service member can, at any time, designate the beneficiary of their choice, regardless of court orders or agreements to the contrary.<sup>5</sup> Further, commercial policies often have exclusions regarding "acts of war." Therefore, it is necessary to obtain a separate specialized policy, to protect family support obligations in the event of death. Remember too, that the New Jersey Child Support Guidelines - APPENDIX IX-B includes as "gross income": "the value of in-

kind benefits." Therefore, in addition to a service member's military pay, their Basic Allowance for Housing (BAH), Basic Allowance for Subsistence (BAS), and Variable Housing Allowances (VHES) are considered income for the purpose of determining child support. These forms of income are not subject to tax.

- **Military Retirement and Survivor Benefits are not for the faint of heart:** Military retirement benefits are not simple pension plans, are subject to narrow jurisdictional rules, have complicated enforcement problems, and cannot be divided by using a standard domestic relations order. For the most part, errors made in the division of such benefits cannot be later fixed or changed in a state court proceeding. By far, this is the area of the most significant malpractice claims arising from military divorces. Both the valuation process, the language of the agreement, the designation of survivor benefits, and the drafting of orders require specific reference to federal statute and regulations. The failure to file a simple form, within a very limited period window of time, can forever prevent the receipt of benefits for a dependent spouse. "Military retirement" includes more than a monthly check. Defined benefits, Thrift Savings Plans, medical care, and commissary privileges are all included. The timing of filing for divorce could inadvertently disentitle a dependent spouse from benefits. Further, retirement comes early in the military. As a general rule, enlisted personnel, warrant officers, and commissioned officers are eligible to retire after 20 years of active-duty service. Simply put, if you are not prepared to spend some serious time in the weeds on this, partner with counsel who do, and seek assistance in negotiating, valuing, and preserv-

ing military benefits from those who have the demonstrated expertise in doing so.

- **Cases involving military members and veterans require specialized issue identification.** How do I serve a sailor on an aircraft carrier? Is the service member considered "domiciled" in New Jersey if they are stationed here? Does the maternal grandmother of a deployed servicemember have a right to delegated visitation under New Jersey law in the case of deployment? What is the Lautenberg Amendment? What special considerations do I have to consider in representing an LGBTQ servicemember? What is the relationship between Military Retirement Benefits and Veteran's Disability Benefits? Who controls death benefits payable to dependent children if a service member is killed in action? How do post 9/11 G.I. Benefits available to dependent children impact my client's contribution to college expenses? Can my client unilaterally move with the children to another state while a service member spouse is deployed? What is the 10/10 rule?

Representing those who do so much for our country is rewarding and can make an enormous impact upon them and their family. However, make sure you are equipped to meet the legal challenges that accompany that work. ♫

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## Endnotes

1. 50 U.S.C. § 3931(b)(2)
2. *Id.* at § 3931(d)
3. 50 U.S.C. § 3931(b)(2)
4. N.J.S.A. 9:2-12.1
5. *Ridgway v. Ridgway*, 454 U.S. 46 (1981)





# War Stories

## One Attorney's Experience Serving in the Military and Building a Life as a Civilian

By Christopher J. D'Alessandro

### My First Day of Law School...

It is August 2014 and my first-year classmates at Rutgers Law School prepare to take their seats on day one of their legal education. Books crack open with a snap, laptops whir to life as they power up, papers shuffle, fingers tap with nervous energy and then the ambient chatter abruptly drifts off to silence as the professor enters the room. "The first day of law school," a momentous day that will likely remain etched in memories for a lifetime. Meanwhile, 4,000 miles away I'm on a logistical support mission in Germany with the National Guard and I was dealing with a far less momentous first: my first time dealing with a shower infested with intestinal worms.

I was part of the support team for a large multi-national training exercise and an "intestinal worm" infestation had been reported in the barracks of a partner-nation troop contingent. It was ostensibly my job to fix any barracks related issues, so my superiors armed me with a bottle of murky liquid marked with brightly colored warning labels prominently featuring the skull and crossbones, warning labels which of course, were all in German and hence indecipherable. Sensing

the need for due diligence, I questioned the wisdom of applying this toxic liquid to a shower floor and was summarily told, "Just deal with it, Captain!" I had been assured this mysterious concoction would address the worm infestation; however, being a cagey quartermaster, I harbored serious doubts.

There I stood in a decrepit barracks shower room 4,000 miles from home, deciding whether to apply a potentially deadly substance to a shower floor, where one could expect unwary bare-footed soldiers to tread. I decided it was prudent to simply place the bottle unopened in an out-of-the way corner, slowly back away from the infested shower, and cordon off the area with tape. As the adrenaline from this epic battle with intestinal worm horde subsided, it occurred to me that this day was also, (technically at least) my own first day of law school...

### The Journey Begins at the Beginning...

In 2001 I was a parole officer working out of the Clifton district parole office. It was a good job, I was making decent money and enjoyed working at what's been called "the best job in law enforcement nobody knows about." To make things even sweeter, Clifton was my hometown, I lived less than a mile from the office and my position came with a take-home car. I had the military to thank for this job, since despite lacking a bachelor's degree, I met requirements due to two years of Military Police experience gained in the Army. Although I owed my job to that military experience, my initial military service was unfulfilling; I had been out for years, and had no intention of reenlisting.



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On the morning of Sept. 11, 2001, I was driving to parole headquarters in Trenton along the Turnpike when reports began to come in of a plane crashing into the World Trade Center. At first, I thought it must be an accidental crash, but when reports of a second large plane crashing began pouring in, I realized it was an attack. I pulled a U-turn at the next exit and headed back up the Turnpike to the parole office in Clifton. As I drove north on the Turnpike, I observed a billowing tower of smoke from the direction of the lower Manhattan skyline. The two-way radio in my state car went inoperative when the first tower fell because the repeater antenna had been located there. A confused garble of false reports were coming in of state offices being attacked, so a few of us stood by and guarded our office that day while we watched the aftermath of the attack unfold on a tiny portable TV.

On Sept. 12, the state requested volunteers for ground zero to assist with recovery operations. Several of us spent upwards of 16 hours working at ground zero on Sept. 13; however the “recovery operations” were moot. I thought I had “seen it all” in my few years working at parole, but after that one day at the World Trade Center site, I did not volunteer to go back. I did some security on the ferries and trains, but I did not return to the site.

As I waded through the knee-deep papers strewn on the ground that day, I picked one up and realized they were financial documents blown out of the towers. It occurred to me that all of this money couldn’t buy these people one more second of life. I thought about how as a kid I had been stuck in an elevator at the World Trade Center for an hour once, about the times I visited the observation deck, and all the times I had walked by staring up at, or admired the twin towers on the skyline. I remember seeing SWAT teams disgorging from boats near the site, bristling with

weapons and laden with body armor, but with a stunned look in their eyes, the same look most of us probably had. I started thinking, “all of this power, all of these weapons and we (law enforcement) are powerless to help here.”

Something shifted in me that day. I lost my place in the world. I later read an account of a man who had been swimming in the ocean when the deadly tsunami hit in 2004. He had been swimming off the shore of the small island he lived on off the coast of Thailand. He had felt what he thought was a swell and it was so gentle he thought nothing of it. When he surfaced a moment later, he didn’t know where he was, because the island he lived on was gone, having been consumed by the tsunami. He described how he found himself adrift and confused in a suddenly still, barren sea, having lost all sense of place. That’s how I felt, as if I started my day in the comfortable world I knew, and emerged into a world that was alien, hostile, and no longer safe. I could tell you about what it was like there that day, but why bother? It won’t change anything, so let’s just say it was bad. Bad to the point that whenever I hear the hackneyed slogan, “never forget,” I think to myself, “I really wish I could.”

Time went by and the war started in Afghanistan, and then in 2003 the Iraq war kicked off with the “shock and awe” air campaign, cruise missiles striking Baghdad live on our TVs. I was now in my mid-30s, and I had been promoted to Sergeant on my job. I was doing well financially, I lived in a comfortable home, and I was content with my life. That contentedness soon eroded into disquiet as I watched the war rage on in Iraq. I felt I was just sitting there, comfortable and passive; other people were doing the heavy lifting for the nation while I sat on the sidelines of history. My experience with 9/11 had filled me with a need for closure, and although I didn’t know what attaining that closure

would entail, I realized being comfortable at home while others fought and died for my freedom wasn’t going to do it. I also saw that many young soldiers were being killed, while I was older, single, with no children and I was still in good physical condition. I had military and law enforcement experience that could be put to good use. I thought that maybe if I volunteered to go, one of these young guys with a family wouldn’t have to. In 2004, after a 12-year break in military service I decided to reenlist. My recruiter was bluntly honest with me, saying up front, “you know if you join, you’re going to go to Iraq right?” Not only did I know it, that was one of the primary reasons I wanted back in.

In January 2005 I reenlisted in the New Jersey Army National Guard, and in March 2005, on my 36th birthday, I started Officer Candidate School at Seagirt, New Jersey. And that my friends and colleagues, is where my journey began. It began at the beginning, at the decision point nexus shared by most modern veterans, the attacks of 9/11.

### **You’re Home, and Then You’re Over There...**

In 2007 I was on military leave from my Parole job for Basic Officer Leadership Training at

Fort Benning in Georgia. As I neared the mid-point of my six months of training, I learned I had earned a promotion to Lieutenant at Parole. I also learned that this would necessitate me moving from North Jersey, where I resided most of my life, to the hitherto unknown reaches of South Jersey as soon as I returned home from training. Toward the end of my training, I flew home for the weekend and quickly rented a house. I returned from training and a few weeks later I was living in a new place, starting a new job. Less than a month later, the Guard informed me I would be deploying to Iraq in mid-2008.

The next few months were a blur of



pre-deployment training and preparation with my Guard unit. I was sometimes gone for up to 30 days on pre-deployment trainings. Simultaneously I was still adapting to the new role and responsibilities at Parole, all against the backdrop that I would soon be on leave for over a year. I moved out of my rental just prior to deploying, moved in briefly with family, staying there until it was time to deploy. The days flew by, and it seemed like one day I had been sitting in my large, comfortable office at work, and the next I was stepping off a plane into the 125-degree heat of the tarmac in Kuwait. One day I was home, and the next I was “over there,” in the sandbox. The feeling was disconcerting and difficult to qualify, the fundamentally life-altering experience of going off to war.

### **You're Over There, and Then You're Home...**

In the summer of 2009, I returned from the deployment to Iraq and after a brief respite, I returned from military leave to my job with Parole. My rank at Parole came with a large, comfortable office, and while my physical body was sitting at that desk, my mind was still in the desert.

In Iraq I had worked months of 12-hour shifts as a Battle Captain in a busy Brigade operations center. The operations center looked very close to how most civilians think a military command center should. A large, dimly-lit amphitheater, with tiers of computer stations manned by serious looking troops, with large screen monitors mounted on the walls. Down on the floor, at the center of it all was the Battle Captain's desk, and that's where I worked for 12 hours every day dealing with anything and everything that came through that operations center. It was a buzzing hive of activity with little downtime besides quick visits to the chow hall, or to sneak in a quick workout at the base gym that was a few meters away across the street.

Living conditions in Baghdad were drab, dusty, cramped, hot and hectic. The windowless concrete room I slept in had a ceiling 5 feet high, which was akin to sleeping in a cave. Days there flashed by in one 12-hour shift after another until one day became indistinguishable from the next. There is a constant backdrop of roaring generators, the grind of armored vehicles as they lumbered down the streets, and occasionally the amplified call to prayer broadcast over crackly loudspeakers from the local mosque. Sometimes there is the unmistakable chainsaw-like sound of the 20mm counter-motor batteries firing, their arcs of tracer rounds splashing up into the night sky. Every now and then there is also the ground-shaking “thump-whump!” impact of mortar rounds or rockets. The sound of birds waking up and chirping in the early A.M. each morning signaled my 12-hour shift was close to an end.

On my rare days off I hop on the shuttle bus and ride on the ring-route as far away as I can from the compound I work on. If I'm lucky my buddy snags a vehicle, and we can explore the huge base complex. Not much to do other than workout or hit the small shops run by the locals for trinkets, or \$1 bootleg DVDs of the latest movies released in theaters back home. It all became a blur of work, eat, workout, sleep, and then work some more. One day after another, until the day it was over and I found myself sitting on a C130 knee-to-knee with who-knows how many other troops flying out of Iraq.

And what seemed like overnight, there I was; back in my office at Parole, cold and uncomfortable after the heat of Iraq, sitting in my big office chair, the room so quiet with the whir of the air conditioner the only sound in the office. My desk was clear, the phone was silent, there were no harried voices crackling from a radio, no briefings, no reports, and my shift was an incredibly short eight hours. I could even take a

lunch break without asking for permission. The ever-present dust was gone, the constant hum of mindless activity was gone, the monotonous tasks were gone, but the sense of urgency was gone as well. I sat there, hands folded in front of me, and tears formed in my eyes, because I realized this office and the civilian world around me, was now as utterly alien as Iraq had been when I walked off a plane in Balad. It seemed like one day I was over there, and the next I was back. Once more I had dunked my head below the surface and remerged in an alien world.

### **Yes, There's Still a War Going Over There, and I'm Going Back to It...**

Two years after I returned from Iraq I was working on a gangs/guns/drugs task force in Camden when a co-worker friend who was also in the Guard asked me if I wanted to deploy to Afghanistan with his unit. Now that may seem like an easy answer for some of you, as in an easy “no.” However, I welcomed the opportunity.

Once again, the impending deployment necessitated a move out of the apartment I was living in, and this meant returning my cable box. I went to the local cable office and the clerk asked me why I was turning in my cable box early. I explained that “I am deploying with the Army to Afghanistan,” she looked at me quizzically and asked, “there's still a war going on there?” I assured her that that yes, there was indeed “still a war” in Afghanistan. The sad reality is that by 2012 most Americans outside of service members and their families, had forgotten that 100,000 troops were still deployed to Afghanistan. In 2012 I deployed to Kandahar, Afghanistan, and spent the next nine months as part of a logistics team tasked with supporting the southern region of operations in Afghanistan.

Unlike my last deployment, however, I had a fiancée with plans to marry upon

my return and I had purchased a home using a no-money-down VA loan. I had a robust support network of family and friends, and a lot to look forward to when I came home.

### **The Circle Closes...**

The reasons I sought a second deployment are complicated. My experiences at the World

Trade Center in 2001 fueled a need for closure. My deployment to Iraq had been difficult, but I wanted to deploy again because I simply wasn't ready for a full return to civilian life. The closure I was looking for, I had not found in my deployment to Iraq.

In the mid-1970s my father had received an American flag when he became a citizen, and when I was a child, he passed that flag to me. In 2008 I flew that flag over Iraq, and in 2012 I flew that same flag over Afghanistan on Sept. 11, 2012. When that flag went up over Afghanistan on 9/11, I finally felt closure. Closure is not to be confused with revenge. It was never about revenge. It was about a journey from where the war started for me, that ended where the events that shaped "our" wars were placed into motion.

### **You're There Again, Then You're Home Again, and Then You're a Lawyer...**

In 2013 I returned to my job at Parole after the deployment to Afghanistan. Having learned from my first post-deployment experiences, I took a longer period of leave before returning to work, facilitating a smoother transition to civilian life. I returned to my home that I had completely renovated with money earned on the deployment, and I married my wife, Dr. Patricia McKernan, shortly thereafter. Although I enjoyed my job with Parole, I was ready to retire and move on to whatever was next. Having that robust support network in place, having roots of home ownership, family and a strong, successful woman as my

wife infused me with confidence and hope for the future that the experiences of my first deployment had drained from me. The good life I had attained gave me inspiration to think in larger terms about what I wanted for the future. After considering various options, I decided to attend law school, retire from law enforcement, and pursue a legal career.

The law interested me for several reasons. While on deployments, I had worked in headquarters units and observed that lawyers were heavily involved in formulating high-level policy. The law also touches on justice, and inherent in the concept of justice is preservation of the rule of law within our society. After experiencing places where the rule of law had ceased to exist, where "might made right," preserving the rule of law presented as an admirable goal. Law school was also practical financially, since the New Jersey National Guard offers a tuition waiver program for Rutgers (and other state schools) that allowed me to attend law school tuition-free.

I began law school in 2014, shortly after returning from the brief overseas training mission where I did mortal combat (by way of a prudent tactical retreat) with the dreaded intestinal worms. In 2015, I retired from my job with Parole and went to work part-time in law enforcement while attending Rutgers Law Camden. In 2018, I graduated from Rutgers Law, then from 2018-2019 I was a fellow with Rutgers Law Associates, working under the guidance of Professor Andrew Rothman. In 2019 at the conclusion of our fellowship, myself and two other Rutgers Law fellows, Keith Peterson and Linwood Donelson, started the firm Donelson, D'Alessandro & Peterson in Woodbury.

This "war story" is of course, my own, yet hardly unique, as millions of men and women answered the call to service over 20-plus years of the global war on terror. Contrary to the endless

negative media depictions of veterans cast as "damaged," or "dangerous," veterans are largely successful, well-grounded people who put down deep roots of service in our communities.

### **"War Stories?"**

Every veteran has their own war stories. There's a lot I've left out of mine here, and pointedly, I've skipped over details of the deployments themselves. You might be thinking, "War stories? Huh? This guy didn't even talk about what he experienced in the war." Well, I am no war hero, and I saw no direct combat during my deployments, so I won't be spinning up any grandiose tales about exploits in Iraq or Afghanistan. I'm not a big fan of pride on principle, but I did my part well and I have no regrets. I tell a few stories about my deployments, but you probably wouldn't find those all that interesting. If you're ever interested however, in hearing about how our section managed simultaneous deliveries of a few hundred thousand cases of bottled water, how I spent a cold snowy day in Afghanistan searching for an irate General's lost cross-fit gear among thousands of crates in the Army's largest supply yard, or want to hear about the absurd lengths troops take to scam supplies of scarce items such as protein mix and ice, let me know. In all seriousness, few troops who deployed to Iraq, Afghanistan, and lesser-known battlegrounds in the war on terror were ever far from harm's way, and there are many stories I could tell that have tragic endings. Instead, I offer you these "war stories" as my story, not by regaling you with contrived "war is hell" tales of deployments, but by sharing my journey from 9/11 to veteran of the global war on terror in the hope of building understanding. It is my hope that in doing so, I've done my small part to bridge the gap of understanding between veterans and non-veterans within our society. ۞



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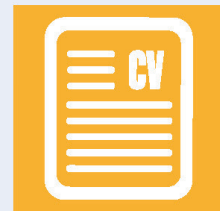
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