

# TOMMY



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## MESSAGE FROM THE CHAIR

by Carol Wild Scott

### *New Orleans CLE*

The Veterans Law Section, hosted by the New Orleans Chapter, conducted a CLE program on March 23, 2011, at the U.S. District Court courtroom of Judge Jay Zainey. Jim Richardson, Carrie Weletz (of the firm Bergmann and Moore), and I addressed the topics of discharge review and basic VA claims processes and representing the homeless veteran. The program was well attended and the questions lively and numerous, evidence of considerable interest in addressing the needs of homeless veterans.

The Veterans Law Section wants very much to conduct more of this type of effort in conjunction with other chapters and/or divisions or sections. This program received CLE credits and the admission charged was modest but sufficient to cover at least part of the expenses. This is your section at work. We have a wealth of talent. Please use it!

### *2011 Indian Law Conference*

We attended the Indian Law Conference in Santa Fe, N.M., on April 6–8 in the continuing effort to encourage an interest in veterans law in Indian law practitioners. We had a table for the

Veterans Law Section with a set of books and a lovely Broken Star quilt from Pine Ridge Reservation for drawings. We sold enough chances on the quilt to pay for the table and some left over for the section coffers.

One of the panels addressed the Tribal Law and Order Act enacted in the last Congress, which institutes a considerable number of reforms for the tribal justice system. Because of the substantial number of veterans in Indian country and the expanded jurisdiction of the tribal courts over sentencing, it was thought that the concept of Veterans Treatment Courts might gain some traction. To that end, I spent a great deal of time discussing the structure and implementation of Veterans Treatment Courts with tribal judges, assistant U.S. attorneys, and tribal leaders from a number of tribes. Most had never heard of the concept and everyone with whom I spoke about the concept expressed a great deal of interest.

Much of my discussion addressed the Veterans Treatment Courts within the context of the Traditional Tribal Veterans Centers, which have been the subject of congressional submissions

and discussions with VHA and VBA. Now that the director of the Office of Tribal Governmental Affairs at the VA, Stephanie Birdwell, is in place, there is room for establishment of specific developmental goals with these issues.

### *Issues on the Radar Screen*

**Fiduciaries:** All of the issues noted in my original message are still part of the legislative agenda for the section. Additionally, the issue of the appointment and supervision of fiduciaries for impaired veterans requires considerable study and should be addressed. It is essential to ensure that veterans who have been found by VA to be incompetent to manage their funds are accorded due process in the selection of fiduciaries. A mechanism must be in place to ensure that family members are given the regulatory preference, and if not appropriate, that alternative selections have the requisite professional background, are trustworthy and are subject to standardized rules of conduct and annual audits.

Also of note is an issue raised in conjunction with the Tribal Veterans Centers, that of modification of 38 C.F.R. Sect. 14.628(b) by adding:

“(2) Tribal organization. An

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# VETERANS CONSORTIUM PRO BONO PROGRAM PROVIDES MENTORED APPELLATE COURT EXPERIENCE

*by David Sizemore*

In most federal courts of appeal cases the petitioner is represented by counsel. However, in the very busy U.S. Court of Appeals for Veterans Claims (CAVC), 68% of the appeals filed were pro se in 2009 (the last full report available) at the time of filing.

Attorneys seeking appellate court experience can help by providing pro bono representation to veterans and qualifying family members through the Veterans Consortium Pro Bono Program. The Veterans Consortium was created by a grant from the Legal Services Corporation (LSC) as authorized by the U.S. Congress at the urging of the Court of Veterans Appeals (now the U.S. Court of Appeals for Veterans Claims). The Veterans Consortium is a 501(C)(3) nonprofit corporation—an ongoing cooperative effort by four national veterans service organizations: the American Legion; the Disabled American Veterans; the National Veterans Legal Services Program; and the Paralyzed Veterans of America.

The Veterans Consortium recruits and trains attorneys—tuition free—who volunteer to take one CAVC appeal for a veteran. The attorney benefits from receiving CLE education and training, and the veteran benefits by having the newly trained attorney voluntarily help with the appeal.

As an attendee at the April 2010 Washington, D.C., veteran training session (training is also given at other U.S. locations), I can attest to the excellent quality of the training provided. Top veterans law practitioners and excellent support provided throughout the course prepare the attorney for a volunteer case.

Initially during the in-class training, each attorney is provided with easily understandable handbooks, in both hard copy and downloadable PDF versions. Once the attorney is assigned a Veterans Consortium case, the support continues for both the veteran and attorney. Once the case is assigned, the attorney can rest assured the case has been evaluated by the Veterans Consortium for its merit and issue determination. The attorney is assigned a mentor and receives the Veterans Benefit Manuals, including the current manual published by Lexis-Nexis, containing a searchable CD-ROM.

The veteran benefits from having legal assistance to fight for their denied claim(s). Claims for compensation before the agency are prosecuted in a “nonadversarial” environment. At the court, however, the Court of Appeals for Veterans Claims’ Rules of Procedure apply. These rules are often formidable to a pro se litigant. The CAVC cases are appeals from a final decision of denial of a veteran’s claim(s) by the Board of Veterans’ Appeals (BVA) of the Department of Veterans Affairs (DVA). The secretary is represented before the court by attorneys from the DVA General Counsel’s Office.

The veteran’s journey to the CAVC is often a multi-year process. The initially application is filed at one of the 57

Veterans Benefit Administration Regional Offices (VARO). The veteran is often seeking disability benefits, either new disability claims or disability claims seeking an increase in the veteran’s present disability rating. A VA disability rating is in 10% increments beginning at 0% and increasing to 100%. Additionally claims may be for non-service connected disability pensions, educational benefits or any other VA benefit denied to the veteran. These cases also may involve a variety of other veteran law issues pursued by either the veteran or by an eligible family member.

After receiving a denial of the veteran’s claims from the VARO, the veteran has appealed the denial to the BVA. The BVA has, in turn, denied or affirmed the VARO decision. The veteran must timely appeal this BVA denial of benefits.

Volunteer program lawyers are only given cases that have a legally credible VA Benefits claim. The program evaluates the BVA decision(s) for merit and the veteran claimant’s eligibility based on several factors, including financial need. The program then refers qualifying cases to a volunteer lawyer.

The Veterans Consortium sends to the lawyer accepting the case a case notebook containing a Program evaluation of the case, a copy of the BVA decision, a procedural history, the Record Before the Agency (RBA) on CD-ROM, and various advisory materials such as court practice information, e-filing rules, applying for admission, and various sample motion templates.

Most important of all, the volunteer lawyer is assigned a program mentor who, as a practitioner of Veterans Law, is available at every turn to provide advice, to recommend strategy, to help with preparing briefs and other required submissions, and if needed, help with preparing oral argument. Most cases can be completed in 50 hours or less even by those attorneys not experienced in this area of the law.

The majority of appeals in the CAVC are remanded back to the VA for correction of various procedural or due process errors rather than directly awarding benefits. However, there can be a tremendous variety of issues ripe for resolution that might never be properly pursued without attorney assistance. Not every case can be won, but we owe it to our veterans, who unselfishly served our country, to let their claims be heard in a fair manner. We should not make them try to compete against the VA Office of General Counsel’s (OGC) cadre of trained lawyers, especially when veterans law, often involving serious health care issues, is so complex and at times seems quite opaque.

My first case was probably quite typical in that the claimant had been trying for years to prove his case. I found it interesting, challenging, and rewarding to work with the client and I would like to offer some CAVC practice tips for those interested in the program.

- Call or talk at length with the veteran about their military experiences and their claim. Think about how you can coach them to proceed if their claim is remanded.
- Get a copy of the claims file (C-File), usually provided by the program on CD, and where feasible pertinent medical records, and review them thoroughly. *The veteran is entitled to one free copy of each.*
- Contact the assigned VA attorney early in the process. These lawyers are often overloaded with cases of all types and may not have read about the case yet. Give them your initial reaction if seeking to negotiate an award or remand and tell them why. Advance contact including e-mail and telephone numbers can help the process when things get more contentious later and/or court deadlines loom.
- Spend as much time as possible working on the Rule 33 Conference Memorandum, both as a means to highlight issues ripe for resolution and as a means to outline (with research and citation authority at the ready) of a possibly later initial brief. If you can achieve VA OGC buy-in early, it may help resolve the case more efficiently, and if not, help you anticipate VA reactions later in the case.
- If your case involves disability ratings issues, as most of them do, learn all you can about how the VA evaluates the condition(s) under appeal by doing a literature search about disease progress, diagnosis, and treatment. Most cases denied by the VBA will require medical expert reports/testimony showing that the claim (at least as likely as not) was caused or aggravated by direct in-service activities.
- Assess the likelihood of an issue being favorably decided by the court, either by a single judge or a panel of judges. If the likelihood is small, based upon your review of the present evidence, think remand instead. In the CAVC, a remand is generally a win, and allows for more/better evidence to be filed by the claimant unlike appellate law cases in general. Remand usually also preserves the effective date of the claim to that of the filing of the original claim.
- The VA OGC will often negotiate, but their focus is on restricting the issues on remand. It may well be the case that you must reject their first attempt, particularly if an urgent procedural right or duty owed the client is at stake and multiple issues have merit wherein the VA must take some positive actions to attain the benefit.
- Be flexible and honor most VA OGC requests for extension of time and the VA attorney will return the favor. Most VA employees are not biased against veterans even though they are, from your standpoint, strictly adhering to an overly rigid process or procedure. Remember that the VA benefits culture has grown and developed over many years.
- Keep your client informed. Pro bono clients, of course, deserve zealous representation. Don't shy away from giving them your true opinion and advice about their case. I recommend sending the client a detailed letter at the completion of the case, and perhaps during the case, suitable for later use in fulfilling such needs as a subsequent medical exam, hearing, or appeal. Education of the veteran is often crucial to the favorable outcome of their claim for compensation after our volunteer work has concluded.
- Keep a detailed record of the time expended on the case both for the Veterans Consortium and for your subsequent EAJA documents. As a volunteer, a single completed task will take several days where there are multiple parts. Document each part separately in 15-minute increments without duplication.
- As a Veterans Consortium Pro Bono Program participant, your client has agreed to assist you in any Equal Access to Justice Application (EAJA). The award belongs solely to the claimant; however, your engagement agreement requires that they agree to provide any EAJA award to the attorney in return for completely free representation. EAJA is under attack these days and may be changed by Congress (including delays or freezes, if not termination), but it has been established to date as appropriate in CAVC cases with proper merit under the law. While we volunteer to assist the veteran, it is a nice feeling to know that your expenses and fees at a subsidized rate may be reimbursed through this program.

As mentioned above, research can be vital to successful negotiation of these cases. Below I have provided some important website links that may be useful both in learning about the VA and in learning about health care medical protocols and research as applied to VA Compensation claims (last visited 3/16/11).

**The Veterans Consortium Pro Bono Program:**

[www.vetsprobono.org](http://www.vetsprobono.org)

**The LA Times health related site:** [www.latimes.com/health](http://www.latimes.com/health)

**National Institute of Health:** [www.nlm.nih.gov](http://www.nlm.nih.gov)

**U.S. National Library of Medicine:** [www.medlineplus.gov](http://www.medlineplus.gov)

**The American Academy of Orthopedic Surgeons:**

[www.orthoinfo.acos.org/topic](http://www.orthoinfo.acos.org/topic)

The **Department of Veterans Affairs** also has a wealth of information on the Internet both for Medical Examination Physician protocols, Compensation & Pension standards, and Code of Federal Regulations Title 38 sections that govern DVA conduct and awards. [www.vba.va.gov/bln/21/Benefits/exams/index.htm](http://www.vba.va.gov/bln/21/Benefits/exams/index.htm).

For **PTSD**, a major current issue, a separate site will give you information such as the clinicians guide: [www.ptsd.va.gov/professional/manuals](http://www.ptsd.va.gov/professional/manuals)

These and other information websites can supplement the tremendous information available on the searchable CD that volunteers will receive upon accepting a case from the Veterans Consortium. The attorney can then compare the veteran's C-File with the data specified by the VBA for a completed exam. The VARO cannot rate the veteran or decide a claim unless the exam meets the C&P criteria for completeness. **T**

## PROJECT SALUTE

*by Jeff Thomas, University of Detroit Mercy School of Law, 3L*

Veterans and military members are simply better than me. No matter the amount of personal goals I achieve, degrees I earn, or general “goodness” I am able to spread, the veterans and current military members will always be better than me—and I thank God every day for them. Some were chosen, while most volunteered. Volunteering to protect you and me, the veterans and military men and women went to places most of us would consider a “hell on Earth” and could not stomach for even a second of time. They put their lives on hold, left loved ones behind, missed the birth of their children, and in some cases gave their lives with nary a second thought. They do this to protect the way of life for people they don’t even know, and will never even meet. Gen. George S. Patton told a story that put into perspective the greatness of these warriors, who stand between us and evil, when he said:

One of the bravest men that I ever saw was a fellow on top of a telegraph pole in the midst of a furious fire fight in Tunisia. I stopped and asked what the hell he was doing up there at a time like that. He answered, ‘Fixing the wire, Sir.’ I asked, ‘Isn’t that a little unhealthy right about now?’ He answered, ‘Yes Sir, but the goddamned wire has to be fixed.’ I asked, ‘Don’t those planes strafing the road bother you?’ And he answered, ‘No, Sir, but you sure as hell do!’ Now, there was a real man; a real soldier.

Those who serve in our military are the best of the best, and from the rest of us, they deserve “a return in-kind.” My father was one of those warriors and as such, I am compelled to help these military men and women. Fortunately for me, the University of Detroit Mercy School of Law and its Project SALUTE has provided me the opportunity assist veterans.

Through Project SALUTE, I had the unique honor to assist some of the most extraordinary individuals one would ever hope to meet. My assistance ranged from assisting veterans in obtaining

benefits past due or previously rejected, to helping veterans reach back into history and set the record straight. Project SALUTE has changed my life for the better, both professionally and personally, by offering a myriad of opportunities to serve those who did so in my place. Simply put, Project SALUTE changes lives.

I cannot accurately put into words the pride I received from helping a Vietnam veteran obtain his VA compensation benefits that in turn changed the veteran’s life by providing him the means to pay his rent or put food on his table. To a lesser degree, I once had the opportunity to help a veteran get something as simple as a reduced-fee bus pass from the city transportation department. While this benefit may not seem like such a life changing event to most, I can assure you that this benefit changes the life of the veteran who cannot get from point A to B without the reduced-fee bus pass.

Aside from the personal growth gained by working with these warriors, Project SALUTE has afforded me opportunities I could not get anywhere else at the law school. Through the project I have been able to learn an area of law that has been underserved and, in some cases, completely ignored. The ability to receive intimate and immediate feedback from professors has been the greatest educational benefit. Admittedly, the workload can be daunting and I am often asked why I would voluntarily subject myself to this course given the numerous other courses I could have chosen.

I answer them by explaining Project SALUTE has provided me with experiences that I will be able to draw upon in my own practice of law, and that I believe these experiences will give me a “secret weapon” when it comes to surviving in the competitive legal world.

However, the underlying reason I chose to take the course is best described by Winston Churchill when he said, “Never in the field of human conflict was so much owed by so many to so few.” Like I said at the beginning, I am compelled to serve those who served in my place. **T**

## VETERANS LAW SECTION RECEIVES NATIONAL FBA AWARDS

*by Bob Goss*

In 2010, Carol Wild Scott was recognized for her tremendous leadership, innovation, and work with the Veteran Law Section. During the FBA awards lunch in New Orleans on Sept. 25, 2010, then FBA President Lawrence R. Baca presented her with the 2010 FBA President’s award.

Additionally, Carol’s leadership led to this section being awarded the 2010 FBA Sections and Divisions Award. This excerpt from the initial notification says it all:

*We are pleased to inform you that*

*you are one of six recipients of this year’s Sections and Divisions Award. Congratulations and thank you for ALL of your dedicated, diligent, and hard work as chair of the Veterans Law Section! You are truly one remarkable woman that exudes both power and kindness. You have expanded the reaches of this section with your partnership with the FBA’s Indian Law Section and even more with your bringing important issues to the forefront of the FBA*

*with your testimony on Capitol Hill. I don’t know how you can get it all done, but you are amazing!*

Carol Wild Scott is much too modest to point out that these prestigious awards were due to her efforts. We are extremely fortunate to have such a talented and professional leader. The next time you see her, thank her for all of her leadership, time, dedication, and extremely hard work reinvigorating and leading our section. Well done and thank you, Carol! **T**

## WHY DO I ASSIST VETERANS?

*by Amanda D. Clark, University of Detroit Mercy School of Law, 3L*

While most people would tell you that the term “veteran” refers to someone who has served as a member of the armed forces, I have discovered that the term “veteran” tells a much deeper story. Ever since my decision to attend the University of Detroit Mercy School of Law, I was attracted to the Veterans Law Clinic. I was drawn to the clinic because many members of my family are veterans, and my cousin is still currently serving his time in the Army. During the summer preceding my third year of law school, I eagerly enrolled in the Veterans Law Clinic. Immediately, I immersed myself in the tedious realm of veterans law, trying to gain the expertise necessary to assist veterans. The knowledge I gained from lectures, the insight from my professors, and my research opened my eyes to much larger issues—but this was only the beginning.

As a student attorney working in the clinic, I participated in Project SALUTE, a pro bono service that travels locally and nationally to assist veterans. Working with the clinic and Project SALUTE has turned out to be an unforgettable experience. Not only has my perspective of people changed for the better, but I have become more empathetic to the individual stories that I have grown accustomed to hearing. Listening to the veterans as they tell their experiences has caused me sadness, laughter, anger, and even fear; these diverse emotions have instilled in me a great passion and have reaffirmed my interest in veterans law.

Since my time with the clinic, I have spoken with veterans from Iraq, Afghanistan, Desert Storm, Desert Shield, Vietnam, and with spouses of World War II veterans. As a student in my twenties, I tend to feel a strong connection towards the younger veterans of my generation who have returned from Iraq or Afghanistan. Hearing their stories and witnessing how their life has changed forever is saddening. Not only does the war affect the veteran’s own life, but it also has a dramatic effect on the lives of the veteran’s family.

One of my most memorable experiences was working with a veteran in his mid-twenties who served in Iraq and now has Post Traumatic Stress Disorder (PTSD). He was married just a few months prior to being sent to Iraq and had no way of knowing that

he would return a drastically different person. When his wife met him at the airport he did not greet her with a hug—all emotions that he used to feel were barren. Although his wife stands by his side, the crying of their newborn child triggers his PTSD. Imagine having a newborn of your own that you are unable to console when crying because you start to have anxiety and flashbacks of horrific experiences.

Moreover, imagine a situation where you have no desire to touch or even look at the person you use to love most in the world. How does that make you feel? Now, compound all those feelings with the fact that you are unable to support your family because you feel too frightened or nervous to even leave your home. These are feelings and inner battles that many veterans and their families face on a daily basis. Although obtaining federal benefits cannot cure the effects of war, it can sure make living a little easier. It is the little things in the life of a veteran that go a long way.

I worked with this veteran over the summer, and I was there, by his side, at his hearing. The process was very hard on the veteran and his wife, but he admitted to me that he was glad to have me there with him. After my summer semester in the clinic ended, I had to say goodbye to this family. Not too long thereafter, I received a message from him thanking me for my help and assistance. The veteran also communicated his interest in keeping in contact with me because I was one of the few people who had gained his trust. Receiving that message made me feel really good about myself and made me realize that I wanted to continue to help veterans.

The situation above is one that many veterans find themselves in when they return from war. Why do I assist veterans? Because I try to imagine what it is like for him or her and how much of that individual’s life has been lost or permanently altered. Veterans need assistance from people that they can trust. There are over 23 million living veterans in our county today; they all took the oath to defend and protect us, and likewise we should take the time to defend and protect them now that they are home. Just being that one person that they can depend upon is truly a blessing. **T**

## CALL FOR ARTICLES

**WE ARE INTERESTED IN PUBLISHING YOUR ARTICLES IN OUR NEWSLETTER! IF YOU HAVE A PIECE YOU WOULD LIKE TO SHARE WITH THE SECTION MEMBERSHIP, PLEASE FORWARD IT TO BOB GOSS AT [BOB@GOSSLAW.COM](mailto:BOB@GOSSLAW.COM) FOR CONSIDERATION.**

organization created and primarily funded by a tribal government for the purpose of serving the needs of veterans of the Tribal Reservation or other entity served by that Tribal government may be recognized. Only one such organization may be recognized in each Tribal government.”

And modification of (2) 38 C.F.R. Sect. 14.629(a)(2) to include:

“or in the case of a county veterans service officer recommended by a recognized State organization, or a Tribal veterans service officer recommended by the Tribal Council, meets the following criteria: (i) is a paid employee of the county or Tribal Council

working for it not less than 1,000 hours annually.”

This issue is increasingly of interest because the large number of veterans returning to Indian country has necessitated appointment or employment by the tribes of tribal VSOs to represent their membership before the agency. In one instance a formerly accredited state VSO from California was employed by a tribe in Washington state. His California accreditation was recognized by the VA, but his successor in that position, who lacks accreditation, will have to apply under regulations that, as written, are inherently discriminatory.

### *Other Matters*

The Veterans Law Section encourages participation by law students, and to that

end there are two articles by students from the University of Detroit Mercy College of Law Veterans Law Clinic in this newsletter. We hope that there are other law students and/or clinics who wish to participate and will feel free to do so.

We need more participation by our membership and a concerted effort by the membership to increase our members. Every one of our members has some aspect of their practice—be it private, government, or academic—which may seem mundane on a daily basis, but which would provide others in the membership with a different perspective on the area of veterans law. Those of you who work for VA are often involved in community activities for veterans that could well provide inspiration and ideas for the membership. Please share them. **T**

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