A Primer on Veterans' Benefits for Legal Assistance Attorneys

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A soon-to-be ex-wife of a separating military member comes into your office for legal assistance. She has the proverbial "quick question," which you know will be anything but quick. She hands you a completed divorce kit and informs you that her husband is going to be an active reservist and then retire. He has been to the base hospital several times since he returned from Desert Storm and she wants to know how she can find out what benefits she and her two children may be entitled to receive from the Department of Veterans Affairs (VA). She would also like to know what to do if her husband fails to pay either her alimony or child support. She has heard that there is something called a VA pension and wants to know whether that, like a military pension, is marital property subject to division in her divorce. Before you reach for the lawyer referral service phone number, there is some guidance you can give her.

Although this article does not explain the myriad of benefits administered through the Department of Veterans Affairs, it will provide an overview of the key areas likely to be encountered during legal assistance, including VA programs dealing with disability payments, access to medical care, home loans, and education benefits. The final section briefly discusses the impact of discharge characterization on various VA benefits.

I. DISABILITY COMPENSATION AND PENSION BENEFITS

Air Force judge advocates must be familiar with basically two important types of VA payments, disability compensation payments and pension benefits. Disability compensation payments are paid to veterans who are disabled by injury, illness, or disease incurred or aggravated while on active duty.[1] Pension benefits are paid to veterans with low incomes and low net worth who are disabled for reasons that do not relate to their military

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[1] 38 C.F.R. § 3.4(b) (1998). *See generally* Veterans Affairs Pamphlet 80-99-1, Federal Benefits for Veterans and Dependents (1999) (overview of benefits available through the Department of Veterans Affairs) [hereinafter VA Pamphlet 80-99-1].

service.[2] However, the first key to understanding these VA benefits is understanding the *service-connected* concept because establishing service-connection is the threshold requirement for compensation payments as well as many other VA benefits.

A. Definition of Service-Connected

Service-connection is established by proving that an injury or disease was incurred or aggravated by military service. Even so, it is only a slight exaggeration to say that service-connected really means something a veteran received medical care for while or within a year of being on active duty. Although the term service-connected is not defined in any one place for all purposes, it is usually defined as a "disability resulting from personal injury suffered or disease contracted in line of duty, or . . . aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military."[3] In addition, to this basic definition, there are a number of presumptions.

The presumptions are listed in various federal statutes and are often the subject of intense political debate. They have the effect of eliminating the veteran's burden of proof. For example, for wartime disability compensation, there is a presumption of service-connection for any chronic disease that manifests itself, within one year of discharge, to the point where the veteran could get a ten percent disability rating.[4] Also included on the presumption list are various nutritional deficiencies (designed to compensate former prisoners of war), peptic ulcer disease, and most cancers if the veteran qualifies as a radiation-exposed veteran.[5] There are also additional presumptions for Vietnam-era veterans[6] and for "undiagnosed" Persian Gulf-related medical conditions.[7] In short, if an individual enters the armed forces with a

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[2] *See* 38 C.F.R. § 3.3(a)(2). These pensions should be distinguished from the monthly pension given to individuals awarded the Congressional Medal of Honor. *See* 38 U.S.C.A. § 1562(a) (West 1999); 38 C.F.R. § 3.802.

[3] *See* 38 U.S.C.A. §§ 1110, 1131; *id.* §§ 101(16), 1131; 38 C.F.R. § 3.1(k). *See generally* Ford v. Gober, 10 Vet. App. 531 (1997) (finding insufficient evidence to establish veteran's psychiatric condition had been incurred during wartime). *See also* 38 U.S.C.A. § 1103 (conditions caused by the use of tobacco products are not service-connected). This is a different analysis than service-connected for military justice purposes. *See* Note, *Military Law: Should Military Personnel Be Court-Martialed For Offenses That Are Not Service-Connected?*, 42 OKLA. L. REV. 116 (1989).

[4] 38 U.S.C.A. § 1112(a)(1). VA rating decisions are made through VA regional offices after a claim has been filed. The VA rating schedule provides degrees of impairment from zero to 100 percent in increments of ten percent. *See infra* notes 12–15 and accompanying text. *See also* 38 C.F.R. § 3.304(f) (requirements for post-traumatic stress disorder).

[5] *See* 38 U.S.C.A. § 1112(c)(1)(2); 38 C.F.R. §§ 3.309(d), 3.311.

[6] *See* 38 U.S.C.A. § 1116; 38 C.F.R. § 3.313. *See also* 38 U.S.C.A. § 1805; 38 C.F.R. § 3.814 (allowances to children of Vietnam veterans suffering from spina bifida).

[7] *See* 38 U.S.C.A. §§ 1117–1118; 38 C.F.R. § 3.317.

preexisting congenital heart condition that gets worse and they received some type of medical treatment for it while on active duty, it will most likely be considered service-connected.[8] This rating could then trigger entitlements to disability compensation and access to medical care. This is not because the VA is running some type of giveaway program. It is because the standards of proof correctly give the benefit of the doubt to the veteran.[9]

B. Disability Compensation Benefits

The first step in the disability compensation claims process is for the veteran to complete a VA Form 21-526 and turn it in to a VA regional office.[10] After a physical exam and a few months of waiting, the claimant will get a written rating decision from a veterans service center manager with the VA regional office. This letter will inform the veteran what their disability rating is, how much money he will receive because of his disability, and what his appellate rights are if he desires to challenge it.[11]

The rules for determining what level of disability a veteran receives are extremely complex,[12] are different than the Air Force's Medical Evaluation Board process[13] and are probably beyond the scope of legal assistance.

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[8] There are over thirty-five medical conditions that trigger a service-connection presumption. 38 U.S.C.A. § 1112. On November 30, 1999, President Clinton signed the Veterans Millennium Health Care and Benefits Act. 106 Pub. Law No. 117, 113 Stat. 1545 (1999). As a result, bronchiolo-alveolar carcinoma is now also presumed to be a service-connected condition. *Id.* § 503 (to be codified at 38 U.S.C. § 1112(c)(2)(P)).

[9] The Department of Veterans Affairs has a stated policy of administering the law "under a broad and liberal interpretation consistent with the facts of each individual case." 38 C.F.R. § 3.303(a); *Id.* § 4.3 (resolves reasonable doubt in favor of the veteran).

[10] Every state, as well as Guam and Puerto Rico, has a VA regional office. Some states have more than one. Examples include California (Los Angeles, San Diego, Oakland), New York (Buffalo, New York City), and Texas (Houston, Waco). There is even one overseas regional office, the Manila Regional Office in Pasay City, Philippines.

[11] Veterans Affairs Manual M21-1, pt. IV, change 82, ch. 9, exhibits A–C (1996) [hereinafter VA Manual]; *See also* 38 C.F.R. § 19.25 (1998).

[12] 38 C.F.R. §§ 4.1–4.150. Due to the complexity of the subject, a complete discussion of the VA ratings system is beyond the scope for this article. There are seventy-four different regulations providing guidance on topics as diverse as painful motion, the endocrine system, and mental disorders. *Id.* In addition, there are other regulations providing rules of construction. For example, one of the rules is known as the bilateral factor. It applies when a compensable disability exists in more than one place (e.g., both arms, both legs, paired skeletal muscles) and provides for an additional ten percent of the value of the combined rating being added. *See id.* § 4.26. *See also* Richard v. West, 161 F.3d 719 (Fed. Cir. 1998) (holding veteran's claim for service-connected compensation benefits did not survive his death).

[13] Air Force Instruction 36-3212, Physical Evaluation for Retention, Retirement, and Separation (Jan. 1, 1998). Air Force Physical Evaluation Boards do use the VA's disabilities rating schedule. *Id.* ¶ 1.7. However, the Air Force and VA run separate programs authorized under different statutes with different goals. The VA may rate any service-connected condition without regard to overall physical fitness. In contrast, the Air Force may rate only conditions that make someone unfit for continued military service. *Id.* ¶ 1.9.

Another difficult concept involves the use of the combined ratings table.[14] Veterans frequently have more than one medical condition that is considered service-connected. However, a 30 percent rating for a knee injured during a parachute jump is not simply added to a 10 percent rating for a stiff joint in an index finger to get an overall disability rating of 40 percent. The example in the regulation is illustrative. A condition with a 60 percent disability rating and an additional condition warranting a 30 percent disability rating yield an overall disability rating of 72 percent, which will then be rounded to 70 percent.[15]

Unless you have had experience as a VA claims adjudicator, it may be better to do nothing more than provide procedural advice to a legal assistance client. If a client wants to appeal their disability rating, it is best to refer them to a counselor from a veterans service organization (e.g., American Legion or Veterans of Foreign Wars).[16] The stakes can be high. In addition to possible government employment implications, a single veteran with a 100 percent service-connected rating is entitled to receive disability compensation in the amount of $1,989 per month, tax-free.[17] Depending on the disability rating, married veterans can receive an additional $34 to $112 per month and between $18 to $60 per month for each additional child.[18] In some cases, clothing allowances for the veteran may also be allowed.[19]

If you are also the claims officer, there is yet another area where VA compensation benefits could impact your recommendations. If you have a medical malpractice claimant who has also received medical care at a VA hospital, it is possible she has simultaneously filed a VA claim for compensation payments. Doing so is allowed under federal law.[20] However,

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[14] *See* 38 C.F.R. § 4.25.

[15] *Id.*

[16] VA employees can also explain the appeals process.

[17] *See generally* 38 U.S.C.A. § 1114. Veterans with a 100 percent rating are also entitled to unlimited commissary and base exchange privileges. *See* Department of Defense Regulation 1330.17-R, Armed Forces Commissary Regulations ¶ 2-101.4i (Apr. 1987); Air Force Joint Instruction 34-210, Army and Air Force Exchange Operating Policies ¶ 2-9a(9) (Dec. 15, 1992). The VA will help eligible veterans complete a DD Form 1172, Application For Uniformed Services Identification Card DEERS Enrollment, to obtain commissary and base exchange access.

[18] 38 U.S.C.A. § 1115.

[19] Clothing allowances are provided to veterans who either have a service-connected disability requiring a prosthetic device (including a wheelchair) that tends to wear or tear clothing or who have a skin condition requiring medication that damages outer garments. *See id.* § 1162 (stating that the amount of the allowance is $528 per year); 38 C.F.R. § 3.810.

[20] 38 U.S.C.A. § 1151. This statute was enacted before the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 2671-2680 (West 1999), and provided a remedy for service-connected medical conditions for individuals who were injured from surgical or medical treatment in VA facilities. *See also* 38 C.F.R. § 3.154. *See also* E. Douglas Bradshaw, *Veterans Administration Benefits and Tort Claims Against the Military,* ARMY LAW., Sep. 1986, at 6. This issue is most likely to come up at Kirkland Air Force Base, New Mexico, and Nellis Air Force Base, Nevada, where they have joint VA and Air Force medical facilities.

the claimant cannot receive a double recovery from both the medical malpractice claim and the VA. The statute has an offset provision.[21]

C. Pension Payments

There are three basic types of pensions: old law pensions, section 306 pensions, and improved pensions.[22] Due to the passage of time, it is unlikely an Air Force judge advocate will encounter an old law pension issue.[23] For Section 306 pensions, low-income veterans may be eligible to receive VA pension payments if they served on active duty for at least ninety days and one of those days was during a period of war.[24] There is also a requirement that the veteran either be disabled for non-service-connected reasons or be at least sixty-five years old.[25] The non-service-connected disability cannot be due to the veteran's "willful misconduct or vicious habits."[26] A slightly different pension is known as the improved pension. It is the type you are most likely to

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[21] 38 U.S.C.A. § 1151(b). *See generally* Brown v. Gardner, 513 U.S. 115 (1994) (holding that VA's requirement to prove negligence was inconsistent with statute); Neal v. Derwinski, 2 Vet. App. 296 (1992) (portion of FTCA settlement offset by Dependency and Indemnity Compensation payments). After the *Brown* decision, Congress amended the law in 1996 to return to a negligence based standard. 38 U.S.C.A. § 1151(a)(1). *See also* Department of Veterans Affairs, Op. Off. Gen. Counsel, 01-99 (June 11, 1999), *summarized in* 64 Fed. Reg. 31,680–31,681 (1999) (patient cannot get compensation under 38 U.S.C. § 1151 for physical disability from sexual assault by VA physician but can receive compensation for psychiatric disability).

[22] Section 306 pensions were passed as part of the Veterans' Pension Act of 1959, Pub. L. No. 86-211, § 1, 73 Stat. 432 (1959). Improved pensions were passed into law in 1978. Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 95-588, 92 Stat. 2497–2511 (1978). The eligibility date for Section 306 pensions expired on December 31, 1978. VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.01c(2) (1995). A person filing a new claim for pension benefits must qualify under the improved pension program. *See* VA Manual M21-1, pt. IV, ch. 10, change 64, ¶ 10.08 (1994); VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.01c(1) (1995). However, existing section 306 pensions and old law pensions are protected. 38 C.F.R. § 3.960.

[23] 38 C.F.R. § 3.1(v). The last date for eligibility for old law pensions was June 30, 1960. VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.01c(2). Old law pensions are part of a different statutory scheme. Old law pensioners do not get cost-of-living increases, although their income limits are increased each year by a cost-of-living factor. *Id.* ¶ 16.01c(5). Old law pensions are valued because a veteran's spouse's income is excluded from his annual income for VA pension determination purposes. 38 C.F.R. § 3.261.

[24] 38 C.F.R. § 3.3(a)(2).

[25] *Id.* § 3.3(a)(2)(iv).

[26] *Id.* The term *vicious habit* is not specifically defined. As an aside, claims for service-connection, filed after October 31, 1990, for a primary or secondary disability that resulted from either drug or alcohol abuse, can no longer be paid. VA Manual M21-1, pt. IV, change 83, ch. 11, ¶ 11.04e(1)(a) (1995).

see during legal assistance. It has similar military service and disability requirements and specifically covers Persian Gulf War veterans.[27]

Each of these pensions have different payment amounts and different income limitations. Attempting to calculate income limitations for receipt of a VA pension is difficult because it is done on a case-by-case determination of reasonableness[28] and the rules governing what is and is not considered to be income for this purpose are complex.[29] The amount of the pension also depends on the health of the veteran and the number of dependants.[30] There are also special benefits and procedures for homeless veterans.[31]

D. Appellate Rights

If the veteran disagrees with the VA regional office's decision concerning either his compensation or pension benefits, he can appeal.[32] The first step is to either reopen his claim by sending in new evidence or appealing to the Board of Veterans' Appeals (BVA).[33] To appeal to the BVA, a Notice

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[27] 38 C.F.R. § 3.3(a)(3). In improved pension cases, the veteran's adjusted income determines the payment amount. The higher the claimant's "countable income," the lower the rate of VA benefits payable. VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.01b(1) (1995).

[28] 38 C.F.R. § 3.274(a).

[29] 38 U.S.C.A. § 1552; 38 C.F.R. §§ 3.260–3.275. *See* Cutler v. Derwinski, 2 Vet. App. 336 (1992) (veteran's wife's workers compensation settlement was properly attributed as income to him); Department of Veterans Affairs, Op. Off. Gen. Counsel, 4-89 (Mar. 14, 1989) (concluding gift of a savings bond is counted as income for improved pension purposes), *summarized in* 54 Fed. Reg. 38,036 (1980). For improved pensions, items counted as income include individual retirement account distributions, Vietnam-era bonus payments, income from joint accounts, and VA compensation payments. *See* VA Manual M21-1, pt. IV, change 79, ch. 16, ¶ 16.41 (1995). In addition to a separate list of medical expenses that can be deducted, excluded items include welfare payments, agent orange products liability settlement payments, mineral royalties, loans, and redress payments to World War II Japanese internees. *Id.*

[30] Examples of the 1999 improved pension maximum annual rates include $8,778 for a veteran without a dependent, $11,497 for a veteran with a dependent, $10,729 for a veteran who is permanently housebound, and $14,647 for a veteran needing regular aid and attendance. *See* VA Pamphlet 80-99-1, *supra* note 1, at 60.

[31] In addition to pension benefits, the VA has a Healthcare for Homeless Program that operates at seventy-one sites. Access to mental health providers and substance abuse programs are included. *See generally* DEPARTMENT OF VETERANS' AFFAIRS, VA PROGRAMS FOR HOMELESS VETERANS (Nov. 1998). The VA's Domiciliary Care for Homeless Veterans Program provides residential counseling and rehab services to ambulatory veterans. *Id.* The VA also makes foreclosed properties available to homeless provider organizations for either substantial discounts or $1 a year leases. *Id.* *See also* 38 C.F.R. § 1.710 (provisions for delivery of correspondence and payments to homeless veterans).

[32] VA appellate rights are explained in detail on VA Form 4017s. *See also* Veterans Affairs Pamphlet 01-96-1, Understanding the Appeal Process (Apr. 1996) [hereinafter VA Pamphlet 01-96-1].

[33] The Board of Veterans Appeals has its own procedures and rules governing practice before its administrative judges. *See* 38 C.F.R. §§ 19.1–20.1304. The President, with the advice and

of Disagreement[34] must be sent within one year from the date of the VA regional office's decision. Attorneys' fees are not authorized, so the veteran should seek out a representative from a veterans service organization for help.

Even though the appeal is to the BVA, the local VA regional office will review the appeal first.[35] This gives the local office an opportunity to change its decision. If it does not, it will prepare a Statement of the Case summarizing the basis for the ruling and mail it to the veteran.[36] At that point, the veteran has sixty days to submit a VA Form 9[37] to the VA office that made the determination being appealed. Completing the VA Form 9 is known as submitting a substantive appeal.

The veteran's appeal to the BVA can be done in writing or he may request a hearing.[38] The BVA will even send board members from Washington, D.C., to the local VA regional office to conduct a hearing.[39] These types of BVA hearings are called Travel Board Hearings and can take a significant amount of time to schedule. Once the BVA has made a decision, a veteran has 120 days to appeal to the United States Court of Veterans Appeals.[40] At this point, attorneys' fees of up to 20 percent of the total amount of any past due benefit are allowed.[41] If the case concerns a question of statutory interpretation, decisions of the Court of Veterans Appeals can be appealed to the United States Court of Appeals for the Federal Circuit.[42]

The veteran may also request a hearing from the VA regional office to present evidence to reopen his claim.[43] Doing so gives the veteran an opportunity to testify and call witnesses on his behalf. The VA will furnish the hearing room, provide a hearing officer, and make a transcript of the hearing. If the claim is subsequently denied, the record is put in the veteran's claims file and forwarded to the BVA.[44]

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consent of the Senate, appoints the Chairman of the Board of Veterans Appeals for a 6-year term. 38 U.S.C.A. § 7101(b)(1) (West 1991).

[34] A Notice of Disagreement can be a letter. It is defined as any written communication from the veteran or her representative that is timely filed and "expresses disagreement with an appealable decision." VA Manual M21-1, pt. II, ch. 7, ¶ 7.04 (1997).

[35] 38 C.F.R. § 19.26.

[36] *Id.* §§ 19.29-19.30.

[37] The VA Form 9 will be mailed to the veteran along with the Statement of the Case.

[38] 38 C.F.R. § 20.700(a).

[39] *Id.* §§ 20.702-20.705.

[40] CT. VET. APP. R. 4(a).

[41] 38 U.S.C.A. § 5904(d)(1) (West 1999).

[42] *See* Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) (noting that 120 day time limit is subject to doctrine of equitable tolling).

[43] 38 U.S.C.A. § 7105(a). "A claimant has a right to a hearing at any time and on any issue under 38 C.F.R. part 3 or 4." VA Manual M21-1, pt. IV, change 85, ch. 35, ¶ 35.01 (1997). *See also* VA Pamphlet 01-96-1, *supra* note 32, at 15.

[44] VA Manual M21-1, pt. IV, change 85, ch. 35, ¶ 35.02h(3).

E. Dependency and Indemnity Compensation Payments for Family Members

There are a number of programs for surviving family members of veterans.[45] Perhaps the most important such program is the Dependency and Indemnity Compensation (DIC) program. DIC payments may be available to widows who have not remarried, unmarried children under 18, dependent children between the ages of 18 and 23 if they are attending a VA approved school, and low-income parents of deceased service members or veterans.[46] Under a recent change, a surviving spouse, who terminates her remarriage, can now regain her ability to receive DIC payments.[47]

The initial threshold is dependent upon how the veteran died. To be eligible, the death must be from either, a disease or injury incurred or aggravated while on active duty, an injury incurred or aggravated during inactive duty training, or a disability compensable by the VA.[48] The death cannot be the result of the veteran's willful misconduct.[49]

DIC payments may also be authorized to survivors of veterans whose death was unrelated to the service-connected disability.[50] These payments require the veteran to have received a rating indicating total continuous disability within one of two time periods: at least ten years immediately before his death or since being released from active duty and for at least five years

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[45] Although Dependency and Indemnity Compensation payments are the most well known benefit, there are other possible benefit payments as well. *See, e.g.,* 38 C.F.R. § 3.23 (1998) (pensions for non-service-connected deaths for surviving spouses); *id.* § 3.24 (improved pension rates for surviving children); *id.* § 3.806 (death gratuity); *id.* § 3.813 (benefits for survivors of Vietnam-era veterans who died due to chloracne or porphyria cutanea tarda); *id.* § 3.814 (monetary allowance for children of Vietnam veterans suffering from spina bifida). *See generally* Martin v. Brown, 7 Vet. App. 196 (1994) (holding pension owed to veteran at the time of his death was not countable as income when determining widow's pension). *See also* 38 C.F.R. § 3.212 (unexplained absence for seven years creates presumption of death).

[46] *See generally* 38 C.F.R. § 3.5. *See also* 38 U.S.C.A. § 103 (special provisions relating to marriages); *id.* § 1313 (if no surviving spouse, $361 for one child, $520 for two); *id.* § 5110(l); 38 C.F.R § 3.20 (surviving spouse's benefit for month of death); *id.* § 3.25 (DIC for parents); *id.* § 3.50 (requirements to be considered a surviving spouse); *id.* § 3.57 (dependent child requirements). To be a surviving spouse, there must have been continuous cohabitation for the duration of the marriage. *Id.* § 3.53. *See also* Air Force Instruction 36-3002, Casualty Services (Aug. 26, 1994).

[47] Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 502, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C. § 103(d)).

[48] 38 U.S.C. § 101(14); 38 C.F.R. § 3.5.

[49] Forshey v. West, 12 Vet. App. 71 (1998) (concluding widow's DIC request was properly denied because active duty Navy member, who died in motorcycle accident due to intoxication and failure to wear a helmet, did not have a service-connected death); Myore v. Brown, 9 Vet. App. 498 (1996) (concerning active duty Marine who died from self-inflicted gunshot wound to the head playing Russian roulette while home on leave).

[50] 38 C.F.R. § 3.22.

immediately before his death.[51] Payments under these provisions are subject to an offset against any awards from judicial actions brought due to the veteran's death.[52]

F. Divorce and Compensation Benefits

A judge advocate who provides legal assistance long enough will, at some point, have a former spouse come in and complain that her ex-husband just got a 30 percent VA disability rating and now she is entitled to only half of 70 percent of his military pension. There is nothing the former spouse can do to stop the veteran from waiving his military retired pay in favor of tax-free VA compensation benefits.[53] In fact, if a military retiree files a claim for VA compensation, a waiver of the retired pay is automatic unless the veteran requests otherwise.[54] There is, however, one little known consequence for the veteran.

Although VA benefits are almost never subject to garnishment,[55] the VA will honor an assignment order from a court if a veteran, who is entitled to receive military retired pay, elects a waiver in order to receive compensation payments.[56] This raises three issues. First, the VA will only garnish compensation, not pension payments.[57] Second, only the amount waived is subject to garnishment.[58] Third, it would be helpful if the former spouse had a way to get accurate information concerning the amount and type of the veteran's VA payments without having to resort to litigation.

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[51] *Id.* § 3.22(a).

[52] *Id.* § 3.22(d).

[53] *See* 38 U.S.C.A. §§ 5304(a)-5305; 38 C.F.R. § 3.750(c); VA Manual M21-1, pt. IV, ch. 21 (1995). A veteran may waive military retired pay by completing a VA Form 21-251. For a detailed discussion of the implications of this issue under the Uniformed Service Former Spouses Protection Act, see Captain Kristine D. Kuenzli, *Uniformed Services Former Spouses' Protection Act: Is There Too Much Protection for the Former Spouse?*, 47 A.F. L. REV. 1 (1999).

[54] 38 C.F.R. § 3.750(c).

[55] The general rule is that veteran's benefits payable under Title 38 cannot be reached by any "legal or equitable process, before or after receipt by the beneficiary." 38 U.S.C.A. § 5301(a). *See generally* Bennett v. Arkansas, 485 U.S. 395 (1988) (finding that state could not attach prisoner's VA benefits). *Cf.* Repash v. Repash, 528 A.2d 744 (1987) (concluding veteran's disability benefits were income for purposes of establishing amount of alimony); Pfeil v. Pfeil, 341 N.W.2d 699 (1983) (determining that disability benefits lost their protected status when invested in real estate).

[56] 5 C.F.R. § 581.103(c)(7) (1998).

[57] *Id.* There is no authority to garnish pension payments. VA Manual M-21, pt. IV, change 32, ch. 19, ¶ 19.13 (1994).

[58] VA Manual M-21, pt. IV, ch. 19, ¶ 19.13. The amount garnished is subject to the percentage limitations specifically listed and any state law limitations as well. 5 C.F.R. § 581.402. The lowest percentage (frequently 50 percent) controls the actual percentage of the garnishment. For example, Arizona limits the amount of a garnishment to "one-half of the disposable earnings of a debtor for any pay period." ARIZ. REV. STAT. ANN. § 33-1131C (West 1990).

Although you could guess the amount of the waiver based on the amount missing from the retired pay, if the veteran is not providing accurate information to his ex-wife, it could be difficult. Since VA adjudication records are protected under the Privacy Act,[59] a court order is necessary before access will be permitted.[60] However, there is a better way. It is possible to call or write a VA regional office and request the monthly rate of a veteran's pension, compensation, or educational allowance.[61] Doing so is an easy and free way to get accurate information.

II. ACCESS TO MEDICAL CARE

While Department of Defense hospitals have been downsizing, VA facilities have been rapidly expanding. There are currently 172 VA medical centers.[62] Although that number has not increased since 1989, over the last ten years, the number of VA outpatient clinics has increased from 230 to over 600.[63] During that same period, the number of outpatient visits per year has increased from 22.6 million to 37 million.[64] So, who is entitled to all this medical care?

The old rule was basically that a veteran could get medical care only for his service-connected medical conditions.[65] There were some noteworthy exceptions,[66] but the system almost seemed to encourage fragmented health care. The Veterans' Health Care Eligibility Reform Act of 1996[67] significantly

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[59] 5 U.S.C.A. § 552a (West 1991).

[60] 38 C.F.R. § 1.576(b)(11).

[61] 38 C.F.R. § 1.502 (provides for disclosure to "any person"). The call should be made to the VA regional office closest to the veteran's home. The telephone number should be available through the blue pages of most telephone books.

[62] Department of Veterans Affairs, *VAnguard*, Mar. 1999, at 12 [hereinafter cited as *VAnguard*]. Included among the 172 medical centers is one in San Juan VA Medical Center in Puerto Rico. The VA also operates 131 nursing homes, 40 domiciliaries, and 206 vet centers. *Id.* Vet centers provide counseling to help veterans resolve war-related psychological issues and readjust to civilian life. There are vet centers in every state and in Guam, Puerto Rico, and the Virgin Islands. Domiciliaries provide rehabilitative and long-term health care for veterans who need assistance but do not need to be in a nursing home. The VA also operates outpatient clinics in Guam and the Philippines. Access to VA nursing home care is now mandatory for veterans who need it for a service-connected disability or to veterans who need nursing home care and have a service-connected disability rating of at least 70 percent. Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 101, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C. § 1710A).

[63] *See VAnguard*, *supra* note 62.

[64] *Id.*

[65] 38 C.F.R. § 17.60(a)(1). Medical care could also be provided to veterans with a low income and low net worth. *Id.* § 17.60(b)(2).

[66] Veterans could receive medical care for a non-service-connected condition if it was aggravating a service-connected condition. *Id.* § 17.60(a)(5).

[67] Pub. Law No. 104-262, § 1, 110 Stat. 3177 (1996) (codified at 38 U.S.C.A. §§ 545, 1705, 1706, 7319, 7230, and 7321 (West 1999)).

changed the access rules. Today, VA medical centers and outpatient clinics are actually competing to become the primary care provider of choice for all veterans. Modern VA health care closely resembles non-federal health care delivery systems. To be seen at a VA hospital, you must first be an enrolled patient.[68] After enrollment, like TRICARE,[69] there are access priorities. Access priorities determine whether and in what order the patients can be given medical care.

A. Access Priorities

The VA has seven priority groups.[70] Priority group one consists of veterans with a 50 percent or more service-connected disability rating. The second priority group includes veterans with a 30 or 40 percent service-connected disability rating. Group three includes veterans with a 10 or 20 percent service-connected disability rating, former prisoners of war, Purple Heart recipients,[71] veterans who received medical discharges, and veterans receiving care under 38 U.S.C. § 1151.[72] Priority group four consists of veterans who are either receiving an increased pension because they need either regular aid and attendance or are housebound and veterans who are

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[68] 38 U.S.C.A. § 1705(c)(1). This statute was widely misread to mean all veterans had to enroll by October 1, 1998, or forever lose access to VA care. In reality, a veteran can enroll at any time. In addition, there are provisions allowing VA medical treatment while an application is pending. 38 C.F.R. § 17.34 (tentative eligibility determinations).

[69] TRICARE is a managed care system for individuals who are eligible for military medical care. It has a choice of three plans under TRICARE: Prime, Extra, and Standard. TRICARE Prime is similar to a Health Maintenance Organization (HMO). It uses military hospitals and a network of civilian providers. There are no deductibles or claims forms. Primary care managers control referral to medical specialists. TRICARE Extra uses a preferred provider network and military hospitals on a space available basis. TRICARE Standard is a fee for service plan. Although it provides for the most flexibility in selecting health care providers, it is also the most expensive to the patient. 32 C.F.R. § 199.17.

[70] *See* 38 U.S.C.A. § 1705(a); 38 C.F.R. § 17.99. There are additional health care programs for veterans with service-connected conditions who are either traveling or residing in foreign countries. DEPARTMENT OF VETERANS AFFAIRS, FOREIGN MEDICAL PROGRAM HANDBOOK (Oct. 1995). The VA can also provide counseling for veterans who were victims of sexual harassment or sexual trauma. 38 U.S.C.A. § 1720D. The entitlement to this service was going to end on December 31, 2001. However, it was recently extended through December 31, 2004. Veterans Millennium Health Care and Benefits Act, § 106 Pub. Law No. 117, § 115, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C. § 1720D). These same amendments require the VA and the Department of Defense to study "the extent to which former members of reserve components of the Armed Forces experienced physical assault of a sexual nature or battery of a sexual nature while serving on active duty for training." *Id.*

[71] Veterans Millennium Health Care and Benefits Act §112 (to be codified at 38 U.S.C. § 1705(a)(3)).

[72] *See* 38 U.S.C.A. §§ 1705(a)(3), 1710(a)(2)(C). *See also supra* notes 21-22 and accompanying text for a discussion of compensation benefit offsets for medical malpractice claims.

catastrophically disabled. Group five consists of low-income veterans[73] with no service-connected disability rating. Priority group six is made up of veterans who are either seeking care due to exposure to a toxic substance, radiation, or for disorders associated with service in the Persian Gulf[74] or who have a zero percent service-connected disability rating. The last group consists of other veterans, with income above a certain level, who agree to pay under a co-pay plan.[75]

These priority groups are going to take on increased significance in the future. In the event the VA does not have sufficient resources to provide timely care to everyone, it will be required to limit health care to patients with higher access priorities.[76] This is significant because there is some indication that demand for VA heath care increased after enrollment was offered to veterans in all priority groups.[77] As of March 1999, the VA had enrolled 4,003,708 patients, with priority group five easily having the most members.[78] Of the over four million veterans enrolled, only 2,449,867 used the VA health care system between October 1998 and March 1999.[79]

B. Financial Information

Veterans, who want to enroll based in part on their inability to pay for any portion of their health care, must complete a VA Form 10-10EZ providing their personal financial data.[80] Income from the patient's spouse is also considered.[81] This process is known as a means test. The threshold amount for program eligibility is adjusted annually.[82] It is important to be accurate

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[73] The current means test threshold is $22,351 for single veterans and $26,824 for veterans with one dependent. GOVERNMENT ACCOUNTING OFFICE, VA HEALTH CARE: PROGRESS AND CHALLENGES IN PROVIDING CARE TO VETERANS, GAO/T-HEHS-99-158, at 5 (July 15, 1999) [hereinafter GOVERNMENT ACCOUNTING OFFICE].

[74] There are two good sources for information on medical conditions. *See* DEPARTMENT OF VETERANS AFFAIRS, ANNUAL REPORT TO CONGRESS: FEDERALLY SPONSORED RESEARCH ON GULF WAR VETERANS' ILLNESS FOR 1997 (March 1998); INSTITUTE OF MEDICINE, VETERANS AND AGENT ORANGE, 1996.

[75] 38 U.S.C.A. § 1710(f)(1).

[76] 38 U.S.C.A. § 1705(a). The VA is required to manage health care resources by providing care first to patients with higher access priorities. *Id.*

[77] GOVERNMENT ACCOUNTING OFFICE, *supra* note 73, at 7. Expanded services also increased demand. *Id.* at 2.

[78] *Id.* at 6. Priority group five had 1,378,924 enrollees. *Id.*

[79] *Id.*

[80] 64 Fed. Reg. 54,212 (1999). The VA Form 10-10EZ is titled, "Application for Health Care Benefits." It is available at VA medical centers and on the Internet at www.va.gov/forms. Veterans applying for care based on being in categories 1, 2, 3, 6 and 7 do not need to complete sections of the form requesting financial information. *Id.*

[81] Block IIC on the VA Form 10-10EZ requests the gross income from the previous calendar year for the veteran, spouse, and any dependent children.

[82] VA Pamphlet 80-99-1, *supra* note 1, at 5. The new threshold amounts are announced each January. *Id.*

with this information because the VA has the authority to cross reference this information with data provided to the Social Security Administration and the Internal Revenue Service.[83]

If the veteran is not eligible for free medical care, then co-payments are going to be required. The amount of the co-payments depends on the type of patient and service. For Medicare eligible patients, the patient is responsible for the Medicare deductible for the first ninety days of care during any 365-day period.[84] The patient is charged half of the Medicare deductible for any further care. In addition, all patients are charged $10 a day for inpatient care and $5 a day for nursing home care.[85] For outpatient appointments, the co-payment is based upon 20 percent of the cost of the average outpatient visit.[86] Pharmacy services can also result in a co-payment. Medication for service-connected conditions is free.[87] It is also free to veterans receiving a VA pension.[88] Otherwise, the veteran will be charged $2 per drug for each thirty-day supply of medication.[89]

On top of this perhaps already complex financial structure is the VA's right to bill the patient's private insurance carrier for treatment of conditions that are not service-connected.[90] Even so, the veteran is not responsible for expenses under the terms of this policy (e.g., deductible, co-payment, or uncovered items).[91] There are additional rules for emergency medical care[92]

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[83] *Id.*

[84] 38 U.S.C.A. § 1710(f)(3)(E) (West 1999).

[85] *Id.* § 1710(f)(2)(B).

[86] *Id.* § 1710(g)(2). *See generally* VA Manual M-1, pt. I, ch. 4, ¶ 4.31 (1993). Military retirees are entitled to VA medical care on the same basis as other discharged veterans. 38 C.F.R. § 17.94 (1998) (outpatient services for military retirees); VA Manual M-1, pt. I, ch. 4, ¶ 4.24. However, Department of Defense patients are frequently seen in VA facilities under sharing agreements. In addition, the Department of Defense has now been required to enter into an agreement with the Department of Veterans Affairs to reimburse the VA, either directly or through a TRICARE contractor, for medical care provided to military retirees. *See* Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 113, 113 Stat. 1545 (1999).

[87] Only charges for medication for non-service connected conditions are authorized. 38 U.S.C.A. § 1722A(a)(1).

[88] *Id.* § 1722A(a)(3)(B).

[89] *Id.* § 1722A(a)(1).

[90] *Id.*

[91] *Id.* § 1729(a)(3).

[92] Veterans may be reimbursed for emergency medical care if a delay would have been hazardous to the patient's life or health, the condition is related to a service-connected condition, and the VA or other federal facilities were not feasibly available. *See* 38 U.S.C.A. § 1728; 38 C.F.R. §§ 17.54, 17.120–17.121 (prior authorization requirements); Zimick v. West, 11 Vet. App. 45 (1998) (concluding facts did not support reimbursement for microsurgery at non-VA facility to save finger in part because there was no service-connection). *See also* Veterans Millennium Health Care and Benefits Act § 111 (establishes payment systems for reimbursement for emergency treatment) (to be codified at 38 U.S.C. § 1725). *See generally* Nolte v. West, No. 96-1311, 1999 WL 184901 (Vet. App. 1999) (finding there should be no reimbursement for psychiatric treatment for depression that was not service-connected).

and situations in which VA medical care cannot be provided either because the veteran lives too far from a VA facility or because the care required is beyond the scope of the facility.[93]

C. Medical Benefits Package

Effective November 5, 1999, the VA enacted a medical benefits package describing the inpatient and outpatient care available to enrolled veterans.[94] The package is divided into the two components of basic care and preventive care. Basic care includes both inpatient and outpatient medical and surgical care, mental health care, prescription drugs, medical supplies, various counseling services, durable medical equipment, home health care, pregnancy and delivery services, and hospice and palliative care.[95] The basic care component also includes two aspects that may be especially helpful for legal assistance attorneys. First, training and counseling services are available to a veteran's immediate family members or to a legal guardian if the veteran is going to live with them.[96] Second, VA providers will complete forms based on their examination or knowledge of a veteran's medical condition (e.g.

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[93] *See* 38 U.S.C.A. § 1703; 38 C.F.R. § 17.52. The VA will contract with local facilities to provide hospital care for veterans when the VA is not capable of providing care due to facility capability or geographic inaccessibility if the treatment is needed for either a service-connected condition or something aggravating a service-connected condition. *Id.* § 17.52(a)(1). The VA will contract for medical services under the same circumstances if the veteran has at least a 50 percent service-connected disability rating or has recently received VA inpatient care. *Id.* § 17.52(a)(2). There are also provisions to contract for hospital care for women veterans. *Id.* § 17.52(a)(4). *See generally* Meakin v. West, 11 Vet. App. 183 (1998) (Board of Veterans' Appeals has jurisdiction to decide fee basis care).

[94] Generally, a veteran must be enrolled to receive VA health care. 64 Fed. Reg. 54,212 (1999) (to be codified at 38 C.F.R. § 17.36). However, there are ten exceptions to this rule, three of which are especially significant. First, VA medical care will be provided to unenrolled veterans with a service-connected disability rating of 50 percent or higher. *Id.* at 54,217 (to be codified at 38 C.F.R. § 17.37(a)). Second, veterans with a service-connected condition will be able to access VA inpatient and outpatient care for that condition. *Id.* (to be codified at 38 C.F.R. § 17.37(b)). Third, veterans discharged or released from active duty for a disability incurred or aggravated in the line of duty may also seek care. *Id.* (to be codified at 38 C.F.R. § 17.37(c)).

[95] *Id.* (to be codified at 38 C.F.R. § 17.38). The following are specifically excluded from the medical benefits package: abortions, in vitro fertilizations, access to drugs and medical equipment that are not approved by the Food and Drug Administration (unless the patient is part of a research study), sex change operations, health care for prisoners, and membership in spas and health clubs. *Id.* (to be codified at 38 C.F.R. § 17.38(c)). Some aspects of this care package will be contracted out to non-VA medical facilities. *See supra* note 93.

[96] 64 Fed. Reg. at 54,217 (to be codified at 38 C.F.R. § 17.38(a)(1)(vii)). The veteran's medical condition must involve either a service-connected disability or a non-service-connected disability in a patient who needs these services in order to be appropriately discharged from a hospital. *Id.*

Family Medical Leave Act forms, life insurance applications).[97] The preventive care component includes periodic physical and eye exams, medication monitoring, immunizations, and genetic counseling.[98]

D. Medical Care for Family Members

Dependants of veterans may be eligible for health care through CHAMPVA.[99] CHAMPVA is a health benefits program that is separate from TRICARE. However, eligibility is fairly restricted. First, the dependant cannot be eligible for either TRICARE or Medicare Part A[100] because they have reached the age of 65.[101] Second, they must fall into one of three categories: (1) the spouse or child of a veteran who has a permanent and total service-connected disability, (2) the surviving spouse or child of a veteran who died from a service-connected condition or was totally disabled from a service-connected condition at the time of his death, or (3) the surviving spouse or child of a veteran who died in the line of duty.[102] In addition, dependants under age 65 must be enrolled in both Medicare Parts A and B to be eligible for CHAMPVA.[103]

III. HOME LOANS

The VA guarantees home loans for almost all active duty military members and veterans. Although the VA does not actually loan money, eligible veterans are able to purchase a home without a down payment, at

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[97] *Id.* (to be codified at 38 C.F.R. § 17.38(a)(1)(xiv)). However, VA physicians will not complete these forms under circumstances where a third party would customarily pay other health care professionals to do these exams but will not pay the VA. *Id.*

[98] *Id.* (to be codified at 38 C.F.R. § 17.38(a)(2)).

[99] *See* 38 U.S.C.A. § 1713 (West 1999); 38 C.F.R. § 17.84. A former spouse, who lost CHAMPVA benefits due to remarriage, can now reapply for them after a divorce from an additional marriage. Veterans Millennium Health Care and Benefits Act § 502 (to be codified at 38 U.S.C. § 103(d)(5)(B)).

[100] Medicare provides health insurance coverage for most Americans over 65 years of age, the permanently disabled, and individuals with a certain renal disease. Medicare Part A is financed by payroll taxes and covers hospital costs. Medicare Part B is optional coverage that usually requires a monthly premium. It covers outpatient visits and diagnostic tests. P. YOUNGER, HEALTH CARE FRAUD AND ABUSE COMPLIANCE MANUAL app. B:9 (1997). *See also Medicare Subvention: Challenges and Opportunities Facing a Possible VA Demonstration, Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means*, 106th Cong., 1st Sess. (1999) (statements of William J. Scanlon and Stephen P. Backhus), *reprinted in* GAO Report GAO/T-HEHS/GCD-99-159 (July 1, 1999).

[101] VA Pamphlet 80-99-1, *supra* note 1, at 42.

[102] 38 U.S.C.A. § 1713(a). However, spouses and children of Persian Gulf veterans are entitled to health status evaluations through December 31, 2003. Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 205, 113 Stat. 1545 (1999) (to be codified in notes after 38 U.S.C.A. § 1117).

[103] *See* VA Pamphlet 80-99-1, *supra* note 1, at 11. *See also* 38 U.S.C.A. § 1713(d) (1999).

relatively low fixed interest rates, and are able to finance the VA funding fee.[104] Depending upon the amount of the loan, the VA will guarantee up to 50 percent of the loan or up to $50,750.[105] Lenders are generally willing to offer loans up to four times the amount of the guarantee (or up to $203,000) without a down payment. The VA also informs the buyer of the reasonable value of the property. However, the VA only guarantees the loan, not the condition of the property. In addition, veterans can get their VA entitlement back or use any remaining balance for additional home purchases.[106] Clearly, the VA Home Loan Guarantee is an incredibly significant benefit.[107]

A. Eligibility

Almost anyone who has served on active duty in the armed forces is entitled to a VA home loan guarantee.[108] Members currently on active duty

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[104] *See* 38 C.F.R. § 36.4312. On home purchase loans, charges associated with recording fees, the credit report, taxes, hazard insurance, a survey, title examination, and flood zone determinations cannot be financed. *Id.* § 36.4312(d). *See also id.* § 36.4337 (underwriting standards). On interest rate reduction loans and on refinanced loans, the veteran is able to finance the closing costs. *Id.* § 36.4312(a). *See generally* 38 U.S.C.A. § 3710 (authorizing statute for loans for purchase or construction of homes).

The VA funding fee is based on the status of the veteran and the amount of the down payment. At the discretion of the veteran and the lender, the VA funding fee may be included in the loan amount. 38 C.F.R. § 36.4254. For veterans of active duty service, who are making first time purchase and construction loans, the VA funding fee is 2 percent if there is no down payment, 1.5 percent if there is a 5 percent down payment, and 1.25 percent if there is a 10 percent down payment. These rates are slightly higher for veterans with only Guard or Reserve service. VA Manual M26-1, change 3, ch. 8, ¶ 8.02 (1998). VA funding fees are not charged on loans made to disabled veterans and to unremarried surviving spouses of veterans who died due to military service. 38 C.F.R. § 36.4254(d)(5).

[105] 38 U.S.C.A. § 3703(a)(1)(A).

[106] To apply to get back a VA loan entitlement, complete a VA Form 26-1880. A veteran can get his or her VA entitlement back if either the property has been sold and the loan has been paid in full or a qualified veteran assumes the loan and substitutes his or her entitlement for the same entitlement used originally. 38 C.F.R. § 36.4203(a)(3). If the veteran cannot meet these restoration conditions, he or she may still have a remaining entitlement for use in another VA loan. VA Manual 26-1, change I, ch. 2, ¶ 2.12 (1997). *See generally* 38 U.S.C.A. §§ 3713–3714; 38 C.F.R. §§ 36.4218, 36.4333, 36.4508.

[107] *See generally* Bernard Ingold, *The Department of Veterans' Affairs Home Loan Guaranty Program: Friend Or Foe?*, 132 MIL. L. REV. 231 (1991); Veterans' Affairs Pamphlet 26-4, VA Guaranteed Home Loans for Veterans (1995) [hereinafter VA Pamphlet 26-4]; Veterans' Affairs Pamphlet 26-91-1, VA Home Loans: A Quick Guide For Homebuyers & Real Estate Professionals (1996); Veterans' Affairs Pamphlet 26-96-1, Settlement Costs (1996); Veterans' Affairs Pamphlet 26-93-1, VA Direct Home Loans for Native American Veterans Living on Trust Lands (1993).

[108] 38 U.S.C.A. § 3701. To obtain a VA Certificate of Eligibility, complete a VA Form 26-1880 and attach a copy of your DD Form 214. If the member is still on active duty and does not have a DD Form 214, she must submit a statement of service including the name of the base or command, her date of entry on active duty, and the duration of any lost time. VA Pamphlet 26-4, *supra* note 107, at 7. Active duty members also must submit a military Leave

are eligible if they have served 181 days.[109] Veterans who served at least ninety days on active duty during a war are also eligible.[110] Other veterans must also have been on either active duty for 181 days or discharged for a service-connected disability.[111] However, time served on active duty in either the National Guard or Reserve does not count toward these time limits unless the military member was activated for federal service.[112] Surviving spouses of members who either died on active duty or from a service-connected disability also qualify.[113] Veterans who either served six years in the Selected Reserve[114] or were discharged prior to six years for a service-connected disability are eligible as well.[115]

B. Special Rules for Assuming a VA Mortgage

VA loans, issued after March 1, 1988, have set criteria before they can be assumed.[116] If a veteran attempts to avoid these restrictions by selling his home without notifying the lender, then a lender holding a VA loan may

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and Earnings statement. 38 C.F.R. § 36.4337(f)(2). For members serving in the Selected Reserve, an NGB Form 22 may be substituted for a DD Form 214. The veteran must also be a good credit risk. *See* 38 U.S.C.A. § 3710(b)(3); 38 C.F.R. § 36.4337. *See also id.* § 36.4325(a) (VA has no liability if either the lender or holder participated in intentional misrepresentation). Additional guidance can be found on VA Form 26-0592, Counseling Checklist for Military Homebuyers.

[109] VA Pamphlet 26-4, *supra* note 107, at 6.

[110] 38 U.S.C.A. § 3702(a)(2)(A). This includes the Persian Gulf War. *Id.* § 3702(a)(2)(D).

[111] *Id.* § 3702(a)(2)(B).

[112] *Id.* § 101(21)–(22).

[113] *See id.* § 3701(b)(2); VA Manual 26-1, ch. 2,¶ 2.05 (1996). Spouses of military members who have been in either MIA or POW status for at least ninety days also qualify. *Id.* ¶ 2.06.

[114] The Selected Reserve is the main component of the Ready Reserve. The President has the authority to order up to 200,000 members of the Selected Reserve to active duty for up to 270 days. 10 U.S.C.A. § 12304 (West 1999). VA home loan guaranty entitlement based on reserve service was recently extended through September 30, 2007. Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 711, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C.A. § 3702(a)(2)(E)).

[115] 38 U.S.C.A. § 3701(b)(5)(A).

[116] Loans issued before March 1, 1988 are fully assumable. *See* 38 U.S.C.A. § 3714(f)(1)(A); 38 C.F.R. §§ 36.4275, 36.4310. However, the buyer must be found creditworthy before the VA will issue a release of liability to the seller. Veterans' Affairs Pamphlet 26-7, VA Lenders Handbook ¶ 2.05 (1998). If the loan is not paid in full in connection with the sale, it is possible for someone to sell their home and still remain liable to the Government on their VA loan even though they no longer own the property. *Id.* In addition, a release of liability from the VA only releases the seller from any liability he has with the Government. The VA release does not release the seller from any liability he has with their lender and does not by itself restore a veteran's loan guaranty entitlement. *Id.* *See also* Veterans' Affairs Pamphlet 26-68-1, Selling Your GI Home? (1989).

demand immediate full payment of the principal and interest.[117] A lender may allow a buyer to assume a VA loan only if the payments are current, the buyer is found to be creditworthy, and the buyer is contractually obligated to purchase the property and assume full responsibility for repayment of any unpaid balance.[118] If these criteria are met, the veteran is released from liability for the assumption.

C. Methods for Veterans to Avoid Foreclosure

By way of background, the VA does have some significant rights when faced with a veteran who may default on the VA loan.[119] The holder of the note is generally required to give the VA notice when the borrower has not made payments for sixty days.[120] In addition, the creditor cannot take any action to terminate the borrower's rights until thirty days after providing notice to the VA that it intends to do so.[121] During this thirty-day window, the VA may pay the holder the unpaid balance and require the holder to assign the loan and the security for the loan to the VA or to a designee.[122] If the VA does not order this assignment within the thirty days, the lender is free to proceed with foreclosure. In order to minimize loses to both the VA and the veteran, the VA has several programs to work with veterans who find themselves in positions where they can no longer make their mortgage payments.[123]

A veteran facing default does have several options beyond either paying enough to make the note current or offering a deed in lieu of foreclosure.[124] First, forbearance is the most common method of avoiding foreclosure.[125] With this option, your legal assistance client may offer to pay

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[117] 38 U.S.C.A. § 3714(b). *See generally* Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992) (holding that VA entitled to summary judgment against veteran who claimed due process violation in foreclosure sale).

[118] *See* 38 U.S.C.A. § 3714(a)(1); 38 C.F.R. § 36.4508.

[119] Over 152,000 VA guaranteed loans with a total value of $11.4 billion went into default between July 1, 1995 and June 30, 1997. The VA had guaranteed a value of $4 billion on those loans. Surprisingly, more active duty military members than veterans defaulted on their VA loans. DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, ATTRIBUTES OF DEFAULTED VA HOME LOANS, Report No. 9R5-B10-047 (Mar. 25, 1999).

[120] *See* 38 C.F.R. § 36.4315; VA Manual M26-4, change 11, ch. 2, ¶ 2.06a (1992). There are provisions for constructive notice. They include a letter from the note holder asking for deed in lieu of foreclosure advice or a bankruptcy notice. VA Manual M26-4, change 6, ch. 2, ¶ 2.03c(4)(a) (1992).

[121] *See* 38 C.F.R. § 36.4317; VA Manual M26-4, change 11, ch. 2, ¶ 2.06a. The 30-day requirement may be waived. *Id.* change 11, ch. 2, ¶ 2.06b.

[122] *See* 38 U.S.C.A. § 3732(a)(2); 38 C.F.R. § 36.4318.

[123] *See* Urs Gsteiger, *Representing A Veteran After Default of an Assumed VA Guaranteed Home Loan*, ARMY LAW., Jan. 1993, at 3. A VA Form 26-8762 contains a list of borrower's rights.

[124] A deed in lieu of foreclosure is not an option if there is a second lien on the property.

[125] VA Manual M26-4, ch. 2, ¶ 2.08a (1992).

back part of the delinquency along with his monthly payments. If this is not realistic, then the note holder may agree to accept partial payments or to suspend payments for a set period of time. Although the VA has no authority to require this of a lender, note holders frequently cooperate as long as the veteran can demonstrate he will be able to resume payments on a specific date.[126] Second, if forbearance options will not work, the lender also has the authority to reamortize the loan by adding the amount of the delinquency to the loan balance.[127] Of course, doing so increases both the loan amount and the monthly payments. Third, if the client has the ability to pay but the lender is unwilling to modify the payment terms, VA refunding may be an option. The VA, in its discretion, can actually buy the loan from the holder and take over as the creditor.[128] At that point, the VA may continue to serve as the note holder or it may sell the note.[129] In spite of all these programs, sometimes sale of the property is the only option. Fourth, the VA can facilitate a compromise sale.[130] Under certain circumstances, a veteran may sell his home for less than the amount due on the loan.[131] The VA then pays the difference between the balance on the loan and the proceeds from the sale, though the amount cannot exceed the maximum amount of the loan's guaranty.[132] It is actually possible for the original borrower to sell his home for substantially less than is owed and walk away from the transaction owing nothing. However, any VA loan entitlement will not be restored.[133]

IV. EDUCATION BENEFITS

The primary education benefits administered by the VA are through the Montgomery GI Bill.[134] Although there are three separate categories of

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[126] *See id.* ch. 2, ¶ 2.03.

[127] VA Manual M26-4, change 15, ¶ 2-8 (1993).

[128] *See* 38 U.S.C.A. § 3720(a)(5); 38 C.F.R. §§ 36.4318, 36.4322; VA Manual M26-4, change 11, ch. 2, ¶ 2.06c(2) (1995).

[129] VA Manual M26-4, ch. 2, ¶ 2.12.

[130] *See* 38 C.F.R. §§ 36.4323, 36.4342; VA Manual M26-4, ch. 2, ¶ 2.09 (1992); Major Bruce D. Lennard, *One Dollar May Move You In, But It Can Take A Lot More To Move You Out*, THE REPORTER, Sep. 1997, at 26.

[131] The VA has the authority to compromise, waive, or release any right or claim. 38 U.S.C.A. § 3720. This authority includes the right of the VA to reduce the number and size of debts it has against veterans. A compromise sale may be appropriate when it will preclude the establishment of an uncollectable debt. Some of the criteria include that the default was caused by circumstances beyond the debtor's control, that there is no indication of bad faith, and that the obligor cooperated with the VA in exploring alternatives to the sale. 38 C.F.R. § 36.4323(e)(1)–(4).

[132] VA Manual M26-4, ch. 2, ¶ 2.09.

[133] 38 C.F.R. § 36.4203(a)(3).

[134] *See generally* Veteran's Affairs Pamphlet 22-90-2, Summary of Educational Benefits Under the Montgomery GI Bill–Active Duty Educational Assistance Program, Chapter 30 of Title 38 U.S. Code (1997).

eligibility, for anyone currently on active duty the general rule is that a veteran is eligible for benefits upon discharge if they served for at least two years and elected to have their military pay reduced by $100 per month for twelve months.[135] Discharges for convenience of the government, for hardship, or for a medical condition could shorten that active duty service requirement.[136]

The amount of the payments and the flexibility of how they may be spent[137] is especially useful. Full time students who served at least three years on active duty receive $528 a month[138] for up to 36 months[139]. Full time students who served two years on active duty receive $429 per month.[140] These funds can be used toward an undergraduate or graduate degree, a certificate or diploma from business, technical, or vocational schools, or various other types of education.[141] Payments for tutors and work-study programs are also available.[142] Generally, any course of study that leads to some type of degree or certificate will be covered.[143] GI bill funds can now also be used to pay for courses that prepare veterans for admissions tests.[144]

Educational benefits are also available for dependents. Spouses who have not remarried and children of veterans are eligible under certain circumstances: (1) the veteran either died or is permanently and totally disabled as the result of active duty service, (2) the veteran died from any cause while rated permanently and totally disabled from a service-connected

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[135] 38 U.S.C.A. § 3011 (basic educational assistance entitlement for service on active duty). There are also programs available for the Selected Reserve and for individuals who had a remaining entitlement under the Vietnam Era GI Bill. VA Pamphlet 80-99-1, *supra* note 1, at 17–20. *See also* Veteran's Affairs Pamphlet 22-90-3, Summary of Educational Benefits Under the Montgomery GI Bill–Selected Reserve Educational Assistance Program, Chapter 1606 of Title 10 U.S. Code (1998); Veteran's Affairs Pamphlet 22-79-1, Summary of Educational Benefits Under the Post-Vietnam Veterans' Educational Assistance Program (1997).

[136] 38 U.S.C.A. § 3011(a)(1)(B)(ii).

[137] 38 C.F.R. § 21.7220 (course approval list). GI Bill funds cannot be used for bartending or personality development courses. *Id.* § 21.7222.

[138] 38 U.S.C.A. § 3015(a)(1) (amount of assistance).

[139] *Id.* § 3013(c)(1) (duration of benefits).

[140] *Id.* § 3015(b)(1).

[141] *See id.* § 3687 (apprenticeship or other training); *id.* § 3241(b) (flight training).

[142] 38 C.F.R. § 21.7141 (tutorial assistance); VA Manual M27-1, pt. I, change 49, ch. 9, (1995) (work-study allowance program).

[143] 38 C.F.R. § 21.4253(b). *See also id.* at § 21.4254 (procedures for nonaccredited courses); *id.* § 21.4255 (required refund policy for nonaccredited courses). A college or educational institution will be considered accredited by the VA if it is recognized by a national accrediting agency or by the applicable state agency. *Id.* § 21.4253(c). Students seeking educational benefits should complete a VA Form 22-1990, Application for VA Education Benefits. The school completes a VA Form 22-1999, Enrollment Certification, and returns it to the VA. Students receiving benefits should complete a VA Form 22-1995, Request for Change of Program or Place of Training, before switching schools or changing their educational objective (e.g., college to a vocational school).

[144] Veterans Millennium Health Care and Benefits Act, 106 Pub. Law No. 117, § 701, 113 Stat. 1545 (1999) (to be codified at 38 U.S.C. § 3002(3)). Examples would college or graduate school entrance exams like the ACT, SAT, LSAT, MCAT, and GRE.

disability, (3) the military member has been listed as either missing in action or as a prisoner of war for over ninety days, or (4) the military member is detained by a foreign government or power for over nintey days.[145] The opportunities are similar to the veterans' programs and the rate for a full time student is $485 per month.[146]

V. IMPACT OF DISCHARGE CHARACTERIZATION

Translating the terms of art used in the military for discharges[147] into set rules for VA benefits is difficult because the statues use definitions that do not correlate with the popular names for the various types of discharges. Instead, the statutes operate using terms like "under conditions other than dishonorable."[148] This can be particularly troubling because the only VA benefits that absolutely require an honorable discharge are the Montgomery GI Bill and VA home loan program for members of the Selected Reserve who have served for at least six years.[149] All other VA benefits are determined based on the actual discharge characterization, the level of the court-martial, and the nature of the offense.

Although VA benefits do not technically ever vest, it is critical to understand at the outset that, as a general rule, no discharge characterization can ever erase the ability of a veteran to receive VA benefits based on prior honorable enlistments.[150] Although it may seem unusual that someone could

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[145] 38 U.S.C.A. § 3501 (definition of eligible person); 38 C.F.R. § 21.3021. *See also id.* §§ 21.3040–21.3045 (eligibility requirements for children); *id.* §§ 21.3046–21.3047 (eligibility periods for surviving spouses).

[146] 38 U.S.C.A. § 3532 (computation of allowance); *id.* § 3511 (duration of educational assistance).

[147] The two punitive discharges are known as a dishonorable discharge and a bad conduct discharge, and they can only be adjudged at a court-martial. *See generally* MANUAL FOR COURTS-MARTIAL, United States, pt. II, Rule For Court-Martial 1003(b)(9) (1998 ed.). The three administrative discharges are known as a discharge under other than honorable conditions, a general discharge, and an honorable discharge. *See generally* Air Force Instruction 36-3208, Administrative Separation of Airmen ¶ 1.18 (Oct. 14, 1994) [hereinafter AFI 36-3208].

[148] 38 U.S.C.A § 101(18).

[149] *See id.* §§ 3011, 3225; *id.* § 3701(b)(5)(A) (Selected Reserve requirements). Military members who have paid into the GI Bill will lose that money, as well as their educational benefits, unless their final discharge from active duty is characterized as honorable. 38 U.S.C.A. § 3011(a)(3)(B). A general discharge will not be sufficient.

[150] Department of Veterans Affairs, Op. Off. Gen. Counsel 61-91, (July 7, 1991), *summarized in* 56 Fed. Reg. 50,149 (1991) [hereinafter Op. Off. Gen. Counsel 61-91]. Military courts share this view. *See* United States v. Perry, 48 M.J. 197 (C.A.A.F. 1998) (concluding there is no right to instruction on recoupment of Naval Academy education); United States v. Perry, No. ACM 30766, 1995 WL 229140 (A.F.C.C.A. 1995) (holding it was not error to instruct that VA benefits may have vested from earlier discharge); United States v. Hansen, 36 M.J. 599 (A.F.C.M.R. 1992) (finding no error with instruction to members that VA benefits from prior honorable service are not forfeited by punitive discharge). *But see* Department of the Army

receive a Dishonorable Discharge and still qualify for a VA home loan or medical care, the rationale is that subsequent dishonorable service should not bar benefits from individuals who successfully completed the period of service to which they had originally agreed.[151]

The VA reviews veterans' military records on a case-by-case basis to determine whether the individual's service was "under conditions other than dishonorable."[152] Generally, no VA benefits will be paid to veterans who were discharged after their first enlistment as a conscientious objector,[153] as the result of a sentence from a general court-martial,[154] after resigning for the good of the service,[155] for being a deserter, or after receiving a discharge under other than honorable conditions for being absent without leave for at least 180 days.[156] If, however, the person was determined to be insane at the time of the event, they may still be eligible for benefits notwithstanding the nature of the

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Pamphlet 27-9, Military Judges Benchbook 69–70 (1996) (A punitive separation "deprives one of substantially all benefits administered by the Department of Veterans Affairs.").

[151] *See* Op. Off. Gen. Counsel 61-91, *supra* note 151. If a member has a three year enlistment, reenlists at two years, and then gets a BCD two and a half years from his original entry on active duty, the honorable discharge received for the two year term will not count as an honorable discharge for VA purposes. *See* 38 U.S.C.A. § 101(18); VA Manual M21-1, pt. I, change 2, ch. 3, ¶ 3.10a (1994).

[152] VA Manual M21-1, pt. IV, change 83, ch. 11, ¶ 11.01a (1995). *See also* Linsday v. Brown, 9 Vet. App. 225 (1996) (concluding widow of veteran, who received bad conduct discharge from Navy for being absent without leave and a discharge under other than honorable conditions from the Army for fraudulent enlistment, was not entitled to death pension); Camarena v. Brown, 6 Vet. App. 565, 567-68 (1994) (concluding someone with a bad conduct discharge is not a "veteran" for purposes of veterans benefits legislation, 38 U.S.C. § 101); Rogers v. Derwinski, 2 Vet. App. 419 (1992) (holding widow of veteran who submitted Chapter 4 request when faced with drug charges at a special court-martial was not entitled to Dependancy and Indemnity Compensation payments). An honorable characterization of a member's service by the armed forces is binding on the VA. 38 C.F.R. § 3.12(a). There are additional rules concerning void enlistments (e.g., concealment of age or physical defect). *Id.* § 3.14.

[153] The text from the statute reads, "a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority." 38 U.S.C.A. § 5303(a). *See also* Air Force Instruction 36-3204, Procedures for Applying as a Conscientious Objector (July 15, 1994) (includes a discussion of loss of VA benefits).

[154] Interestingly, a discharge from a general court-martial, even if it is subsequently upgraded, still prohibits VA benefit payments. *See* Department of Veterans Affairs, Op. Off. Gen. Counsel 10-96, (Oct. 28, 1996), *summarized in* 61 Fed. Reg. 66,784 (1996); Helige v. Principi, 4 Vet. App. 32 (1993) (determining that veteran who passed sanity board before court-martial was not insane; dishonorable discharge upgraded to bad conduct discharge still prohibited entitlement to VA benefits because sentence was from general court-martial). Upon request, the VA will mail a DD Form 293 to members wishing to upgrade their discharge. If it has been more than 15 years, a DD Form 149 should be used.

[155] Applies to commissioned officers only.

[156] *See* 38 U.S.C.A. § 5303(a); 38 C.F.R. § 3.12(c).

discharge.[157] This exception does not apply if the member is discharged after a Chapter 4 discharge or a Resignation In Lieu of Court-Martial is submitted to avoid trial by general court-martial,[158] for either mutiny or spying,[159] for an offense that involved moral turpitude, for misconduct that was willful and persistent, or for homosexual acts that involved some type of aggravating factor.[160] The VA will consider the discharge to be under dishonorable conditions in these situations.[161] Any entry level separations[162] "shall be considered under conditions other than dishonorable."[163] By contrast, void enlistments and members dropped from the rolls will be reviewed on a case-by-case basis.[164] Finally, anyone who has committed a homicide will not be entitled to VA benefit payments.[165]

The rules for access to medical care also require explanation. Otherwise eligible veterans who received either an honorable or general discharge at the time of separation can access VA medical care without the review of a VA regional office.[166] However, a veteran who has had his discharge under other than honorable conditions upgraded to a general

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[157] The VA uses a medical, rather than a legal, definition of insanity. There is no discussion that the veteran is unable to distinguish right from wrong. Under the VA definition, a person is insane if he exhibits,

> due to disease[,] a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

38 C.F.R. § 3.354.

[158] A Chapter 4 discharge refers to a request submitted by an enlisted Air Force member to be discharged in lieu of court-martial under Chapter 4 of AFI 36-3208. *See* AFI 36-3208, *supra* note 147, ch. 4. A Resignation in Lieu of Court-Martial, or RILO, is an equivalent request submitted by an officer. *See* Air Force Instruction 36-3207, Separating Commissioned Officers ¶ 2.23 (May 29, 1997).

[159] *See generally* 38 U.S.C.A. § 6104 (forfeiture for treason); *id.* § 6105 (forfeiture for subversive activities); 38 C.F.R. § 3.903 (subversive activities).

[160] The military's homosexual conduct policy, 10 U.S.C.A § 654 (West 1995), and the Air Force policy and discharge procedure, permit discharge for homosexual conduct. *See* AFI 36-3208, *supra* note 147, ¶ 5.36. If the facts indicate that in addition to engaging in such conduct, there were aggravating factors (e.g., the conduct took place in public, with a minor, or by force) present, the Air Force member can be discharged under other than honorable conditions. *Id.* ¶ 5.37.3.

[161] 38 C.F.R. § 3.12(d)(5).

[162] Entry level separations are those that occur within 180 days of entry onto active duty. *See* AFI 36-3208, *supra* note 147, ¶¶ 1.19.1, 5.22.

[163] 38 C.F.R. § 3.12(k)(1).

[164] *Id.* § 3.12(k)(2)-(3).

[165] *Id.* § 3.11.

[166] VA Manual M-1, pt. I, ch. 4, ¶ 4.37a (1993).

discharge, must have a VA medical facility complete a VA Form 10-7131 and submit it to the VA Regional Office for review.[167] In some cases, veterans with a discharge under other than honorable conditions may be entitled medical care only for conditions incurred or aggravated due to military service.[168] Individuals with a punitive discharge (i.e., a bad conduct or dishonorable discharge adjudged by a court-martial) from a first enlistment will not be able to access VA medical care.[169]

VI. ANSWER TO THE "QUICK QUESTION"

This article began with a hypothetical divorce fact pattern involving a Gulf War veteran husband separating from active duty, a civilian wife, and two children. Assuming there are no discharge characterization issues, the husband will be entitled to receive, at a minimum, a VA home loan guaranty and access to medical care. He may also be eligible for education benefits and should apply for service-connection for any medical condition or symptom he has had since returning from that conflict. The former spouse is not going to be entitled to any VA benefits because she will no longer be either married to a veteran or considered to be a surviving spouse. If her husband is eligible for either compensation or pension payments, they are his separate property. The children, however, may be entitled to VA medical and educational benefits if their father becomes disabled. In addition, if he receives any type of additional VA payment because he has dependent children, he has an obligation to pass that additional amount on to the children.

VII. CONCLUSION

VA benefits explanations do not always lend themselves to a chart or to a quick question. However, there is no reason judge advocates should not be able to provide useful and accurate guidance during legal assistance. A few simplified, general rules illustrate the point. For example, almost every compensation or pension question in legal assistance could be answered, at a minimum, with a recommendation that the client apply for the benefits sought. If the client wants either an explanation of or desires to appeal a rating decision, then in addition to any assistance provided by the judge advocate, he should be referred to a veterans' service organization counselor.

For divorce clients, there are two key things to remember. First, compensation and pension benefits are the veteran's separate property and are not subject to division. Second, the VA will only garnish compensation payments and only if there has been an offset against the veteran's military

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[167] *Id.* ¶ 4.37b. The purpose of the form is to request a determination on whether the veteran's service was other than honorable.
[168] *See* 38 C.F.R. § 3.360; VA Manual M-1, pt. I, ch. 4, ¶ 4.38.
[169] VA Manual M-1, pt. I, ch. 4, ¶ 4.38(b)(3).

retired pay. On the real estate front, a client nearing default should not simply be told to offer a deed in lieu of foreclosure. The VA will work with her and refer her to the loan guaranty section of the nearest VA regional office. It is also critical that both trial and defense counsel remember that no discharge characterization, punitive or otherwise, can ever erase the ability of veterans to receive VA benefits based on prior honorable enlistments.

Almost everyone who has ever served in the armed forces will be directly impacted by some VA benefit. Accordingly, all military personnel should have at least a basic understanding of what is available and how those benefits can significantly improve their lives. Of course, judge advocates provide an important service to military members in the form of legal advice on these and many other issues. All judge advocates must have a sound, working knowledge of these benefits and programs and how they interact with each other.