A GUIDE FOR ATTORNEYS TO HELP VETERANS AND MEMBERS OF THE ARMED FORCES
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When this issue reaches you in early November, Election Day will likely have come and gone, and Veteran’s Day and Thanksgiving Day will be approaching. Do you ever ponder what to be thankful for? Is it your family’s peace, safety, and health? Is it your ability to speak your mind without censorship? Is it your ability to vote for the president of your choice? All these are safeguarded by the 1 percent of the people in the country who are currently defending us and protecting our safety—our active military service members. They, their families, and all the nation’s military veterans don’t ask for much. Most don’t ask for glory or to be compared to heroes. Most just want to come home to their families and enjoy the protection that everyone else does.

The difficulty is that a lot of the time they receive much less than what they deserve. Veterans have many concerns, including lack of benefits, lack of access to healthcare, unemployment (especially among the 9/11 veterans, which is higher than the national average for veterans) and homelessness (again especially among the 9/11 veterans). The news is filled with stories about our military community needing help. That’s where we as lawyers can step in and advocate for our clients who have sacrificed so dearly. The articles in this issue cover a small sampling of the legal problems facing our service members and offer some solutions to those problems. The topics range from access to benefits to immigration status to criminal defense. This issue is offered as a guide to understanding the breadth of matters faced by our service members and their families and how to help.

Los Angeles County is on the forefront. It created one of the first veterans courts in the country (as you can read about in “An Innovative Court for Veterans in Los Angeles County,” by Ben Gales and Paul Freese), and the Los Angeles County Bar Association recently started an Armed Forces Committee (AFC), whose primary mission is to help our active-duty, reserve, national guard, and military veterans by increasing access to pro bono and low-cost legal services through LACBA programs and activities. To date, the AFC has worked in coordination with other LACBA committees in identifying and coordinating services for veterans among existing programs, agencies, pro bono clinics, and other resources. Members of the AFC recently created the Parole Board Boot Camp that taught approximately 75 local attorneys how to represent veterans at parole board hearings.

In addition, and as part of its effort to increase access, the AFC will hold its first military ball on November 17. The proceeds raised will support the work of LACBA in serving veterans in Los Angeles County.

All of us know or have known someone who has served our country. We, the Veterans and Armed Forces Law Special Issue’s coordinating editors are no exception. We have served in the military, have family that has served in the military, and serve by aiding those who have. What we all have in common is an understanding of the sacrifices made by those who protect the rest of us. What better way to show our thanks than to educate others in their legal issues and help point out solutions. To our readers who are serving or have served, thank you for your service. We still need your help.

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MILITARY SERVICE OFTEN REQUIRES people to work and live in a state other than their home state. As a result, service members often have tangled connections to multiple tax jurisdictions. Federal law is designed to protect the choice of domicile of active-duty military members and their spouses, but confusion over the law reigns, and, as a result, various states may pursue income tax deficiencies against service members. Although some states do not tax income at all, other states (including California) treat military members as nonresidents for tax purposes if they are absent from the state, and therefore only tax active-duty military domiciliaries on income earned while they are permanently stationed in California. If they are permanently assigned outside the state, they become nonresidents of California for income tax purposes and are not taxed on income earned while out of state. But other states do not confer this immunity from taxation. So, if a domiciliary from such a state is assigned to duty in California, it may trigger a taxable residency claim, and both states could assert income tax jurisdiction.

The Servicemembers Civil Relief Act (SCRA) protects service members from various civil legal processes that could adversely affect them while they are away from their homes serving the United States. The SCRA postpones or suspends various civil obligations pertaining to leases, credit card interest, mortgage foreclosures, judicial proceedings, and state income tax. Section 571 of the SCRA (residence for tax purposes) specifically protects service members from double state taxation of income and personal property. The provision prevents the loss or acquisition of a military member’s domicile due to the presence or absence in a tax jurisdiction by reason of military orders. Previously, military spouses had never been granted the same protections, which complicated joint returns. However, the Married Spouses Residency Relief Act (MSRRA) of 2009 amended the SCRA and extended similar protection to certain military spouses.

The SCRA provides:
A service member shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property or income of the service member by reason of being absent or present in any tax jurisdiction of the United States in compliance with military orders.

Compensation of a service member for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the service member is not a resident or domiciliary of the jurisdiction in which the service member is serving in compliance with military orders.

Thus, a service member’s military compensation is protected from double income taxation under the fiction that the income is earned only in the state of domicile regardless of where it is actually earned. The issue for both the service member and state taxing authority is deciding which state is the domicile.

A state’s power to tax, some states’ special treatment for military income, and federal law preventing double state taxation all seem like simple concepts until one asks a military member, “Where are you from?” A Captain Jane Doe may answer that her “home of record” is San Diego, but she had been “residing” in Virginia during her tour at the Pentagon before her year of deployment to Afghanistan. She thinks her “legal residence” is Texas, because she owns a house in San Antonio and her military pay stub indicates Texas. She holds a Texas driver’s license, but her new car is registered in Virginia. She most recently voted absentee in Texas but then registered to vote in Virginia. She may add that her husband is from Michigan, but he spent the last year working in Virginia while she was deployed. They are moving to Fort Irwin, California, on permanent orders next month. She might believe she is a resident of California, because she was born in San Diego and lived there her entire life until she joined the Army. She is adamant that her “domicile” for the last year was Kabul, because she seeks the combat-zone tax exclusion.

The Concept of Domicile

Service members, their family members, and tax administrators frequently confuse home of record, legal residence, and domicile. The key to determining which state, if any, can tax Captain Doe’s or her husband’s income requires a clear understanding of these terms, the most important of which is “domicile.”

“Domicile” means a person’s true, fixed, and permanent home, to which that person intends to return and remain even though currently residing elsewhere. It differs from residence, which is the place one is actually living for an undetermined period and is not necessarily combined with the intent to stay permanently. As noted, the SCRA treats “residence” and “domicile” interchangeably due to the fact that some states equate the two or, in the case of California, assert tax jurisdiction over statutory residents who may not be domiciled in California. The issue of domicile is largely determined based on a person’s intent. If a person has physically lived in a place, the issue is always whether the person intends to remain or return to that place.

States are within their authority to critically examine service members’ claims of SCRA-protected out-of-state domicile.
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The subjectivity of intent often requires courts to look at objective factors and draw conclusions that may conflict with what a service member believes to be his or her domicile.

Courts consider indicia of domicile when analyzing whether a person intends to permanently reside somewhere. The applicable factors include physical presence, payment of taxes, ownership of real property, voter registration, vehicle registration, driver’s license, professional licenses, declarations of residence in legal documents, and declaration of domicile in affidavits or litigation. Military people move a lot. They often establish indicia of domicile in multiple places. Captain Doe likely resided in Afghanistan during her physical deployment, but probably does not intend to return permanently. Sorting out domicile requires a close look at the facts and knowledge of the various terms. One of the most misunderstood terms is the “home of record.”

“Home of record” refers to the place from which a person was appointed or enlisted into the military. It is used to determine a person’s maximum travel and transportation entitlement upon leaving military service. It may or may not be the same as one’s domicile or residence. Captain Doe claims San Diego as her home of record. This only means that she entered the service in San Diego, and if she leaves the service at Fort Bragg, North Carolina, her transportation and travel entitlement will be the value it takes to move her and her goods from Fort Bragg back to San Diego. However, if she entered military service from college at the University of North Carolina, the military would only pay the value of moving her and her goods from Fort Bragg, North Carolina, to Chapel Hill, North Carolina. When service members speak of their “home of record,” they may mean their hometown, their home state, or perhaps where they entered service, but one should be very cautious about equating it with domicile.

“Legal residence” is another term sometimes equated with domicile; the terms are often used interchangeably. Captain Doe resided in Virginia while working at the Pentagon and she “resided” in Afghanistan while deployed there. It would seem she also resided in Texas at some point in the past. As long as she was or is physically present in a place, she is residing there. But domicile, its protectable status under the SCRA, and the power to tax domiciliaries turn on intent to remain or return. Captain Doe called Texas her “legal residence.” It appears she believes Texas is her domicile, because she owns a house, has a driver’s license, and votes in Texas. She also lists Texas as her withholding state on her military pay statement. Captain Doe may also be claiming Texas as her legal residence because Texas does not tax income. Should Virginia or California attempt to tax her income, she will have the burden of establishing her intent to return to Texas through strong indicia of domicile.

One of the most common issues pitting military members and state tax authorities against each other is the double nontaxation issue. Service members often legitimately assert a domicile in a state that does not have an income tax. Too often, however, the concept is misunderstood and confused with home of record, or the belief that the member may simply assert a given state as the member’s domicile without establishing or maintaining indicia of domicile. The Oregon Tax Court faced this situation in *Carr v. Department of Revenue.*

Navy Senior Chief Carr entered active duty in 1980 in Las Vegas, Nevada, and served for 25 years, ultimately retiring in Oregon. He served in Portland, Oregon, from 1993 to 1996 before he transferred to California, where he remained until 1999. He was reassigned to Oregon in 1999, where he remained until he retired in 2005. Oregon assessed personal income tax for the 2001, 2002, and 2003 tax years. The issue was whether Chief Carr sufficiently established domicile in Oregon subjecting him to taxation despite his being there as an active-duty service person and claiming Nevada (a state without income tax) as his domicile. The court found that Chief Carr had established a new domicile in Oregon and upheld the tax assessment.

The SCRA, (as did its predecessor, the Soldiers and Sailors Civil Relief Act) provide that a member neither loses nor acquires tax domicile by being present in or absent from a state solely due to military orders. The court rightly observed that while the act of being posted to a state does not change domicile, a state can and often does look at other factors that might establish domicile, even unknowingly. In this case, Chief Carr bought a house in Oregon in 2001 and registered his vehicles in Oregon. He maintained no ties with Nevada other than some extended family living there. He did not own property in Nevada, hold a Nevada driver’s license, register his vehicles, or vote in Nevada. Moreover, in a 1999 bankruptcy filing, he listed California as his domicile. Faced with almost no evidence of ties to Nevada or any other state, the court concluded that purchasing a home and registering vehicles in Oregon, though tenuous, was the strongest indicia of domicile to any state.

This case turned more on Chief Carr severing his ties with Nevada than on his affirmatively establishing domicile in Oregon. Chief Carr likely confused home of record and domicile. He enlisted in Nevada, and at the time it probably was his domicile. He likely registered his car, held a driver’s license, and voted in Nevada. His mistake was not maintaining those ties. The lesson from this case is that a bare assertion of domicile, without conduct to back it up, is not enough. In addition, if a service member allows his or her domicile to lapse, the SCRA will not act as a shield against his or her future actions in a new state that establish ties to that state. Had Chief Carr maintained strong ties with Nevada, buying a house and registering vehicles while residing in Oregon might arguably not have been sufficient to establish tax jurisdiction there. But in the absence of evidence connecting him to any other state, it was enough for the court to declare him an Oregon domiciliary.

In *Palandech v. Department of Revenue,* the Oregon Tax Court again faced the issue of double nontaxation, but, although the ties to the non-income tax state were stronger, the court similarly concluded that Oregon had taxing jurisdiction over the service member. Palandech was a dentist with the Public Health Service (PHS), and he lived in Oregon, Washington, New Mexico, Arizona, and Oregon again throughout his career. He established and essentially severed ties with each state along the way. In his final assignment in Oregon, he claimed a Washington domicile, but Oregon disagreed and assessed personal income tax for years 2004, 2005, and 2006.

Palandech was born and raised in California. He completed dental school in Illinois and in 1980 established himself in Oregon. He bought a home, obtained a dental license and a driver’s license, and practiced dentistry in Oregon. In 1984 he joined the PHS and remained in Oregon until he was assigned to Washington in 1989. Once in Washington, Palandech established ties there. He registered to vote, obtained a driver’s license, registered his cars, and declared Washington his legal residence for state income tax withholding. He also sold his Oregon house and rented a house in Washington. He was reassigned to New Mexico in 1991 and then to Arizona in 1993, where he remained until 1998. During this time, he purchased unimproved land as an investment in Oregon with the possible intent to build a house. But he also bought a house in Arizona, and turned on utilities, telephone service, and enrolled his children in school. He also opened bank accounts in Arizona. When Palandech was reassigned back to Oregon in 1998, he sold his Arizona house and bought a five-bedroom house in Salem, Oregon. The entire time, he maintained his Washington driver’s license and voting registration. The issue once again was to determine the true location of his domicile through examining overt indicia of domicile and inferring intent.

The court concluded that the case was a
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“straightforward” residency case. The court accepted the premise that Palandech’s initial Oregon domicile was protected by the SCRA. Thus, Palandech would neither lose Oregon domicile nor acquire Washington domicile simply by residing in Washington in accordance with military orders. But the court concluded that Palandech abandoned Oregon and intended to acquire Washington as his domicile after looking at several key factors such as selling his Oregon house, obtaining a Washington driver’s license, registering to vote, registering his autos, and declaring Washington as his domicile for income tax withholding. Unfortunately for Palandech, the court performed the same analysis when he moved back to Oregon in 1998. The court cited the unimproved lot purchased in Salem with the intent to build, the house purchase, opening of bank accounts, registration of autos, Palandech’s active Oregon dental license, moonlighting as a dentist in Oregon while on active duty, and his family members living in Oregon as the basis for finding Oregon domicile.

Unlike Carr, in which no ties to Nevada remained and only tenuous ties to Oregon existed, the Palandech court was not so apologetic in finding Oregon domicile. Although Palandech kept his Washington driver’s license and voter registration—two strong indicia of domicile, the court saw this as a veneer. It believed that his other affirmative actions in Oregon reflected his true intent to remain in Oregon. In addition, the court noted that Palandech purchased the unimproved lot in Oregon, not Washington, and he registered his autos in Oregon, not Washington. Arguably the Washington ties could have led the court to find that the Washington domicile was not lost in moving to Oregon, but the court noted that when Palandech moved to Arizona, he closed his Washington bank accounts. The court simply did not believe that Palandech intended to return to Washington.

Carr and Palandech highlight several concepts about the SCRA. First, the SCRA is meant to protect a service member from double state income taxation. Military members often establish domiciles in states that do not have income tax, creating a double nontaxation benefit. Second, as these cases show, the burden is on the service member to establish and maintain legitimate domicile through indicia of domicile or else be subject to challenge. It is not enough to simply declare a tax-favored jurisdiction, nor is it enough to make a half-hearted effort at maintaining the tax-favored domicile. Third, as the Oregon Department of Revenue has demonstrated, states are within their authority to critically examine service members’ claims of SCRA-protected out-of-state domicile and overt acts within their state.

The SCRA domicile issue historically applied just to the service member. However, with the passage of the MSRA, states are faced with out-of-state domicile assertions from military spouses. Thus, the issue of domicile will become even more subject to debate as states also have to establish the ability to tax military spouses’ income. Under the MSRA and California law, a nonmilitary spouse of a military service-member shall neither lose nor acquire a residence or domicile for tax purposes by being absent from or present in California to be with the service member serving in compliance with military orders if the servicemember and the spouse have the same domicile. While the law affords the same domicile protection (and pitfalls) as the SCRA, to qualify, California has three requirements: 1) the spouse must be present or absent in California to be with the service member spouse, 2) the service member must be in compliance with military orders, and 3) the service member and spouse must have the same domicile. For example, while stationed in Texas, a service member who is a Texas domiciliary marries a civilian spouse who is also a Texas domiciliary. Next, the service member receives orders to move to California, and the spouse moves in order to be with him or her. The spouse could claim MSRA protection and California would not tax the spouse’s income earned in California, because both had the same domicile of Texas and the spouse moved to California to be with a service-member spouse. However, as seen in Carr and Palandech, the burden of establishing and maintaining strong Texas indicia of domicile is on the member and his or her spouse. This outcome could change if the service member moved to California and then married a California domiciled spouse or married a Michigan domiciled spouse. In those cases, the “same domicile” prong would fail. It is important to remember that just like the service member, the spouse cannot simply choose a convenient domicile. The spouse is subject to the same domicile scrutiny as the service member when asserting a given jurisdiction.

Recall Captain Doe and her answer to, “Where are you from?” If she is on her way to California with her husband, how would one advise her regarding state income tax liability for 2012? The first step would be to determine her domicile. While she was born in California and entered the service there, she offers no further evidence that she maintained a California domicile once she left the state. Her strongest indicia of domicile comes from Texas, where she owns real property, holds a driver’s license, voted, and declared Texas as her state for income tax withholding. As noted, Texas is a common domicile among service members because of its tax-favored status. But during her time in Virginia, Captain Jones registered a new car and registered to vote. She may have put herself at risk with Virginia, which could challenge her claim of Texas domicile. If Captain Doe hopes to rely on SCRA protecting her Texas domicile when she moves to California, she is best advised to register her car in Texas, reregister to vote in Texas, and take other steps to indicate her intent to return, if that is the case. Otherwise, she could also be at risk for a domicile challenge in California. As noted in Palandech, subsequent moves and subsequent actions can function to change domicile, even unwittingly.

Likewise, determining her husband’s domicile is the first step in determining his tax liability and whether he could claim protection under the MSRA upon their move to California. His domicile is not clear from the facts. It could be Michigan, it could be Virginia, or it could be Texas. One should ask where and when they were married and what indicia of domicile he has with each state. To receive MSRA protection from California taxation, he will have to travel to California to be with his military spouse pursuant to her military orders. Moreover, they both must arrive with the same domicile, whether Texas or Virginia. Unless those elements are met, he would not receive MSRA protection.

Servicemembers have significant tax benefits, but state income taxation based on domicile is often a confusing factual maze to navigate—especially with constant moves from one state taxing jurisdiction to another. The multiple moves and misunderstanding of terms and law can place tax authorities and service members at odds over the issue of state income taxation. Now more than ever, as states scramble to find income, service members and their spouses need to understand the basic rules for establishing and maintaining a legitimate domicile. Although the SCRA, and now the MSRA protect service members and their spouses from gaining or losing domicile, tax authorities have shown they may be paying more attention to the rules than are the service members. Service members and their tax advisers would benefit greatly by fully understanding what it takes to establish, maintain, and defend a domicile under the SCRA and MSRA.

1 See http://www.taxadmin.org/fta/rate/mil_chart03.htm, Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming do not have a broad-based state income tax. Id.
2 STATE OF CALIFORNIA FRANCHISE TAX BOARD PUBLICATION 1032, TAX INFORMATION FOR MILITARY PERSONNEL (2011).
3 Orders for more than 179 days are considered permanent change of station (PCS) orders. Orders for 179 days or less are considered temporary duty orders (TDY). California residents out of the state on TDY
orders are still considered residents for income tax purposes.

4 The SCRA was originally called the Soldiers and Sailors Civil Relief Act of 1940, amended in 2003 and 2009 and codified at 50 U.S.C. app. §§ §301-396. Section 571 (tax residence) is the former §574 and remains substantially the same.

5 50 U.S.C. app. §571; See Dameron v. Brodhead, 345, U.S. 322 (1953) (upholding the constitutionality of SSCRA §574, the forerunner state tax provision).

This article focuses on income tax, not personal property, but note that intangible personal property includes bank accounts, stocks, etc., which could become relevant for income tax purposes.

6 The Married Spouses Residence Relief Act, Pub. L. No. 111-97 (2009) (adding provisions protecting spouses of military members losing or acquiring domicile by reason of being present in or absent from a tax jurisdiction solely to be with a service member in compliance with the service member’s military orders).


8 50 U.S.C. app. §571(b). Note that nonmilitary income is not protected and can be taxed by the state of domicile and the state in which the income is earned.


10 BLACK’S LAW DICTIONARY 359 (9th ed. rev. 2009) (defining domiciliary as a person who resides in a particular place with the intention of making it a principal place of abode); See also Mitchell v. United States, 88 U.S. 350, 352 (1874) (defining domicile as a residence in a particular place accompanied with a positive or presumptive proof of an intention to remain there for an unlimited time).

11 BLACK’S LAW DICTIONARY 1423 (9th ed. rev. 2009) (defining residence as the place where one actually lives, as distinguished from domicile).

12 REV. & TAX CODE §17016 (2012) (establishing a rebuttable presumption of residency for every individual who spends in aggregate more than nine months of the taxable year within California).

13 Other factors include expressed intent, residence of immediate family members, location of schools attended by children, leasehold interests, situs of personal property, location of bank and investment accounts, home of record, place of marriage, and spouse’s domicile.

14 See e.g. DD Form 2058, State of Legal Residence Certificate (explaining that domicile and legal residence are essentially interchangeable). This form is filled out by service members and instructs the defense finance accounting office as to the state for which income taxes will be withheld from wages, if any.

15 Supra note 1.


17 Id. at 1.

18 Id.

19 See Matter of Karsten, 924 P. 2d 1272 (Kan. App. 1996) (Purchasing a house or registering a motor vehicle in a host jurisdiction does not automatically change a service member’s domicile unless the service member indicates intent to change domicile.).


21 Id. at 2.

22 Id. at 3.

23 Id. at 5.

24 Id.

25 Id. at 7.

26 Id. at 22. See White v. Department of Revenue 14, OTR 319, 521 (1998) (establishing a three-part test to effect a change in domicile: 1) residence in another place, 2) intent to abandon old domicile, and 3) intent to acquire new domicile).

27 Supra note 1.

28 50 U.S.C. app. §571(a)(2) and (c); State of California Franchise Tax Board Publication 1032, Tax Information for Military Personnel (2011). Unlike the SCRA, which only protects military income of the service member from taxation, the MSRRA protects all income for services performed. Id.

29 State of California Franchise Tax Board Publication 1032, Tax Information for Military Personnel (2011). It should be noted that although the rules applying SCRA are set forth in REV. & TAX CODE §17140.5, the rules relating to MSRRA have not been codified in the REV. & TAX CODE. It would appear, therefore, that the Franchise Tax Board has adopted MSRRA as a matter of tax policy and affords its benefits to the spouses of service members.

30 For example, I.R.C. §112 excludes compensation received for active service in a combat zone. Other combat-zone-related tax benefits include but are not limited to: I.R.C. §104(a)(4) (excluding combat-related disability payments), I.R.C. §134(b)(6) (excluding state payments due to service in a combat zone), I.R.C. §692(a) (tax forgiveness if a member dies in a combat zone), I.R.C. §2201 (reduced estate tax liability), I.R.C. §4253(d) (no excise tax on phone calls originating in a combat zone), and I.R.C. §7308(a) (180-day automatic extension of time to file and pay income tax). The I.R.C. provides many other noncombat-related tax benefits to service members, such as I.R.C. §217(g) (moving and storage), I.R.C. §134 (exclusion of qualified military benefits, e.g., BAH/BAS), I.R.C. §265(a) (tax-exempt income not subject to apportionment/allocation), and I.R.C. §121 (expanded time for gain exclusion on the sale of principal residence).
Employment and Reemployment Rights of Veterans

IN 2010, APPROXIMATELY 21.8 MILLION VETERANS lived in the United States.1 Half of these veterans served during World War II, the Korean War, and the Vietnam era.2 Gulf War II veterans—those who have served since September 2001—amount to nearly 1 in 10 of the veteran population,3 and they have a higher unemployment rate than veterans from all other service periods.4

Veterans have proudly served the United States around the world during war and peace, but often return home to find themselves unemployed. Those who employ veterans provide valuable assistance but need to be aware of the rights and responsibilities of hiring those who have served this country. Presently, tax credits are one of the benefits of hiring veterans. For example, under the Returning Heroes Tax Credit, employers are credited up to $2,400 for hiring veterans who have been unemployed for at least four weeks. If employers hire veterans who have been unemployed for more than six months, that credit increases to up to $5,600. The Work Opportunity Tax Credit gives employers who hire veterans with service-related disabilities up to a $4,800 credit. However, these credits expire at the end of 2012, and there is currently no news of an extension.5

The Uniformed Services Employment and Re-Employment Rights Act (USERRA)6 was enacted in 1994 with three purposes. The first was to encourage non-career military service by reducing its disadvantages. Second, Congress hoped to minimize the disruption to the lives of those in the armed services as well as to their employers, their fellow employees, and their communities, by facilitating prompt reemployment upon completion of service. Finally, Congress enacted USERRA to prevent discrimination against service members due to their military status or obligations.7 As articulated by the U.S. Department of Labor, “The law is intended to encourage non-career uniformed service so that America can enjoy the protection of those services, staffed by qualified people, while maintaining a balance with the needs of private and public employers who also depend on these same individuals.”8

Employment and Reemployment Rights

USERRA extends reemployment rights to persons who have been absent from a position of employment because of “service in the uniformed services.”9 Specifically, it guarantees a veteran who is returning from military service or training the right to be reemployed at his or her former job (or as nearly comparable a job as possible) with the same benefits, subject to conditions. Unlike other employment laws that often require a minimum number of employees to be applicable, USERRA applies to employers regardless of the number of employees.10 To be eligible under USERRA, a service member’s absence from work cannot exceed five years cumulatively. There are eight exceptions to the five-year period that cover situations outside the veteran’s control, such as an involuntary order to remain on active duty during a domestic emergency or periodic required trainings for reservists and National Guard members.11

The reemployment benefits provided to veterans by USERRA terminate upon the occurrence of any disqualifying service.12 For example, a service member is disqualified for reemployment benefits if he or she separated from the service with a dishonorable or bad conduct discharge, separated from the service under other than honorable conditions, or was dismissed as a commissioned officer under situations involving a court martial or by order of the president in time of war.13

Although returning service members have reemployment rights, this benefit comes with certain responsibilities. Under USERRA, service members must give their employer advance notice of the leave and their intent to return.14 This notification may be either verbal or in writing. However, if the soldier is shipped out before having a chance to give adequate notice to the employer, the notice requirement may be delayed or waived. Delay or waiver is granted when notice was impossible, unreasonable, or precluded by military necessity.15 Military necessity is determined “pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.”16

When the service member returns from deployment, it is his or her responsibility to report back to work. How this is to be done depends on how long the member was away from work.17 If the service member was absent from work for less than 31 days, the member must return to work the first full day following completion of military service, not including time to travel home and an eight-hour rest period. If the member was absent from work between 31 and 180 days, the member must submit an application for reemployment within 14 days of the completion of military service. If the absence from work was more than 180 days, the service member must submit an application for reemployment within 90 days of the completion of military service. If the member was absent from work for more than 180 days, the service member must give their employer advance notice of the reemployment request.18 This two-year period can be increased to allow for circumstances beyond the member’s control in which reporting back to work would be “impossible or unreasonable.”19 It is important for employers to remember that because reservists must be rehired, the “application” is actually a notice of the intent to return to work rather than a new job application.

Once a service member seeks reemployment, the question for the employer is often where to place the returning employee. While soldiers are away on duty, their employers must continue to run businesses back home. During the period of deployment, additional hires may have been made or—given the current economy—jobs may have been eliminated. This places employers in the difficult situation of determining how to reintegrate the returning employee. This may involve more than merely returning an employee to a former position. For instance, under USERRA, the corporate ladder may become an escalator. The “escalator position” requires that the returning service

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member be placed in the position he or she would have occupied with reasonable certainty if the employee had remained continuously employed, including any pay raises and promotions. 20

In other words, if an employer is questioning whether it can place a returning service member in a lower position than the member was in before he or she left, the answer in most circumstances will be no. An employer is required to place a returning service member in the position the member would have been in if he or she had not left, as long as the service member is qualified for the job or can become qualified after reasonable efforts are made by the employer to help him or her become qualified. Additionally, the reemployment must be prompt or as soon as practicable under the circumstances. 21

USERRA provides another protection to employees that could raise liability concerns for employers. Although many employees in California are “at will” and can be fired for any reason as long as it is not discriminatory (i.e., on the basis of race, sex, gender, sexual orientation, gender expression, religion, national origin, etc.) or for reasons in violation of public policy (e.g., reporting an unsafe work condition), military service may change an employee’s at-will employment status. A person reemployed under USERRA cannot be discharged, except for cause, within one year after the date of reemployment if the period of service was over 180 days. 22 A reemployed service member cannot be discharged within 180 days after the date of reemployment, except for cause, if the period of service was more than 30 days but less than 181 days. 23 Employers should also be aware that employees who feel their rights under USERRA have been violated have no statute of limitations by which they must file a complaint with the Department of Labor or with the Veterans Employment and Training Service or file a private action in court. 24

**Accommodating Disabilities**

Qualifying returning service members for a job is further complicated when an employee returns to work with a disability sustained in the course of military service. Statistics show that veterans with service-incurred disabilities are less likely to be employed than veterans without disabilities. 25 A 2009 U.S. Bureau of Labor study found that among veterans who had served since August 1990, 70.7 percent of disabled veterans were employed, compared with 81.9 percent of veterans without a service-related disability. 26 Furthermore, only 53.8 percent of veterans with a disability rating of 60 percent or more on the rating scale used by the Department of Veterans Affairs (V.A.) were employed, which suggests the more severe the disability, the less likelihood that the veteran will find employment. 27

Similar to the Americans with Disabilities Act (ADA), USERRA requires an employer to provide returning service members with reasonable accommodations. 28 These accommodations can include reconfiguring a workspace, such as adjusting the height of a desk for a person in a wheelchair, as well as providing leave for disability-related treatment or recuperation. 29 Unlike the ADA, USERRA also requires employers to engage in reasonable efforts to assist a veteran during the application process regardless of whether the veteran has a service-connected disability. 30 Assistance can include helping the veteran become qualified for employment and can take the form of training or retraining for a position. 31

USERRA also differs from the ADA in that, if a service member does not qualify for a previous position due to service-related disabilities, the employer must transfer the employee to another position with equivalent seniority, status, and pay, if such position is available. 32 While USERRA requires employees and employers to engage in certain actions before and after a service member actively serves, it also requires that an employer continue to provide certain benefits while he or she is serving. An employee who serves in the uniformed services for 30 days or less only has to pay his or her share, if any, of the health coverage. 33 The service member then may elect to continue health coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) for up to 24 months or until one day after he or she fails to apply for a return to work, whichever period is shorter. 34 Under no circumstances can the service member be required to pay more than 102 percent of the full premium for the health coverage. 35 If the service member is on active duty for more than 30 days, the member and dependents should be eligible for coverage by military healthcare and can contact his or her military unit for additional information.

In addition, the Health Insurance Portability and Accountability Act (HIPAA) may give the service member and his or her family rights to enroll in another group’s health plan, such as the health plan provided to the member’s spouse. The service member has an opportunity to enroll regardless of the health plan’s applicable enrollment periods. 36 To qualify, the service member must request enrollment in the other plan within 30 days of losing eligibility for coverage under his or her current employer’s plan. 37 After that special enrollment is requested, the service member must be covered in the other plan no later than the first day of the first month following the request for enrollment. If the service member will be on active duty more than 30 days, coverage in another plan through the special enrollment may be cheaper than COBRA continuation coverage.

Under USERRA, a service member’s pension plan should be unaffected by military leave; military service must be considered service with the employer for vesting and benefit accrual purposes. 38 If employee contributions are required, the service member must be given the opportunity to make up any missed contributions within a period of over three times the length of military service but not more than five years. 39

Although employers may provide paid days for military leave, they are not required to do so. 40 Employers that pay an employee while on military leave, however, are required to uniformly extend that policy to all eligible military personnel under USERRA, including reservists ordered into active duty. 41 An employer may not require service members to use vacation time while away on a military leave of absence. However, the employer cannot stop the service member from utilizing paid vacation time if the employee chooses to do so. 42

While USERRA provides a variety of reemployment protections to employees, the law is not without employer defenses. An employer does not have to reemploy a person if the employer’s circumstances have changed to make reemployment impossible or unreasonable, if reemployment would impose an undue hardship on the employer, or if the preserve service was for a brief or nonrecurring period and there was no reasonable expectancy that such employment would continue indefinitely or for a significant period. In each of these cases, a service member plaintiff has the initial burden of showing by a preponderance of the evidence that his or her military service was a substantial or motivating factor in the adverse employment action. The burden then shifts to the employer to prove that the reason provided for the adverse action was not a pretext. If an employer is found liable for violations of USERRA, it may be liable for various damages, including lost wages, lost benefits, and liquidated damages equaling lost wages and lost benefits.

**The Family and Medical Leave Act**

Most employers are generally familiar with the Family and Medical Leave Act (FMLA). The law provides certain employees with the right to take an unpaid, 12-week, job-protected leave to care for their own serious health condition or to care for a family member who has a serious health condition. The FMLA also makes it illegal for employers to interfere with an employee’s right to take the leave, to harass an employee for taking the leave, to deny a valid leave request, or to
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In 2009, the FMLA was amended to include two new types of leave for eligible family of service members—exigency leave and military caregiver leave. Exigency leave provides up to 12 weeks of leave for situations arising out of the military member’s deployment, service, injury, reintegration, and other events that place some extra burden on the employee’s time or attention. Exigency is broken into eight categories: 1) short-notice deployment, 2) military events or related activities, 3) childcare and school activities, 4) financial and legal arrangements, 5) counseling, 6) rest and recuperation, 7) post-deployment activities, and 8) additional activities that arise out of active duty or a call to duty status provided that the employer and the employee agree the leave qualifies as an exigency.43

For example, under exigency leave, a family member can take leave to provide urgent childcare or to make alternative childcare arrangements for the child of a military member when required by the military member’s active duty or call to active duty. The exigency leave only applies to family members of service members in the National Guard or Reserves and not the armed forces. As a comparison, individuals who qualify for FMLA leave but are ineligible for exigency or military caregiver leave can only take leave to attend to their own or a family member’s serious health condition, or to care for a newborn or newly adopted child or other pregnancy-related condition.

Military caregiver leave under the FMLA allows qualifying employees to take up to 26 weeks of leave to care for a covered military member with a serious injury or illness.44 Military caregiver leave can be taken by a spouse, child, parent, or next of kin of a covered service member who requires care. A covered service member is any member or veteran of the armed services, including the National Guard or Reserves. Under military caregiver leave, serious illness and injury is defined as an illness or injury sustained by the member in the line of duty while on active duty that makes the service member medically unfit to perform duties of the service member’s rank.45

This year, the Department of Labor released proposed regulations to change application of the FMLA. The proposed changes would extend exigency leave to family members of armed forces service members and not just the National Guard and Reserves. In addition, the proposed changes expand the maximum rest and recuperation exigency leave time for an employee from 5 to 15 days.46 Proposed changes to military caregiver leave would allow family members of veterans to take a leave of absence from work to care for the veteran’s serious injury or illness for up to five years after the service member’s discharge.

To enforce the FMLA, an employee can bring a private lawsuit or file a complaint with the Department of Labor within two years of the violation or within three years if the violation was willful. The FMLA military exigency leave provisions have been effective since January 2009 and the military caregiver provisions since January 2008. However, there are currently no major federal cases on either of these provisions. With service members returning at such a high rate, this will undoubtedly change, and case law will be developed as family members attempt to take leave to care for their related service members and veterans.

The ADA, ADAAA, and VEVRRA

On December 31, 2011, there were 3.38 million veterans receiving disability compensation from the V.A.47 In January 2009, the ADA Amendments Act of 2008 (ADAAA) took effect, expanding the coverage of individuals under the Americans with Disabilities Act (ADA). For example, a person must have a physical or mental impairment that substantially limits one or more major life activities, among other requirements, to meet the ADA’s definition of disability. The ADAAA expands the coverage of major life activities to include not only activities like walking, hearing, and seeing but also the operation of major bodily functions, such as those of the brain and neurological system.48 The ADAAA also mandates that an impairment that “substantially limits” does not have to “prevent or severely or significantly restrict” performance of a major life activity. For instance, episodic impairments or those in remission, including Posttraumatic Stress Disorder (PTSD), are disabilities if they are substantially limiting when active. In this way, it will be easier for service-related disabilities, including PTSD, depression, partially or completely missing limbs, deafness, and blindness to be considered disabilities under the ADA.49

Consequently, the number of service members with qualifying disabilities is going to increase. Disabilities such as depression and PTSD are on the rise among veterans,50 and these types of “invisible” disabilities often present challenges for employers who are not well trained in disability accommodation. As a result, employers will have to educate themselves on disabilities affecting service members and ways to reasonably accommodate those disabilities.

USERRA requires employers to provide reasonable accommodations to employees who incur any service-related disability regardless of whether the disability would be protected under the ADAAA or California’s equivalent, the Fair Employment and Housing Act (FEHA). To enforce violations of the ADAAA or FEHA, employees must exhaust the administrative requirements by filing ADAAA violation complaints with the Equal Employment Opportunity Commission within 300 days of the violation and by filing FEHA violations with the California Department of Fair Employment and Housing within one year of the violation. Again, there is no major case law that discusses service-related disabilities under the ADAAA.

Another act, the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) applies to contractors and protects Vietnam-era veterans, special disabled veterans, and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized for participation in an armed conflict. The VEVRAA requires most federal contractors and subcontractors to take affirmative and deliberate steps to employ certain categories of veterans and help them advance once employed.51 The VEVRAA also prohibits discrimination against these veterans. The act requires contractors and subcontractors to post all job openings, except for executive and top management jobs, with local and state employment services. However, it does allow employers to forgo listing jobs that will last for three days or less or jobs that the contractor expects to fill internally. Under the VEVRAA, contractors must also give covered veterans priority to job openings and annually report on the number of covered veterans they employ. The law also requires contractors to establish hiring benchmarks for veterans, annually review personnel practices, and comply with veteran outreach and recruitment requirements. Veterans who feel their VEVRAA rights have been violated may file complaints with the Office of Federal Contract Compliance Programs or their local veteran’s employment representative.52

California Law and Veterans

California law provides its own protections for service members under California Military and Veterans Code Sections 394 and 395.53 The law requires that private employers provide temporary, job-protected leave for up to 17 days a year for “military training, drills, encampment, naval cruises, special exercises or like activity.”54 Additionally, both private and public employers cannot terminate employees or make adverse employment decisions against service members for performing their ordered military duties.55 California law also provides reemployment rights similar to those provided under
USERRA. 57 As provided by federal law, California public employees who are also service members are provided with temporary leave of up to 180 days to perform their military duties. 58 Like USERRA, California law entitles an employee to be reemployed to the same position or a new position with the same seniority, status, and pay if the prior position no longer exists. 59 Similar to USERRA, public employees maintain their same benefits while away on a military-related leave. 60 Under California law, public employees who have worked for a public agency for at least one year when their military leave begins receive the same sick leave, vacation time, and right to promotion as if they had not taken leave. 61 In addition, public employees can include recognized military service as public agency service in the public’s “one year of service” requirement. 62 If the temporary military leave does not last longer than 180 calendar days, the public employee must receive regular wages for the first 30 days of the leave. 63

There is currently little case law on the California provisions, but the California Supreme Court has recently held that supervisors may be held individually liable under USERRA, but may not be liable under California Military and Veterans Code Section 394 for discrimination against an employee based on his or her status as a member of the military. 64

In California, the Family Military Leave Act provides employees who are spouses of service members and who work at least 20 hours a week for an employer with at least 25 employees, with up to 10 days of unpaid leave when the service member is temporarily home from deployment. 65 An employee must provide his or her employer with a notice of intent to take Family Military Leave within two days of learning that their service member relative will have a leave from deployment and provide the employer with documentation of the deployment leave. 66

The Vow to Hire Heroes Act
To help veterans navigate the transition from military to civilian life and thereby decrease the unemployment rate among veterans, President Barack Obama signed the Vow to Hire Heroes Act into law in November 2011. 67 The law makes the Transition Assistance Program—a three-day workshop offering job search assistance such as resume and cover letter preparation—mandatory for service members. 68 In addition to the workshop, members with a service-related disability receive individual consultation to assess their job readiness and special needs. 69 The law also provides one year of vocational rehabilitation and employment benefits to disabled veterans who have exhausted their unemployment benefits. 70 Additionally, under the act, service members are allowed to begin applying for federal jobs before leaving the armed forces. Finally, the Vow to Hire Heroes Act gives employers tax credits for hiring unemployed and disabled veterans.

As employers and employees continue to work together to reintegrate veterans into the workforce, they should be aware that there are resources available to help. The Department of Labor has a number of publications for employers about recruiting and retaining veterans and complying with the laws affecting veterans in the civilian workforce. The Department of Labor also has a variety of materials about the employment rights of veterans. The V.A. is an additional source of information for veterans who have questions about everything from postservice employment to healthcare. The Employer Support of the Guard and Reserve (ESGR) is another organization that veterans and those with questions about employing veterans can contact for support. The ESGR is a “Department of Defense agency that [works to] develop and promote a culture in which all American employers support and value the service of their employees with ESGR as the principal advocate within” the Department of Defense. 71

Hiring veterans may seem complicated because of the various laws that apply to their leave and reemployment. However, hiring a veteran can be and should be a straightforward decision for an employer to make. The laws provide guidance to employers and are in place to ensure that those who serve their country are given a chance to reintegrate successfully after their service. 72

15 38 U.S.C. §4312(b).
16 Id.
17 38 U.S.C. §4312(c).
18 38 U.S.C. §4312(c)(2).
21 Id.
22 38 U.S.C. §§4316(c)(1).
26 Id.
27 Id.
36 29 C.F.R. §§825.126(a)(1)-(8).
37 29 C.F.R. §§825.127(a), (c).
38 29 C.F.R. §§825.127(a)(1).
41 29 C.F.R. §§1630.20(1)(i), (ii).
42 29 C.F.R. §§1630.2(1)(ii).
43 29 C.F.R. §§1630.2(1)(ii).
47 MIL. & VET. CODE §§394, 395.
48 MIL. & VET. CODE §394.5.
49 MIL. & VET. CODE §394.
50 MIL. & VET. CODE §395.
51 MIL. & VET. CODE §395.06.
52 MIL. & VET. CODE §395(a).
53 MIL. & VET. CODE §395(c).
55 MIL. & VET. CODE §395(d).
56 Id.
57 MIL. & VET. CODE §395.01(a).
59 MIL. & VET. CODE §395.10.
60 Id.
63 Id.
64 H.R. 674 §233.
65 See http://www.esgr.mil.
Equitable Tolling at the U.S. Court of Veterans Claims

A VETERAN WHO MEETS THE LEGAL CRITERIA may apply for educational benefits, healthcare benefits, service-connected benefits, non-service-connected pension benefits, and various forms of loans and stipends. Even surviving spouses and other dependents of veterans may qualify for benefits. Veterans have earned these benefits, and each may change a veteran’s life for the better. Non-service-connected pension benefits provide income for indigent veterans. Healthcare benefits replace a loss of private insurance benefits. Service-connected benefits provide veterans with an outward acknowledgement of an injury sustained during active duty and with monetary compensation. If the Department of Veterans Affairs (V.A.) denies these benefits, it can be devastating to a veteran’s well-being.

The adjudication of veterans benefits claims is a uniquely proclaimant, nonadversarial, and ex parte process.1 A veteran files an initial claim for benefits at his or her local regional office, and if he or she is dissatisfied with the decision, the veteran may request a de novo review by the Board of Veterans Appeals in Washington, D.C. The veteran can appeal anything from the outright denial of a requested benefit to a disability percentage for service-connected benefits.

Prior to 1988, the veteran only had the opportunity to appeal a decision to the board, as there was no other appellate body to conduct further review. In 1988, however, Congress passed the Veterans’ Judicial Review Act to create the U.S. Court of Veterans Claims,2 which exists specifically to review unfavorable board decisions. In 1999, the Veterans Programs Enhancement Act renamed the court as the U.S. Court of Appeals for Veterans Claims.3

In order for a claimant to have the Veterans Court review a claim, a notice of appeal must be filed with the court within 120 days of the mailing of the board decision.4 As the fledgling Veterans Court developed, a litany of cases established the use of equitable tolling so claimants could continue with appeals despite untimeliness. Equitable tolling is an important issue, as claimants may have valid reasons for being late. Some are proceeding without counsel or have been given bad advice on where or when to appeal, some are hospitalized during the appeal period, and the mental and physical disabilities of some veterans—the very disabilities for which they are requesting V.A. benefits—prevent them from timely filing an appeal. The Veterans Court has recognized that under certain circumstances the 120-day judicial appeal period should be equitably tolled.

In 1990, the U.S. Supreme Court, in a case not concerning veterans law, held that equitable tolling was allowed in suits against the federal government unless Congress enumerated a clear, contrary intent.5 The Court also determined that equitable tolling of statutory time limits would be allowed in certain circumstances, for example if “the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or [if the claimant] has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.”6 It further held that equitable tolling would not be applied in “a garden variety claim of excusable neglect.”7

Bailey v. West

The U.S. Court of Appeals for the Federal Circuit held in Bailey v. West that Congress did not intend for 38 USC Section 7266(a) to be barred from equitable tolling.8 The court determined that the veteran was able to have the deadline for filing his notice of appeal to the Veterans Court tolled.9 In Bailey, the veteran was told by a V.A. employee he could only appeal his board decision if he hired an attorney. However, after 117 days elapsed, the veteran returned to the V.A. and was told by another V.A. employee that she could assist him in filing an appeal; however, she failed to submit the document to the Veterans Court and instead kept it at the local regional office.10 The Federal Circuit determined that the veteran’s reliance on an incorrect statement of a V.A. official was sufficient to equitably toll the deadline for filing a notice of appeal with the Veterans Court.11

The Federal Circuit determined in Jaquay v. Principi that when a claimant files a notice of appeal at a place other than the Veterans Court, equitable tolling will not be allowed unless 1) the claimant has exercised due diligence in pursuing his or her legal rights, 2) the misfiled document reveals the claimant’s clear intent to seek further review, and 3) the misfiled document puts V.A. on notice of the intent.12 Following that premise, the Federal Circuit permitted equitable tolling in Santana-Venegas v. Principi, in which a veteran sent his notice of appeal to his local regional office within the 120-day limit, but the regional office did not transfer the document to the Veterans Court until the deadline had passed.13

Claimants suffering from mental health disabilities who filed untimely appeals also deserve equitable tolling if “the failure to file was the direct result of a mental illness that rendered [the claimant] incapable of ‘rational thought or deliberate decision making’ or ‘incapable of handling [the claimant’s] own affairs or unable to function [in] society.’”14 If the claimant is represented by counsel during the 120 days, the claimant must make an “additional showing that the mental illness impaired the attorney-client relationship.”15

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the claimant timely filed a notice of appeal but erroneously sent it to the board, and the board transferred the document to the Veterans Court after 120 days. Similarly, in Arbas v. Nicholson, the Federal Circuit extended its holding in Barrett v. Principi to allow equitable tolling if the claimant’s physical health prevented the timely filing of a notice of appeal. The Federal Circuit determined that “[t]here are a myriad of physical illnesses or conditions that impair cognitive function or the ability to communicate.”

In 2005, the Veterans Court heard a case of first impression to determine if extraordinary circumstances permitted equitable tolling. In McCreary v. Nicholson, a veteran alleged that Hurricane Ivan prevented him from timely filing a notice of appeal. He blamed the late notice on the fact that after the hurricane damaged his home, he misplaced the paperwork in boxes while cleaning up the damage. The Veterans Court determined that equitable tolling based on extraordinary circumstances is appropriate, and adopted a three-part test to make that determination:

First, the extraordinary circumstance must be beyond the appellant’s control. Second, the appellant must demonstrate that the untimely filing was a direct result of the extraordinary circumstances. Third, the appellant must exercise “due diligence” in preserving his appellate rights, meaning that a reasonably diligent appellant, under the same circumstances, would not have filed his appeal within the 120-day judicial appeal period.

After applying its test, the Veterans Court ultimately determined that the veteran in McCreary did not establish that his untimely appeal was the direct result of Hurricane Ivan, nor did he demonstrate that he acted with due diligence in light of the fact that the hurricane hit three months prior to the appeal deadline. Therefore, it did not equitably toll the filing deadline.

Bowles v. Russell

The Supreme Court’s ruling in Bowles v. Russell in 2007 put a temporary halt to equitable tolling. Bowles, a convicted prisoner failed to file a timely notice of appeal from the federal district court’s denial of his habeas corpus application. Petitioner Bowles moved to reopen the filing period under Federal Rule of Appellate Procedure 4(a)(6), which allows a federal district court to grant a 14-day extension under certain conditions. The federal district court granted an extension but gave Bowles 17 days instead of the 14 allowed under the rule. Bowles filed an appeal after the 14-day period but before the end of the 17-day period. The U.S. Court of Appeals for the Sixth Circuit held that the appeal was untimely because it was filed beyond the 14-day period, and therefore the court did not have jurisdiction. The Supreme Court determined that “the timely filing of a notice of appeal is a quintessential claim-processing rule” and it had “no authority to create equitable exceptions to jurisdictional requirements.”

Applying Bowles to Henderson v. Peake, the Veterans Court determined that 38 USC Section 7266(a) contained a “clear and unqualified time limit” and that “there are no equitable exceptions to the 120-day judicial appeal period.” The Federal Circuit upheld the Veterans Court’s ruling, and the Supreme Court granted certiorari.

The Supreme Court’s decision in 2011 in Henderson III changed the landscape of the 120-day rule. The decision solidified the use of equitable tolling for 38 USC Section 7266(a) and determined that the 120-day filing deadline is a “quintessential claim-processing rule” and is not jurisdictional, thereby rendering Bowles inapplicable to that particular statute. The Court further held that Congress did not intend for equitable tolling to be barred from application in 38 USC Section 7622(a) not only because of the terms and placement of words in the statute itself, but also because the V.A. system is uniquely proclaimant, and prohibiting equitable tolling would “clash sharply with this scheme.” As a result, the Supreme Court held that the 120-day limit “does not have jurisdictional attributes,” but it is “nevertheless an important procedural rule” and directed the Veterans Court to consider what cases fall within any exception to the rule.

The Federal Circuit remanded the case without any further comment to the Veterans Court. Numerous appeals were consolidated in order to determine if the 120-day filing period for a notice of appeal is subject to equitable tolling and, if so, what circumstances warrant equitable tolling. The Veterans Court determined that the 120-day appeal period is subject to equitable tolling, but “within the parameters established by Bailey and its progeny, and the precedential decisions of this Veterans Court prior to this Veterans Court’s Henderson decision.” In coming to this determination, the Veterans Court also held that the 120-day limit is not subject to waiver or forfeiture by the secretary of veterans affairs because if it were allowed, it would give the secretary the ability to arbitrarily select the filings that are “worthy of waiver,” which is a “process devoid of consistency, procedural regularity, and effective judicial review.” The Veterans Court further clarified that it had authority to seek facts outside the record and independently weigh the facts of the case to determine if equitable tolling is appropriate.

With this recent reversal of opinion, the Veterans Court has returned to its prior holdings regarding equitable tolling. Previously established case law will continue to guide claimants in determining whether their untimely appeal will be equitably tolled. This return to favor regarding equitable tolling has maintained the V.A. adjudication system’s proclaimant process. It protects the ability of veterans to seek appellate review when they feel that they are wrongly denied the benefits that they deserve.
An Innovative Court for Veterans in Los Angeles County

WHEN A FORMER MARINE VOLUNTEERED for military service in Iraq three years ago he had no idea that the greatest challenge he would face would come not from combat but from returning home to resume normal life as a civilian. His combat experiences left him afflicted with the invisible wounds of posttraumatic stress disorder (PTSD), a highly prevalent condition among veterans returning from Afghanistan and Iraq. His PTSD symptoms include hypervigilance, an abnormal need for adrenaline rushes and intense experiences, and poor impulse control.

As part of his military duties, he served as a tactical vehicle instructor, which involved training other Marines on how to handle high-speed and dangerous driving situations. Less than a year after he returned home, a police officer attempted to stop him for a routine traffic violation. When he saw the police officer pursuing him and heard the siren blaring, he reported, “Instinct took over, and I needed to get away.” A police chase ensued, and he ultimately pulled his car over and was arrested.

The veteran faced many years in prison for this offense. Fortunately, he came before a judge who recognized that the violation of law was a symptom of PTSD, not a desire to commit any crime. Concluding that both society’s interests and the interests of justice would be better served through therapy rather than punishment, the judge sentenced him to spend two years in a residential treatment program, where he would receive intensive clinical services to address his mental health issues. To date, he has made remarkable progress and has learned to manage his impulses through his therapy. Once he completes treatment and can demonstrate his ability to conduct himself responsibly again, he will enter an engineering program.

This success and the innovative court model that assisted him demonstrates a significant philosophical shift regarding how best to handle veterans in the criminal justice system. The Veterans Treatment Court model has emerged across the country with great success and has grown rapidly during the last few years. The first veterans court was established in 2008 in Buffalo, New York, and today there are approximately 100 veterans courts across the country. In September, 2010, Los Angeles County became a leader in this growing movement by launching its own veterans court within the Los Angeles Superior Court.

The growth of veterans treatment courts has been a critical development in working with justice-system-involved veterans. Like other mental health and drug courts, veterans court is essentially an alternative sentencing court designed to rehabilitate the underlying mental health problems and trauma that cause veterans to act out and end up in the criminal justice system. Veterans courts are cooperative efforts in which the judge, district attorney, and public defender work directly with the U.S. Department of Veterans Affairs (V.A.) and other veteran service providers to develop and monitor treatment plans. Thus, veterans courts replace the traditional adversarial approach between prosecutors and defense attorneys with an outcome-oriented team approach designed to enable the participants to return to productive and healthy living in the community.

California, like many other states, has created legislation that directly addresses alternative sentencing practices for veterans. California Penal Code Section 1170.9 outlines a specific process for determining whether or not a veteran is eligible for alternative sentencing under the code. The concept of the statute is that an alternative sentence is justified when there is a nexus between a problem or condition resulting from military service and the crime that was committed.

It is the balance of positive support and predictable consequences that accounts for the veterans court’s success.

The statute specifically identifies PTSD, traumatic brain injury, military sexual trauma, substance abuse, and mental health problems as justifications for alternative sentencing. An additional requirement of the code section is that the veteran be eligible for probation. It is worth noting that Section 1170.9 was recently amended to remove a combat-service requirement for alternative sentencing.

Section 1170.9 serves as a statutory basis for the functioning of a veterans court in the same way that it authorizes alternative sentencing for veterans on a case-by-case basis. But some veterans courts create their own criteria for admission into their programs. For example, some courts require combat exposure even though Section 1170.9 no longer does. Veterans courts vary in their approach to addressing the question of whether a nexus exists between the crime committed by the veteran and a mental health or substance abuse problem. Some courts rely on mental health professionals to address this question, while others may rely on judicial discretion. Courts also vary as to how much information they need to answer the question of whether a nexus exists.

One concern related to Section 1170.9 is that the statute is rarely employed. From a practitioner’s standpoint, it is worth noting that Section 1170.9 only requires that a veteran defendant “allege” that his or her criminal conduct is linked to mental health or substance abuse issues in order to trigger the requirement that the court conduct an evaluation as to whether the defendant does actually suffer

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from service-related mental health or substance abuse problems.

While statutory factors affect what types of cases veterans courts will handle, individual courts often create their own additional criteria for deciding which veterans to work with. Generally, veterans courts handle non-violent offenses, but some courts will consider acts of violence on a case-by-case basis. Cases of violence that are accepted usually involve lower level assaults. A bar fight is a typical example of a violent offense often accepted in veterans courts. There are no reports of a veterans court accepting a serious crime of violence, such as homicide or rape. Courts vary as to whether they will handle felonies, misdemeanors, or both. Courts may also base admission upon eligibility for V.A. benefits and services. In limited instances, some courts have been willing to work with active-duty military personnel.

Most veterans courts exist as dockets that operate within already existing mental health and drug courts. Thus, the authorization to operate a veterans court generally involves securing approval from the presiding judge of a particular court system. Procedurally speaking, veterans courts tend to operate in an informal manner that often evokes a family atmosphere. Veterans courts (although not Los Angeles's) generally develop their own manuals of procedure that outline issues such as the length of time a veteran may be required to be under the court's jurisdiction, the various phases of the veterans court program, and requirements of participation.

Most veterans courts operate on what is known as a post-plea basis. This means that a veteran must plead guilty in order to avoid incarceration and receive treatment as an alternative. In some cases, when a veteran graduates from the court, a judge will use his or her discretion to remove an offense from the veteran defendant's record.

The Los Angeles Veterans Treatment Court, supervised by Judge Michael Tynan, illustrates the potential of veterans courts. It holds sessions on a weekly basis and handles only felonies that put the veteran at risk of long-term incarceration. This court has helped save more than 75 veterans from serving extensive time and enabled them instead to rehabilitate and heal in a residential treatment program as part of an alternative sentencing order. Most crimes in the Los Angeles Veterans Treatment Court involve drugs or alcohol. Typical crimes include drug use, drug sales, and petty theft with a prior (a felony in California).

A typical session at the Veterans Treatment Court involves 5 to 10 veterans appearing in court to report to Judge Tynan on the progress they are making in their treatment programs. The session also involves assessments of two or three veterans to determine whether they are entering the program voluntarily and with the appropriate positive attitude. Once a veteran is admitted into the court, he or she will generally remain under the supervision of Judge Tynan for 18 months. During this time, veterans are required to report to the court every month or sometimes less often, depending on the veteran's success in the program. Judge Tynan will offer his praise and support to those veterans who are performing well but castigate those who are not meeting the court's expectations, laying down firm and clear consequences of noncompliance, which include time in jail or prison as a last resort. It is this balance of positive support and predictable consequences that accounts for the veterans court's success.

A hallmark of the Los Angeles Veterans Treatment Court is the presence of a social worker who helps identify suitable treatment options for veterans and prepares regular progress reports. The social worker in the Los Angeles court, who is referred to as a veteran justice outreach worker (VJO), is part of an impressive national program administered by the V.A. to work with veterans in the courts and jails. There are more than 150 VJOs across the country.

VJOs are not limited to working in veterans courts and may also assist almost any veteran in the criminal justice system and act as a resource to attorneys representing veterans. It is therefore imperative for defense attorneys to become familiar with this resource, which can greatly amplify their ability to secure alternative sentencing orders that keep their clients in a community-based setting and protect them from incarceration.

A major reason for the success of these alternative courts is the array of community partners that offer their support. Many resources are available to veterans that would not be available to other defendants. In Los Angeles County, for example, there are approximately 1,300 beds of service-rich transitional housing for veterans that will accept referrals from the court. These residential treatment programs provide comprehensive mental health and substance abuse services and have long histories of successfully rehabilitating veterans. Veterans courts often help supply life coaches and peer mentors to serve as a resource to the court. Mental health professionals are also integral members of the team that the veterans court relies upon, providing invaluable assessments, counseling and support, as well as help in documenting mental disabilities for purposes of procuring veterans benefits or other potential sources of income.

Practicing attorneys have several ways to get a client considered for admission to a veterans court if the veteran appears eligible.
First, they may contact the veterans court directly to inquire about transfer procedures. In many courts, including in Los Angeles, the public defender serves as a gatekeeper for transfers from regular courts to veterans court. Veterans courts also sometimes have court coordinators that serve as liaisons between the court and the community. These coordinators can be valuable sources of general information on the functioning of a particular veterans court. Practitioners may also reach out to the VJO serving in the jurisdiction where the case is being handled. In California, VJOs may be identified to assist in developing a potential treatment plan for a veteran defendant regardless of where the crime occurred in the state. Treatment options include V.A.-sponsored residential and outpatient programs and a range of other services available through nonprofit organizations, including Public Counsel.

It is important for practitioners to remember that if a veteran is not accepted into the Veterans Treatment Court, a vigorous defense may still be presented including, among other likely issues, the link between PTSD or combat-related traumatic brain injury and the behavior that resulted in criminal charges. There is no shortage of experts in the field of veterans mental health that are available to guide attorneys in constructing defenses on behalf of veterans.

Some critics of veterans courts and alternative sentencing for veterans argue that they afford unjustified preferential treatment to veterans. This is also an argument that a prosecutor could make against offering an alternative sentencing order. In response, a practitioner may offer two rebuttal arguments. First, the alternative sentencing arrangements that veterans courts often order are no different than the types of treatment plans that are ordered for nonveterans in general mental health and drug courts. Second, the reality is that veterans often experience wartime traumas that ordinary civilians do not experience. It is these very traumas that justify providing a veteran an opportunity to receive treatment instead of incarceration.

In addition to pointing out the positive impact alternative sentencing has on the lives of veterans, there are other social and public policy considerations that are helpful for practitioners to understand and potentially use in arguments. Veterans courts are gaining recognition thanks to findings that public safety is actually improved by connecting veterans with appropriate treatment and services, because veterans are less likely to reoffend once their underlying problems have been addressed. One source of debate related to veterans courts is whether treatment is an appropriate sentence for a crime of violence. Some of the most well-regarded veterans
court judges in California² handle crimes of
violence in their courtrooms, because they
have seen positive results in reducing recidi-
vism and protecting public safety.

Another reason veterans courts are gain-
ing attention is their potential to reduce local
and state expenditures. A veteran can be
housed in an excellent residential treatment
program for about half the cost of jail or
prison. Furthermore, treatment programs for
veterans are primarily federally funded. There-
fore, veterans courts leverage significant fed-
eral dollars and dramatically decrease costs
associated with jails, prisons, and other pro-
grams funded by state and local government.

Consider the cost savings of the Los Angeles
Veterans Treatment Court alone. The Cal-
ifornia Department of Corrections and Re-
habilitation reports that the annual cost of
incarcerating an inmate in state prison is
roughly $50,000 per year. According to sup-
portive housing providers for veterans, the
cost of providing a quality residential treat-
ment for a veteran is approximately
$25,000 a year, and in many cases is less.

These numbers indicate that the Los Angeles
court is saving $1.5 million a year when over-
seeing 60 veterans. When federal funding for
residential treatment is included, the court is
creating even greater cost savings from a
local and state perspective. In the long run,
there are even greater cost savings by reduc-
ing recidivism and breaking the cycle of crime,
attack, and incarceration that has affected so
many veterans for so long.

In addition to the veterans court, there are
other effective examples in Los Angeles of a
more progressive approach to working with
veterans in the justice system, including the
Los Angeles City Attorney’s HALO Program
(Homeless Alternatives to Living on the
Streets). HALO, which covers misdemeanors
and infractions, provides opportunities for
defendants to avoid jail or other sanctions by
participating in treatment programs. It also
effectively resolves old tickets, warrants, and
associated fines for homeless individuals,
including many veterans, who have demon-
strated success in treatment.

The rapid emergence of veterans treat-
ment courts is the result of many vital agen-
cies and entities joining force in an effort to
help the V.A. achieve the ambitious goal of
ending homelessness for veterans in five years.
The V.A. has worked extensively with the
American Bar Association and the National
Association of Drug Court Professionals to
promote this model nationally.

California is at the forefront of this vital
effort. It was only four years ago that the first
veterans court opened its doors and today the
state hosts more than 10 veterans courts.

The success of the veterans court model is due
in large part to the initiative of judges, pros-
cutors, and defense attorneys in local juris-
dictions, as well as to the concerted effort of
numerous organizations and individuals
across the state in organizing and collectively
promoting the model, which has also attracted
the support of private foundations such as the
California Community Foundation and, most
recently, the State Bar Foundation.

If you are a judge, prosecutor, defense
attorney, or advocate interested in helping
start a veterans court or alternative sentenc-
ing model in your jurisdiction, please reach
out to Public Counsel.³

³ The authors wish to acknowledge those without
whose support the Los Angeles Veterans Treatment
Court would never have become a reality: Judge
Michael Tynan; Judges Tim McCoy and Lee Edmon,
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the Los Angeles County District Attorney; the U.S.
Department of Veterans Affairs; New Directions, Inc.;
and Ninth Circuit Court of Appeals Judge Harry
Pregerson, a World War II veteran.
² These include Judges Wendy Lindley in Orange
County and Stephen Manley in Santa Clara County.
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UNEMPLOYMENT IS ONE OF THE many daunting realities of civilian life that confront veterans. In particular, unemployment is high among veterans who served in Iraq and Afghanistan after September 11, 2001. Based on data from December 2011, the unemployment rate of the 12 million veterans in the labor force is approximately 8.7 percent. However, September 11 veterans, who represent approximately 1.8 million members of the total veteran workforce, have a rate of 11.5 percent. Fortunately, unlike many other administrative and legal difficulties that veterans face, the obtaining of unemployment benefits follows predictable guidelines, and special programs are available to allow veterans to collect benefits. The Unemployment Compensation for Ex-Servicemembers (UCX) program is available for former service members who want to file for unemployment benefits following their military service.

Under the UCX program, a former service member’s military wages can be used to establish benefits entitlement if certain requirements are met. One requirement is that the former service member must have been discharged or released under honorable conditions from active service. If the former service member is an officer, he or she cannot have resigned for the good of the service. The former service member must also have completed the first full term of active service initially agreed upon at enlistment. The guidelines also apply to reservists or National Guard members who satisfy the requirement of continuous active military duty for 90 days or more.

A former service member’s work and earnings from domestic and overseas military service can be used by the state unemployment department to qualify for UCX benefits. This becomes especially important for veterans who were deployed abroad for most of their military service. The former service member’s weekly benefit depends upon pay grade at the time of separation from the military. The more the veteran made in the military, the more the potential benefits. The annual Federal Military Schedule of Remuneration is provided to state unemployment departments by the U.S. Department of Labor and sets the pay grades for military personnel.

The benefits analysis becomes more complicated if former service members did not complete the first full term of active duty at the time they leave military service. In that case, in order to qualify for UCX benefits, the release must be 1) for the convenience of the government under an early release program, 2) because of medical disqualification, pregnancy, parenthood, or service-incurred injury or disability, 3) for hardship, or 4) for personality disorders or ineptitude, if the member served at least 365 continuous days.

The amount of UCX benefits to which a former service member is entitled can be affected if the former service member is receiving a living allowance for vocational rehabilitation training, an educational assistance allowance, or special training allowance under the War Orphan’s Educational Assistance Act. In addition, receiving separation pay may also affect the former service member’s receipt of unemployment benefits. For example, retirees will generally receive a lesser amount of benefits because the weekly amount of retirement pay is used in calculating the amount of unemployment benefits. Former service members should inform the unemployment department if they are receiving money from former military service so that the correct calculation of unemployment benefits may be made and any potential overpayment and penalties avoided.

Unemployment benefits differ from state to state. The local state unemployment office can inform the former service member of the total amount of benefits to which he or she is entitled after military service. There are also veterans employment representatives at state employment offices who can assist former service members in filing an unemployment claim.

When a former service member applies for UCX unemployment benefits, he or she must provide a few key pieces of information. In California, former military personnel are required to mail a specific form to the Employment Development Department. This form is known as Member 4 of the DD214 and as the Certificate of Release or Discharge from Active Duty. A NOAA Form 56-16, Report or Transfer or Discharge, can also be used in some cases. If a former service member does not have the DD214, the National Archives and...
Affairs regional office and from the county DD214 from the Department of Veterans regarding military service. In addition, the provide copies of the DD214 and information Records Administration is available to provide copies of the DD214 and information regarding military service. In addition, the former service member may request a duplicate DD214 from the Department of Veterans Affairs regional office and from the county clerk or the local bureau of vital statistics, if the DD214 was registered.

Without a DD214, the former service member’s claim for benefits will be delayed. A military discharge certificate or other military certificate of service will not be used in the place of a DD214 to establish UCX eligibility. (A service member may also be able to present his or her orders of release or his or her orders to report containing an endorse ment of release, although a determination of benefits will be delayed while the state unemployment department attempts to confirm the former service member’s military service with the appropriate branch of service.) The information contained in the DD214 is used to determine a former service member’s entitlement to UCX benefits. Specifically, the former service member’s entitlement to UCX benefits depends on the information contained in Item 28 (which is found in Member 4) of the DD214. This item provides the narrative reason for separation from military service.

If a former service member completes a first full term of active military service and is honorably discharged, a nonconforming narrative reason in Item 28 of the DD214 will not be considered in determining the individual’s eligibility for UCX benefits. In other words, if a veteran has completed a first full term of active military service and is honorably discharged, it does not matter what Item 28 says (for example, “adultery” or “personal drug abuse”).

If a former service member has not completed the first full term of active military service, however, the narrative reason contained in Item 28 must be a “qualifying reason” to entitle the former service member to UCX benefits. A qualifying reason is defined by federal guidelines and is determined by the military service branch in its sole discretion. There is no discretion on the part of the unemployment department to change the qualifying reason, no matter what facts are presented to the department and no matter how sympathetic the case. If a former service member does not agree with the reasons for the discharge, he or she must resolve the issue with the military prior to seeking benefits. The unemployment department also has no discretion to determine a service member’s pay rate. The findings of the branch of service regarding a former service member’s pay grade at the time of separation from active military service and the type of discharge or release of the service member by the applicable branch must be accepted as “final and conclusive” for determining UCX eligibility.

What this means for a former service member is that, if the military waives the full first term requirement by using a narrative reason for separation, the qualifying reason listed on the Item 28 of the DD214 must be an exact match to one of the narratives for the former service members to be found eligible for UCX benefits by a state’s unemployment department. The qualifying reasons in Item 28 must be: 1) for the convenience of the government under an early release program, 2) because of medical disqualification, pregnancy, parenthood, or service-incurred injury or disability, 3) because of hardship, 4) because of personality disorders or inaptitude, 5) condition, not a disability, 6) involuntary in lieu of board, 7) disability, aggrava tion, 8) disability, not in line of duty, 9) disability, not in line of duty (enhanced), 10) force shaping (board selected), 11) hardship, general, 12) hardship, resignation allowed due to support of a dependent, 13) hardship, service member initiated due to dependency, 14) adjustment disorder, 15) disruptive behavior disorder, 16) homosexual conduct (acts), 17) homosexual conduct (marriage or attempted marriage), 18) homosexual conduct (statement), 19) impulse control disorder, mental disorder (other), 20) personal drug abuse.

For example, if a former service member serves less than a full first term and is discharged because the military accepted his or her resignation because of the veteran’s need to come home to support a dependent, and the service member files for unemployment benefits, he or she can be eligible for benefits as long as Item 28 states the qualifying reason for discharge is hardship, resignation allowed due to support of a dependent. If, however, a DD214 lists a nonqualifying reason for the former service member’s separation from the military in Item 28 (misconduct, for example), and the former service member has not completed a first full term of service with an honorable discharge, the former service member will not be eligible for UCX benefits.

There are several courses of action available to service members if their DD214 lists a nonqualifying reason in Item 28. First, the former service member can ask for a review by the appropriate branch of service that issued the DD214. (See “Good Paper,” page 43.) While a state’s unemployment department can assist a former service member with a request to a review of the information contained in the DD214, the unemployment department cannot alter the information provided by that former service member’s military branch of service. The same applies to the state’s administrative appellate authority. If a former service member wants to contact his or her branch of military service because he or she disagrees with the information contained in the DD214, he or she can obtain a DD Form 149, known as a Request for Military Record, or a Correction of Military Record (Standard Form 180) from, among other sources, a state’s unemployment department.

If a former service member’s military branch will not change the basis for discharge in Item 28 to a qualifying narrative reason, and the state’s unemployment department denies the former service member benefits based on the original reason in Item 28, the former service member has the right to appeal the state’s decision within the time limit detailed in the state’s determination. In California, a former service member has 20 calendar days to file an appeal of a determination. However, a California administrative law judge who hears a former service member’s appeal must accept the information provided in the DD214 from the former service member’s branch of service as final and conclusive in issuing a decision. The judge cannot change the basis for discharge based on the facts presented at the hearing, no matter how sympathetic the veteran’s circumstances.

Alternatively, a veteran has the option of filing a direct appeal of the department’s determination with the military. Former service members can obtain information regarding what evidence is to be submitted to the branch of service through any veterans organization, the Department of Veterans Affairs contact office, state veterans commission or bureau representative, or the Red Cross. However, if the former service member chooses that option, he or she must also file a timely appeal with the state’s unemployment development department. While no one program can function as a panacea for September 11 veterans, the UCX program, if successfully navigated, can provide them with invaluable assistance as they reenter civilian life.

3 5 U.S.C. ch. 85, §§8501 et seq.
4 38 U.S.C. §§1700 et seq.
PATH TO CITIZENSHIP

by KATHRIN S. MAUTINO and MARGARET D. STOCK

Undocumented veterans who served honorably may still be eligible for citizenship

UNDER THE U.S. CONSTITUTION, Congress is delegated authority to develop a uniform system of naturalization. Under this authority, Congress has, on a regular basis, allowed expedited citizenship opportunities for those who honorably serve in the U.S. military. Many practitioners who do not specialize in immigration and nationality issues are unaware of the naturalization possibilities that may exist for those who are presently serving honorably in the military, for veterans who have been honorably discharged, and, in many cases, for members of their families.

Normal naturalization procedures have many requirements. An individual must ordinarily be a lawful permanent resident (demonstrated by producing a document commonly called a “green card”), and must reside in the United States for a certain time, generally three or five years. The individual must be at least 18 years old and be able to read, write, speak, and understand English. The individual must show an attachment to the U.S. Constitution and American form of government and be a person of “good moral character” for at least three—and in many cases—five years. But for military members and veterans, the residency and physical presence requirements are reduced or waived, and a shorter period of good moral character applies.

Two main laws apply to the naturalization of military members and veterans. They can roughly be categorized as a “peacetime” law, which covers those who serve during peacetime, and a “wartime” law, which covers those who serve during a designated period of armed conflict. Those who provide peacetime service are eligible to naturalize after an aggregate period of one year of honorable service. They must, however, have a green card at the time that they apply for naturalization. If they apply while currently serving or within six months of discharge, they need not comply with the residency and physical presence requirements for naturalization. They may also be eligible to naturalize despite being subject to deportation from the United States.

The wartime law only covers those persons who have served during certain periods.
of conflict designated by Congress or the president. Congress and the president over time have designated some obvious and some less obvious periods of time for the law’s coverage. World War I, World War II, and the Korean conflict have all been designated with dates that more or less comport with the beginning and ending of hostilities. The wartime statute, however, was originally passed while the United States was engaged in the Vietnam conflict. Lawmakers therefore designated a start date for naturalization eligibility through honorable service in the Vietnam conflict, but left it to the president to announce an end date, which was later set as October 15, 1978—or five years after the end of American involvement in ground combat in Vietnam.

In the post-Vietnam decades, other periods of armed conflict have been designated by the president. President Ronald Reagan designated the Grenada campaign as such, although the designation was later revoked because President Reagan had tried to limit the application of the law to those who had served in a limited geographic area. The first Persian Gulf conflict was designated retroactively by President Bill Clinton. Most recently, President George W. Bush designated the period beginning on September 11, 2001, as a period of armed conflict. This designation has yet to be terminated.

Those serving on active duty or in the Selected Reserve (including the National Guard) during a designated period of armed conflict are granted more benefits than those who serve during peacetime. An individual serving during wartime need not serve for any particular time in the military and can in some circumstances obtain naturalization while in boot camp or basic training. The individual need not be over age 18. Also, to apply under these statutes, individuals must show that their military service can be characterized as “honorable.” Importantly, the person need not have a green card to obtain U.S. citizenship under the wartime law. Applications for naturalization under either peacetime or armed conflict provisions are processed without charge.

Military Personnel without Proper Documents

Normally, only individuals who can provide evidence that they are U.S. nationals or lawful permanent residents may enlist in the Armed Forces. The various branches of the military have the authority, however, to waive that requirement if a person’s enlistment is “vital to the national interest.” In 2009, the Army, Navy, and Air Force experimented with allowing lawful nonimmigrants with certain language or designated-shortage skills to enlist via the Military Accessions Vital to the National Interest program. MAVNI enlistees were able to skip the permanent resident process completely. By joining the military, they went from being nonimmigrant visa holders (typically, college students or authorized temporary workers) to U.S. citizens, often in only a few months. The catch, of course, was that they could lose their U.S. citizenship if they failed to serve honorably for at least five years. MAVNI is a temporary program, but it was reauthorized in May 2012.

The MAVNI program provides an exception to the requirement that a potential enlissee provide proof that he or she is a U.S. national or a lawful permanent resident. However, if an individual manages to enlist without meeting the requirement, he or she may still be eligible to naturalize under the armed conflict provisions.

This raises the question of how an ineligible person manages to enlist. The answer, of course, is either by accident or by fraud. In the case of fraudulent enlistments, in which the individual presents documents showing U.S. citizenship, the fraud may be on the part of the individual or the individual’s parents, since immigrant parents have been known to give their children fraudulent documents, such as false birth certificates, to facilitate the child’s enlistment.

If a person has fraudulently enlisted in the military, he or she may face grave difficulty naturalizing through military service. By regulation, an individual wishing to naturalize through military service must show that prior to filing his or her naturalization application, he or she has been a person of good moral character for one year. Presenting false documents to the government may be deemed to demonstrate bad moral character. The practical consequence of the regulation is that those who enter military service by fraud or deceit cannot apply for naturalization for at least one year. If they are discharged early after their fraud or deceit is caught, they may not be able to show the minimum period of honorable service required for military naturalization.

Although eligible to apply for naturalization, an individual who has falsely claimed to be a U.S. citizen or lawful permanent resident in order to enlist faces risk. As part of the naturalization process, the applicant must get confirmation of his or her military service. Requesting confirmation of honorable service for purposes of applying for naturalization may be a de facto confession to the particular branch of service that the individual lied in order to join, and the person may have lied additional times if he or she obtained security clearance based on that initial lie. Each military branch retains the option to discharge such individuals with a less than honorable discharge. Until recently, only the Air Force regularly used its discharge authority against those who lied in order to enlist. However, reports of the Army and Navy discharging naturalization applicants surfaced in 2011, and their current policies are unclear.

Individuals discharged with less than honorable discharges are ineligible for naturalization under either military naturalization provision.

Individuals who have falsely claimed to be U.S. citizens in order to enlist face additional risks. Although a false claim to U.S. citizenship does not bar an individual from naturalization, a false claim to U.S. citizenship made on or after September 30, 1996, is a permanent bar to obtaining a green card through a family member or employer. Therefore, if the individual is denied naturalization, he or she will have a very hard time obtaining any other legal immigration status. Making a false claim to U.S. citizenship is also a deportable offense. Thus, if denied naturalization, the person faces a high likelihood of being placed in formal removal proceedings before an immigration judge and being returned to his or her country of citizenship.

These individuals would be barred from returning to the United States even as visitors unless a special waiver is granted.

There are also individuals who do not realize that they are already U.S. citizens when they enlist. Many people become U.S. citizens automatically when they are children because they obtain lawful permanent resident status as children and (while under the age of 18) reside in the legal and physical custody of a U.S. citizen parent in the United States.

As a general rule, automatic citizenship can happen in two ways. First, a family may immigrate to the United States, and a child may become a U.S. citizen automatically when one of the parents naturalizes while the child is still under age 18. Second, a parent who already is a U.S. citizen may apply for a green card for his or her child while the child is under age 18. Once the child enters the United States with a green card and takes up residence with the parent, the child automatically becomes a U.S. citizen. In some cases, if the parent immigrated to the United States without bringing his or her family, the child may become a citizen automatically.

Beneficiaries of this law often have a permanent resident card and are unaware that they are U.S. citizens. They do not automatically receive documentation of their citizenship status. To obtain documentation, they must affirmatively apply for a Certificate of Citizenship, which is similar in appearance to a Certificate of Naturalization but is a very different legal document. The Certificate
of Citizenship documents the automatic receipt of U.S. citizenship in the past, while the Certificate of Naturalization documents a grant of American citizenship after the person submits an application and goes through the process of naturalizing. Additionally, while the fee for naturalization is waived for military personnel or veterans by statute, the fee to apply for a Certificate of Citizenship is not waived by law but by policy.

Often, an individual will file for naturalization only to have the application denied on the basis that the applicant is already a U.S. citizen. If this happens, the individual must then apply for a Certificate of Citizenship. The individual must pay the current fee of $600 or request that the fee be waived. (By policy, it is waived for currently serving military members.) In addition to the potential cost, the individual has lost whatever time was spent applying for naturalization, and must then wait an additional two to six months for the processing of a request for fee waiver and the Certificate of Citizenship.

As a practical matter, the process can take even more time since the individual must gather evidence of the parent’s U.S. citizenship status, marital status, and residence with the individual while the individual was under age 18. If the parent is deceased or not on good terms with the applicant, the process may become much more difficult. It is quite conceivable that immigration authorities will deny a naturalization application on the basis that the individual is already a U.S. citizen, and then deny an application for a Certificate of Citizenship on the basis that the individual did not provide sufficient proof that he or she is a U.S. citizen.

**Immigration Status for Spouses and Children**

The spouse and minor (under age 21) unmarried children of a naturalized military member or veteran often are eligible to obtain permanent resident status more quickly and easily than they can in other categories. Children, for purposes of permanent resident status, include stepchildren in addition to biological and adopted children. Obtaining green card status can be described as a two-step process. The first step occurs when the U.S. citizen (the petitioner) files an immigrant visa petition on behalf of his or her relative (the beneficiary) with the U.S. Customs and Immigration Service office that has jurisdiction over the place of residence. USCIS confirms the status of the petitioner and the beneficiary proceeds to the second step.

The second step requires an investigation into whether the individual beneficiary meets the legal requirements to be admitted as a permanent resident. In some circumstances, a beneficiary physically within the United States may file a combined application allowing both steps to be completed with the USCIS. When a beneficiary is ineligible for combined processing, or when a beneficiary is outside the United States, however, the second step is processed through an American consulate.

Spouses and children of military members or veterans may face various issues in obtaining permanent resident status, and in most cases a knowledgeable immigration professional should be consulted prior to the filing of any application.

The eligibility requirements for green card status are not waived for the spouses and children of U.S. citizen military members or veterans. Spouses and children who entered the United States illegally, have criminal convictions, or engage in other activities generally deemed to be inconsistent with good moral character are not eligible to immigrate and are deemed to be inadmissible. Some grounds of inadmissibility can be waived; others cannot. Relatives of military members or veterans who file an application for green card status who are not eligible to immigrate are often placed in deportation or removal proceedings. While having a military member or veteran as a family member generally is considered to be a positive factor in the decision-making process, it is not a guarantee of a right to remain in the United States. Depending on the ground of inadmissibility, an immigration judge may be forced by law to order the deportation or removal of the person, irrespective of the equities in the case. While Immigration and Customs Enforcement can exercise prosecutorial discretion and terminate proceedings, there is no guarantee that ICE will do so.

Individuals who enter the United States illegally generally are ineligible to apply for a green card unless they apply for a waiver of their “unlawful presence,” which normally requires the individual to be out of the United States anywhere from several months to a decade or more. Individuals with multiple illegal entries or who have been deported from the United States and who then returned illegally generally do not qualify for a waiver of unlawful presence.

To protect the military readiness of military members and veterans, the USCIS will consider issuing a Parole in Place to certain immediate relatives who entered the United States illegally. The USCIS may file an I-823 Form to request that the beneficiary be granted parole in place.
States illegally. A grant of PIP generally allows a spouse, child, or parent of a military member or veteran to be deemed to have entered the United States lawfully, so that the individual can apply for permanent resident status while in the United States, often without the need of applying for an unlawful presence waiver. Spouses, children, and parents of military members or veterans located overseas may also be considered for a humanitarian parole if not eligible to immigrate for similar reasons. These forms of relief are discretionary and should not be taken for granted. Although not barred from requesting a PIP or humanitarian parole, spouses, parents, and children of military retirees are unlikely to be granted such relief.

If a service member is sent to an overseas assignment and the lawful permanent resident spouse will accompany him or her, a permanent resident spouse can apply for expedited naturalization. The spouse theoretically could receive lawful permanent resident status and naturalization the same day. However, as a practical matter, the processing of the required paperwork for expedited naturalization takes additional time. Most USCIS offices are sensitive to the needs of military personnel and will consider expedited processing for the spouse in appropriate circumstances. Also, stepchildren of a U.S. citizen military member or veteran do not automatically receive U.S. citizenship upon immigration. However, if their biological parent is granted expedited naturalization, stepchildren under age 18 who are permanent residents would derive citizenship. Note, however, that the permanent resident spouse is not eligible for expedited naturalization if the service member is stationed in the United States or if the spouse is not accompanying the military member overseas.

A U.S. citizen military member or veteran who wishes his or her spouse, child, or parent to immigrate must promise to support the family members financially through filing what is called an Affidavit of Support (Form I-864). How much income the sponsor must earn depends on circumstances.芒干.lang as a practical matter, the processing of the required paperwork for expedited naturalization takes additional time. Most USCIS offices are sensitive to the needs of military personnel and will consider expedited processing for the spouse in appropriate circumstances. Also, stepchildren of a U.S. citizen military member or veteran do not automatically receive U.S. citizenship upon immigration. However, if their biological parent is granted expedited naturalization, stepchildren under age 18 who are permanent residents would derive citizenship.

5. President Reagan attempted to limit eligibility geographically, which caused the executive order to be challenged in court and later revoked. Matter of Reyes, 910 F.2d 611 (9th Cir. 1990); Executive Order No. 12913, 59 Fed. Reg. 23115 (1994).
8. The Selected Reserve includes certain units and military members serving in the reserve components of the U.S. Armed Forces (including the National Guard). See 10 U.S.C. §10143 for the statutory definition of “Selected Reserve.” Generally, this definition includes units and military members that perform military duty each year.
10. Allan Wernick, Restored MAVNI Program is Citizenship Path, N.Y. DAILY NEWS, May 23, 2012 (describing how reinstated MAVNI program will run through May 16, 2014).
11. 8 C.F.R. §329.
15. INA §320, 8 U.S.C. §1431. The law became effective Feb. 27, 2001. Children who met the qualifications on or after that date benefited. The previous version of the law was more complicated and benefited fewer children.
16. Some, but not all, children born overseas to a U.S. citizen parent are U.S. citizens. Factors that can influence whether or not the child is a U.S. citizen include the length of residence in the United States of the U.S. citizen parent, whether the parent is married to the other parent, and whether the U.S. citizen parent is the mother or the father. INA §§501-309, 8 U.S.C. §§1401-1409.
17. For example, the so-called amnesty program of the 1980s required each individual in a family to meet the requirements. Often a parent would qualify to immigrate but the children would not. The parent would then naturalize and apply to immigrate the children.

19. The scope of this article does not permit a full discussion of issues related to eligibility to immigrate.
20. A stepchild-stepparent relationship is established if the parents marry while the child is under age 18. INA §101(b), 8 U.S.C. §1101(b).
21. INA §101(b), 8 U.S.C. §1101(b). There are many issues related to the definition of a child for purposes of the immigration laws, including legitimation and adoption.
22. A permanent resident may file an immigrant petition for his or her relatives, but there is a quota, meaning a wait for several years before the second step may be filed. There is no quota for qualifying relatives of U.S. citizens.
24. Individuals convicted of crimes defined as “aggravated felonies” under INA §101(a)(43), 8 U.S.C. §1101(a)(43) are ineligible for most forms of relief from removal. The list is extensive.
27. Recently, USCIS published proposed regulations to allow for stateside processing of waivers prior to the individual traveling to an American consulate overseas. This process will significantly shorten the time an individual must remain outside the country. Comments were due by June 1, 2012, and the process is not expected to be finalized before fall 2012, at the earliest. F.R. Doc. No. 2012-7698.
29. Parole in Place (PIP) is a creature of administrative convenience and not regulation or statute. At present, it is authorized by memorandum and is widely applied to relatives of veterans. The memos authorizing Parole in Place can be found at http://www.uscis.gov.
30. INA §131(b), 8 U.S.C. §1430(b).
31. See note 14 and accompanying text.
34. The relative files a self-petition on Form I-360, which can be filed concurrently with an application to adjust status. ADJUDICATORS FIELD MANUAL at 21.11(b)(2)(D).
35. Individuals may contact LACBA’s Immigration Legal Assistance Project at 300 N. Los Angeles St., Room 310, or by calling (213) 485-1873. Information about the American Immigration Lawyers Association’s Military Assistance Program can be found at http://www.aila.org/military.
ACCORDING TO THE DEFENSE Manpower Data Center, more than 1.2 million active enlisted personnel serve in the five branches of the U.S. military. Many service members are married—for example, 58 percent of active U.S. Air Force personnel. Even during peacetime, military marriages involve significant stresses—from long absences to financial worries—that can lead to divorce, and this country has been at war for more than 10 years. As a result, it should not be surprising that since the start of military operations in Afghanistan in 2001, the divorce rate among military members has risen. There are over 400 military bases in this country, and California is the leading state in number of bases. Family law attorneys are obliged to consider the interplay of California and federal laws that specifically concern members of the U.S. military in divorce.

Divorces involving military personnel have unique statutory considerations. Those on active duty enjoy legal protections that civilians do not. One example is that military authorities may be asked to serve process on an active-duty service member deployed overseas, but that member can refuse to accept the service. Courts may be asked to make service, but few will send someone a long distance to serve a member of the military. Therefore, the start of a divorce may have to wait until the service member returns.

Another example is the Servicemembers Civil Relief Act (SCRA), which was signed into law by President George W. Bush in 2003 to update and strengthen the Soldiers and Sailors Civil Relief Act of 1940. The SCRA allows for temporary suspension of judicial and administrative proceedings and transactions against active-duty members of the military. The protection begins on the date of entering active duty and generally terminates 30 to 90 days after the date of discharge from active duty. The definition of “active duty” is complex.

Jurisdictional Issues

Issues of jurisdiction are also complicated. The application of subject matter and personal jurisdiction makes it possible to have one divorce case take place in two different states.

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This may also happen with military divorces and can be further complicated by special jurisdiction rules involving the transitory stationing of a service member. This often affects service members who have not formed an intention to remain in a state and do not meet the requirements for residency.

In civilian and military divorces, California can acquire subject matter jurisdiction if one party has been a resident of the state for at least six months preceding the filing of the petition for dissolution of marriage. Residency requires proof of physical residence and an intention to remain in the state. A service member may not meet these requirements while a spouse does. Therefore, it is often relatively simple for California to acquire subject matter jurisdiction. The complicated issue is whether California has personal jurisdiction over a respondent service member.

Often, service members are stationed here by demand of the military rather than by a purposeful action of the service member. Regardless of whether a person is on active duty in the military, however, state law applies to the issue of personal jurisdiction, and in California, courts may exercise jurisdiction “on any basis not inconsistent with the Constitution of this state or of the United States.” In Marriage of Hattis, the court held that the relevant inquiry was whether the service member had sufficient minimum contacts with the state to make the exercise of jurisdiction reasonable. The “minimum contacts” test that the court utilized was the one set forth in International Shoe Company v. State of Washington. Due process requires establishment that a party to an action has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

While a California court may find it has personal jurisdiction over a service member, often the member’s domicile is the state from which he or she entered the military. In the absence of contrary proof, this state is presumed to continue to be the member’s domicile. Furthermore, the body of law on minimum contacts is general, while laws relating to family law are more specific and thus are better guides, and special jurisdictional rules apply to child support, spousal support, and property division.

One way to simplify the issue of jurisdiction is with consent. A service member may consent to personal jurisdiction with Judicial Council form FL-130 or FL-130(A) and a Declaration and Conditional Waiver of Rights under the SCRA. Respondent service members who do so will not be charged a filing fee. While it is unlikely a service member will use the issue of personal jurisdiction as a means of contesting dissolution, a court will have to rule that no personal jurisdiction exists over a service member who is present in the state by order of the military and does not otherwise qualify for personal jurisdiction. If a case involves more than the mere termination of marital status, however, the likelihood of an objection based on personal jurisdiction increases. In cases involving children, property, support, and pensions, the specific jurisdiction rules applicable to family law and to military divorces must be considered.

For example, the powers of the state court to divide a military pension are subject to the Uniform Services Former Spouse’s Protection Act (USFSPA). Pensions are specifically governed by the USFSPA. The act requires that the state in which the service member is sued for the division of the pension plan be the state in which he or she has 1) established residence (other than because of military assignment), 2) established domicile, or 3) provided consent. Even if a service member consents to the personal jurisdiction of California over some issues in the dissolution (e.g., custody, support, and property), the act prevents the state court from dividing the service member’s military pension. If a service member asserts what is known as a Tucker defense, it is possible that to end one marriage, two divorce actions will take place in different states.

Other means for exercising personal jurisdiction (such as the “minimum contacts” rule or in-state service of process) are no substitutes for the USFSPA requirement that a service member be a resident or domiciliary of this state or that he or she consent to the state court’s division of his or her military pension. Under the USFSPA, issues of jurisdictional contact (residence, domicile, or consent) must be settled at the time the military pension division is litigated, and past contacts do not suffice.

Military divorce complicates the rules of jurisdiction in other ways. For example, California’s Uniform Interstate Family Support Act (UIFSA) applies to the establishment and modification of child support orders against a service member. The act relies on the rules of residency to determine personal jurisdiction, which means there can be only one domicile. If a service member stationed in California on military assignment can show that he or she remains domiciled in a different state (e.g., the state that issued the support order), California does not have jurisdiction to establish or modify support. Custody and support issues, in turn, are addressed in provisions of the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act of 1980.

The SCRA also applies to child custody proceedings. Upon application, an active-duty service member who is a party to any civil action is entitled to a stay of the proceedings for at least 90 days. The application must include a letter setting forth facts that show how “current military duty requirements materially affect the service member’s ability to appear and stating a date when the service member will be available to appear.” This letter shall be from the commanding officer and shall include a statement that the service member’s current military duty prevents appearance and that military leave is not authorized at the time.

If a service member wants a stay beyond 90 days, a court may grant it. The test is whether the service member’s military service adversely affects participation in the court proceeding. If the court denies a stay beyond 90 days, it must appoint counsel to represent the service member’s interests. The court may not proceed with the matter unless the service member is represented or has waived his or her SCRA rights.

The SCRA also provides legal protection for the active service member if there is a default of appearance. If the service member’s default occurred while he or she was in military service or within 60 days of termination of military service, the court shall, upon a motion filed by the service member, set aside the judgment. This motion however must be filed no later than 90 days from the day that military service is terminated. The service member must demonstrate that 1) the military service “materially affected” the service member’s ability to defend the action, and 2) that he or she has a meritorious defense to the action.

State Law Preemption
While the SCRA offers protection to service members who are doing what they can to respond to civil suits, once personal jurisdiction over the service member has been obtained, state law generally applies. Exceptions include military pensions. A state law governing domestic relations will not be overridden by a federal law unless the state law does “major damage to clear and substantial federal interests,” and express preemption arises only when Congress has explicitly stated its intent in statutory language.

One example of preemption involves child, spousal, and family support. Service members receive basic allowances, in the form of pay, for housing (BAH) and subsistence (BAS). Congress has not expressly prohibited state courts from considering these military allowances as nontaxable income for purposes of determining support. The Federal Preemption Act, however, provides that a military member’s BAH and BAS allowances
1. Texas has more military bases than any other state.
   True. False.

2. If an active-duty member of the military is served with notice of a family law proceeding, the Servicemember Civil Relief Act (SCRA) allows for:
   A. Dismissal without prejudice if specified conditions are met.
   B. Suspension of the proceeding until 30 to 90 days after the date the member is discharged from active duty.
   C. A stay in the proceeding until 30 days after the service member returns from active duty.
   D. Neither A nor B.
   True. False.

3. If a service member consents to California having jurisdiction over the issues of custody and support, the court may grant reasonable visitation rights to a stepparent, grandparent, or other family member.
   True. False.

4. Under the Uniformed Services Former Spouse’s Protection Act (USFSPA), the state in which a service member is sued for the division of a pension plan must be the state where he or she has 1) established residence (other than because of military assignment), 2) established domicile, or 3) provided consent.
   True. False.

5. If a service member consents to California having jurisdiction over the issues of custody and support, he or she must also consent to California’s jurisdiction over the division of his or her pension.
   True. False.

6. Under certain circumstances, a military service member may appear at child custody proceedings via telephone, video teleconferencing, Skype, or the Internet.
   True. False.

7. A letter requesting a stay from a service member’s commanding officer shall include a statement that the service member’s current military duty prevents appearance and that military leave is not authorized at the time.
   True. False.

8. If a service member requests that the stay in the proceeding be extended beyond a 90-day period and the court denies the request, the court must appoint counsel to represent the service member’s interests.
   True. False.

9. Upon motion by a service member, a court may set aside a judgment resulting from the service member’s default.
   True. False.

10. In order to set aside a default, a service member must demonstrate within 90 days that military service materially affected the service member’s ability to defend the action and that he or she has a meritorious defense to the action.
    True. False.

11. Federal law allows a state court to consider military allowances for food and housing as nontaxable income for purposes of determining support.
    True. False.

12. The Federal Preemption Act allows a service member’s food and housing allowances to be garnished and taxed.
    True. False.

13. If military duty prevents a service member from exercising custody or visitation rights, the court may grant reasonable visitation rights to a stepparent, grandparent, or other family member.
    True. False.

14. A court may grant reasonable visitation rights to a stepparent, grandparent, or other family member upon the request of that family member.
    True. False.

15. If a service member is deployed and wants to seek a modification of child support, the local child support agency may appear in court on behalf of the service member.
    True. False.

16. The USFSPA allows for the collection of up to 65 percent of the service member’s disposable retired pay to meet arrearages of child support, spousal support, and attorney’s fees.
    True. False.

17. A splitting of military retirement pay is not mandated by the USFSPA unless:
    A. The parties were married at least 10 years.
    B. During the marriage, at least 10 years of service credit was earned toward retirement benefits.
    C. A and B.
    D. Neither A nor B.
    True. False.

18. Federal law provides that a military insurance policy is the service member’s separate property, regardless of the source of premium payments.
    True. False.

19. A court can make an order regarding the beneficiary of a service member’s military life insurance policy.
    True. False.

20. Any court orders for a division of a military member’s retirement benefits must be served on the secretary or designated agent of the member’s service branch.
    True. False.

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In other areas, California law is not pre-

tempted. Under the Family Code, for example, custody and visitation orders shall not be modified if a service member is unable to comply with them because of military service or deployment out of state. However, if a service member’s “temporary duty, deployment, or mobilization orders from the mili-
tary” requires him or her to relocate a “sub-
stantial distance” from his or her residence or otherwise has a “material effect” on the ser-
vice member’s ability to exercise custody or visitation rights, a temporary modification shall be considered. If temporary orders are made, the court is mandated to consider any appropriate order to ensure that the relocat-
ing parent can maintain frequent and con-

ining contact by means that are reason-
able available. One possible means of ensuring contact is by allowing interim fam-
ily member visitation. In civilian divorce and custody matters, third parties are very rarely granted visitation rights.

The Family Code also provides that on a service member’s return from military duty, deployment, mobilization, or temporary duty, a hearing shall be held to review its tempo-

rarily orders. There shall be a presumption for reinstatement of the custody order that was in place before the temporary modifica-
tion occurred, unless the court determines that to not be in the best interest of the child. In addition, relocating service mem-
bers may, in contrast to civilians, receive spec-
ial accommodations for an expedited hear-
ing on custody and visitation issues prior to their departure or upon relocating. Service members will be allowed to present testi-
mony and evidence via telephone, video tele-
conferencing, Skype or the Internet, to the extent this technology is reasonably avail-
able to the court and protects both parties’ due process rights.

In cases involving service members, upon a relocating parent’s motion, a court may grant reasonable visitation rights to a step-
parent, grandparent, or other family member if the court finds there is a preexisting relationship between the family member and child that has “engendered a bond” so that visitation is in the best interest of the child. The court finds that visitation will facilitate the child’s contact with the relocating parent, and balances the child’s best interest in having visitation with the family member against the other parent’s right to exercise parental authority. This request must be brought by the service member; the nonparent does not have standing to seek such orders. Nonparent visitation has no effect on the calculation of child support.

Another difference between military and civilian divorces may be found in the modi-

fication of child, spousal, and family sup-
port due to reduced income from military service activation and out-of-state deploy-
ment. Rather than utilizing the standard pro-
cedures of motion or orders to show cause, a service member may seek a support modi-

fication by filing and serving a notice of acti-

vation and request to modify support. Upon request by the service member, in child (but not spousal) support cases, the local child support agency may appear in court on behalf of the service member. Once the service mem-
ber fills out the Notice of Deployment, the agency must bring the motion to modify sup-
port if the change in circumstances would result in any change in the support order.

An order modifying or terminating sup-
port based upon a change of income result-

ing from activation to the military or National Guard and deployment out of state must be made retroactive to the latest of 1) the date of service of the notice of activation, 2) the date of activation or notice of the motion, or 3) the date of a request for order to modify or terminate support unless good cause is shown for not making the order retroac-
tive. Good cause may be shown if a service member unreasonably delayed in seeking the modification.

Military Pensions

The biggest difference between military divorces and civilian divorces concerns mil-
itary pensions, which are governed by the USFSPA. This area of law, however, is plag-
ued with litigation, dissenison, and con-
fusion. It is affected by retroactivity and con-
stant amendments to existing laws. Even the statutory definitions continually change.

Moreover, special jurisdictional rules apply to military pensions. Service members may forum-shop among the states in which he or she is resident, domiciled, or consents to jurisdiction, and interstate disputes may arise. The state that has jurisdiction over the mili-
tary pension determines how the pension is divided, and different states apply different rules, although the differences among the states are decreasing. It is important to under-
stand how the pension may be treated in dif-
ferent states. In 1983, the USFSPA granted state courts the right to divide military retire-
ment pay in accordance with state law. The act limits the former spouse to receipt of no more than 50 percent of the disposable retired pay from the government. If more than 50 percent is to be awarded to the spouse of the service member as part of the property division, the amount above 50 percent must be collected directly from the service member. The USFSPA allows collection of up to 65 percent of the disposable retired pay to meet arrearages of child support, spousal support, and attorney’s fees. Under the federal act, these percentages cannot be exceeded even with the service member’s consent.

State law comes into play with how and when a pension should be divided. California typically applies what are known as a time rule formula and Gilmore rights to set pay-
ments prior to retirement but after eligibility. These calculations involve mortality tables, but the military uses tables that are different from California’s. The military also uses par-
ticular definitions of whether a service mem-
ber has accrued a retirement interest while on active duty (retired pay) or while serving in the reserves (retainer pay).

Military pensions are not like ERISA plans, from which the spouse’s share can be calculated and separated. This makes the timing of the spouse’s ability to access bene-

fits critical. Service members may be eligible to retire after 20 years of service but may choose not to do so for another 20. Therefore, in order to exercise Gilmore rights, the divorce decree must specifically state that the benefits are to be divided at the time the service mem-
ber is eligible to receive the benefit. Otherwise, the former spouse must wait until the service member retires in order to obtain his or her share of the benefits.

The USFSPA makes no guarantee that a spouse will get a portion of the retirement paid directly by the government out of the pension account as part of a property division. This direct division of military retirement pay is not mandated unless two other USFSPA requirements are met. One is that the parties were married at least 10 years, and the other is that during the marriage, at least 10 years of service credit was earned toward retirement benefits. This is often referred to as the 10-year rule. It does not mean a spouse is denied a share of the retirement benefits if 10-year rule requirements are not met. Rather, it means an order cannot be enforced against the government to make payments out of the pension account. The state court will still determine the community interest in the plan but if the 10-year rule is not met, the court will be limited to making an order enforce-
able only against the service member.

Many spouses may not be comfortable pursuing former spouses for a portion of the pension. An alternative is to negotiate a trade, such as a nonmodifiable, nonterminable spousal support order measured by the mili-
tary retirement benefit. Spousal (and child) support orders are enforceable against the pension account. This gets around the 10-year rule and will assure the service member that the spousal support order will not increase. If the 10-year rule requirements are met, thereby allowing for payments directly from the pension account, it is important for the spouse that the interest in the plan be defined as a percentage rather than a dollar figure.
Only with a percentage interest is the spouse entitled to cost-of-living adjustments.

There are legitimate ways a service member can intentionally or unintentionally cause the reduction of the value of a pension account, such as exercise of the right to take a lump sum distribution prior to retirement. A service member may also waive what is known as retired pay in order to receive service-connected disability pay. The nonmilitary spouse should have explicit language in the divorce settlement that reserves jurisdiction with respect to the military pension and indicates the intent to protect the nonmilitary spouse’s right to continued pension payments even if the service member waives retired pay.56

If the service member seeks disability pay before the conclusion of the divorce, the spouse should request the trial court to make specific findings distinguishing the amounts of “true” disability pay (i.e., the service member’s separate property, not divisible by the state court) from longevity retirement pay (which is subject to community property interests and therefore divisible by the state court).57

In the case of the service member’s post-judgment receipt of disability pay and concurrent waiver of retired pay, the state court can enforce agreements by the service member indemnifying the spouse for his or her community property share of military retirement benefits lost by this election. However, this should be negotiated as part of the divorce judgment, including a reservation of jurisdiction to supervise and enforce the indemnification obligations.

Other future contingencies to consider in a military divorce include 1) the possibility of either a reserve retirement or a normal active-duty retirement if a service member is activated to the reserves, 2) notification by the service member to the former spouse when termination of active duty is planned or occurs, 3) the possible rollover credit of military service into a civilian service retirement or other pension, 4) whether spousal support is possible if the service member takes a disability retirement or otherwise reduces or eliminates regular retired pay, 5) whether a reservation of jurisdiction is needed to correct the form of order to comply with the court’s intentions, 6) whether there should be a waiver of military retired pay in exchange for the receipt of a federal civil service retirement annuity if the service member is already retired or retirement is imminent, and 7) whether to obtain a Privacy Act waiver from the service member, permitting the former spouse or attorney to obtain information concerning retirement, retired pay, and other benefits must be served on the secretary of the military for a division of retirement related matters.

Any court orders that are to be effected against the military for a division of retirement benefits must be served on the secretary of the designated service branch (or designated agent) via personal service or certified or registered mail, return receipt requested.58 Very specific language must be included in all orders made under the USFSPA.59

Other Benefits
There are other benefits to be considered in a military divorce. Under the USFSPA, a former service member’s spouse is eligible for full medical, commissary, and exchange privileges when 1) the marriage lasted at least 20 years, 2) the military member performed at least 20 years of service creditable for retired pay, and 3) there was at least a 20-year overlap of the marriage and the military services.

If the spouse remarries, eligibility for benefits is terminated. The benefits are revived if the subsequent marriage ends in divorce or death. In other words, the former spouse must not be married at the time benefits are sought. Very clear rules must be met to receive these benefits, which are considered entitlement and therefore should not be bargained for in the divorce.

When representing the spouse of a service member, it is very important to make sure he or she is deemed the surviving spouse of an annuity or other retirement and death benefits under the survivor benefit plan. The state court has the authority in a divorce to order the service member to participate in the annuity plan, to pay the premiums, and to designate his or her former spouse as beneficiary.60 After dissolution, the annuity benefits payable to the surviving spouse will only be payable if the service member makes a new election in favor of his or her former spouse. Where the dissolution judgment requires such election, the now-former spouse should file a written request with the military that the election be deemed made. This request is irrecoverable and must be made within one year after the judgment is entered.61 Also, the former spouse must remain unmarried when the service member dies.

Military life insurance policies written through the National Service Life Insurance62 and Servicemembers’ Group Life Insurance63 illustrate federal preemption. Federal law provides that a military insurance policy is the service member’s separate property regardless of the source of premium payments.64 Further, the service member has the sole right to designate the beneficiary of the policy proceeds, and a state court cannot order otherwise. Therefore, it is important never to negotiate and bargain for attributing value to a policy and never to use this military policy to secure support or any other obligation, because a change in beneficiary will always supersede the state court orders.

With 1.2 million enlisted military personnel in the U.S. armed forces, divorce among some of them is inevitable, and family law attorneys representing spouses in military divorces need to be informed of the many important differences between civilian and military divorces.

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A military divorce may involve not only those serving in the Army, Marines, Navy, Air Force, and Coast Guard but also the National Guard. See Servicemembers Civil Relief Act, 50 U.S.C. §§501-597(b). No residency requirement exists of Thornton, 135 Cal. App. 3d at 508–10).


18 Gov. Code. §70673.

19 Marriage of Hattis, 196 Cal. App. 3d at 1168, n.6 (citing Marriage of Thornton, 135 Cal. App. 3d at 308-10).


21 10 U.S.C. §1408(c).


25 10 U.S.C. §1408(f); Fam. Code §§4900 et seq.


27 Fam. Code §§4040-3465.


32 Fam. Code §§3631(c)(2).


34 HOGOBOOM & KING, supra note 15, at §16:196 (citing 50 U.S.C. app. §§212(1)(a), (2)).


36 Marriage of Stanton, 190 Cal. App. 4th 547, 556 (2010); see also Viva! Int’l Voice for Animals, 41 Cal. 4th 929, 935.

37 Marriage of Stanton, 190 Cal. App. 4th at 560.

38 Fam. Code §3047.

39 Fam. Code §§3651(c)(2).

40 Fam. Code §3047.


42 Fam. Code §3047(b)(2)(D).

43 Fam. Code §3047(b)(2)(B).

44 Fam. Code §3047(b)(2)(C).

45 Fam. Code §3047(b)(2)(C).

46 Fam. Code §3047(b)(2)(B).

47 Fam. Code §3047(b)(2)(C).

48 Fam. Code §4900 et seq.


52 10 U.S.C. §1408(e)(1).


57 HOGOBOOM & KING, supra note 15, at §§8:228, 9:401.5 (citing 10 U.S.C. §1408(a)(4)(B), (C)).


61 10 U.S.C. §§1448(b), 1450.


SINCE SEPTEMBER 11, 2001, military service members have faced repeated deployments and financial hardship, and a significant number of veterans struggle with psychological or physical problems such as post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). Many have been separated from the armed forces with a less than fully honorable discharge, often referred to as bad paper. Any discharge other than an honorable one can adversely affect a veteran’s benefits and life after service, for example in employment. Veterans may apply for an honorable discharge, but obtaining one is not easy. Attorneys can provide an invaluable service to veterans by helping them request a change in discharge status before administrative review and corrections boards.

With rare exceptions, when service members are discharged from the military, their service is characterized as 1) honorable, 2) general (under honorable conditions), 3) other than honorable, 4) bad conduct, or 5) dishonorable. Bad conduct and dishonorable discharges are punitive and result from court martial convictions, usually for serious crimes, under the Uniform Code of Military Justice.1 Anything other than an honorable discharge results in the loss of some or all of the benefits that are available from the Department of Veterans Affairs (V.A.).2

Everyone discharged from active duty receives a certificate known as a DD214. This form serves as a veteran’s proof of military service, and veterans are often asked to show it to potential employers, schools, and medical providers. Veterans must show the DD214 to the V.A. to prove eligibility for services—and, for example, to California’s Employment Development Department when filing for unemployment benefits after service. (See “Unemployment Benefits for Veterans under the UCX Program,” page 28.) Item 28 on the DD214 provides what is known as the narrative reason for separation. The military’s list of reasons includes completion of service and reduction in force as well as misconduct, alcohol abuse, or personality disorder.

Many veterans face difficulties because their DD214 includes a derogatory reason for separation. Between fiscal years 2001 and 2010, for example, more than 31,000 service members were discharged for personality disorders.3 Thousands of these people suffer or suffered from a medical condition warranting medical retirement, but a personality dis-

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order discharge deprives them of this benefit. This phenomenon is not new. During the Vietnam War, the military doled out bad paper generously, conferring 563,000 less-than-honorable discharges. Between 2006 and 2010, more than 34,000 Army soldiers were discharged for misconduct alone. Thousands of veterans who are in dire need of help for untreated physical and mental health conditions cannot get it because of bad paper, which itself may be the result of those conditions. Many of these veterans are falling into unemployment, homelessness, and drug and alcohol abuse. A 2010 study found that war-deployed Marines diagnosed with PTSD were over 11 times more likely to be discharged for misconduct than those without such a diagnosis. To alleviate this problem, attorneys can help veterans petition administrative review and corrections boards for discharge upgrades.

**Administrative Review Boards**

Each branch of the military has a Discharge Review Board (DRB) and a Board for Correction of Military/Naval Records (BCMR /BCNR). These administrative law boards have the power to change the reason for discharge or dismissal, characterization of service, or other aspects of military records. The Marine Corps is part of the Department of the Navy, so Marine Corps veterans must seek relief from the Naval Discharge Review Board and/or the Board for Correction of Naval Records. The DRBs have more limited powers than the BCMRs. A DRB may upgrade the characterization of service (except one that was given as a result of a general court martial) and may change the narrative reason for separation (except to or from a disability discharge). BCMRs have more extensive authority. Those boards can upgrade any discharge characterization, change any reason for discharge, change the date of issue of discharge (which may result in back pay), change a discharge to a disability retirement, remove inaccurate performance evaluations or other records, and change reenlistment codes.

If the relief sought may be granted by a DRB, a veteran must petition the DRB before applying to a BCMR. Attorneys advocating for a service member before a board should find out whether the veteran has previously applied for a discharge upgrade. If the veteran does not remember, counsel should make a request under the Freedom of Information Act and the Privacy Act for copies of prior applications and decisions from the relevant boards. Whether the veteran has applied for a discharge upgrade or not, some practitioners choose to bypass the DRBs completely by requesting additional relief, such as a change in reenlistment code, that only a BCMR may grant.

DRBs have procedures and rules that are different from those of the BCMRs, but the statute of limitations for all discharge review boards is 15 years from the date of discharge. There are no exceptions to this rule. DRBs are composed of five military officers. DRBs make decisions based on service and medical records (if applicable), the application and accompanying brief, and any other evidence submitted by the applicant. If after documentary review a DRB denies an applicant’s request for upgrade or change in reason for separation, the applicant has the right to a personal appearance hearing. While an applicant may forgo the initial documentary review step and request a personal appearance hearing only, this eliminates the option of having two chances at success.

At personal appearance hearings, the boards consider all evidence and testimony of the applicant and witnesses. Counsel may make opening and closing statements and question the applicant and any witnesses. Personal appearance hearings generally have greater success rates than documentary review alone. Rules of evidence do not apply, and the boards do not have subpoena authority. A veteran may appear alone or with counsel, or counsel may appear alone. While the Army and Air Force DRBs travel as needed, the others do not, thus requiring veterans to travel to Washington, D.C., at their own expense. This obstacle alone is insurmountable for many veterans and presents due process concerns.

If a veteran has exhausted all available remedies at the appropriate DRB, the veteran may seek relief from a BCMR. BCMRs maintain a three-year statute of limitations from the date of discovery of the error or injustice. This date may be three years from the date of discharge, or three years from the date of an adverse DRB decision, or three years from the date the veteran “discovered” the existence of a corrections board. The statute of limitations may be waived “in the interest of justice.” Generally, a BCMR that is inclined to grant relief will waive the statute of limitations, but if the board finds the case lacks merit, relief is denied because of the statute of limitations. When filing an application after the three-year deadline, one must include in the accompanying brief an explanation of why it is in the interest of justice to waive the deadline.

BCMRs are composed of civilian employees of the pertinent military branch. Some see
BCMRs as having more liberal standards and producing more reasonable decisions than DRBs. Veterans applying for an upgrade or correction before BCMRs may request documentary review or a personal appearance hearing, but in contrast to DRBs, applicants have no right to a personal hearing before a BCMR. Requests for personal appearance hearings are rarely granted. BCMRs are all located in the area of Washington, D.C., and do not travel.

In response to the epidemic of service members with PTSD or TBI who have been unjustly separated with less than fully honorable discharges, or who have been involuntarily discharged because of an alleged personality disorder instead of being given medical retirement, Congress amended the DRB statute in 2009 with two important provisions. First, if a veteran was diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing PTSD or TBI as a result of deployment “in support of a contingency operation,” one member of the review board panel must be a physician, clinical psychologist, or psychiatrist. Second, if the request for relief “is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury,” the board must “expedite a final decision and shall accord such cases sufficient priority to achieve an expedited resolution.”

**Bases for Upgrades and Corrections**

The boards do not engage in de novo review or a personal appearance hearing, but in contrast to DRBs, applicants have no right to a personal hearing before a BCMR. Requests for personal appearance hearings are rarely granted. BCMRs are all located in the area of Washington, D.C., and do not travel.

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A 2010 study found that war-deployed Marines diagnosed with PTSD were over 11 times more likely to be discharged for misconduct than those without such a diagnosis. To alleviate this problem, attorneys can help veterans petition administrative review and corrections boards for discharge upgrades.

**Bases for Upgrades and Corrections**

The boards do not engage in de novo review of the veteran’s discharge. DRBs grant upgrades on the basis of equity or propriety, and BCMRs consider injustice or error. For those veterans with bad conduct or dishonorable discharges, the boards may grant relief based on clemency only. To prove inequity and impropriety, one must overcome the presumption of regularity in the conduct of governmental affairs. This is a rebuttable presumption, but the burden is on the applicant to provide substantial credible evidence of divergence from regularity.

DRBs do not utilize stare decisis, and until recently, BCMRs did not either. In July 2011, however, the U.S. District Court for the District of Columbia found in [Wilhelms v. Geren](https://www.jimmylurie.com/lois/lois.22149000000052295315) that the Army Board for Correction of Military Records must consider relevant prior decisions and distinguish its own precedent.

Impropriety may be found when a prejudicial error of fact, law, procedure, or discretion occurred. Impropriety may also be found if an expressly retroactive and favorable change in law or policy has been made. The impropriety must constitute more than harmless error. For example, an impropriety could exist if a service member was not granted the right to submit a statement in response to the proposed discharge as provided by military regulation. In order to make propriety arguments, an advocate must carefully review the regulations on discharge procedures to determine if there were any irregularities in the veteran’s case.

Inequity exists when current policies and procedures are more favorable than those existing at the time of discharge, when the discharge was inconsistent with disciplinary standards at the time, or when quality of service and capability to perform military service make the discharge unfair. Factors for consideration of the quality of service include the veteran’s military ranks, awards, and decorations; letters of commendation or reprimand; combat service; acts of merit; length of service; prior military service; civilian convictions; courts martial and other forms of discipline; and records of unauthorized absence.

Positive postservice history is imperative for any upgrade applicant but is not by itself a sufficient reason for an upgrade. Most boards recommend at least five to six years of positive postservice conduct, consisting of steady work or educational history, lack of a criminal record, community involvement, and a stable family life. Military and medical records form the primary body of evidence, however. Therefore, it is important to request service personnel and medical records utilizing Standard Form 180. The service medical records of a veteran who has applied for V.A. benefits may be found at the V.A. regional office nearest to the veteran. For this reason, a request under the Freedom of Information Act should be submitted to the appropriate regional office. It is important to request records even if the veteran believes he or she has complete copies of all records.

Other important military records to review include unit-specific files, such as unit logbooks or after-action reports. If the veteran was involved with criminal misconduct in the military, counsel should request copies of criminal investigative files. If the military ever held an Article 32 evidentiary hearing involving a veteran, counsel should request a copy of the hearing summary. If the veteran was court martialed, counsel should request a copy of the court martial transcript.

Obtaining records can be a frustrating experience. It may take multiple requests to multiple locations to collect all the records needed. The Navy is notorious for destroying important personnel records. Advocates may argue that the lack of necessary evidence rebuts the presumption of regularity in the conduct of governmental affairs.

Upon receipt of the records, counsel should review them for any punishment or discipline the veteran received. Commanders may punish service members for anything found to be in violation of good order and discipline. Nonjudicial punishment is used regularly as a form of discipline that is less severe than a court martial. Attorneys should review the records, noting the number of punishments
received, the degrees of severity, and when they occurred. Attorneys should also take note of any awards, good performance scores, medals, letters of commendation, or other positive notice the veteran received in service. Reviewing records for disciplinary action is essential, because the alleged misconduct is what the advocate needs to try to mitigate or explain. If misconduct occurred only after combat exposure, for example, one could make an argument that the conduct was a symptom of an underlying medical condition such as PTSD or TBI.

If the case relates in any way to a medical condition, it is necessary to obtain current medical records. For example, if a psychiatric disability could have led to misconduct that led to a bad discharge, a detailed psychiatric evaluation is in order. Journal articles discussing comorbidity of PTSD and substance abuse may also be helpful.

Other sources of information include relevant news stories, such as articles describing the battles in which the veteran participated. If applicable, an attorney should also request and review any relevant civilian criminal records. Percipient witness statements are useful to corroborate the client’s story. Fellow service members may provide good statements. It is always preferable to get a statement from someone higher in the chain of command than the client. People who know the veteran very well may be helpful when arguing that a veteran’s conduct was a result of PTSD or TBI. Family members and friends can describe the change in the veteran’s attitude or personality since the trauma or injury that led to the condition.

Evidence of positive postservice history can take the form of school transcripts, diplomas, marriage and birth certificates, and certificates of completion of alcohol or drug treatment programs, if applicable. If possible, counsel should include a statement or record to verify the veteran has no civilian criminal history.

Upgrade applications should also include at least three character statements. First, these statements should put the veteran in a positive light by demonstrating that the behavior that led to the discharge was an aberration in the life of an otherwise model citizen. Second, there should be evidence of reformation. If the discharge related to drug or alcohol abuse, evidence of successful treatment completion is essential. A statement from an employer or professor who can describe the veteran’s strong work ethic and leadership potential is valuable. Counsel should also include a statement that attests to the veteran’s honesty. Another statement should be from a religious or community leader to speak to the veteran’s standing in the community.

Finally, the veteran must write his or her own statement. In plain English, he or she should explain what led to the discharge and why the discharge should be upgraded or the record corrected. While the client should not shirk from accepting responsibility for those things he or she did wrong, the statement does give an opportunity to tell his or her side of the story, including mitigating factors.

Essentially, the attorney’s role is to review and gather the evidence, assist in the creation of statements and letters, and write an informal brief that synthesizes the material and creates a narrative that provides a sympathetic portrait of the veteran. Members of the boards are not lawyers.

If there is little to mitigate the client’s in-service misconduct, and there are no violations in the discharge procedures, and the veteran does not have much in the way of positive postservice history, the best course is to wait before applying. Inform the client that a successful application will require a clean record, completion of substance abuse treatment if appropriate, successful work history, and positive contributions to family and community.

**Submitting the Request**

DRBs require submission of DD Form 293, and BCMRs require use of DD Form 149. Many representatives at veterans service organizations make the mistake of filling out these short forms and submitting them without doing any legwork or attaching an accompanying brief or evidence. This rarely yields positive results. A complete application for upgrade or correction includes a cover letter, the application form, a brief, a copy of the veteran’s DD214, copies of relevant military personnel and medical records, and additional evidence.

Once the board receives the application, it will assign a docket number and mail a letter confirming receipt of the upgrade or corrections request. The Naval Discharge Review Board requests confirmation that all relevant evidence has been submitted. The review boards also request official copies of military and medical service records directly from the branch of service. The board then makes a decision based on the evidence and issues a decisional document outlining the reasons and bases for the decision. The applicant and counsel are notified of the decision and provided a copy of the decisional document. The names and votes of the panel are available upon request.

Veterans seeking benefits from the V.A. may also utilize a process known as a character-of-service determination instead of going through the entire discharge upgrade process. A favorable V.A. character-of-service determination grants baseline eligibility for benefits to a veteran whose discharge was granted under conditions other than dishonorable.

Military discharge review offers lessons in patience and fortitude. It takes a long time, and the success rate is low. The rewards, however, are priceless. Helping a veteran upgrade or correct a military discharge can mean the difference between a life of struggle and one of successful transition from combat to community.

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1. 10 U.S.C. §§816 et seq. See also 10 U.S.C. ch. 47.
2. 38 U.S.C. §§101(2), 3311(c).
10. 5 U.S.C. §§552, 552(a).
12. See, e.g., Kathleen Gilberd, Upgrading Less-Than-Fully-Honorable Discharges, THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE 324 (2008) (Air Force DRB documentary review applicants have a 15% success rate, while personal appearance applicants have a 45% success rate.).
14. Id.
15. 10 U.S.C. §§1553(d)(1);
22. DoD 1332.28, supra note 18, at E3.2.12.6. See also 32 C.F.R. §724.211.
23. See, e.g., 32 C.F.R. §724.902(c).
25. 32 C.F.R. §70.9(b).
26. 32 C.F.R. §70.9(c)(1)(ii); DoD 1332.28, supra note 18, at E4.3.1.2, E4.3.2, E4.3.3.
27. 32 C.F.R. §70.9(c)(i); DoD 1332.28, supra note 18, at E4.3.3.1.
29. 10 U.S.C. §832.
32. Id.
34. 38 C.F.R. §3.12.
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ON MONDAY, NOVEMBER 12, Trial Advocacy and the Litigation Section will host a program to provide introductory and intermediate instruction on how to take and defend depositions in California state court actions. The first part of the program will be a lecture covering the rules relating to oral depositions as well as how to “pin down” the deponent, defend a deposition, use deposition testimony in trial, and develop a deposition strategy. The second part is a workshop in which participants practice taking and defending the deposition of a plaintiff in a civil action for negligence and receive constructive feedback. Participants will receive a deposition outline that organizes the deposition process for ease of reference in an actual deposition. Course materials will be distributed via e-mail prior to the first class, so a correct e-mail address is needed at the time of registration. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration begins at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The registration code number is 011608. The prices below include the meal.

$250—CLE+ member
$350—LACBA member
$500—all others
3.75 CLE hours

TAP: Witness Examination Skills Workshop

On Monday, November 12, Trial Advocacy and the Litigation Section will host a program offering introductory and advanced instruction on how to examine a witness under oath. The first part of the program is a lecture covering how to lay the foundation for demonstrative evidence, create a strategy for cross-examination, control the witness, and employ such advanced techniques as leading by prior question and anticipating rebuttal. The second part is a workshop in which participants conduct direct examination and cross-examination of witnesses. Participants receive constructive feedback on their performance. Course materials will be distributed via e-mail prior to the first class, so a correct e-mail address is needed at the time of registration. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration will begin at 5:30 P.M., with the discussion continuing from 6:30 to 8. Proceeds benefit Center for Civic Mediation community and youth peer mediation programs. The registration code number is 011609.

$75—general admission
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$2,500—Sponsor
$5,000—Underwriter
$10,000—Patron
$25,000—Benefactor
1.5 CLE hours

Robert I. Weil Lecture

ON TUESDAY, NOVEMBER 13, the Center for Civic Mediation and LACBA will host the 7th Annual Robert I. Weil lecture, titled “The Neuroscience and Neuroeconomics of Decision-Making: Its Implications for Mediation.” The lecture will be delivered by Antonio Rangel, professor of neuroscience and economics at the California Institute of Technology, and Jonathan Katz, Kay Sugahara professor of social sciences and statistics at the California Institute of Technology. Max Factor III will moderate the discussion. The program will focus on imbedded processes that affect how decisions are made (often effectively but sometimes in self-defeating ways), what the differences are between the brains of good and bad decision-makers, and practical implications for lawyers and mediators. A reception will precede the event, which will be held at Jones Day, 555 South Flower Street, 50th floor, Downtown. On-site registration will begin at 5:30 P.M., with the discussion continuing from 6:30 to 8. Proceeds benefit Center for Civic Mediation community and youth peer mediation programs. The registration code number is 011761.

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The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org, where you will find a full listing of this month’s Association programs.
ATTORNEYS MUST BE PREPARED to address a myriad of questions, concerns, and needs of their clients, which sometimes is a daunting challenge all by itself. For example, during the intake of a client who is injured in an accident, whether the client has a regular healthcare provider is an issue always discussed. This seemingly simple question should have a simple answer. However, if the client is a veteran of the U.S. Armed Forces, this routine inquiry often reveals an increasingly common problem: The veteran is having trouble obtaining health (or other) benefits from the Department of Veteran’s Affairs (V.A.), and the client wants to know what the attorney can do to help. And, so, a case that initially appeared to be within the attorney’s practice area has taken on a new twist. The answer is that it all begins with V.A. accreditation.

Veterans today face unprecedented challenges in obtaining benefits from the V.A. These challenges are a result of several factors, including the sheer number of veterans eligible to receive benefits. There are currently thousands of returning veterans who are entering the V.A. system for the first time and even more who are eligible for benefits. The V.A. currently has a backlog of 1 million claims, and veterans can expect to wait an average of six months for their claims to be processed.1 However, with attorney assistance during the early stages of a claim, a veteran’s likelihood of success in obtaining benefits can increase by as much as 25-fold.2

The V.A. regulations define a “claim” as any application for entitlement to V.A. benefits, reinstatement of V.A. benefits, continuation or increase of V.A. benefits, or the defense of an adverse action by the V.A. concerning entitlement to benefits.3 If a veteran (or claimant) wants attorney representation in connection with a claim, the V.A. requires the veteran to file Form 21-22a appointing the attorney as the veteran’s representative.4 V.A. regulations prohibit any individual from assisting a veteran in the preparation, presentation, and prosecution of a claim unless the individual has been accredited.5 This is true regardless of whether the work is done pro bono or for a fee. Although V.A. regulations allow certified paralegals, legal interns, and law students to assist in preparing and prosecuting claims for V.A. benefits, they may only do so under the direct supervision of the attorney of record and only with the specific written consent of the claimant. If an application is made to appoint an unaccredited attorney, the V.A. will give written notice to the claimant that the V.A. will not recognize the unaccredited attorney as the claimant’s representative.6 Accreditation is therefore a fundamental first step in helping existing clients with V.A. benefits issues.

Becoming Accredited

To become an accredited attorney, the first step is to attain initial accreditation status from the V.A. by applying to the V.A.’s Office of the General Counsel. In practice, this is done by completing V.A. Form 21a and submitting it to the V.A. The form can be downloaded from the V.A. Web site at www.va.gov/vaforms/va/pdf/VA21a.pdf, and can be submitted via mail, facsimile, or e-mail. After the application is submitted and approved, the V.A. will send the attorney a letter welcoming him or her as an accredited attorney, and the V.A. will publish the attorney’s name and contact information on the Department of Veteran’s Affairs Web site. This initial approval process usually takes between 90 and 120 days.

The next step is the completion of three hours of State Bar-approved CLE credits within a year of initial accreditation. The CLE course must cover the following topics: representation before the V.A., claims procedures, basic eligibility for V.A. benefits, right to appeal, disability compensation, dependency and indemnity compensation, and pension. After completing the required three hours of CLE training, the attorney must certify to the Office of the General Counsel that the required CLE has been completed by sending a letter stating the title of the CLE event, the date and time the event was taken, and the provider’s name.

In addition to the initial CLE requirement and self-certification, the attorney must provide the V.A. a yearly self-certification in order to maintain accredited status. This consists of sending a letter to the V.A. stating that the attorney is in good standing in every bar, court, or agency in which the attorney is admitted, including identification numbers and membership information for each jurisdiction. In addition, the attorney must complete another three hours of approved CLE on the subject of veterans benefits law and procedure within three years of initial accreditation and three hours of approved CLE every two years thereafter. Each time an attorney completes the required CLE, the attorney must send the V.A. a self-certification letter. As long as the attorney meets these requirements, he or she will remain an accredited attorney with the V.A.

Attorneys who become accredited by the V.A. have the opportunity to make a difference for the women and men who put their lives on the line for the United States. Several organizations provide opportunities for mentorship and training for attorneys who wish to help veterans with benefits issues after they are accredited. For more information about these opportunities, please contact LACBA’s Armed Forces Committee.7

ATTORNEYS MUST BE PREPARED

3 38 C.F.R. §14.627(g).
4 38 C.F.R. §14.631(a), §14.629(c)(1).
5 The rules concerning the accreditation of attorneys before the Department of Veterans Affairs can be found in 38 C.F.R. §14.629(b)(1).
7 Those seeking more information about attorney accreditation may contact the author at (323) 284-2834 or jurahartley@gmail.com.

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