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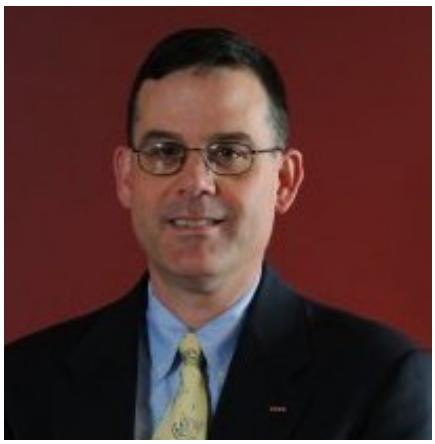
VETERANS AND MILITARY LAW SECTION

In This Issue

MESSAGE FROM THE CHAIR: "33"

by Robert J. DeSousa



The number 33 has special meaning. It's approximately a third, which is a significant societal number, there are organizations like "The Big 33," a popular Movie about the Chilean Mine disaster called "the 33," the number "33" mysteriously appears on the Rolling Rock bottle of beer, and Mason's achieve their highest order at 33rd°.

The number 33 is also significant to the Veterans and Military Law Section because that is the number (33 percent) by which VMLS has grown since the beginning of the Federal Bar Association's fiscal year. This growth is directly attributed to the actions of all of our members. We have implemented a vigorous CLE program working with FBA chapters, other like-minded organizations, and veterans and military associations. We have put on programs like the "Jobs for JAGs" program and a veteran outreach program in Baltimore. We have a great legislative and regulatory committee which has managed to get major issues on the Federal Bar Association's official agenda. Our military law committee has analyzed the changes to the Uniform Code of Military Justice and our publications committee has put out this, our second edition of our revised newsletter, as well as preparing for an upcoming special edition of *The Federal Lawyer.* Your Veterans and Military Law section is a section that looks for participation by all of its members. Our full board is large—consisting of approximately 33 members and subcommittee members!

So here's my challenge to each of you. Please consider spending 33 minutes in the next week to reach out to a third of your contacts and see if they be interested in joining our section. I'd like to see our section grow to three times its original size or proximately 330 members!

Keep up the great work. It's a pleasure to be your chairman.

Robert J. DeSousa

Past National President, Chair Veterans and Military Law Section The Federal Bar Association

PLEASE JOIN the Veteran's and Military Law Section at: www.fedbar.org/Veterans

Report of the Legislative and Regulatory Committee

by Carol Wild Scott

ABA SUMMIT

The Mission: To launch a sustainable, integrated national system of legal support to produce improved outcomes for Veterans, Active duty service members, their families, Caregivers and Survivors. The Summit delegates met in D.C. at Jones Day law firm June 23-24. Broken into working groups (from state bar groups to neighborhood and state hotlines to TAPS, Caregiver organizations, Military Spouses, Veterans Treatment Courts and many others) and assisted by facilitators . VMLS has a seat at the "inner" table as we were among the initial group of twenty who started the project. The reports should be out in a few weeks and my next report will address those and the next steps.

VETERANS BENEFITS APPEALS SYSTEM REFORM

On May 24, there was a joint hearing with the House and Senate Veterans Affairs Committees to address the issue. VMLS was, however, invited to submit written testimony, on those specific bills and on the issues in general.

Chairman Miller introduced H 5620, a bill primarily providing for VA accountability and for reform of the appeals system. The appeals reform is in Section 9 of the Bill.

Highlights include raising the evidentiary bar for "supplementary claim"; eliminating the Duty to Assist from any but the initial rating process ; closing the record at the issuance of the initial rating decision unless the appeal track with hearing at the Board is selected; and availability of fee-based representation upon issuance of the initial rating decision. Among other proposals is one to eliminate the C& P exam unless the claim is tended to be proven at the filing of the claim. This would overrule McLendon and negate an essential part of the Duty to Assist.

VMLS was invited to participate in a roundtable on July 14 with VSOs (the "big 6"), NOVA, MOAA, and the Board of Veterans Appeals. The topic was the pending legislation. VMLS was the only participant that raised the issue of the need for profound structural reforms at the Board without which any change in the appellate process merely equates with shuffling the deck chairs on the Titanic. The measures we have proposed and intend to push include Title 5 ALJ certification for what are now characterized as "Veterans Law Judges," appointment of adequate leadership for the Board; and transparency about and adequate training for hearing examiners/decision makers. We pointed out that the statistics from the annual reports from the CAVC for the past several years demonstrate that of the decisions appealed to the Court, in excess of 75 percent are remanded or reversed for VA error on at least one issue.

NATIVE AMERICAN VETERANS

We have been working for over six years to get VA to publish regulations to permit the certification of Tribal VSOs on at least an equivalent basis with state & county VSOs. The latest endeavor was published in the Fed. Reg. on July 20. It provides for pretty much the same approach as that proposed in March—require of Tribal governments who wish to have offices of veterans affairs as part of their governmental structure to meet qualifications required of "organizations" seeking to provide representation to veterans—i.e. membership levels, financial accounting and other requirements. Tribes are also free to accredit their TVSOs through accredited State offices. Responses are due by Sept. 19. Several tribes are working on individual responses and there is a plan for at least one and possibly more to retain counsel to craft response with challenges in mind.

A proposed Indian Veterans Law Conference in Tulsa, Okla., Oct. 5-6. 2017, is in the planning stage. We will be working closely with the CLE Committee under Hillary Wandler and our section leadership, reaching out to the Oklahoma Chapter and to the Indian Veterans community, as well as other national organizations for participants and for sponsorship. Members interested in working to put this together should contact Carol Wild Scott. ●

Carol Wild Scott, Legislative Chair

Nov. 2 CLE Event to be Held in Baltimore

On Nov. 2, 2017, at the University of Maryland Cary School of Law, the Veterans and Military Law Section, in cooperation with the Maryland State Bar Association, will host a Veterans Day program featuring one hour of continuing legal education credit. During the first hour, a number of veterans from the War in Vietnam, will discuss their experience returning to school following service in combat, during that period of history.

Clips from "Maryland War Stories," a movie produced by Maryland Public TV, will be shown. In part featuring attorneys who attended law school during that era. The second hour will be a discussion of cultural competency, i.e. dealing with veterans as clients, and the unique issues of communication with a veteran.

The Newly Created Army National Guard Trial Defense Service and the Pressures of Increased Accountability in the Army National Guard

by Col. Nelson Van Eck, Army National Guard

Introduction

The Army National Guard Trial Defense Service (ARNG TDS) is now fully functional in nearly all of the states and territories of the United States. This statement may come as a surprise to many people. Hasn't an independent Trial Defense Service in the military been around for decades? Well, that is true for the active component TDS and TDS in the United States Army Reserve. The active component TDS has been in existence since 1980, and the independent United States Army Reserve Trial Defense Service has been in existence since 1993. Prior to the establishment of an independent Trial Defense Service in those two components of the Army, the senior legal advisor to the command, who was also in charge of all prosecutions in the command, would assign a trial defense counsel to a Soldier accused of misconduct on a case by case basis. That same defense counsel could also be assigned as a prosecutor in other cases.

That seemingly antiquated way of providing defense services to Soldiers accused of misconduct was precisely how the National Guard provided defense services to Soldiers until very recently. It was not until 2009 that the National Guard activated the force structure for an independent Trial Defense Service that is managed, trained, and evaluated completely outside of the chain of command administering discipline. However, unlike the active component and the USAR, the sovereignty of each state and territory dictated that participation in the ARNG TDS program would be voluntary. Each state and territory is free to participate in the independent ARNG TDS program or to provide defense services the old fashioned way. By the date of this article, 52 of the 54 states and territories, have decided that an independent TDS is the best way to protect the due process rights of Soldiers accused of misconduct. Since 2009, ARNG TDS participation has increased year by year with the last state to come on board being Alaska in 2015. The remaining 2 sovereigns still provide Trial Defense Services with counsel from their own national guards under the direction of The Adjutant General's senior command legal advisor.

While the ARNG TDS is now fully functional, it is still in its nascent phase as an organization and is being severely tested by the recent focus on increased accountability in the Department of Defense. The focus on accountability, along with the focus on increasing victim participation in the accountability process, has produced at least eight major changes to the military justice system over the past two years and the devotion of significant resources by all components, including the National Guard, to increase the investigation and prosecution of Soldiers accused of misconduct.

It is the opinion of this author that, in order to ensure a balanced and fair system of justice into the future, ARNG TDS needs the addition of full-time personnel to properly accomplish its mission of defending Soldiers accused of misconduct as the resources devoted to the prosecution of alleged misconduct continue to increase. This article provides a brief history and overview of the ARNG TDS as an organization and the strain it now faces due to the increased focus on accountability in both the active and reserve components of the US Army.

History and Organization of the Army National Guard Trial Defense Service

In 2005, based on the prompting of the National Guard Chief Counsel, then-Lieutenant Colonel (LTC) Christian Rofrano, Lieutenant General (LTG) H. Steven Blum, Chief, National Guard Bureau, and LTG Scott Black, The Judge Advocate General (TJAG), U.S. Army, committed to the creation of a vigorous and independent trial defense organization in the ARNG. Consequently, LTG Blum directed LTC Rofrano to develop an independent TDS in the ARNG. LTC Rofrano selected then-Major (MAJ) Patrick Barnett to lead the planning effort. By the summer of 2008, after then-LTC Colonel Barnett had overcome a seemingly unending stream of force management and force structure hurdles and had engaged nearly every TAG and leader in the National Guard to win support for this program, the Army approved the creation of the Army National Guard Trial Defense Service in the 54 states and territories.

In 2009, the Director of the Army National Guard stood up the ARNG TDS by activating a force structure of one Legal Support Organization, seven Regional Defense Teams, and 28 Trial Defense Teams with a total of 180 authorized personnel (130 Judge Advocates, 1 Legal Administrator, and 49 Paralegals) to support the approximately 360,000 Soldiers of the Army National Guard. By late 2009, the Chief Counsel and TJAG stood up a temporary Office of the Chief, ARNG TDS, choosing LTC Patrick Barnett as its first Chief to provide "technical supervision, management, direction and legal defense training for all members of the ARNG TDS while in Title 32 Status" under the supervision of the Commander, The Judge Advocate General's Legal Center and School and the Chief, US Army Trial Defense Service.

LTC Barnett's first task was to persuade the states and territories to fill their authorized TDS billets. By the end of 2009, nearly 40 states were participating in the ARNG TDS. By 2012, 120 judge advocates and 30 paralegals were assigned in 46 states and territories. On March 1,

2014, the temporary Office of the Chief supervisory structure was finally made permanent with an authorized strength of six full-time Active Guard Reserve personnel. By March 2014, the ARNG TDS was comprised of 181 assigned trial defense personnel in 48 of the 54 states and territories of the United States. It is important to note that all members of the ARNG TDS are traditional part-time Guardsmen. The ARNG TDS has no full-time support personnel in its structure with the exception of the six full-time Soldiers in the Office of the Chief, which is the supervisory element located at the National Guard Bureau in Arlington, Virginia.

As of the date of this article, the Army TJAG, LTG Flora Darpino, now fulfills her responsibility of administering an independent, Army-wide trial defense service to provide representation to Soldiers facing adverse administrative action and courts-martial through stand-alone trial defense assets in all three components. Today, the Army National Guard Trial Defense Service consists of 187 assigned personnel serving in 52 of the 54 states and the territories including Guam, Puerto Rico and the Virgin Islands. The successful implementation of the ARNG TDS is a testament to the efforts of its first Chief and primary architect, Colonel (Retired) Patrick A. Barnett. The Chief Counsel of the NGB contributed to the success of the program by keeping Colonel Barnett at the helm of the organization from its inception until his retirement in December 2014. This decision was critical to the success of the program. Colonel Barnett's efforts are memorialized by all members of the organization in many ways, and now even more fervently due to his untimely passing in September 2015.

Increased Accountability in the Army and its impact on the ARNG TDS

The focus on accountability and the focus on procedures to increase victim participation in the accountability process have placed great strain on the newly created ARNG TDS. As noted above, all ARNG TDS personnel who represent and support Soldiers accused of misconduct are part-time traditional Guardsmen. Other than six full-time members at the Office of the Chief, the ARNG TDS has no full-time billets in its force structure. Increased accountability and maintaining good order and discipline in the Armed Forces is absolutely necessary in order for the US Army to remain the greatest fighting force in the world. Victim participation in the military justice process is also critical to the proper functioning of the military justice system in our armed forces. How victim participation should be increased and managed is open to much debate, but the concept of increased victim participation in the process is incredibly important. Increased accountability and victim participation in the National Guard have been addressed and are still being addressed in two ways. The first is through legislative changes to both the UCMJ and state codes of military justice. The second is through programmatic changes which leverage full-time judge advocates in the National Guard. Both legislative changes and programmatic changes in the National Guard to increase accountability have placed a severe strain on the ARNG TDS force.

Legislative changes that place a strain on ARNG TDS

As mentioned earlier, there have been at least 8 major changes to the military justice system over the past two years via the FY15 and FY16 National Defense Authorization Acts that have swung the pendulum in favor of accountability. In addition, the Department of Defense has recently announced proposed reforms to the military justice system in the draft Military Justice Improvement Act of 2016. While these UCMJ changes impact National Guardsman when mobilized in a Title 10 status, they have also influenced the enactment of new state codes of military justice that closely mirror the UCMJ but apply to Guardsman while in a Title 32 status.

A short summary of the major changes in the FY15 and FY16 NDAAs and the proposed changes contained in the Military Justice Act of 2016 are included below. This is not a comprehensive list, but they illustrate the trend in undermining elements of the military justice process that enable defense counsel to represent Soldiers accused of misconduct.

(1) The Fiscal Year 2014 National Defense Authorization Act (FY14 NDAA) changed the Article 32 process to make it a preliminary hearing rather than an investigation, and it now allows victims to refuse to testify about the allegations they are making. The Article 32 is no longer an investigation into the charges to ensure their truthfulness or a means of discovery. The Article 32 process no longer has as one of its purposes the testing of the veracity of the alleged victim during live testimony, and it no longer captures victim testimony for impeachment purposes or as evidence at trial in the event a witness is unavailable at trial.

(2) The FY14 NDAA reduced the defense's ability to depose a witness. It changed the standard for deposition to "due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at [an Article 32] preliminary hearing . . . or a court-martial." Discovery or trial preparation is no longer a basis for a deposition. Coupled with the ability of the alleged victim to refuse to testify at the Article 32 preliminary hearing, limiting depositions means that Soldiers often go to trial for serious offenses without their defense counsel even being able to talk to the alleged victim before trial.

(3) The FY15 NDAA requires a review of convening authority decisions not to refer charges of certain sex-related offenses for trial by Court-Martial if referral of charges is recommended by the Chief Prosecutor. It established the Service Secretary as the superior authority to review convening authority decisions not to refer a sex-related offense to trial if detailed counsel for the government requests review through the "Chief Prosecutor" of an Armed Force. The practical effect of this provision has been that nearly all sex-related offenses are referred to trial even if the Article 32 hearing and pretrial investigation reveal information that make a decision not to refer the case to trial the only reasonable decision, because no commanding general wants to have his non-referral decision reviewed by the Service Secretary and down the road by Congress when he or she is nominated for a promotion or key position.

(4) The FY14 NDAA directed modification of MRE 404(a) to make general military character inadmissible in most cases. Previously, evidence of general military character was allowed during the merits portion of a trial. Now, general military character is not admissible to show

probability of innocence for many offenses (unless it is relevant to a specific element of the charged offense), including offenses under Articles 120-123a, Articles 125-127, and Articles 129-132, or an attempt or conspiracy to commit any of these offenses. This change severely limits the defense's ability to use the "whole Soldier" concept when representing a Soldier-Client.

(5) The FY14 NDAA directed expansion of the Military Rules of Evidence 513 psychotherapist-patient privilege to include communications to any licensed mental health professionals, and it removed the "constitutionally required" exception in MRE 513(d)(8) which had long been used to allow access to the defense when necessary to prepare an adequate defense. Although, the due process clause or the confrontation clause of the Constitution could still require the piercing of the privilege for the benefit of the defense, the NDAA added strict guidelines to limit the judge's discretion in finding the information necessary for the defense. The cumulative effect of the changes is that some information that has been critical for preparing and presenting an adequate defense, including cross-examination of the alleged victim, might not be available in the future.

(6) The FY15 NDAA increased the alleged victim's participation in the military justice process and increased the role of the Special Victim Counsel (SVC). The NDAA now requires victim access to SVCs provided by the military and broadened the eligibility to receive SVCs beyond just those victims entitled to receive legal assistance. It also established that the alleged victim's preference for military or civilian prosecution must be considered by the convening authority and that the SVC not only represent the alleged victim in any matter where the victim has a right to be heard but also to petition ACCA on the victim's behalf after a military judge's adverse ruling under MRE 412, 513, or 514. This expansion of the roles of the victim and the SVC directly increases the workload of the defense counsel during the military justice process.

(7) The FY15 NDAA requires that in order for the Defense Counsel to interview the alleged victim in an alleged sex-related offense, they must now go through the SVC or other counsel for the victim. As mentioned previously, defense counsel often have no opportunity to talk to an alleged victim before trial, so they go into trial blind not knowing what exactly they have to defend against.

(8) The FY14 NDAA limits the convening authority's discretion to act on the findings and sentence to correct an error or to grant clemency to a Soldier. In most cases, the convening authority is no longer allowed to disapprove, reduce or suspend a punitive discharge or the term of confinement.

Although these provisions take rights away from Soldiers accused of misconduct, the cumulative effect has, in my opinion, resulted in a higher rate of acquittals in the US Army for sex related offenses, which is the opposite of the intended effect. This is because the recent changes in effect deny the prosecution an opportunity to test the evidence before trial and develop strategies to overcome the weaknesses in their case that used to come to light through the Article 32 investigation, unfettered access to alleged victims, and depositions. Also, when weak cases, with evidence that does not warrant going to trial, still get referred to trial, the only logical result is a lower rate of conviction. The changes to the Military Rules of Evidence combined with less convening authority discretion significantly swung the pendulum in a way that makes the system less fair for Soldiers who may be accused of committing misconduct.

The Secretary of Defense previously appointed a Department of Defense (DoD) Military Justice Reform Group, and it has proposed changes to the Uniform Code of Military Justice (UCMJ). If adopted, these recommendations would swing the pendulum further away from the defense. The proposed changes include denying the accused the right to a panel of court members (jury) for minor offenses, similar to the non-jury trial for petty offenses in civilian courts; requiring sentencing by military judges, even in cases when the accused has requested trial by court members; constraining flexibility by the military judge by establishing sentencing parameters and criteria, which are similar to sentencing guidelines; and permitting the government to appeal a sentence under conditions similar to those applied by the federal civilian courts of appeal.

Programmatic changes that place a strain on ARNG TDS.

The National Guard has developed two new programs to address accountability in the National Guard and increase victim participation in the military justice process. The two programs are the NGB's new Office of Complex Investigations (OCI), which was established to investigate sexual assaults and other complex crimes, and NGB's new Special Victim Counsel Program, which assigns a full-time judge advocate for every alleged victim of a sexual assault. Both programs utilize full-time personnel and both programs have placed a strain on ARNG TDS operations.

The Office of Complex Investigations was created in 2014 due to a recognition that civilian authorities, who have traditionally been the mechanism for the investigation and prosecution of crimes committed by National Guard members while in a Title 32 "state" status, are inadequate to investigate and prosecute purely military offenses and other crimes such as sexual assaults to the degree that the military believes is necessary to maintain good order and discipline within its formations. In many instances, civilian prosecutions are not visible to other service members and do not involve the chain of command. Command involvement, command responsibility and visible accountability are critically important for deterrence and the maintenance of good order and discipline within our Army. OCI has approximately 30 full-time personnel which deploy to the 54 states and territories to conduct investigations on behalf of the TAG in the particular state where the allege offense has occurred.

NGB's SVC Program was developed in 2014 in response to the mandated implementation of a SVC program in all components by the Secretary of Defense. NGB's SVC program has approximately 20 full-time personnel who represent victims of sexual assault and assist in their participation in the accountability process in all 54 states and territories.

As the number of OCI investigations increase, so does the number of disciplinary actions, courts-martial and administrative separations, as well as the number of assigned full-time SVCs. This all increases the TDS workload. In addition, each state has a full-time judge advocate who assists with managing the adverse actions in the state and who draws from all judge advocates in the state to accomplish the increased number of disciplinary actions. As mentioned earlier, ARNG TDS has no full-time personnel in its structure located in the states. If the state, OCI, or SVC take

actions during the normal work week with their full-time personnel, it is easy to see how the ARNG TDS counsel is at a disadvantage and ultimately the defense services provided to the Soldier suffer.

Conclusion

ARNG TDS continues to improve its operations, and it continues to receive incredible support from the states and territories participating in the program. ARNG TDS has been able to obtain an increase in its force structure of 7 judge advocates and 25 junior (E3) paralegals for FY17. However, these additions are all part-time traditional Guardsmen and are inadequate to meet the demands placed on ARNG TDS by the recent legislative changes to the UCMJ and state codes of military justice and the creation of NGB's OCI and SVC programs. It is this author's view that, although an increased focus on accountability is important, the increased resourcing of TDS is equally important. For the ARNG TDS, that means the addition of full-time personnel to meet the challenges created by full-time judge advocates in OCI, SVC, and the state JA offices. It also means filling all authorized TDS billets with exceptionally qualified personnel. Properly defending Soldiers accused of misconduct must remain a priority that is at least equal to increased accountability. ●

The author is the Chief of the Army National Guard Trial Defense Service. The views expressed in this article are his personal views.

VMLS Edition of *The Federal Lawyer*

by Raymond J. Toney, Attorney and Counselor at Law, Chair, Communications Committee

As we reported in the last VMLS newsletter, the Section is taking the lead on submissions for the Spring 2017 edition of *The Federal Lawyer*. The response to our previous call for submissions has been something short of overwhelming. We again invite submissions from VMSL members and nonmembers on topics relevant to servicemembers and veterans. Guidelines for submissions are available online at *The Federal Lawyer* website.

The deadline (hard and fast) for submissions is Nov. 1. Inquiries and submissions may be directed to Raymond J. Toney at rjtoney@militarylawpro.com. ●

Veteran's & Military Law Section of the FBA cosponsors the Widener University Commonwealth Law School's Veterans Day Ceremony

The Program begins at 8:00 a.m. on Friday, Nov. 11 at the Widener University Law School, Room A180, Administration Building, 3737 Vartan Way, Harrisburg PA 17110.The event begins with a one-hour Ethics CLE, "What Every Practicing Lawyer Needs to Know about Military Law." That CLE takes place in the same room as the ceremony and there will be breakfast for attendees. FBA member Jon Crisp will be the lead presenter.

The CLE will be followed by the Widener Law Commonwealth community honoring the memory of U.S. Army Captain Shane R.M. Mahaffee, a 1994 graduate of Widener University Law School's Harrisburg campus who was killed in 2006 while deployed in Iraq. His widow, Jennifer, their two children, his parents, his sister and his brother-in-law Don Willett (who happens to be a Justice of the Texas Supreme Court) will be joining us.

The confirmed speakers for the ceremony following the CLE, include past national FBA president and current chair of the Veteran's and Military Law Section, Bob DeSousa, Pennsylvania; Lt. Gov. Mike Stack; Pennsylvania Supreme Court Justice Debra McCloskey Todd; and Texas Justice Willett as well as a General Officer of the Pennsylvania National Guard.

Please look for details on how to register.

Veteran's and Military Law Section Membership Plan

The Veteran's and Military Law Section (VMLS) hereby adopts the following Membership Plan. The Plan is guided by FBA's Best Membership Practices: (1) RETAIN eVMLSisting members, (2) ATTRACT new members, and (3) LEAD by having a designated Section leader who is responsible for eVMLSecition of the Section's Membership Plan.

A. LEADERSHIP

- The designated leader will be called the "Membership Chair."
- The Membership Chair shall have a Membership Committee, which the Chair shall appoint within the first month of taking office. The Committee will be responsible for assisting the Membership Chair with implementation of this Plan.
- Although VMLS Section will have certain members designated to lead in the area of membership, VMLS Section recognizes that all Section members should be engaged in membership. To this end, the Board of VMLS Section will include Membership in its regular agendas, where a member of the Membership Committee will provide an update as to the monthly membership numbers supplied by FBA National and upcoming membership efforts.

B. RETAINING AND ATTRACTING MEMBERS

VMLS Section will retain VMLS VMLS members and attract new members in two ways: engaging in personal outreach and providing eVMLScellent programming.

1. Personal outreach

a. Retaining eVMLSisting members

i. The Membership Chair, or Section Chiar or a member of the Membership Committee, will personally contact VMLS VMLS Section members when notified by FBA National that the VMLS VMLS members are coming due on renewal. The contact may be by telephone, e-mail, or letter, and it will highlight benefits of FBA membership and the Section. The contact will provide contact information for the Membership Chair and will encourage the VMLS member to renew.

ii. The Membership Chair, or a member of the Membership Committee, will personally contact each renewing Section member to thank them for renewing and recognizing their support for FBA. The contact will also invite the member to upcoming event(s).

iii. The Membership Chair, or a member of the Membership Committee, will personally contact each non-renewing Section member once to encourage them to renew. The contact will remind the non-renewing member of the benefits of FBA.

b. Attracting new members

i. The Membership Chair, along with all Board members, will strive to invite at least one new person to an event each year.

ii. The Membership Chair or Membership Committee will reach out to include law students and judicial law clerks in events, and will encourage law students to joint as Law Student Associate members of FBA.

2. Programming

a. When VMLS Section plans any Section event, VMLS Section will consider how the event will further the Section's goals of

retaining existing members and attracting new members. The Section will strive to implement the strongest programming possible in order to demonstrate the value of membership. The Section will also invite the judiciary to attend its events.

b. At each Section event, upcoming events and encouragement to join will be included in either introductory or concluding remarks.

c. At each Section event, membership applications will be available at the check-in area, along with CLE certificates if applicable.

d. After each Section event, the Membership Chair, or a member of the Membership Committee, will contact any non-FBA members who attended and encourage them to join FBA and attend future events.

e. The Section will co-sponsor or advertise Section events with Chapters or other Sections who share similar interests or

f. When possible, VMLS Section will provide a cost benefit that encourages membership, such as reduced fees for existing members or those who join at an event.

Commissioner Sean Connolly

by Michael J. O'Brien, Oliver, Price & Rhodes

Commissioner Sean Connolly exemplifies the best of the Federal Bar Association through his commitment to public service in two professions. As the Commissioner of Veterans Affairs for the State of Connecticut, Connolly works tirelessly day and night to improve the health, welfare and quality of life of veterans across the state. At the same time, as a Lieutenant Colonel in the U.S. Army Reserve, Connolly stands ready to deploy alongside those same veterans and others in the event duty calls.

Commissioner Connolly received his undergraduate degree from Bryant University, cum laude and his Juris Doctor from the Catholic University of America, Columbus School of Law. A Veteran of Operation Iraqi Freedom, Connolly served as a Prosecutor and Brigade Legal Advisor with the 101st Airborne Division (Air Assault) at Fort Campbell, Kentucky, and in Kuwait and Iraq, where he was responsible for trying all courts-martial, non-judicial punishment, elimination boards, and administrative separation actions for two brigades and advising on operational and administrative law matters. He has taught as an Adjunct Lecturer at the Catholic University of America, Columbus School of Law and served as a law clerk to Hon. H.F. "Sparky" Gierke, U.S. Court of Appeals for the Armed Forces.

His military awards and decorations include the Bronze Star Medal, the Meritorious Service Medal, the Joint Service Commendation Medal, the Army Commendation Medal, the Army Achievement Medal, the Iraqi Campaign Medal, and the Global War on Terrorism Service Medal. He is also entitled to wear the Air Assault Badge and the Office of the Secretary of Defense Identification Badge.

Connolly first became active with the Pentagon Chapter of the FBA upon his return from deployment in Iraq. "The FBA fostered my development of lasting professional relationships and leadership skills that helped advance my experiences and career, and also helped balance the competing commitments of military and civilian life," Connolly said. "Balancing a civilian career with military requirements and family time is challenging, especially last year and this year as I am currently enrolled in the U.S. Army War College. Luckily I have an amazing family and loyal colleagues who have supported me in these efforts, allowing me to continue the service that I love."

Connolly credits his military service with helping him in his own civilian career. "The military provides experience in dynamic and changing environments, team-building, and technical training that is transferable to any organization. I believe my Army experience has increased my effectiveness in the organizations I have been associated with, including the FBA. That's why, as a Veterans Advocate, it's important to me to highlight to employers that our Veterans are committed, trustworthy, resilient, and entrepreneurial, and that from a talent management perspective, hiring Veterans makes good business sense."

Commissioner Connolly is married to Carol A. Connolly, Esq. and they have two boys, Sean (10) and Brendan (7) and a rescue puppy, Lucky. ●

U.S. Court of Claims Awards Nearly $4 Million in Attorneys' Fees Against United States in Veterans Benefit Class Action

by Brian D. Schenk

On July 26, Judge Margaret Sweeney in the United States Court of Federal Claims awarded $3,862,924.53 in legal fees and expenses to Plaintiff's lawyers from Morgan, Lewis & Bockius and the National Veterans Legal Services Program. In 2008, the Plaintiffs' attorneys filed a pro bono suit contending that about 2100 veterans separated due to Post Traumatic Stress Disorder related to service in Iraq and Afghanistan were unlawfully assigned disability ratings of less than 50 percent. The court certified the class in late 2009 and the parties engaged in protracted settlement discussions until ultimately settlement was reached in July 2011.

While the settlement was being implemented, Plaintiffs' attorneys submitted an application for attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), a federal statute authorizing payment of such fees by the government to successful litigants. Enacted in 1980, EAJA was designed, on part, to level the playing field between the average citizen and a federal government with vast litigation resources. For many military and veterans law practitioners, EAJA makes it possible to litigate cases for Plaintiffs who could not otherwise afford an attorney.

To be entitled to EAJA fees, litigants must first demonstrate they are a "prevailing party," which not always clear especially in cases such as this where the parties voluntarily agreed to settle the matter and the Court did not, for instance, enter judgment on the parties' dispositive motions. If the EAJA applicant can demonstrate he is a prevailing party, the burden shifts to the government to prove that "the position of the United States was substantially justified." The substantial-justification inquiry presents the largest area of dispute as there are no particular objective factors for courts to apply. As the Supreme Court has noted, it is a "multifarious and novel question, little susceptible ... of useful generalization ..." *Pierce v. Underwood,* 487 U.S. 552, 562 (1988). In short, there is a lot of room to argue and precedent in most jurisdictions bears this out.

EAJA applications often beget additional rounds of briefing and litigation and this case was no different. The government advanced numerous arguments disputing the Plaintiffs' entitlement to fees and expenses but ultimately the Court found them unavailing. Judge Sweeney held that, even though the parties voluntarily settled the case, Plaintiffs were nonetheless prevailing parties within the meaning of the statute. The Court further rejected numerous arguments by Government that both its pre-litigation and litigation positions were not substantially justified. Having concluded that the Plaintiffs met the requirements for EAJA fees, the Court approved the massive, nearly $4 million award. The Government can appeal the decision to the United States Court of Appeals for the Federal Circuit but, to date, no notice of appeal has been filed. ●

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The views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions to Raymond J. Toney at rjtoney@militarylawpro.com. Yanissa Pérez de León, managing editor.