

# LIGHTENING THE VA’S RUCKSACK: A PROPOSAL FOR HIGHER EDUCATION MEDICAL-LEGAL PARTNERSHIPS TO ASSIST THE VA IN EFFICIENTLY AND ACCURATELY GRANTING VETERANS DISABILITY COMPENSATION

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*This Article is written in recognition that the Department of Veterans Affairs (VA) is a titanic bureaucracy that is unlikely to deliver benefits to veterans efficiently or effectively in its current state. While change of the entire system is desirable, radical change is unlikely to happen quickly. In light of this reality, this Article proposes a unique solution to the problem: a medical-legal collaboration between law and medical schools. This interdisciplinary approach allows veterans to benefit from skilled advocacy and advice at the most essential stages of a claim at no cost to the veteran. Through this partnership, law and medical students learn critical skills that will impact their future practices. Finally, this type of collaboration helps the VA make accurate decisions more efficiently.*

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## INTRODUCTION

The plight of America's veterans dying while waiting for health care appointments has become a nearly ubiquitous story in the news.<sup>1</sup> The number of claims for service-related disability benefits continues to grow as veterans remain homeless, destitute, and languishing.<sup>2</sup> There can be no doubt that too many of today's military veterans have been marginalized to a powerless position in our society upon their return from service. Despite the displays of American flag pins on Veterans Day and the speech-giving and flag-waving on Memorial Day, the fact remains that 6,256 veterans under the Department of Veterans Affairs (VA) care have committed suicide since 2005 with as many as 1,000 attempts per month recorded.<sup>3</sup> Many of these suicides and attempts occurred while veterans were waiting for appointments at a VA Medical Center.<sup>4</sup>

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<sup>1</sup> See, e.g., Curt Devine & Scott Bronstein, *VA Inspector General Admits Wait Times Contributed to Vets' Deaths*, CNN (Sept. 18, 2014), <http://www.cnn.com/2014/09/17/politics/va-whistleblowers-congressional-hearing/>; Gregg Zoroya, *Report: VA Scandal Probe Targets Potential Obstruction of Justice*, USA TODAY (Aug. 26, 2014), <http://www.usatoday.com/story/news/nation/2014/08/26/va-veterans-affairs-scandal-mcdonald-phoenix/14620397/>.

<sup>2</sup> See Jacqueline Maffucci, *The Battle to End the VA Backlog*, IRAQ & AFG. VETS. OF AM. (Feb. 2014), [http://media.iava.org/2014BattleToEndtheVABacklog\\_PRINT.pdf](http://media.iava.org/2014BattleToEndtheVABacklog_PRINT.pdf).

<sup>3</sup> See Dennis Wagner, *VA Touts Progress on Suicides; Data Tell Another Story*, USA TODAY (Aug. 25, 2014), <http://www.usatoday.com/story/news/nation/2014/08/25/vets-suicides-data/14554371/>.

<sup>4</sup> See *id.*

These examples are an unfortunate testament to the unwelcome truth that the federal government has created a bureaucratic system in the VA that even its own leaders find hard to navigate and control. Shockingly, the former Secretary of the VA, retired General Eric Shinseki, was forced to admit in his resignation speech in May 2014 that although he had initially believed the issues regarding failure to treat veterans at VA hospitals were “limited and isolated,” he conceded that they actually had occurred due to “systemic” problems inside the VA.<sup>5</sup> Just as concerning are the comments in a concurrence by one federal judge that the VA’s rules are too complex for VA employees to make good decisions.<sup>6</sup> Therein lies the challenge for veterans: If the Secretary of the VA and his specially-trained employees cannot make the system work correctly, what are the chances for a single veteran alone to push beyond the institutional barriers? Trained advocates and opinions from medical experts would help any veteran in this pursuit, but attorney involvement is highly discouraged by the VA at the most crucial stages of this process, and competent independent medical evidence is not readily available to most veterans.<sup>7</sup>

The VA is a titanic bureaucracy that is unlikely to deliver benefits to veterans efficiently or effectively in its current state. Several thoughtful articles have considered how and why to change the model in which the VA delivers its services. While the author wholeheartedly agrees that the VA’s systems should be changed, this Article is written in light of today’s reality that, despite the need for radical change, it is unlikely to happen quickly or efficiently.<sup>8</sup> Firing bad or inept actors is not enough, and any legislative or regulatory change will not be sufficiently rapid to relieve this situation. Therefore, this Article proposes a method in which veterans can obtain the legal and medical help necessary to establish their entitlement to disability compensation benefits, while at the same time providing a vibrant training and clinical environment for graduate students in a variety of professions. This proposal joins two different aspects of higher education: law students advocating on behalf of veterans during the claims process while under the supervision of attorneys, and medical students reviewing, assessing, and rendering medical opinions under the supervision of clinical faculty. This type of collaboration

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<sup>5</sup> *Eric Shinseki Apologizes for “Systemic” VA Hospital Problems*, CBS NEWS (May 30, 2014), <http://www.cbsnews.com/news/eric-shinseki-apologizes-for-systemic-va-hospital-problems/>.

<sup>6</sup> See *DeLisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring).

<sup>7</sup> See *infra* Part II.

<sup>8</sup> For proposals to change the existing system, see Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361 (2009); Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 WIDENER L.J. 57 (2009).

brings enormous benefits not only to veterans, but also to the students and the VA.

While medical-legal partnerships between graduate-level students have been studied in the advocacy and treatment of several client populations, veterans have yet to be one of them. This deficiency in the scholarship and research should be rectified. These collaborations can help to improve the accuracy and efficiency of the government's delivery of benefits to veterans. The use of graduate students also avoids the constraints of regulations that limit paid professionals and helps veterans who may not be able to afford private medical opinions.

For example, in one case where law students and medical students worked together in a medical-legal partnership, a veteran who had suffered a sexual assault was finally able to receive benefits for his resulting post-traumatic stress disorder (PSTD).<sup>9</sup> The VA had denied several times that the assault had occurred and even debated whether the veteran suffered from PTSD. Law students combed through piles of documents and medical records and pieced together enough historical information for graduate clinical psychology students to assess the veteran and render an opinion that established the diagnosis of PTSD, which was linked to the assault. The law students proved the assault through circumstantial evidence and then argued that the veteran's PTSD entitled him to benefits. Because of this collaborative work, the veteran now receives benefits from the VA that he had been fighting for over thirty years to collect.

To examine this unique model of collaboration, Part I of this Article will discuss the VA disability compensation benefits system and the challenges facing the VA in delivering these benefits. Part II will argue that the veteran's need for a trained advocate during the claims process is absolute and should be filled, despite the VA's hesitancy to allow attorneys to enter the fray. Part III will examine the veteran's need for independent medical evidence. Finally, Part IV will propose that law students, medical students, and other professional graduate students are a vast, untapped resource that is distinctively equipped to fill these needs. This Article will highlight results realized from this type of collaboration and the benefits to all involved.

## I. AN OVERVIEW OF THE VA'S DISABILITY COMPENSATION SYSTEM

Veterans who have served their country and are injured in that service are entitled to disability compensation benefits.<sup>10</sup> These benefits are administered by the Department of Veterans Affairs through the Veter-

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<sup>9</sup> Case on file with author.

<sup>10</sup> See 38 U.S.C. § 1110 (2012).

ans Benefits Administration.<sup>11</sup> In addition to disability compensation, the VA administers a number of other benefits ranging from home loan guarantees to widow and survivor pensions,<sup>12</sup> but the focus of this discussion will be on disability compensation benefits.

To be awarded disability compensation benefits from the VA, a member of the Armed Forces must be able to prove that he is indeed an eligible veteran.<sup>13</sup> This veteran status requires that the member have served on active duty and that this service was under conditions “other than dishonorable.”<sup>14</sup> After establishing threshold eligibility criteria, the veteran must establish entitlement to benefits. The requirements for establishing entitlement to receive benefits for disabilities incurred in service are found in the Court of Appeals for Veterans Claims’ 1995 decision in *Caluza v. Brown*.<sup>15</sup> First, the veteran must be able to establish that he is suffering from a current disability.<sup>16</sup> The court recognizes that fulfilling this requirement often requires a medical diagnosis of disability.<sup>17</sup> Second, the veteran must establish that he suffered an event during his active service that caused or aggravated his current condition.<sup>18</sup> Again, the court recognizes that medical evidence is likely necessary to prove this element.<sup>19</sup> Finally, the veteran must provide evidence that his current disability is in fact caused by that in-service event.<sup>20</sup> Notably, the burden of proof on the veteran to receive benefits is remarkably low when compared to other legal burdens. The standard, often referred to by practitioners as the “as likely as not” standard, provides that “a veteran need only demonstrate that there is an ‘approximate balance of positive and negative evidence’ in order to prevail . . . . In other words . . . the preponderance of the evidence must be against the claim

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<sup>11</sup> *About VBA*, VETERANS BENEFITS ADMIN., <http://www.benefits.va.gov/benefits/about.asp> (last visited Nov. 17, 2014).

<sup>12</sup> 38 C.F.R. pts. 3, 21 & 36.

<sup>13</sup> See *Veteran Population*, NAT’L CTR. FOR VETERANS ANALYSIS & STAT., [http://www.va.gov/vetdata/veteran\\_population.asp](http://www.va.gov/vetdata/veteran_population.asp) (last visited Nov. 17, 2014). The pronoun “he” will be used throughout this Article to refer to the veteran. This is not to discount the service of our women in uniform. However, because men make approximately 91% of living veterans and for the purposes of simplicity, the pronoun “he” will be used.

<sup>14</sup> 38 U.S.C. § 101(2) (2012); 38 C.F.R. § 3.1(d) (2013). The requirements for veteran status are worthy of an article length analysis themselves. This Article assumes that the veterans discussed herein have met these threshold requirements and are indeed eligible veterans.

<sup>15</sup> 7 Vet. App. 498 (1995), *aff’d*, 78 F.3d 604 (Fed. Cir. 1996).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* An exception to the need for medical evidence occurs in cases where lay testimony is sufficient to satisfy these requirements, such as cases where a lay person could make an obvious medical diagnosis. See *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007).

<sup>20</sup> See *Caluza*, 7 Vet. App. at 507.

for benefits to be denied.”<sup>21</sup> This nexus requirement almost always requires competent medical evidence or the opinion of a medical expert to be satisfied.<sup>22</sup> These decisions are made at the VA’s agency of original jurisdiction, also referred to as the “regional office” or “VARO.”<sup>23</sup> The VA employees who decide a veteran’s claims at the regional office level are not doctors or lawyers.<sup>24</sup> Often these rating officials, also called “Rating Veterans Service Representatives” (RVSRs) have been on the job making these types of decisions for only three to five years.<sup>25</sup>

The VA faces several challenges to its ability to effectively deliver disability compensation benefits to veterans. The number of claims for disability that have yet to be decided has been an ongoing source of concern for those who monitor the VA.<sup>26</sup> Congressional hearings have analyzed the VA’s inability to make significant strides to quickly and accurately assess veterans’ claims.<sup>27</sup> Concerned veterans’ interest groups have published numerous investigations of the VA over this issue.<sup>28</sup> The Iraq and Afghanistan Veterans of America’s 2014 report, *The Battle to End the VA Backlog*, reflects this concern by noting:

With the war in Iraq over and Afghanistan coming to a close, it will become easier for the public and lawmakers to forget this country’s obligation to our veterans. It is more important than ever to put in place long-term plans to address the needs of our veterans and the system that supports them for decades to come.<sup>29</sup>

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<sup>21</sup> Gilbert v. Derwinski, 1 Vet. App. 49, 54 (1990); 38 U.S.C. § 5107 (2012); 38 C.F.R. § 3.102 (2013).

<sup>22</sup> See Hensley v. West, 212 F.3d 1255, 1262 (Fed. Cir. 2000).

<sup>23</sup> See *Compensation*, VETERANS BENEFITS ADMIN., <http://www.benefits.va.gov/compensation/apply.asp> (last visited May 11, 2015).

<sup>24</sup> See *Rating Veterans Service Representative*, U.S. DEP’T OF VETERANS AFFAIRS, <http://mycareeratva.va.gov/careers/career/099604> (last visited May 11, 2015).

<sup>25</sup> See *Adjudicating VA’s Most Complex Disability Claims: Ensuring Quality, Accuracy and Consistency on Complicated Issues: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans’ Affairs*, 113th Cong. 44 (2013) [hereinafter *Adjudicating VA’s Most Complex Disability Claims*] (statement of Zach Hearn, Deputy Director for Claims, American Legion); *Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims?: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans’ Affairs*, 111th Cong. 52 (2009) [hereinafter *Addressing the Backlog*] (statement of Ian de Planque, Assistant Director of Veterans Affairs and Rehabilitation Commission, American Legion).

<sup>26</sup> See, e.g., H.R. 2189, 113th Cong. (2013) (improving the processing of disability claims by the Department of Veterans Affairs, and for other purposes).

<sup>27</sup> See, e.g., *Expediting Claims or Exploiting Statistics?: An Examination of VA’s Special Initiative to Process Rating Claims Pending over Two Years: Hearing Before the H. Comm. on Veterans’ Affairs*, 113th Cong. (2013); *Addressing the Backlog*, *supra* note 25.

<sup>28</sup> See, e.g., VA BACKLOG WORKING GROUP, MARCH 2014 REPORT (2014), [http://www.legion.org/documents/pdf/VA\\_Backlog\\_Report\\_\(FINAL\).pdf](http://www.legion.org/documents/pdf/VA_Backlog_Report_(FINAL).pdf).

<sup>29</sup> Maffucci, *supra* note 2, at 4.

The VA, for its part, has responded to criticism by implementing additional bureaucracy on top of existing bureaucracy. In one example of the effort to address this backlog, the VA has identified all claims sitting in a regional office awaiting decision for over 125 days and has ordered that these claims be eliminated by the end of 2015.<sup>30</sup> This new procedure has, however, created new inequities and incentives to rush claims through the process, even at the expense of proper adjudication.<sup>31</sup> More usefully, the VA has also created a process called the “Fully Developed Claim” (FDC), a method that allows a veteran to receive an expedited decision by waiving the VA’s statutory duty to acquire the veteran’s private medical records.<sup>32</sup> The VA has even begun reporting the backlogged numbers of claims weekly in what it calls the “Monday Morning Workload Report,” in order to satisfy the congressional and public demand for more transparency on this issue.<sup>33</sup> Although the VA has made strides, the number of claims waiting for decision is still very large and is not likely to lessen in the near future.<sup>34</sup> Claims for VA disability compensation benefits are actually projected to increase.<sup>35</sup> According to the VA’s 2015 budget, the VA expects 1.5 million new claims to be filed in 2015, which represents an increase of 20% over 2014 numbers.<sup>36</sup> Additionally, other problems plague the VA’s disability compensation system. Investigators have caught VA employees hoarding, tampering with, and even improperly destroying claims-related documents to appear compliant with mail management standards.<sup>37</sup> The VA

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<sup>30</sup> VETERANS BENEFITS ADMIN., DEPARTMENT OF VETERANS AFFAIRS STRATEGIC PLAN TO ELIMINATE THE COMPENSATION CLAIMS BACKLOG (2013), [http://benefits.va.gov/transformation/docs/VA\\_Strategic\\_Plan\\_to\\_Eliminate\\_the\\_Compensation\\_Claims\\_Backlog.pdf](http://benefits.va.gov/transformation/docs/VA_Strategic_Plan_to_Eliminate_the_Compensation_Claims_Backlog.pdf).

<sup>31</sup> *Evaluation of the Process to Achieve VBA Goals: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. (2014) [hereinafter *Evaluation of the Process to Achieve VBA Goals*] (statements of Ronald Robinson, Senior Veterans Service Representative, Columbia Regional Office of the Department of Veterans Affairs, and Javier Soto, Former Rating Veterans Service Representative, St. Petersburg Regional Office of the Department of Veterans Affairs).

<sup>32</sup> See 38 U.S.C. § 5103A(b)(1) (2012); VETERANS BENEFITS ADMIN., ADJUDICATION PROCEDURES MANUAL M21-1MR, pt. III(i), ch. 3, § B(6)(a) (2013) [hereinafter ADJUDICATION PROCEDURES MANUAL]. See generally U.S. DEP'T OF VETERANS AFFAIRS, VA FORM 21-526EZ (2014).

<sup>33</sup> *Monday Morning Workload Report Data*, VETERANS BENEFITS ADMIN., [http://benefits.va.gov/REPORTS/detailed\\_claims\\_data.asp](http://benefits.va.gov/REPORTS/detailed_claims_data.asp) (last visited Nov. 17, 2014).

<sup>34</sup> As of September 29, 2014, 47.1% of the 520,465 pending claims were “backlogged,” meaning they were over 125 days old. See *id.*; Maffucci, *supra* note 2, at 3; Nick Simeone, *Hagel Outlines Budget Reducing Troop Strength, Force Structure*, U.S. DEP'T OF DEF. (Feb. 24, 2014), <http://archive.defense.gov/news/newsarticle.aspx?id=121703>.

<sup>35</sup> Jacob W. Sotak, *What's in Veterans Affairs' \$164 Billion Budget?*, N.Y. TIMES (Mar. 20, 2014), <http://atwar.blogs.nytimes.com/2014/03/20/whats-in-veterans-affairs-164-billion-budget>.

<sup>36</sup> See *id.*

<sup>37</sup> DEP'T OF VETERANS AFFAIRS OFFICE OF THE INSPECTOR GEN., REVIEW OF ALLEGED MAIL MISMANAGEMENT AT THE BALTIMORE VA REGIONAL OFFICE (2014), <http://www.va.gov/>

has also struggled to store and digitize veterans' records.<sup>38</sup> The integration and movement of veterans' electronic health records from the Department of Defense to the VA is slow and incomplete.<sup>39</sup> While the VA attempts to solve these problems by implementing new training and procedures, veterans continue to wait for the VA to determine basic benefit eligibility, hoping the VA makes the right decisions.<sup>40</sup>

## II. A VETERAN'S NEED FOR AN ADVOCATE THROUGHOUT THE CLAIMS PROCESS

As VA leaders attempt to implement procedural change from the top down,<sup>41</sup> the Court of Appeals for Veterans Claims—the federal Article I court responsible for hearing the first level of court appeals in veterans cases—has suggested that the VA has other issues to contend with. Judge Lance, of that court, noted that “[t]here is an unfortunate—and not

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oig/pubs/VAOIG-14-03644-225.pdf; *Document Tampering and Mishandling at the U.S. Department of Veterans Affairs: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs and the H. Subcomm. on Oversight and Investigations of the Comm. on Veterans' Affairs*, 111th Cong. 24–30, 55–61 (2009) (statement of Belinda J. Finn, Assistant Inspector Gen. for Auditing, Department of Veterans Affairs).

<sup>38</sup> See *Evaluation of the Process to Achieve VBA Goals*, *supra* note 31 (statement of Ronald Robinson, Senior Veterans Service Representative, Columbia Regional Office of the Department of Veterans Affairs); *Reclaiming the Process: Examining the VBA Claims Transformation Plan as a Means to Effectively Serve Our Veterans: Hearing Before the H. Comm. on Veterans' Affairs*, 112th Cong. (2012) (statement of Richard Dumancas, Deputy Director for Claims, Veterans Affairs & Rehabilitation Commission of American Legion); Mark Flatten, *Veterans Affairs IG Says New Computer System Riddled With Gremlins*, WASH. EXAMINER (Feb. 4, 2013), <http://washingtonexaminer.com/veterans-affairs-ig-says-new-computer-system-riddled-with-gremlins/article/2520532>; Steve Vogel, *VA Embracing Digital Age*, WASH. POST (Jan. 20, 2013), [http://www.washingtonpost.com/politics/va-embracing-digital-age/2013/02/03/fad9f020-5e9b-11e2-9940-6fc488f3fec\\_story.html](http://www.washingtonpost.com/politics/va-embracing-digital-age/2013/02/03/fad9f020-5e9b-11e2-9940-6fc488f3fec_story.html).

<sup>39</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-302, ELECTRONIC HEALTH RECORDS: VA AND DOD NEED TO SUPPORT COST AND SCHEDULE CLAIMS, DEVELOP INTEROPERABILITY PLANS, AND IMPROVE COLLABORATION (2014); Nicole Blake Johnson, *DoD, VA Have Spent \$1B Trying to Build Joint Health Records System*, FED. TIMES (June 12, 2013), <http://www.federaltimes.com/article/20130612/IT03/306120010/DoD-VA-spent-1B-trying-build-joint-health-records-system>.

<sup>40</sup> See Gregg Zoroya, *Report Cites VA Struggles with Benefits Paid to Veterans*, USA TODAY (July 14, 2014), <http://www.usatoday.com/story/news/nation/2014/07/14/va-backlog-committee-hearing-veterans/12573043> (noting that while the VA has reduced its backlog of claims, “[t]he number of pending appeals of compensation judgments has increased 18% since 2011 to nearly 270,000”).

<sup>41</sup> See Jordain Carney & Stacy Kaper, *4 Things Washington Could Do Right Now to Fix the VA*, NAT'L J. (May 22, 2014), <http://www.nationaljournal.com/defense/4-things-washington-could-do-right-now-to-fix-the-va-20140522>; Jordain Carney and Stacy Kaper, *Who Really Broke Veterans Affairs?*, NAT'L J. (May 20, 2014), <http://www.nationaljournal.com/defense/who-really-broke-veterans-affairs-20140520>; Jordain Carney & Stacy Kaper, *Obama Has Every Reason to Fix the VA. Why Hasn't He?*, NAT'L J. (May 14, 2014), <http://www.nationaljournal.com/defense/obama-has-every-reason-to-fix-the-va-why-hasn-t-he-20140514>; Lisa Desjardins, *VA Scandal: Why Hasn't Anyone Been Fired Yet?*, CNN (May 23, 2014), <http://www.cnn.com/2014/05/21/politics/va-hard-to-fire/index.html>.



entirely unfounded—belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year.”<sup>42</sup> This observation is quite amazing, especially in light of the fact that the VA disability claims system is meant to be an informal, pro-claimant, and “non-adversarial system.”<sup>43</sup> However, it is hard to understand how pro-claimant proceedings can be effectively realized if the laws governing and rules implementing a veteran’s disability benefits are so convoluted that the average first-level VA rating officer cannot do his job adequately.<sup>44</sup>

More startlingly, a concerning number of cases decided at the Court of Appeals for Veterans Claims are awarded Equal Access to Justice Act (EAJA) fees. EAJA fees are awarded to an attorney who represents a successful plaintiff in an action where the government has taken a position in litigation that is not “substantially justified.”<sup>45</sup> The number of veterans cases being awarded EAJA fees is so astonishing that Chief Justice John Roberts castigated one Department of Justice attorney during a case about EAJA fees:

CHIEF JUSTICE ROBERTS: — 70 percent of the time the government’s position is substantially unjustified?

MR. YANG: In cases — in the VA context, the number is not quite that large, but there’s a substantial number of cases at the court of appeals —

CHIEF JUSTICE ROBERTS: What number would you accept?

MR. YANG: It was, I believe, in the order of either 50 or maybe slightly more than 50 percent. It might be 60. But the number is substantial that you get a reversal, and in almost all of those cases, EAJA —

CHIEF JUSTICE ROBERTS: Well, that’s really startling, isn’t it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?

MR. YANG: It is an unfortunate number, Your Honor. And it is — it’s accurate.<sup>46</sup>

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<sup>42</sup> DeLisio v. Shinseki, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring).

<sup>43</sup> Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see also* 38 C.F.R. § 3.103 (2013) (“Proceedings before the Veterans Administration are *ex parte* in nature. It is the obligation of the Veterans Administration to assist a claimant . . . and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government.”); Hensley v. West, 212 F.3d 1255, 1262 (Fed. Cir. 2000).

<sup>44</sup> *See* Allen, *supra* note 8, at 397.

<sup>45</sup> Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1), (d)(2)(F) (2012).

<sup>46</sup> Transcript of Oral Argument at 52, *Astrue v. Ratliff*, 560 U.S. 586 (2010) (No. 08-1322).

While the Chief Justice was using statistics from 2008 and 2009, the numbers today are no more encouraging. The statistics from the Court of Appeals for Veterans Claims for 2014 demonstrate that in more than 67% of the appeals and petitions decided by the court, EAJA fees were awarded to the veteran's attorney.<sup>47</sup> The number of veterans' claims reviewed by the court is an extremely small portion of all the claims filed.<sup>48</sup> The fact that in a majority of these cases the court has found that the government is withholding benefits not due to an error, but instead due to unjustified reasons, is hard to reconcile with a non-adversarial system. Indeed, it is hard to imagine how many more veterans have fallen by the wayside, too beaten down or unaware of these statistics to appeal. Unfortunately, there are no available statistics on how many veterans fail to file an appeal because they have lost hope for receiving their benefits. These concerns at the court ultimately begin with processing claims and are bolstered by the data of decision-making accuracy made at all levels of the VA. The statistics demonstrate that the raters at the VA are unable to accurately render these decisions in a significant portion of claims.

As of the third quarter of fiscal year (FY) 2014, the Veterans Benefits Administration published data reflecting that it had completed 1,306,043 claims filed by veterans in 2014.<sup>49</sup> Veterans have one year to appeal this initial regional office decision.<sup>50</sup> The VA regional offices—the first level adjudicators of these claims—have been racing to make decisions on those claims sitting over 125 days, even requiring significant overtime for some regional office employees.<sup>51</sup> This 125-day requirement may be backfiring on the VA's efforts when it comes to accuracy. The VA asserts that it has an accuracy rate of 90% in these claims, but the American Legion found this number to be questionable based on a blind sample of cases it reviewed:

VA's accuracy statistics from the Monday Morning reports are not consistent with the review of recently adjudicated claims as conducted by the American Legion [Regional Office Action Review] teams. When visiting

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<sup>47</sup> U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FISCAL YEAR 2014 (2014), <http://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf> (noting that of the 3,524 appeals and petitions decided by the CAVC in 2014, 2,356 were awarded EAJA fees—a 67% rate of award).

<sup>48</sup> See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 151 (2009).

<sup>49</sup> *Monday Morning Workload Report Data*, *supra* note 33.

<sup>50</sup> See 38 U.S.C. § 7105(b)(1) (2012).

<sup>51</sup> See Leo Shane III, *VA Workers Say Mandatory Overtime Won't Solve Benefits Backlog*, STARS & STRIPES (May 17, 2013), <http://www.stripes.com/va-workers-say-mandatory-overtime-won-t-solve-benefits-backlog-1.221294>.

VAROs over the past year, [Regional Office Action Review] staff reviewed 260 claims adjudicated by the VAROs. Of those 260 claims, 55 percent were identified as having errors, particularly regarding the development of the claim. This statistic is in stark contrast to the approximate 90 percent accuracy rating in claims' adjudication indicated by VA's Monday Morning workload reports.<sup>52</sup>

Congressional testimony from a representative of the Paralyzed Veterans of America (PVA) concerning one specific case highlights the VA's inability to process more complicated medical claims.<sup>53</sup> The PVA spokesperson described a veteran with amyotrophic lateral sclerosis (ALS) whom the PVA assisted with filing a claim.<sup>54</sup> Despite a large amount of credible evidence provided by the veteran to the VA, the VA insisted that the veteran submit to a medical examination by one of the VA's doctors contracted for this purpose.

Not only did the examiner improperly contemplate [the condition], VA misapplied its own regulation on resolving doubt when two expert opinions conflict. . . . This case . . . illustrates what happens when a profoundly complicated set of disabilities, a lack of expertise, subjective interpretation of regulations, and rules that do not allow for a "common sense override" option collide in a veteran's claim.<sup>55</sup>

These testimonials of many VA employees' inability to navigate the labyrinth of case law, regulation, and complicated medical evidence informing their benefits decisions illustrate the need for specialized training for those who navigate these waters. A Government Accountability Office report emphasized that "it takes about 3 to 5 years for newly hired rating specialists to become proficient given the complexity of the job."<sup>56</sup> Despite the intensive training the VA has introduced for first line raters, the continuing difficulties of decision makers at all levels in the VA pro-

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<sup>52</sup> *Adjudicating VA's Most Complex Disability Claims*, *supra* note 25 (statement of Zach Hearn, Deputy Director for Claims, American Legion); *see also VA Processes More than 1.3 Million Veterans' Claims in FY14*, U.S. DEP'T OF VETERANS AFFAIRS OFFICE OF PUB. & INTERGOVERNMENTAL AFFAIRS (Oct. 9, 2014), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2645>.

<sup>53</sup> *See Adjudicating VA's Most Complex Disability Claims*, *supra* note 25 (statement of Sherman Gillums, Associate Executive Director for Veterans Benefits, Paralyzed Veterans of America).

<sup>54</sup> *See id.*

<sup>55</sup> *Id.*

<sup>56</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-910T, PRELIMINARY FINDINGS ON CLAIMS PROCESSING TRENDS AND IMPROVEMENT EFFORTS 12 (2009).

cess are borne out by the statistics of error in the cases that are appealed beyond the regional office level.<sup>57</sup>

The VA reports that it grants benefits in 65% of the claims presented, leaving 35% of veterans with no benefits at all.<sup>58</sup> There is no guarantee that the decisions made on that 65% of claims are accurate. Of all of the ratings issued, only 11–12% of the decisions made by the VA are appealed, a number that has held steady for the past 20 years.<sup>59</sup> These first-level appeals are returned to the regional office and are again considered by a rating officer there.<sup>60</sup> The veteran may request that a Decision Review Officer—a more senior rating officer who has held the position longer—re-evaluate his claim at the regional office.<sup>61</sup> Once a veteran has exhausted all of his options for review at the regional office level, he begins a protracted wait for another appellate review.

The first level the veteran may appeal to, outside of the regional office, is to the Board of Veterans Appeals (BVA). The BVA, which is part of the VA, offers veterans their first chance in the claims process to have their claims reviewed by a government attorney.<sup>62</sup> According to the BVA's website: "These [Administrative] Law Judges, attorneys experienced in veterans law and in reviewing benefit claims, are the only ones who can issue Board decisions. Staff attorneys, also trained in veterans law, review the facts of each appeal and assist the Board members."<sup>63</sup> As an illustration of how many cases are actually appealed to the Board, by the end of FY 2012, the VA had completed 1,044,207 compensation and pension claims by issuing a rating decision.<sup>64</sup> The VA reports that for FY 2012, the number of veterans receiving benefits in that year was 261,839.<sup>65</sup> These numbers reflect that a large percentage of veterans were denied benefits. For that same time period, the BVA

<sup>57</sup> See generally VETERANS BENEFITS ADMIN., COMPENSATION SERVICE NATIONAL TRAINING CURRICULUM FOR FISCAL YEAR 2015 (2014) (describing the training program for VA regional offices).

<sup>58</sup> See U.S. DEP'T OF VETERANS AFFAIRS, THE VETERANS APPEALS PROCESS (2014) [hereinafter VETERANS APPEALS PROCESS], <http://www.bva.va.gov/docs/Appeals101Briefing.pdf>. This statistic, however, does not reveal data of veterans who have been granted benefits, but at an inappropriate level of compensation such that they may then appeal.

<sup>59</sup> See *id.* at 4.

<sup>60</sup> See *id.* at 5.

<sup>61</sup> See 38 C.F.R. § 3.2600 (2013); ADJUDICATION PROCEDURES MANUAL *supra* note 32, pt. III(i), ch. 3, § A.

<sup>62</sup> See 38 U.S.C. §§ 7103, 7104 (2012); *Gateway to VA Appeals*, BD. OF VETERANS APPEALS, <http://www.bva.va.gov> (last visited Nov. 17, 2014).

<sup>63</sup> *Gateway to VA Appeals*, *supra* note 62.

<sup>64</sup> See *Improve Accuracy and Reduce the Amount of Time It Takes to Process Veterans' Disability Benefit Claims*, VETERANS BENEFITS ADMIN., [http://archive-goals.performance.gov/goal\\_detail/va/334/print](http://archive-goals.performance.gov/goal_detail/va/334/print) (last visited Nov. 17, 2014).

<sup>65</sup> See VETERANS BENEFITS ADMIN., ANNUAL BENEFITS REPORT FISCAL YEAR 2012, at 5 (2012) [hereinafter ANNUAL REPORT 2012], [http://www.benefits.va.gov/reports/abr/2012\\_abr.pdf](http://www.benefits.va.gov/reports/abr/2012_abr.pdf).

calculated that 37,326 appeals were filed at the VA's regional offices.<sup>66</sup> This is approximately 3.5% of the decisions rendered by the VA, a small portion of those veterans who likely had appealable issues. Other sources report that approximately 4–5% of veterans appeal to this second level of review at the Board.<sup>67</sup> When the veteran appeals the regional office decision to the Board, it normally takes an average of 943 days for the Board to issue a decision on the claim.<sup>68</sup> The Board does not rely on the regional office's decision, but instead makes a decision de novo.

[T]he Board is not charged with assessing the RO's decision; rather, the Board takes an entirely new look at the record. Each decision of the Board must contain written findings of fact and conclusions of law, as well as reasons or basis for those findings and conclusions, on all material issues of fact and law presented.<sup>69</sup>

In FY 2012, the Board remanded for further development or completely overturned a staggering 74.2% of the regional office decisions that were appealed.<sup>70</sup>

If a veteran chooses to appeal the decision of the BVA, the first appeal will be filed in the Court of Appeals for Veterans Claims. Only about 8% of the decisions made by the BVA are appealed to the Court of Appeals for Veterans Claims.<sup>71</sup> This number represents only half of one percent of all claims filed by veterans at the regional office.<sup>72</sup> Even more alarming than the fact that very few claims reach an appeal, are the results of those appeals. In 77% of the cases where the court rendered a

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<sup>66</sup> See BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN, FISCAL YEAR 2012, at 24 (2012) [hereinafter REPORT OF THE CHAIRMAN], [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2012AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf).

<sup>67</sup> See VETERANS BENEFITS ADMIN., DEPARTMENT OF VETERANS AFFAIRS (VA) STRATEGIC PLAN TO TRANSFORM THE APPEAL PROCESS 11 (2014) [hereinafter STRATEGIC PLAN], [http://www.seankendalllaw.net/library/SVAC\\_Appeals\\_Report\\_140226.pdf](http://www.seankendalllaw.net/library/SVAC_Appeals_Report_140226.pdf).

<sup>68</sup> See REPORT OF THE CHAIRMAN, *supra* note 66.

<sup>69</sup> *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans' Affairs*, 113th Cong. 8 (2013) [hereinafter *Why Are Veterans Waiting Years on Appeal?*] (statement of Laura Eskenazi, Principal Deputy Vice Chairman, Board of Veterans Appeals).

<sup>70</sup> See REPORT OF THE CHAIRMAN, *supra* note 66, at 22 (adding the total percentage of remanded and allowed appeals). These remand orders from the BVA are not ordinarily final orders in themselves and cannot be appealed to the CAVC, so the veteran continues to wait in limbo for the regional office to make another determination. See 38 U.S.C. § 7266 (2012); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

<sup>71</sup> In the fiscal year 2012, the BVA decided 44,300 cases. See REPORT OF THE CHAIRMAN, *supra* note 66, at 4. That same year, the Court of Appeals for Veterans Claims saw 3,649 appeals of BVA decisions filed with the court. See ANNUAL REPORT 2012, *supra* note 65, at 1.

<sup>72</sup> See *Ridgway*, *supra* note 48, at 151.

decision on the merits of the appeal, the BVA decision was reversed or remanded in whole or in part.<sup>73</sup>

Oversight of the VA's actions by a federal court is a relatively new phenomenon. The Court of Appeals for Veterans Claims was established in 1988 by President Reagan.<sup>74</sup> Since that time, the court has issued hundreds, if not thousands, of decisions interpreting the VA's regulations and determinations, and the VA has struggled to translate those decisions into practice. The VA argues that the intervention of courts (and presumably lawyers) has had mixed effects on the claims process. Among the positive effects of legal intervention, the VA agrees that a veteran gets his "day in court," and that these hearings and decisions have resulted in a significant body of reliable law.<sup>75</sup> The negative result is that these decisions have "significantly complicated VA's administration of its benefits programs, resulting in significant delays in the initial claim and appeal processes. The processes that were developed in the decades after WWI were not designed to be compatible with judicial review."<sup>76</sup>

The fact that the VA's processes for veterans' claims are not "compatible with judicial review" in a system that now allows for judicial review of the VA's decisions is concerning for a number of reasons. Most importantly, the VA discourages attorneys from helping veterans in the earliest stages of the claims process at the agency of original jurisdiction—the place where many of the mistakes are made and where a veteran is statistically most likely to exit the process.

With a complicated maze of statutes, regulations, rules, and case law, one might believe that the VA would welcome experienced attorneys helping veterans sort out legitimate claims from illegitimate or inappropriate claims. Attorneys may be able to ease the burden on the VA by ensuring that only the appropriate evidence is before the rater. However, the VA takes the exact opposite position and forbids attorney involvement at the agency of original jurisdiction.<sup>77</sup> Unfortunately, this view of attorneys is based on perceptions of lawyers as scoundrels portrayed in movies and television shows. The image of the huckster in the expensive suit chasing an ambulance may seem amusing, but is also the view that

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<sup>73</sup> See U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT FISCAL YEAR 2013, at 2 (2013) [hereinafter ANNUAL REPORT 2013], <https://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf>. In the fiscal year 2013, the CAVC made a decision on the merits of an appeal in 3,076 cases. See *id.* Of these only 714 were wholly affirmed. 2,362 of the cases were reversed, vacated, or remanded in whole or in part. See *id.*

<sup>74</sup> See Veterans' Administration Adjudication Procedure and Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

<sup>75</sup> See STRATEGIC PLAN, *supra* note 67, at 5.

<sup>76</sup> *Id.*

<sup>77</sup> See 38 U.S.C. § 5904(c) (2012).

appears to inform many of the VA's determinations concerning attorneys in the claims process.<sup>78</sup>

Officially, the VA's system discourages attorney intervention at the regional office because the proceedings there are intended to be "non-adversarial."<sup>79</sup> The VA considers a claim to be "adversarial" when it leaves the VA (which includes the BVA) and reaches the Court of Appeals for Veterans Claims.<sup>80</sup> The VA has implemented a system of rules, which ensure that it is difficult for veterans to pass the initial "non-adversarial" stages of a claim with legal help. For instance, Congress does not allow an attorney to receive pay for helping a veteran until a particular stage of the claims process.<sup>81</sup> The veteran must receive an adverse determination from the VA, appeal that decision himself, and then, only after the veteran appeals the VA's decision can an attorney represent that veteran for a fee.<sup>82</sup>

Consider for a moment what appealing a VA decision requires of a veteran. The veteran would have to understand that the VA may actually be, and is statistically likely to be, wrong in its decision on a veteran's claim.<sup>83</sup> The veteran would then have to understand that the burden of proof placed on him is extremely low, requiring only that when the evidence is balanced, the benefit of the doubt belongs with the veteran.<sup>84</sup> Additionally, the veteran should have an understanding of all of the evidence before the rater at the VA who made this decision. The most important piece of evidence for the VA rater is the Compensation and Pension (C&P) exam done by a VA employee or contracted medical provider, yet it is often not provided to the veteran for his review.<sup>85</sup> The veteran would have to know that he should and can request that record

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<sup>78</sup> See *infra* text accompanying note 88.

<sup>79</sup> See 38 C.F.R. § 3.103(a) (2013); see also *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

<sup>80</sup> See *Reed v. Principi*, 17 Vet. App. 380, 385 (2003); *Macwhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992).

<sup>81</sup> See 38 U.S.C. § 5904(c)(2) (2012).

<sup>82</sup> See *id.*

<sup>83</sup> See VETERANS APPEALS PROCESS, *supra* note 58; ANNUAL REPORT 2013, *supra* note 73; ANNUAL REPORT 2012, *supra* note 65; STRATEGIC PLAN, *supra* note 67.

<sup>84</sup> See 38 U.S.C. § 5107(b) (2012) ("[W]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."). See generally *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001) (discussing the burden of proof and benefit of the doubt used in deciding veterans claims).

<sup>85</sup> There is no law that says the VA should not release the C&P. If the VA Hospital conducted the exam, it will be placed in a veteran's medical record. If a contractor conducted the exam, the veteran must request the C&P from the VA regional office with a FOIA. See, e.g., *How to Submit A FOIA Request*, U.S. DEP'T OF VETERANS AFFAIRS, [http://www.oprm.va.gov/foia/howto\\_file\\_foia\\_request.aspx](http://www.oprm.va.gov/foia/howto_file_foia_request.aspx) (last visited Nov. 17, 2014).

by submitting a Freedom of Information Act request (FOIA) to the VA's regional FOIA office.<sup>86</sup>

These are just a few of the things that a veteran would likely want to know before deciding if an appeal is appropriate or not. This is probably the first and only claim a veteran has ever attempted to usher through the claims process. Most veterans, like most average laypersons, probably have little to no idea what the standard requests are and what they should consider when contemplating an appeal. It is easy to imagine how many veterans at this point simply quit the process.

Additional VA rules present challenges for experienced attorneys who would otherwise be inclined to help a veteran at these initial levels. As early as 1864, Congress attempted to protect veterans from attorneys and their fees by legislating a maximum \$10 fee for work done by an attorney on a veteran's claims.<sup>87</sup> Congress reviewed this provision in 1918, and, in some of the most colorful language in the Congressional Record, refrained from raising the limit on attorney and agent fees because:

[i]t is not the intent of Congress that these mercenary claim-agent leeches should sap the blood of any financial benefit from the Government by putting up these false claims and establishing their right to this 10 per cent commission for doing nothing, and doing what the Government itself intends to do in every individual case.<sup>88</sup>

Sadly, this distrust of attorneys is evident still today. In 1988, the \$10 limit was repealed but attorneys were limited to helping veterans for a fee in cases where the BVA had already rendered a decision.<sup>89</sup> In 2000, attorneys were given the ability to enter the process for a fee after the notice of disagreement was filed.<sup>90</sup> This means that attorneys who work for a fee are still left out of the critical phase of case development.

Congress and the courts have relied upon the concept of the VA's pro-claimant, non-adversarial, paternalistic mentality time after time to justify denying attorneys from entering the claims process earlier for a fee. The legislation that created the Court of Appeals for Veterans Claims emphasized the VA's duty to "fully and sympathetically develop

<sup>86</sup> See *id.*; 5 U.S.C. § 552 (2012).

<sup>87</sup> See Act of July 14, 1862, ch. 166, § 12, 12 Stat. 566 (amended 1864), cited in Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism,"* 1 VETERANS L. REV. 2, 6 n.19 (2009).

<sup>88</sup> 56 CONG. REC. 5222 (1918), quoted in Reiss & Tenner, *supra* note 87, at 7.

<sup>89</sup> See 38 U.S.C. § 3404(c) (1988). Section 3404 of title 38 was amended by striking out subsection (c) and inserting (c)(1).

<sup>90</sup> See 38 U.S.C. § 5904(c)(3) (2012).



the veteran's claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt."<sup>91</sup>

The Supreme Court has also relied on the supposed beneficence of the VA toward a veteran as a justification for restricting lawyers' roles. In 1985, three years before the establishment of review by the Court of Appeals for Veterans Claims, the Court was willing to believe that the VA was fostering a pro-claimant atmosphere that would be muddied by the involvement of attorneys in the process.<sup>92</sup> The Court noted that Congress intended for the VA system to "be managed in a sufficiently informal way that there should be no need for the employment of an attorney . . . so that the claimant would receive the entirety of the award without having to divide it with a lawyer."<sup>93</sup> The Court also made clear that "[t]he regular introduction of lawyers into the proceedings would be quite unlikely to further this goal."<sup>94</sup>

Chief Justice Rehnquist wrote:

[T]he day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys.<sup>95</sup>

The Court also noted that while attorneys might be helpful in complex cases, the majority of claims "involve simple questions of fact, or medical questions relating to the degree of a claimant's disability; the record also indicates that only the rare case turns on a question of law."<sup>96</sup> The Chief Justice commented that while there are likely some "complex" cases that are considered by the VA, they are probably a "tiny fraction" of all of the cases the VA decides.<sup>97</sup>

How surprised Justice Rehnquist might then have been by Chief Justice Roberts' concern that in over half of the cases now reviewed by courts, the government has been unjustifiably withholding a veteran's

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<sup>91</sup> H.R. REP. NO. 100-963, at 13 (1988), *reprinted in* 1998 U.S.C.C.A.N. 5782, 5794-95.

<sup>92</sup> *See* *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985).

<sup>93</sup> *Id.* at 321.

<sup>94</sup> *Id.* at 324.

<sup>95</sup> *Id.* at 326.

<sup>96</sup> *Id.* at 329-30.

<sup>97</sup> *See id.*

benefits.<sup>98</sup> As to the complexity of the cases seen by the regional offices and BVA, times have surely changed. The BVA's Principal Deputy Vice Chairman testified before Congress the following:

The Board's decisions are also growing increasingly complex due to activity from the Court of Appeals for Veterans Claims and the Federal Circuit. The Board's position on the front lines with the Courts means that the Board has to adjust to an ever-changing legal landscape, drafting decisions that look like dense legal briefs, while at the same time drafting decisions that are understandable to the Veterans we serve.<sup>99</sup>

It is hard to imagine a claim where an attorney's intervention could cause more delay than already exists in the system or unnecessary scrutiny of the veteran's claims.<sup>100</sup> This is especially true because these benefits constitute a property interest entitling the veteran to the due process requirements of the Fifth Amendment.<sup>101</sup>

The change in the rules allowing attorneys to intervene for pay on a veteran's behalf before the BVA decides a case appears to be an acknowledgment that attorneys may be helpful in this process.<sup>102</sup> However, the VA and Congress have also created both statutory and practical barriers of entry for attorneys attempting to help veterans. In 2006, Congress required that an attorney or agent representing a veteran before the VA be accredited by the VA for this purpose.<sup>103</sup> For attorneys, this means that in addition to being licensed by a state bar and in good standing to practice law, the lawyer must submit an application to be accredited before the VA.

Not all barriers are congressionally mandated, however. The manner in which the VA requires attorneys to gather information for the clients they represent differs substantially from the way the VA interacts with other representatives of veterans—for example, Veterans Service Organizations (VSOs).<sup>104</sup> The VA has allowed VSO representatives access to the “Stakeholder Enterprise Portal,” a digital service created by

<sup>98</sup> See VETERANS APPEALS PROCESS, *supra* note 58; ANNUAL REPORT 2013, *supra* note 73; ANNUAL REPORT 2012, *supra* note 65; STRATEGIC PLAN, *supra* note 67.

<sup>99</sup> *Why Are Veterans Waiting Years on Appeal?*, *supra* note 69 (statement of Laura Eskenazi, Principal Deputy Vice Chairman, Board of Veterans Appeals).

<sup>100</sup> See STRATEGIC PLAN, *supra* note 67, at 5.

<sup>101</sup> See *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009).

<sup>102</sup> See 38 U.S.C. § 5904(c)(3) (2012).

<sup>103</sup> See 38 U.S.C. §§ 5901–5902, 5904 (2012); see also 38 C.F.R. §§ 14.629(b)(i)–(iii) (2013) (implementing regulations).

<sup>104</sup> VSOs are defined by the VA as non-profit groups which advocate on behalf of veterans. See *Glossary*, NAT'L CTR. FOR VETERANS ANALYSIS & STAT., <http://www.va.gov/vetdata/glossary.asp> (last visited Nov. 17, 2014). These groups are normally made up of a large number of volunteer veterans and some paid staff. See *id.*

the VA to “represent Veterans more quickly, efficiently, and electronically.”<sup>105</sup> Using this system and its predecessors, the VSOs have had access to veterans’ electronic records in the benefits system for several years.<sup>106</sup> Only in October 2014 did the VA begin implementing procedures to allow attorneys access to this electronic system.<sup>107</sup> Doing so allows attorneys to monitor the status of a veteran’s claim throughout the rating process.<sup>108</sup>

To ensure that veterans’ rights are protected, it seems reasonable for veterans to have representation at the agency of original jurisdiction when the VA is working on crucial case developments that will be relied upon in further stages of appeal. Because hiring an attorney is currently impossible at these early stages, veterans need alternative representation. VSOs have traditionally filled this role, and pro bono attorneys have only recently begun to integrate into the process. These two types of advocates can provide sound but limited advocacy either due to training or time constraints. This Article argues that law students are uniquely positioned to fill the void of advocacy at the regional and other office levels.

#### A. *Veterans Service Organizations*

The VA has historically worked with the Veterans Service Organizations who hold congressional charters and recognize the VSOs as specialists in the field of veterans’ benefits.<sup>109</sup> VSOs represent diverse veterans from all eras and with different qualifications. For instance, the Veterans of Foreign Wars (VFW) requires that a veteran member have service overseas that would qualify him for a campaign medal.<sup>110</sup> The Military Order of the Purple Heart requires, as the name implies, that the member have been awarded a Purple Heart for being combat

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<sup>105</sup> *Stakeholder Enterprise Portal*, VETERANS BENEFITS ADMIN., [http://dvs.ohio.gov/Portals/0/library/odvs/varo/IT/SEP/SEP\\_Connect\\_Fall2014.pdf](http://dvs.ohio.gov/Portals/0/library/odvs/varo/IT/SEP/SEP_Connect_Fall2014.pdf) (last visited Nov. 23, 2015).

<sup>106</sup> The Stakeholder Enterprise Portal’s predecessor was the “Training, Responsibility, Involvement and Preparation of Claims” (TRIP) program. *The Role of National, State, and County Veterans Service Officers in Claims Development: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans’ Affairs*, 109th Cong. (2006) [hereinafter *The Role of National, State, and County Veterans Service Officers*] (statement of Jack McCoy, Associate Deputy Under Secretary for Policy and Program Management, U.S. Department of Veterans Affairs).

<sup>107</sup> See *Stakeholder Enterprise Portal Announcements*, VETERANS BENEFITS ADMIN., <https://www.sep.va.gov/sep/web/guest/sep> (last visited Nov. 17, 2014).

<sup>108</sup> See *id.*

<sup>109</sup> See *The Role of National, State, and County Veterans Service Officers*, *supra* note 106.

<sup>110</sup> *VFW Eligibility Information*, VETERANS OF FOREIGN WARS, <http://www.vfw.org/uploadedFiles/VFWorg/Join/sept2012%20ElgibilityFolder2.pdf> (last visited Nov. 17, 2014).

wounded.<sup>111</sup> Other VSOs are more liberal in their member requirements. The American Legion, as an example, allows anyone who served in the United States Armed Forces during many different periods of conflict and received an honorable discharge to join its ranks.<sup>112</sup> There are forty-six VSOs holding a congressional charter, each of which has its own requirements for membership.<sup>113</sup>

Many of these VSOs offer help to veterans trying to obtain disability benefits at all levels of the claims process, often through the services of a “veterans service officer.”<sup>114</sup> The veterans service officers working within a VSO may be trained and tested by the VSO with whom they are affiliated, but this training and testing is not required of all VSO representatives before they are accredited by the VA.<sup>115</sup> There is also no blanket requirement that the VSOs retrain their service officers in new developments in veterans law, or supervise the work being done by the service officers.<sup>116</sup> VSOs are adept at advocating for a veteran in many types of claims, but some claims are so complex either procedurally, medically, or legally that they require a more specialized type of advocacy.

### B. *Pro Bono Attorneys*

Although legal help for veterans at the earliest stages of a claim is arguably necessary, or at the very least highly desirable, it is unlikely that the ban on attorneys fees in these early stages will be lifted. In recognition that attorneys can offer unique help to veterans navigating the VA, pro bono attorneys have been stepping into the breach. For veterans, there may be good reasons to prefer that an attorney handle a case from the start, rather than a VSO service officer (or any other agent). Attorneys appear to have a better track record of success at the BVA level either by obtaining an outright grant of benefits, or at least a remand back to the regional office for further factual development.<sup>117</sup> Additionally,

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<sup>111</sup> See *Application for Life Membership*, MILITARY ORDER OF THE PURPLE HEART, <http://www.purpleheart.org/Downloads/Bank/Headquarters/MembershipApplication.pdf> (last visited Nov. 17, 2014).

<sup>112</sup> See *Membership Application*, AMERICAN LEGION, <https://www.members.legion.org/CGI-BIN/lansaweb?webapp=EDMS+webtrn=NETINTRO+ml=LANSAXHTML&art=TAL+lang=ENG> (last visited Apr. 22, 2015).

<sup>113</sup> See *Veterans Service Organizations*, HOUSE COMM. ON VETERANS' AFFAIRS, <http://veterans.house.gov/citizens/resources> (last visited Nov. 17, 2014).

<sup>114</sup> See *The Role of National, State, and County Veterans Service Officers*, *supra* note 106.

<sup>115</sup> See 38 C.F.R. § 14.629 (2013).

<sup>116</sup> There is a requirement for an initial training and testing and annual training or supervision, but only for those officers representing a county veteran's service officer. See 38 C.F.R. § 14.629(a)(2)(i)–(iii) (2013).

<sup>117</sup> Attorneys in fiscal year 2012 had an 81.7% success rate compared to the American Legion, which had a 75.1% success rate, or the Military Order of the Purple Heart, which had

attorneys are subject to their own state rules of professional conduct and are charged with zealously and competently representing their clients.<sup>118</sup> Veteran-clients may report to the state bar an errant attorney who fails to meet these standards.<sup>119</sup>

In response to the need for free legal help, groups representing attorneys and the bar have mobilized to offer pro bono services to veterans at different stages in the claims process. The American Bar Association (ABA) has long advocated for attorneys to do pro bono work on behalf of underserved populations and has considered the veteran population in this regard several times.<sup>120</sup> For instance, in its most recent call to help veterans, the ABA launched its Veterans' Claims Assistance Network (ABA VCAN) initiative in conjunction with the VA.<sup>121</sup>

The VA, in a rare expression of legal aid acceptance, has partnered with the ABA to provide attorney help to a limited number of veterans. A veteran with claims pending in part of the backlog at one of two regional offices has the option of seeking the help of an assigned pro bono attorney to help the veteran reevaluate and potentially submit new evidence and materials to support his claims.<sup>122</sup> In essence, the VA is asking these attorneys to help by doing what they do best—developing a case and presenting the evidence in a coherent and efficient fashion. This is one of the first instances where attorneys have been encouraged by the VA to be part of the decision-making process at the agency of

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a 79% success rate. ANNUAL REPORT 2012, *supra* note 65, at 23. The second most successful group of advocates after attorneys were accredited agents, who had an 80.5% success rate. *See id.*

<sup>118</sup> *See* MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 1983). Forty-nine states have adopted the Model Rules in whole or in part. *See State Adoption of the ABA Model Rules of Professional Conduct*, AM. B. ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited May 15, 2015). The exception is California, which requires its own professional rules of conduct. *See* CALIFORNIA RULES OF PROF'L CONDUCT r. 3-110 (2013).

<sup>119</sup> Every state bar has its own procedures for a client to report an attorney who failed in their ethical duties. *See, e.g., Attorney Discipline*, IDAHO ST. B., [https://isb.idaho.gov/bar\\_counsel/bc\\_info\\_public.html](https://isb.idaho.gov/bar_counsel/bc_info_public.html) (last visited Nov. 14, 2015); *How to File a Misconduct Inquiry About a Lawyer*, VA. ST. B., <http://www.vsb.org/site/regulation/inquiry> (last visited Nov. 14, 2015); *Attorney Consumer Assistance Program*, FLA. B., <http://www.floridabar.org/tfb/TFBConsum.nsf/0A92A6DC28E76AE58525700A005D0D53/37E34BBB81F1EE4E85256C0D00703FF4> (last visited Nov. 14, 2015).

<sup>120</sup> *See* MODEL RULES OF PROF'L CONDUCT r. 6.1.

<sup>121</sup> *See ABA Veterans' Claims Assistance Network*, AM. B. ASS'N, [http://www.americanbar.org/portals/public\\_resources/aba\\_home\\_front/Military\\_Pro\\_Bono/aba-veterans-claims-and-assistance-network.html](http://www.americanbar.org/portals/public_resources/aba_home_front/Military_Pro_Bono/aba-veterans-claims-and-assistance-network.html) (last visited Nov. 14, 2015).

<sup>122</sup> *See VCAN Attorney Frequently Asked Questions*, AM. B. ASS'N, [http://www.americanbar.org/portals/public\\_resources/aba\\_home\\_front/Military\\_Pro\\_Bono/aba-veterans-claims-and-assistance-network/attorneys/attorneys\\_faq.html#faq\\_1](http://www.americanbar.org/portals/public_resources/aba_home_front/Military_Pro_Bono/aba-veterans-claims-and-assistance-network/attorneys/attorneys_faq.html#faq_1) (last visited Nov. 17, 2014).

original jurisdiction, and may be a harbinger of encouraging more pro bono service in the future.

In addition to the ABA's new program, the Veterans Consortium Pro Bono Program (Pro Bono Consortium), along with its partner organization, the National Veterans Legal Services Program (NVLSP), has long called upon the nation's largest law firms to represent veterans in the VA process.<sup>123</sup> The Pro Bono Consortium matches underrepresented veterans and family members who have filed pro se appeals or petitions with the Court of Appeals for Veterans Claims where the record before the agency is already complete and the advocacy to be done is at the appellate level.<sup>124</sup>

The VA holds attorneys to a very high standard of training and accreditation, a standard the VA regularly monitors.<sup>125</sup> Attorneys, including ones helping veterans pro bono, must be accredited by the VA.<sup>126</sup> This added regulation of attorneys by the VA comes with drawbacks. The duty of the VA to verify and approve these applications is another added burden on the system that may be unnecessarily draining the VA's resources. Additionally, the requirements for attorneys to obtain accreditation and maintain that accreditation are much more stringent and time-consuming to fulfill than those required of service officers with a VSO. Attorneys must complete a three-hour "continuing legal education" (CLE) course within one year of receiving accreditation and must renew that VA-specific CLE every two years thereafter.<sup>127</sup> The attorney must also provide information concerning her "military and civilian employment history," any representation she has done for clients before "any department, agency, or bureau of the Federal government," her criminal background, whether or not she is being treated for a mental disease or disability, her level of training and academic history, and three character references.<sup>128</sup> This is a large list of requirements for attorneys who are already in good standing with a state bar and whose interactions with veterans will be controlled by the attorney's own rules of professional conduct. It is indeed admirable that any attorney is willing to assume these administrative burdens to help veterans on a pro bono basis when VSOs and other advocates are not submitted to the same vetting.

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<sup>123</sup> See *About Us*, VETERANS CONSORTIUM PRO BONO PROGRAM, <http://www.vetsprobono.org/about-us/> (last visited Nov. 17, 2014).

<sup>124</sup> See VETERANS CONSORTIUM PRO BONO PROGRAM, HELPING VETERANS EVERY STEP OF THE WAY: 2013 ANNUAL REPORT (2013), <http://www.vetsprobono.org/wp-content/uploads/2011/05/Annual-Report-2013.pdf>.

<sup>125</sup> See 38 C.F.R. § 14.629(b)(1)(iii)–(iv) (2013).

<sup>126</sup> See *id.* § 14.629.

<sup>127</sup> See *id.* § 14.629(b)(1)(iii)–(iv).

<sup>128</sup> See *id.* § 14.629(b)(2).

Pro bono work on behalf of veterans, while important, is also limited in its size and scope. Pro bono work is supported only by actual paying work, so it is inherently a limited commitment for most attorneys and law firms.<sup>129</sup> Additionally, with the increasing complexity of veterans law, attorneys who have minimal training and limited exposure to the VA may not understand the nuances or procedures of the VA regional offices' work. The training program that the Pro Bono Consortium provides for attorneys is focused on work at the Court of Appeals for Veterans Claims (CAVC) level,<sup>130</sup> which lacks that crucial regional office advocacy. However, the Pro Bono Consortium structure makes sense due to the limited amount of time a pro bono attorney would have available to dedicate to building the record and developing a case at the lower levels of adjudication. While pro bono attorneys have much to offer to veterans in need of representation, the limitations on their services require new approaches to respond to the need for advocacy at the VA. Including law students in the representation of veterans could dramatically increase the number of specially trained advocates involved.

### III. A VETERAN'S NEED FOR MEDICAL EVIDENCE

Law student assistance adds value by collecting and analyzing a crucial piece of the claim. Veterans require not only skilled advocacy to advance their claims, but also thorough and expert medical evidence. Medical evidence is necessary to establish many of the elements of a claim for entitlement to disability benefits.<sup>131</sup> Indeed, the court specifically emphasizes the importance that this evidence be competent.<sup>132</sup> The VA, as discussed above, has the duty to help a veteran provide this competent medical evidence.<sup>133</sup> What qualifies as "competent" is defined in the regulation concerning the VA's statutory duty:

*Competent medical evidence* means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in

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<sup>129</sup> According to the ABA's 2013 report on pro bono hours for America's attorneys, 56% of attorneys did fewer than forty hours of pro bono in a year (based on 2011 surveys). See AMERICAN BAR ASSOCIATION, SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS (2013) [hereinafter SUPPORTING JUSTICE], [http://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/lb\\_pb\\_Supporting\\_Justice\\_III\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lb_pb_Supporting_Justice_III_final.authcheckdam.pdf).

<sup>130</sup> See VETERANS CONSORTIUM PRO BONO PROGRAM, *supra* note 124, at 3.

<sup>131</sup> See *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996).

<sup>132</sup> See *id.* at 504.

<sup>133</sup> See 38 U.S.C. § 5103A(b)(1) (2012).

medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.<sup>134</sup>

Often, the VA fulfills the duty to help a veteran develop his claim by determining that the veteran claimant is entitled to a medical examination furnished by the VA.<sup>135</sup> These examinations are referred to as Compensation and Pension (C&P) exams.<sup>136</sup> C&P exams are commissioned by the VA and often request that the medical provider offer a diagnosis of a current disability, an opinion on whether the etiology of that disability is connected to the veteran's military service, or both.<sup>137</sup> These examinations are administered by a medical professional employed by the VA or a medical professional contracted by the VA for such purposes.<sup>138</sup>

Recent changes in Veterans Health Administration (VHA) policy require that all examiners assessing veterans for purposes of disability compensation be given specific training and that these examiners pass post-test modules.<sup>139</sup> The VHA directive on this issue notes:

As health care providers traditionally approach evaluations in the purely clinical domain, training is critical to ensure that they have an understanding of the legal ramifications of the evaluations, and what elements are required by the Veterans Benefit Administration (VBA) in order to make a valid determination on disability benefit claims.<sup>140</sup>

However, inadequate medical examinations provided by VA medical examiners still abound. In a recent VA Office of Inspector General (OIG) audit of the Reno, Nevada regional office, inspectors found that four out of fourteen randomly selected claims for traumatic brain injury had been incorrectly processed because the ratings official issued ratings on these conditions using deficient VA medical examination reports.<sup>141</sup> "Specifi-

<sup>134</sup> 38 C.F.R. § 3.159(a)(1) (2013).

<sup>135</sup> See 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c)(4).

<sup>136</sup> See ADJUDICATION PROCEDURES MANUAL, *supra* note 32, § A(1)(d).

<sup>137</sup> See *McLendon v. Nicholson*, 20 Vet. App. 79 (2006).

<sup>138</sup> See VA OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF VETERANS AFFAIRS AUDIT OF VA'S EFFORTS TO PROVIDE TIMELY COMPENSATION AND PENSION MEDICAL EXAMINATIONS 1 (2010), <http://www.va.gov/oig/52/reports/2010/VAOIG-09-02135-107.pdf>; ADJUDICATION PROCEDURES MANUAL, *supra* note 32.

<sup>139</sup> See VETERANS HEALTH ADMIN., CERTIFICATION OF CLINICIANS PERFORMING VA DISABILITY EVALUATIONS (2013), [http://www.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=1643](http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=1643).

<sup>140</sup> *Id.* at 1.

<sup>141</sup> See VA OFFICE OF INSPECTOR GENERAL, INSPECTION OF VA REGIONAL OFFICE, RENO, NEVADA 5 (2014), <http://www.va.gov/oig/pubs/VAOIG-13-04324-170.pdf>.



cally, the medical examiners did not delineate which symptoms were due to [traumatic brain injury] and which were due to a coexisting mental condition. Also, in two of the cases, examiners did not properly complete the disability benefits questionnaires as required when additional symptoms were present.”<sup>142</sup> These mistakes were made a full year after the publication of the most recent VHA directive, which required all examiners to be trained and tested before they are certified to perform these examinations.<sup>143</sup>

The Atlanta regional office has also been audited recently and the same issues appear again. In a random sampling of thirty claims for traumatic brain injury, the OIG found that four of these were inappropriately rated due to inadequate medical examinations.<sup>144</sup> And in Columbia, South Carolina’s regional office, seven of thirty randomly selected traumatic brain injury cases used insufficient C&P examinations to make a determination on a veteran’s claim for this disability.<sup>145</sup> Despite training, C&P examiners are having a difficult time administering competent medical examinations and translating those diagnoses to writing with a “reasoned medical explanation” for any conclusions reached.<sup>146</sup>

A veteran is permitted to submit a private medical opinion to counter or bolster the findings of a C&P examination.<sup>147</sup> In theory, the VA should accept the evidence of the veteran, all other things being equal.<sup>148</sup> For many veterans, this means asking their primary care doctors or specialists at the VA medical centers for help.<sup>149</sup> Interestingly, VA doctors appear to be increasingly hesitant to help veterans in any way relating to their disability benefits. Several times, veterans who have asked for help from their VA providers have been turned away because the provider insists she is prohibited from helping a veteran with a benefit claim. For instance, one client of Stetson’s Veterans Advocacy Clinic who has Stage 4 cancer requested a letter from his oncologist at

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<sup>142</sup> *Id.*

<sup>143</sup> See VETERANS HEALTH ADMIN., *supra* note 139 and accompanying text.

<sup>144</sup> See VA OFFICE OF INSPECTOR GENERAL, INSPECTION OF VA REGIONAL OFFICE, ATLANTA, GEORGIA 7 (2014), <http://www.va.gov/oig/pubs/VAOIG-14-00902-207.pdf>.

<sup>145</sup> See VA OFFICE OF INSPECTOR GENERAL, INSPECTION OF VA REGIONAL OFFICE, COLUMBIA, SOUTH CAROLINA 7 (2014).

<sup>146</sup> See *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 300–01 (2008) (stating that VA must provide an adequate examination with a reasoned medical explanation for any determinations made).

<sup>147</sup> See *id.* at 301.

<sup>148</sup> See 38 U.S.C. § 5107(b) (2012).

<sup>149</sup> See VETERANS HEALTH ADMIN., DOCUMENTATION OF MEDICAL EVIDENCE FOR DISABILITY EVALUATION PURPOSES 2 (2013) [hereinafter MEDICAL EVIDENCE], [http://www.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=2856](http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2856).

the VA medical center stating the veteran's prognosis.<sup>150</sup> The purpose of the letter was to provide evidence to the Veterans Benefits Administration that the veteran's claim needed to be expedited because he is terminally ill. The oncologist was unwilling to help the veteran and informed the Veterans Advocacy Clinic that he was permitted to work only with the VA's own legal department. This refusal to provide a simple letter for a veteran to help speed up the adjudication of his claims led to a subpoena being issued and several hours of time spent by both the VA's own in-house attorney and the Veterans Advocacy Clinic making certain that the doctor wrote the letter.

Historically, there has been very little interaction between the Veterans Benefits Administration (VBA), which is the division of the VA that administers disability benefits, and the Veterans Health Administration (VHA), the division of the VA that delivers health care to veterans.<sup>151</sup> While the VA continues to attempt to integrate the VBA and the VHA, large fissures still exist.<sup>152</sup> In fact, many veterans are surprised to find that after being diagnosed and treated by the VHA for a disease for a number of years, that information never makes it over to the benefits section of the VA unless the veteran affirmatively files a claim.<sup>153</sup> More often than not, the VA Medical Center treatment providers are not trained in the requirements to establish a service-connected disability with the VA, and are unaware that a "nexus statement" connecting the veteran's disability to his service is necessary to obtain benefits in most instances.<sup>154</sup> Some VA medical providers erroneously believe that the

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<sup>150</sup> Letter from Stacey-Rae Simcox, Dir., Stetson Univ. College of Law Veterans Advocacy Clinic, to Dir., Bd. of Veterans Appeals Mgmt. and Admin. (Mar. 12, 2015) (on file with author).

<sup>151</sup> See, e.g., *Variances in Disability Compensation Claims Decisions Made by VA Regional Offices; Post-Traumatic Stress Disorder Claims Review; and United States Court of Appeals for the Federal Circuit Decision Allen v. Principi: Hearing Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans' Affairs*, 109th Cong. 1 (2005) (statement of Quentin Kinderman, Deputy Director, National Legislative Service, Veterans of Foreign Wars of the United States) ("Instead, we believe that the problem is institutional, a sense of barrier between the two major institutions of the VA; VBA and VHA, who have become barricaded within their own cultures and cannot appreciate that they share areas of mission and responsibility with their sister organization."); Alex Horton, *How VA is Structured (and Why It Matters to You)*, U.S. DEP'T OF VETERANS AFFAIRS (Dec. 9, 2010), <http://www.blogs.va.gov/VAntage/812/how-va-is-structured-and-why-it-matters-to-you> ("The three VA administrations work to provide services and support for Veterans, but their structure, budgets, goals and projects don't always align.").

<sup>152</sup> See, e.g., *VA Announces Single Regional Framework Under MyVA Initiative: Internal Organizations to Realign Their Existing Structures*, U.S. DEP'T OF VETERANS AFFAIRS OFFICE OF PUB. & INTERGOVERNMENTAL AFFAIRS (Jan. 25, 2015), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2672>.

<sup>153</sup> See 38 C.F.R. § 3.1(p) (2014); 38 C.F.R. § 3.155(a); see also *Rodriguez v. West*, 189 F.3d 1351, 1353 (Fed. Cir. 1999) (stating that the request to file a claim must be in writing and indicate an attempt to apply for benefits).

<sup>154</sup> See MEDICAL EVIDENCE, *supra* note 149, at 3.

raters at the VA who are reading medical notes in a veteran's files are actually doctors.<sup>155</sup> Practitioners also report that these same doctors are concerned that providing a medical opinion regarding the nexus of the veteran's disability to his service would be a conflict of interest to their positions as VA doctors and health professionals.<sup>156</sup>

The VHA issued guidance that the VA medical providers could provide assistance to veterans to clear up confusion, but the effect has been limited.<sup>157</sup> VHA providers are required to provide any information for a patient on the Disability Benefits Questionnaire (DBQ).<sup>158</sup> The DBQ was implemented by the VA in 2010 to assist veterans in attaining medical opinions from their own private doctors that addressed the requirements of the ratings schedule.<sup>159</sup> While the DBQ does ask for a current assessment of severity of conditions, functional impairment, and diagnoses, it does not ask the critical question of the nexus of the condition to an in-service event.<sup>160</sup> Knowing that these nexus determinations are often made based on medical opinions, limiting the VHA providers to forms that do not even raise the question of nexus is of limited help to a veteran.<sup>161</sup>

Some veterans have access to private doctors through private health insurance. In this case, the doctor can evaluate the veteran under the VA's own Schedule for Rating Disabilities (VASRD) by using a DBQ.<sup>162</sup> For practitioners in this area, a valuable DBQ from a treating physician depends on three things: the personal relationship of the veteran to the doctor, the extra time that a doctor has to fill these forms out thoroughly, and the amount of money a veteran is willing to pay for this private medical opinion.<sup>163</sup>

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<sup>155</sup> See VA OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF VETERANS AFFAIRS AUDIT OF VA'S INTERNAL CONTROLS OVER THE USE OF DISABILITY BENEFITS QUESTIONNAIRES 4 (2012) [hereinafter INTERNAL CONTROLS].

<sup>156</sup> These pervasive beliefs with the VHA are reported by practitioners time and time again at conferences on the subject of representing veterans, for example the National Organization of Veterans' Advocates conferences. See generally Jennifer Hanna et al., *Conflict of Interest Issues Pertinent to Veterans Affairs Medical Centers*, 54 J. VASCULAR SURGERY 3 (2011).

<sup>157</sup> See MEDICAL EVIDENCE, *supra* note 149, at 1.

<sup>158</sup> See *id.* at 2–3.

<sup>159</sup> See INTERNAL CONTROLS, *supra* note 155, at 1.

<sup>160</sup> See *id.* at 1.

<sup>161</sup> See, e.g., DEP'T OF VETERANS AFFAIRS, REVIEW POST TRAUMATIC STRESS DISORDER (PTSD) DISABILITY BENEFITS QUESTIONNAIRE (2012), <http://www.vba.va.gov/pubs/forms/VBA-21-0960P-3-ARE.pdf>; DEP'T OF VETERANS AFFAIRS, NECK (CERVICAL SPINE) CONDITIONS DISABILITY BENEFITS QUESTIONNAIRE (2013), <http://www.vba.va.gov/pubs/forms/VBA-21-0960M-13-ARE.pdf>.

<sup>162</sup> See 38 C.F.R. § 4.1 (2013) (noting the essentials of evaluative rating); see also MEDICAL EVIDENCE, *supra* note 149, at 1–2.

<sup>163</sup> See MEDICAL EVIDENCE, *supra* note 149, at 2.

The time investment for a doctor in private practice to fill out the DBQ cannot be overestimated. For example, the DBQ for a private doctor to evaluate a veteran's back issue (claimed as thoracolumbar strain) is eleven pages long.<sup>164</sup> While the VA estimates that the time it will take a doctor to fill the form out is forty-five minutes, this assumes that the doctor has completed the testing of the veteran necessary to fill out the form.<sup>165</sup> The DBQ for knee problems is ten pages long and the VA estimates this will take thirty minutes to complete—again assuming all testing has been done.<sup>166</sup> Asking an orthopedic doctor to take one hour and fifteen minutes to complete paperwork for a medical opinion on a veteran's back and knee issues could result in a hefty bill for a veteran who is paying for the doctor's time. For those veterans who are unable to procure adequate medical evidence from a private practitioner, a new approach must be found to secure medical opinions.

#### IV. THE PROPOSED MODEL

In light of the need for skilled advocacy and thorough medical examinations, law and medical students bring unique opportunities to the disability claims setting. A medical-legal partnership between these two graduate programs can bring great benefits to all parties involved: the veterans, the students, and the VA itself.

##### A. *Law Students as Advocates*

Adept advocacy before the VA is desirable. Because of the limitations on fee-based attorneys and the scarcity of pro bono attorneys, stakeholders must develop alternative opportunities to provide legal representation to veterans.<sup>167</sup> Law students are a natural fit for this need; law student involvement in this representation avoids the prohibitions placed upon attorneys consulting for a fee and the time restraints of a pro bono attorney.<sup>168</sup> Students can also help to relieve the burden on the VSOs by taking on the more complicated cases requiring an intensive investment of time or specialized advocacy skills.

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<sup>164</sup> See DEP'T OF VETERANS AFFAIRS, BACK (THORACOLUMBAR SPINE) CONDITIONS DISABILITY BENEFITS QUESTIONNAIRE (2013), <http://www.vba.va.gov/pubs/forms/VBA-21-0960M-14-ARE.pdf>.

<sup>165</sup> See *id.* at 1.

<sup>166</sup> See DEP'T OF VETERANS AFFAIRS, KNEE AND LOWER LEG CONDITIONS DISABILITY BENEFITS QUESTIONNAIRE 1 (2013), <http://www.vba.va.gov/pubs/forms/VBA-21-0960M-9-ARE.pdf>.

<sup>167</sup> Cf. Hugh Lessig, *Cutting the VA Backlog: William and Mary May Have National Model*, DAILY PRESS (Apr. 30, 2013), [http://articles.dailypress.com/2013-04-30/news/dp-nws-veterans-law-clinic-20130430\\_1\\_mary-law-school-warner-northern-virginia](http://articles.dailypress.com/2013-04-30/news/dp-nws-veterans-law-clinic-20130430_1_mary-law-school-warner-northern-virginia). The Stetson Law Veterans Advocacy Clinic's 200-hour semester requirement can support between twenty to thirty clients per semester. See *infra* note 177.

<sup>168</sup> See *id.*

Law students are in the process of training to become legal professionals and they value opportunities to practice this profession under the tutelage of an experienced attorney.<sup>169</sup> They are also encouraged regularly by both the ABA and their own school policies to engage in ongoing public service activities.<sup>170</sup>

Law students working in a law school clinical setting can practice in the area of veterans law under the supervision of an attorney or faculty member with experience.<sup>171</sup> Each faculty member supervising eight clinical students can potentially work on twenty to thirty veterans cases at a time, depending on the model used for case management and supervision.<sup>172</sup> Law students are not paid in these clinical programs and the faculty members receive no fee from the veteran; thus, the issue of remuneration is absolved.<sup>173</sup>

Law students have the time to thoroughly examine a veteran's medical records and track down witnesses and other pieces of evidence to support a veteran's claims.<sup>174</sup> At the Lewis B. Puller, Jr. Veterans Benefits Clinic at William & Mary Law School, law students worked an average of 130 hours each over the course of two years on a claim for post-traumatic stress disorder and traumatic brain injury.<sup>175</sup> When considering all the legal work done in the clinical setting, the work averaged approximately \$428,325 in private market dollars.<sup>176</sup> Students at Stetson University College of Law working in the Veterans Advocacy Clinic work 200 hours each semester on approximately three to four veterans'

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<sup>169</sup> See Lusine Akobian, *Mandatory Pro Bono as Confidence Builder for Law Students*, 83 J. KAN. B. ASS'N 19 (2014); Lori D. Dougherty, *Clinical Experience for the Law Student*, 74 J. KAN. B. ASS'N 31 (2005); Charity Scott, *Collaborating with the Real World: Opportunities for Developing Skills and Values in Law Teaching*, 9 IND. HEALTH L. REV. 409 (2012).

<sup>170</sup> See AMERICAN BAR ASSOCIATION, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 110 (2014), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_bookmarked.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf) (noting that "[a] law school shall offer substantial opportunities for . . . student participation in pro bono activities").

<sup>171</sup> See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 127 (2007), [http://www.cleaweb.org/Resources/Documents/best\\_practices-full.pdf](http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf).

<sup>172</sup> Cf. Lessig, *supra* note 167.

<sup>173</sup> See SUPPORTING JUSTICE, *supra* note 129, at 3–4; see also James Podgers, *Law School Accreditation Standards Breeze Through House of Delegates with Minimal Fuss*, A.B.A. J. (Aug. 12, 2014), [http://www.abajournal.com/mobile/article/law\\_school\\_accreditation\\_standards\\_breeze\\_through\\_house\\_of\\_delegates](http://www.abajournal.com/mobile/article/law_school_accreditation_standards_breeze_through_house_of_delegates) (discussing comment to Standard 305 of the ABA Standards and Rules of Procedure for Approval of Law Schools).

<sup>174</sup> Cf. STUCKEY ET AL., *supra* note 171, at 127 (discussing how experiential learning can "[m]eet the needs and interests of students").

<sup>175</sup> See K.N. BARRETT ET AL., LEWIS B. PULLER, JR. VETERANS BENEFITS CLINIC, FINAL REPORT 6 (2012), <http://www.wm.edu/as/publicpolicy/documents/prs/vbc.pdf>.

<sup>176</sup> See Lessig, *supra* note 167.

cases.<sup>177</sup> This type of time investment would not be feasible for an attorney in private practice to put into one case.<sup>178</sup>

The time investment can pay huge dividends in case development. In one case the law students worked on, a veteran had been denied compensation for twenty years for a rape that occurred on board a United States Navy ship in the 1970s. This veteran was granted benefits because the medical evaluation provided new and material evidence to reopen his case. With this new opportunity for the VA to review the case, an ambitious law student traveled to the National Archives in Washington, D.C. and found documentation supporting the veteran's claim by sorting through several months' worth of Navy ship logs. In the logs from Vietnam, the student corroborated the veteran's recollection that he and his attackers were missing from an unexpected formation call, providing the circumstantial evidence necessary to meet the veteran's burden of proof and collect the desired benefits he had earned.

Law students also have the desire to learn the practice of law and grow tremendously from exposure to real clients in real situations. The ABA has recognized law students' need for practical hands-on experience and has raised the required amount of experiential or clinical training to six hours for each student.<sup>179</sup> Six hours of credit could be easily satisfied with 12–18 hours of work each week on a veteran's claims or 168–252 hours per semester.<sup>180</sup>

### *B. Medical Students and Mental Health Clinical Students as Experts*

Obtaining medical evidence to substantiate a veteran's claims from C&P examinations, private doctors, and VA medical providers depends on constraints of time, money, and the willingness of the provider to help. In light of these constraints, and much like the proposition concerning law students, medical students and other students participating in graduate clinical programs in the medical field are ideally suited to help veterans gather the medical opinions necessary to support their claims. These clinics offer excellent opportunities for medical field graduate students to learn their craft under the supervision of licensed practitioners,

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<sup>177</sup> See *Veterans Advocacy Clinic Program Requirements*, STETSON UNIV. COLL. OF LAW, <http://www.stetson.edu/law/academics/advocacy/clinics/po-veterans-appellate-rights-clinic.php> (last visited Nov. 15, 2015); see also Bobbie O'Brien, *Winning Appeals for Veterans Denied Benefits*, HEALTH NEWS FLA. (Mar. 7, 2015), <http://health.wusf.usf.edu/post/winning-appeals-veterans-denied-benefits>.

<sup>178</sup> See SUPPORTING JUSTICE, *supra* note 129, at 5.

<sup>179</sup> See Andy Thomason, *Bar Association Approves Package of Reforms for Law Schools*, CHRONICLE OF HIGHER EDUC. (Aug. 13, 2014), [http://chronicle.com/blogs/ticker/jp/bar-association-approves-package-of-reforms-for-law-schools?cid=AT&utm\\_source=AT&utm\\_medium=EN](http://chronicle.com/blogs/ticker/jp/bar-association-approves-package-of-reforms-for-law-schools?cid=AT&utm_source=AT&utm_medium=EN).

<sup>180</sup> See STUCKEY ET AL., *supra* note 171, at 127.

participate in required clinical training, and understand how their evaluations affect the life of the veteran they are treating.

Additionally, the Liaison Committee on Medical Education (LCME), which accredits medical schools in the United States and Canada, recognized the importance of service in the community in the education of a medical student, and mandated in 2008 that these opportunities be provided to medical students. The current version of this mandate reads:

The faculty of a medical school ensure that the medical education program provides sufficient opportunities for, encourages, and supports medical student participation in service-learning and community service activities.<sup>181</sup>

The importance of this community service for medical students cannot be overstated. One study conducted in 2011 reported that the benefits obtained by community service for medical students included appreciation for the patient, desire to improve healthcare, better communication skills, and feelings of fulfillment.<sup>182</sup> Medical students participating in community service also reported higher rates of empathy toward their patients.<sup>183</sup>

Like the ABA, the LCME also requires that medical schools provide medical students with appropriate clinical settings with “adequate numbers and types of patients.”<sup>184</sup> Veteran patients offer unique clinical opportunities to medical students, allowing the students to conduct a number of personal interviews and administer a battery of tests to determine potential medical conditions.<sup>185</sup> Working with a veteran with traumatic brain injury, for example, can also expose the student to collaborations with neuropsychology for specific cognitive testing. The veteran, in turn, is armed with a number of clinically administered tests under the supervision of a licensed practitioner to support his claims for disability benefits with the VA. Additionally, medical students participating in this type of evaluation are limited in their time commitment to simply completing an evaluation and not for the ongoing treatment and therapy of the veteran.

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<sup>181</sup> LIAISON COMM. ON MED. EDUC., FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL 13 (2014), <https://www.nymc.edu/Academics/SchoolOfMedicine/LCME/assets/2015-16-functions-and-structure-with-appendix%282%29.pdf>.

<sup>182</sup> See generally Chantal M. L. R. Brazeau et al., *Relationship Between Medical Student Service and Empathy*, 86 J. ASSN. AM. MED. COLLEGES 42 (2011).

<sup>183</sup> See *id.*

<sup>184</sup> LIAISON COMM. ON MED. EDUC., *supra* note 181, at 9.

<sup>185</sup> See E-mail from Dr. Isis Marrero, Assistant Professor, Univ. of S. Fla. Coll. of Med. Psychiatry and Behavioral Neurosciences, to author (Oct. 24, 2014, 9:23 EST) (on file with author).

### C. *The Medical-Legal Partnership*

Currently, there are a number of medical-legal partnerships for a variety of clients. Several of these partnerships involve a legal aid office or a law school clinical program helping patients in a specific hospital setting, which fosters an interdisciplinary environment.<sup>186</sup> For law students, learning “in context” is important to understanding the fundamentals and nuances of the law. Professor Charity Scott, Director of the Center for Law, Health & Society at Georgia State University’s College of Law, emphasized this point in a recent analysis.<sup>187</sup> Professor Scott advocates that an interdisciplinary approach to teaching law students helps to meet the three “domains” of “professional competency” that should be taught in an integrative fashion:

(1) knowledge (including cognitive and analytical skills); (2) interactive behavioral skills (including problem-solving, client-oriented, and communication skills); and (3) professional values and ethics. These three domains reflect what competent lawyers should *know* and how they *think*, what they should be able to *do*, and how they should *act* as professionals. Real-world collaborations help to integrate the three *Carnegie* apprenticeships in one course, rather than keep them siloed in different courses.<sup>188</sup>

In a medical-legal interdisciplinary setting, law school faculty and medical faculty can teach collaboratively with law and medical students in the same classroom, learning the same lessons, while facilitating an understanding of the impact of these lessons on each other’s professional duties and responsibilities. Professor Scott found that teaching collaboratively with the medical instructors from Emory’s School of Medicine was a worthwhile experience for the instructors and both sets of students.

Among other things, the law students directly experienced how deeply runs the medical profession’s distrust of the legal profession and how to react gracefully to dispel biased assumptions. When they realized the medical students thought they were legal experts, they had to explain in understandable, non-legalese “what the law

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<sup>186</sup> See, e.g., *Health Law Partnership Legal Services Clinic*, GA. STATE UNIV. COLL. OF LAW, <http://law.gsu.edu/clinics/help-legal-services-clinic/> (last visited Nov. 15, 2015).

<sup>187</sup> See Scott, *supra* note 169, at 414–15.

<sup>188</sup> *Id.* (footnote omitted); see also STUCKEY ET AL., *supra* note 171; WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).



says,” in all its grayness, and how it might be applied in any given case. They gained appreciation and respect for how uncertain medical practice is, and they developed sympathy for the professional complexities facing their counterparts in medical school.<sup>189</sup>

My own experience has been very similar. While teaching at both William & Mary Law School and Stetson University College of Law, I included psychology graduate students and other medical professionals in a course known as “Bootcamp.” The purpose of this one-day training is to teach the law students working on veterans benefits cases the three main elements of proving that a veteran is entitled to service connection. The purpose of inviting the medical students and professionals is to give them the opportunity to see through the eyes of an advocate the legal requirements necessary to helping a veteran receive his benefits. The medical students’ presence also allows the law students to see the difficulties of medical diagnoses and evaluation through the lens of medical professionals.

Training exercises are interspersed throughout the day, giving the students fact patterns of veterans coming in the door to be interviewed so that they can expand on and discuss the information they have learned. A narrative or storytelling exercise is also included where each participant in the room is paired with another. In turn, one of the participants tells the story of her most memorable moment to her partner. After five minutes, the listening partner recites the speaking partner’s story to the group. After each presentation, the participants discuss how the speaker felt hearing her story told to the group by someone else. Did she think the listening partner stayed true to the meaning of the story he heard? Were any important details missed? The listening partner then fields questions from other participants in the group and receives constructive feedback concerning the delivery of the story.

The purpose of this exercise is to allow all participants in the room—law students, medical students, and other professionals—to feel what a client feels when he tells a lawyer the most important moments of his life and then has to hear it repeated to strangers. The experience is invaluable. It opens up the eyes of law students to the importance of capturing the significant details of a client’s story and remembering to convey the client’s story with the respect and compassion that the student herself would appreciate and expect.

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<sup>189</sup> Scott, *supra* note 169, at 432.

The medical students during this exercise are often astounded at the end.<sup>190</sup> Medical professionals are trained to gather details of information and piece together puzzles from seemingly unrelated pieces of information, much like lawyers. Doctors, however, are not necessarily taught to then put those details into a cohesive story and deliver that as a compelling storyteller. By the end of this small exercise, many medical professionals and students reported that they had a new appreciation for the importance of a doctor noting every detail and why each decision was made in the record of a patient who was seeking some type of disability benefit. During discussions of the legal requirements of handling a veteran's claims, the medical students are uniformly more comfortable working on a veteran's case when they understand the end result of the evaluations, testing, and diagnosis.

The law students are enlightened by hearing the potential difficulties that the medical students may have in answering seemingly straightforward questions, parsing out symptoms of different conditions, and determining etiology for particular diseases. For law students, simply finding out how doctors and mental health professionals train and conduct evaluations grounds their understanding of effective investigation and advocacy.

The benefits of medical-legal partnerships between law school clinics and medical professionals is well documented, and the number of these collaborations is growing.<sup>191</sup> However, collaborative *clinical* environments that specifically serve veterans are still rather small.<sup>192</sup> Indeed, law school clinics devoted to serving veterans' needs are still a growing minority of all law school clinics.<sup>193</sup> Each school that has dedicated resources to a veterans law clinic has its own unique model for serving veterans in their local communities.<sup>194</sup> The University of San Diego's veterans clinic has chosen to selectively represent veterans regarding their GI Bill benefits.<sup>195</sup> The University of Arizona works with local courts to help veterans deal with crimes and the judicial system in a ho-

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<sup>190</sup> These are thoughts that have been conferred to the author by participants in the Boot-camp program.

<sup>191</sup> Brock Vergakis, *Law School Clinics Help Veterans Escape Benefits Backlog*, HUFFINGTON POST (May 27, 2013), [http://www.huffingtonpost.com/2013/05/27/law-school-clinics-veterans-backlog\\_n\\_3343559.html](http://www.huffingtonpost.com/2013/05/27/law-school-clinics-veterans-backlog_n_3343559.html).

<sup>192</sup> See Press Release, Jeanne Shaheen, U.S. Senator for N.H., Shaheen Testifies Before Veterans Affairs Committee on Charlie Morgan Act to Expand Benefits for Same Sex Military Couples (June 12, 2013), <http://www.shaheen.senate.gov/news/press/release/?id=319d2a72-6681-401e-a2f3-96f2f0e73346> (noting that "[s]ince 2008, more than 30 law schools in 18 states have developed clinical programs specifically to assist veterans").

<sup>193</sup> See *id.*

<sup>194</sup> See generally KYNDRA MILLER ROTUNDA, *MILITARY AND VETERANS LAW* (2011).

<sup>195</sup> See *University of San Diego Veterans Legal Clinic*, UNIV. OF SAN DIEGO, <http://www.sandiego.edu/veteransclinic/> (last visited Nov. 17, 2014).

listic approach.<sup>196</sup> Still others have chosen to represent veterans seeking disability compensation benefits from the VA.<sup>197</sup> Within this subset of clinics focusing on veterans disability compensation benefits, each clinic chooses to advocate at different points in the process, using different methods. Widener Law School's veterans clinic has chosen to focus its services primarily on claims before the BVA.<sup>198</sup> Yale Law School's veterans clinic has successfully pursued benefits and other issues through the use of class action lawsuits for veterans suffering from disabilities.<sup>199</sup> The John Marshall Law School's veterans clinic helps veterans at any point in the disability process and often accomplishes this representation by focusing on enlisting the assistance of pro bono attorneys.<sup>200</sup>

There are also some limited numbers of law school clinics that represent veterans while participating in medical-legal partnerships. The Connecticut Veterans Legal Center, affiliated with Yale Law School, works with veteran patients of the VA's Connecticut Errera Community Care Center.<sup>201</sup> Doctors at the VA Care Center refer patients to the clinic for general legal services, including benefits provided by clinic staff.<sup>202</sup> At one time, a law school in Florida partnered its students with medical residents in a VA medical center to help veterans with legal issues such as social security, where the medical staff gave referrals to the law students.<sup>203</sup> Finally, some law clinics have chosen to partner with medical professionals specifically to help advance a veteran's disability claims—a partnership that is arguably the most beneficial to a veteran, but is exceedingly rare. A clinical program with expertise in public benefit programs “is distinctly well suited for a medical-legal partnership.”<sup>204</sup>

William & Mary Law School's Lewis B. Puller, Jr. Veterans Benefits Clinic was the first of its kind in the nation to forge this type of

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<sup>196</sup> See *Veterans' Advocacy Law Clinic*, UNIV. OF ARIZ., [http://www.law2.arizona.edu/clinics/Veterans\\_Advocacy\\_Clinic.cfm](http://www.law2.arizona.edu/clinics/Veterans_Advocacy_Clinic.cfm) (last visited Nov. 15, 2015).

<sup>197</sup> See, e.g., *Veterans Advocacy Clinic*, STETSON UNIV., <http://www.stetson.edu/law/veterans/legal-help-for-veterans.php> (last visited Apr. 22, 2015).

<sup>198</sup> See *Information for Law Students*, WIDENER UNIV., <http://delawarelaw.widener.edu/prospective-students/jd-program/jd-academics/clinics/veterans-law-clinic/information-for-law-students/> (last visited Nov. 15, 2015).

<sup>199</sup> See *Veterans Legal Services Clinic*, YALE UNIV., <http://www.law.yale.edu/academics/veteranslegalservicesclinic.htm> (last visited Nov. 17, 2014).

<sup>200</sup> See *Veterans Legal Support Center & Clinic*, JOHN MARSHALL LAW SCH., <http://www.jmls.edu/veterans/> (last visited Nov. 17, 2014).

<sup>201</sup> See CONN. VETERANS LEGAL CTR., <http://ctveteranslegal.org/> (last visited Nov. 17, 2014).

<sup>202</sup> See *The Need*, CONN. VETERANS LEGAL CTR., <http://ctveteranslegal.org/mission/the-need/> (last visited Aug. 13, 2015).

<sup>203</sup> See *Health Rights Clinic*, UNIV. OF MIAMI SCH. OF LAW, <http://www.law.miami.edu/clinics/health-rights> (last visited Nov. 17, 2014).

<sup>204</sup> Jane R. Wettach, *The Law School Clinic as a Partner in a Medical-Legal Partnership*, 75 TENN. L. REV. 305, 309 (2008).

liaison by seeking relationships with graduate students in psychology training clinics.<sup>205</sup> Law students representing veterans through the Puller Clinic partner with graduate psychology students from three other public universities across Virginia: Virginia Commonwealth University, Radford University, and George Mason University.<sup>206</sup> Puller Clinic students have the ability to seek mental health assessments and evaluations from graduate clinical psychology students working under the supervision of licensed professional faculty.<sup>207</sup> In the first six years of the Puller Clinic's operation, the law students partnered with psychology students on more than half of the clinic's cases.<sup>208</sup>

Stetson University College of Law's Veterans Advocacy Clinic has recently taken the collaboration between law schools and health-related graduate students farther by creating a first-of-its-kind alliance with a medical school, the University of South Florida (USF) Morsani College of Medicine.<sup>209</sup> In the initial stages of this partnership, Stetson College of Law's students and USF medical students from several disciplines collaborate together, training one another in each other's respective profession, and assisting veterans in the disability compensation process.<sup>210</sup> Through this unique cooperation, opportunities to analyze and influence policy regarding veterans' health and disability issues are readily accessible. The memorandum of understanding for this collaboration agreement between Stetson University and USF recognizes these varied goals and potential opportunities:

[Stetson and USF] students will participate in an experiential-learning experience designed to help students understand a holistic approach to client/patient short-term and long-term welfare. Within this multi-disciplinary collaboration, our respective students will learn the importance of collaboration with other professionals and

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<sup>205</sup> The author, who began this medical-legal collaboration in 2008 and was at that time the director of the Puller Clinic, and Dr. Leticia Flores, Associate Director of the University of Tennessee's Psychological Clinic, co-founded the collaboration during Flores's tenure as the director of the Center for Psychological Services and Development (CPSD) at Virginia Commonwealth University as part of a health law and policy collaboration. See Pamela DiSalvo Lepley, *Presidents Announce VCU—William and Mary Health Policy and Law Initiative*, WILLIAM & MARY (May 15, 2008), <http://www.wm.edu/news/announcements/archive/2008/presidents-announce-vcu—william-and-mary-health-policy-and-law-initiative.php>.

<sup>206</sup> See *id.*; see also *National Conference on Law Clinics Serving Veterans*, WILLIAM & MARY (Apr. 3, 2014), <http://law.wm.edu/academics/programs/jd/electives/clinics/veterans/documents/natlconfagenda2014.pdf>.

<sup>207</sup> See STACEY-RAE SIMCOX ET AL., PULLER CLINIC PLAYBOOK 4 (2013).

<sup>208</sup> See BARRETT ET AL., *supra* note 175, at 6.

<sup>209</sup> This collaboration is also a first in bringing together a private and a public university to cross traditional barriers in partnership in order to assist veterans.

<sup>210</sup> See O'Brien, *supra* note 177.

provide an opportunity to serve the communities in which our students work and live.<sup>211</sup>

The Stetson-USF agreement also recognizes that this distinctive affiliation is important to each stakeholder participating in the agreement:

There are two primary purposes of this relationship. The first is to serve Florida's veteran population by delivering services in order for them to seek benefits they have earned from the Department of Veterans Affairs (VA). The second is to offer an inter-disciplinary environment in which to train and educate Florida's law students, medical students, and other students studying to serve in a variety of professions by allowing them to work collaboratively to assist Florida's veteran population.<sup>212</sup>

#### *D. The Benefits of a Medical-Legal Partnership for All Stakeholders*

Recognizing that medical-legal partnerships are rare in the field of veteran representation, the benefits of such collaboration should be explored to further examine the efficacy of this type of relationship.

##### 1. The Benefit of the Medical-Legal Partnership for Veterans

Medical-legal partnerships allow a holistic approach to serving a client and a patient. Often, a client enters an attorney's office with more than just the narrow legal issue he first presents to the attorney. While a divorce client seeks legal counsel for the limited purpose of getting a marriage dissolved, that client likely has a host of other concerns including feelings of anger and loss, financial anxieties, and worries about the well-being of children who may be involved in the process.<sup>213</sup> Veterans are no different. Veterans who come to an advocate for help resolving claims for physical issues that sound simple—for instance, back pain—often have other concerns. Physical impairment in the back can lead to an inability to work, potentially causing loss of income. Back pain can also lead to the inability to perform normal activities of daily living such as driving, carrying items, and even doing yard work. For some, these limitations on daily living can lead to depression or anxiety.<sup>214</sup>

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<sup>211</sup> Collaboration Agreement between Stetson Univ. Coll. of Law and Univ. of S. Fla. Health to Serve Florida's Veterans, at 1 (Sept. 25, 2014) (on file with author).

<sup>212</sup> *Id.*

<sup>213</sup> See Louis Parley, *Attorney-Client Communications: Now What Is It Exactly that We Are Supposed to Tell Them?*, 33 FAM. L.Q. 311, 315–16 (1999).

<sup>214</sup> See *Depression and Chronic Pain*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/publications/depression-and-chronic-pain/index.shtml> (last visited Nov. 17, 2014).

Collaborating with a medical professional allows the lawyer to identify the legal issues at play in a client's case, and gives the attorney the tools to address other concerns that will affect the client's participation in pursuing legal claims.<sup>215</sup> With appropriate professional resources, the attorney can be trained to identify potential ancillary concerns of the client and determine who may be able to help the client address those matters.<sup>216</sup> For example, the attorney can refer the veteran to an orthopedic doctor for new assessments or to therapy for the back pain. The attorney may also refer the client to a psychologist to address any depression or anxiety concerns. Through contact with the attorney, the veteran-client receives a 360-degree assessment of the veteran's needs and requirements.

Furthermore, doctors frequently address patients' concerns that fall outside of their immediate physical or mental health. For example, doctors often attempt to reach beyond the medical matter at hand to find referral sources for those matters to be resolved, thus allowing the patient to more completely focus on recovery and healing. Professor Jane Wettach relays the story of the creation of the first medical-legal partnership, which grew from Dr. Barry Zuckerman's frustration that the medical care of his pediatric patients was being thwarted by the conditions of their situations at home.<sup>217</sup> For instance, Dr. Zuckerman's asthmatic patients had to return to "squalid rental housing" and his patients with Attention Deficit Hyperactivity Disorder (ADHD) could not receive special education accommodations at school.<sup>218</sup> Seeing the benefits of having an attorney to remedy the life conditions that were inhibiting healthy growth, Dr. Zuckerman collaborated with an attorney to help his patients, and the Medical-Legal Partnership for Children was born.<sup>219</sup> The benefits of collaborative work on behalf of these patients are apparent in their overall health.<sup>220</sup>

The veteran reaps numerous benefits from collaboration between law school students working on his claims and medical students helping to diagnose and assess the etiology and severity of the veteran's disability. Veterans receive pro bono advocacy from students specifically

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<sup>215</sup> See Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 632 (2006).

<sup>216</sup> See *id.*; see also SIMCOX ET AL., *supra* note 207.

<sup>217</sup> See Wettach, *supra* note 204.

<sup>218</sup> See *id.* at 306–07.

<sup>219</sup> See *id.*; see also MEDICAL-LEGAL PARTNERSHIP FOR CHILDREN, <http://www.mlpcfchildren.org/> (last visited Apr. 22, 2015).

<sup>220</sup> See Lee W. Badger et al., *The Case for Integration of Social Work Psychosocial Services into Rural Primary Care Practice*, 22 HEALTH & SOC. WORK 20 (1997). See generally Maricruz Merino et al., *Global Health Careers: Serving the Navajo Community*, 2 NARRATIVE INQUIRY BIOETHICS 86 (2012).

trained in veterans benefits under the tutelage and supervision of an attorney experienced in veterans law and benefits. These students identify the veteran's legal claims for disability and assess what medical evidence is needed to satisfy the legal requirements for a current disability, an in-service event, and determine how best to prove if there is a nexus between the two. Law students then contact other students in each necessary medical discipline to arrange for the veteran to be seen and assessed. These medical or mental health students have been trained by law students on the standards of proof the VA requires before granting disability claims, the types of evaluations the VA mandates must be done to determine the level of disability, and the VA's standards for the often elusive "nexus" statements. The nexus statement—a medical opinion that links an event from a veteran's military service to a disability the veteran currently experiences—is often difficult for medical professionals to grasp. Because most medical professionals are trained to provide opinions with "a degree of medical certainty," it is often hard to understand that the VA does not require a veteran to meet such a high burden and requires a doctor only to say that the link is "possible" or "more likely than not."<sup>221</sup> This step is imperative to a productive working relationship for students and the veteran-client-patient. Medical and mental health students can then perform all necessary testing and assessment under the direction of their faculty supervisor. Results of this collaboration can prove that the veteran is entitled to disability compensation from the VA. Beyond personal evaluations of patients, medical students can aid law students in understanding complex medical conditions, deciphering medical records and testing, conducting medical research, and reviewing records from a veteran's often extensive military and medical history.

Veterans can also benefit from a more holistic approach to lawyering. Attorneys are often ill-equipped to analyze difficult medical matters, and doctors are not necessarily trained in the complex regulatory and case-driven world of veterans benefits. Each profession can complement the other in its ability to help make the veteran as whole as possible in the process of gaining disability benefits, identifying underlying medical issues, potentially diagnosing illnesses, and identifying different organizations within the community from which a veteran may benefit.<sup>222</sup>

Other more tangible benefits to the veteran come from the collaboration of law and medicine. In the Puller Clinic model, each of the veterans was assessed and evaluated for mental health conditions, traumatic brain injuries, or both, at no cost to the veterans. In most cases, the

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<sup>221</sup> See David L. Faigman, *Evidentiary Incommensurability: A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision-Making*, 75 BROOK. L. REV. 1115, 1134 (2010).

<sup>222</sup> See generally Wettach, *supra* note 204.

Puller Clinic was able to obtain testing for nearly 7.5 times less than it would cost in the private arena.<sup>223</sup> Additionally, in 33% of the cases over a period of six years, the Puller Clinic obtained extensive testing and evaluation that led to corrections of veterans' initial diagnoses.<sup>224</sup> With the help of the thorough testing that was done and the medical nexus opinions obtained from these tests, law students were able to convince the VA to change a previous rating decision—which usually resulted in a denial of benefits—in 84% of the cases.<sup>225</sup> Overall, the clients received an average increase of 109% in their original benefits, resulting in a total of more than \$12 million dollars in expected future benefits to be paid over the veterans' lifetimes.<sup>226</sup> Approximately \$690,000 was paid to those veterans who had received decisions in back payments.<sup>227</sup> In addition to positive end results, the intervention of students often saved the veterans time waiting for a hearing or review by the BVA. Seventy-eight percent of the time a law student was involved post-appeal, the VA granted the claim at the VARO level, before it reached the BVA.<sup>228</sup>

Despite the benefits of partnering with mental health professionals, many conditions veterans suffer from are often related to service but are nevertheless difficult to connect. Respiratory illnesses, orthopedic issues, heart conditions, cancers, and many other disabilities can often render a veteran unemployable, but the connection to military service is not always evident.<sup>229</sup> These types of disabilities require specialized medical opinions to connect the conditions to service. Stetson University College of Law's relationship with USF's Morsani College of Medicine allows law students to consult with professionals and medical students in many different specialty areas to train, teach, and collaborate on a veteran's health and medical conditions.<sup>230</sup> The results of this relationship will be important to evaluate the success of these partnerships in a wider

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<sup>223</sup> See SIMCOX ET AL., *supra* note 207, at 4.

<sup>224</sup> All statistics reported regarding client data and results were collected from September 2008 through June 2014. These numbers are not reported using a pure statistical method, but are offered as results of the sample of veterans served by this collaborative model from 2008–2014 where decisions were by the VA based on evidentiary submissions made by the law students.

<sup>225</sup> See Stacey-Rae Simcox, Claims Statistics, at 6 (2014) (on file with author). In some of these cases, claims were only partially granted or assigned in appropriate levels of disability.

<sup>226</sup> See Memorandum, Lewis B. Puller, Jr. Veterans Benefits Clinic, About the Clinic Factsheet (March 2013) (on file with author).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> See Dan Fastenberg, *4 Challenges Facing Disabled Veterans and How to Overcome Them*, AOL JOBS (Oct. 17, 2012), <http://jobs.aol.com/articles/2012/10/17/4-challenges-facing-disabled-veterans-and-how-to-overcome-them>.

<sup>230</sup> See O'Brien, *supra* note 177.



arena of medical conditions. As the clinic collects hard data, future law clinics will be able to determine the best ways to partner with medical schools and the most valuable methods of collaboration.<sup>231</sup>

## 2. The Benefit of the Medical-Legal Partnership for Students

While the medical-legal partnership obviously benefits the veteran-client-patient, this type of interaction is equally beneficial for the students. It has been said that one of the most important results of a medical-legal partnership is that it “can give students a chance to discover ‘that the other group did not come congenitally equipped with either horns or pointed tails.’”<sup>232</sup> With lawsuit threats requiring exorbitant medical malpractice insurance policies, it is no wonder that doctors (and medical students) are hesitant to associate with attorneys who they may see as profiting from the physicians’ own misery of being sued.<sup>233</sup> Law students, in turn, may be concerned about an association with professionals who appear to hedge answers that the advocate wants answered absolutely (or at least to a “reasonable degree of medical certainty”) and charge hefty expert fees while doing so.<sup>234</sup> By putting law and medical students together in a collaborative environment, each has the opportunity to be exposed to the “true” motivations, considerations, and goals of the other—an admirable and achievable goal.

This interdisciplinary collaboration has many other benefits as well. For instance, both sets of students are exposed to the pro bono assistance of a marginalized, and often economically deprived, client-patient—an experience many commentators exhort as necessary to gaining a broader and more empathetic perspective on their respective relationships to the veteran and with each other.<sup>235</sup> United States Army Captain Kurtis Maciorowski, a Judge Advocate officer and former student said of his experience, “I spent two years during law school trying to get one vet-

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<sup>231</sup> Data of this type for a veterans clinic can take several years to collate. The extremely delayed pace of decisions on a veteran’s claim from the VA makes statistics and data concerning the effect of and success of these collaborations slow in building.

<sup>232</sup> Elizabeth Tobin Tyler, *Allies Not Adversaries: Teaching Collaboration to the Next Generation of Doctors and Lawyers to Address Social Inequality*, 11 J. HEALTH CARE L. & POL’Y 249, 249 (2008) (quoting Benjamin J. Naitove, *Medicolegal Education and the Crisis in Interprofessional Relations*, 8 AM. J.L. & MED. 293, 304 (1982)).

<sup>233</sup> See, e.g., Graeme Browning, *Doctors and Lawyers Face Off*, 72 A.B.A. J. 38 (1986); Mark Curriden, *Formidable Friends*, 88 A.B.A. J. 41 (2002); John Gibeau, *The Med-Mal Divide*, 91 A.B.A. J. 39 (2005); *Straight Talk About Doctors*, 41 TRIAL 11 (2005).

<sup>234</sup> See, e.g., Andrew Jay McClurg, *Fight Club: Doctors vs. Lawyers—A Peace Plan Grounded in Self-Interest*, 83 TEMP. L. REV. 309 (2011); Jason Knutson & Guy DuBeau, *Walk in “Our” Shoes: Why Docs Avoid Lawyers*, 85 WIS. LAW. 6 (2012); *Defense Experts’ Distortions: Interview with Dorothy Clay Sims*, 48 TRIAL 22 (2012).

<sup>235</sup> See Brazeau et al., *supra* note 182; Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1, 3 (2008).

eran in from the cold. [A veterans clinic] gives students the chance to do their small part to keep the promise of a nation. I cannot imagine time better spent.”<sup>236</sup>

The holistic approach to a client allows the legal representative and the medical treatment provider to see the client-patient in a 360-degree image, determining how each can best help the client-patient and help the other professionals involved to bring their best options to the table. It can also help to determine how and what resources may be missing from the equation and leverage other professionals to bring those resources to bear.<sup>237</sup>

Dr. Leticia Flores, former director of the Center for Psychological Services and Development (CPSD) and collaboration partner, commented:

The challenges as well as the successes we confronted [in this collaboration] and the in-depth discussions that resulted ended up providing some of the richest training and educational experiences for students and faculty alike. Law students developed a more sophisticated understanding of mental health issues, and thus developed greater empathy and sensitivity for their clients. Psychology students gained a better understanding of how the legal system works in the VA benefits system, and greater respect for the role of the lawyer in fighting for a client’s case. Students from both disciplines gained a greater level of understanding regarding what veterans . . . experienced in combat and afterwards. Many students described this collaboration as affecting them on a personal level, deeply and positively. Several psychology students went on to obtain greater training in VA medical centers, and even began working as clinical psychologists in VAs. Their early experiences with veterans who were sometimes “on the wrong side of the hospital door” surely informed students’ decisions to pursue careers assisting veterans.<sup>238</sup>

The importance of the medical-legal relationship is evident in the following example. A young veteran suffering from traumatic brain injury and

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<sup>236</sup> SIMCOX ET AL., *supra* note 207, at 16.

<sup>237</sup> See Wettach, *supra* note 204, at 309; see also Amy Killelea, *Collaborative Lawyering Meets Collaborative Doctoring: How a Multidisciplinary Partnership for HIV/AIDS Services Can Improve Outcomes for the Marginalized Sick*, 16 GEO. J. ON POVERTY L. & POL’Y 413 (2009).

<sup>238</sup> E-mail from Dr. Leticia Flores, Assoc. Dir., Univ. of Tenn. Psychological Clinic, to author (Nov. 16, 2014, 17:45 EST) (on file with author).

post-traumatic stress disorder contacts a veterans law clinic for help filing his claims for these conditions because he is confused by the process.<sup>239</sup> The veteran has received conflicting diagnoses from the military and the VA medical center. One has diagnosed him with post-traumatic stress disorder. The other has diagnosed him with traumatic brain injury and a generalized anxiety disorder. The veteran is experiencing memory issues, significant signs of anxiety at leaving the house and being surrounded by crowds, and is abnormally concerned with the safety of his family, often locking, checking, and relocking the doors of his home for several hours before falling into bed for another night of restless sleep and nightmares. In the course of working with this client, the law clinic contacts its collaborative partner, a psychology assessment clinic, to help get an accurate diagnosis and picture of this veteran's severity. While doing the assessment of the veteran, the psychology clinic notes that the veteran's wife and two children are feeling estranged, anxious, and depressed about the behavioral changes in their husband and father. The psychology students suggest that the veteran be referred to another collaborative partner, a family counseling center located at a nearby graduate school, to help deal with the concerns of the veterans support structure and to ensure that this support remains in place and is not further jeopardized.

In the meantime, the law students working on the veterans claim receive a call from the veteran asking when they believe the VA will make a decision. The veteran is attending school on the Post-9/11 GI Bill and the law students learn that the veteran's memory issues have caused him to forget to sign financial documents for the school to complete his enrollment for the semester and to receive the "basic housing allowance" that the GI Bill provides. The veteran and his family rely on this steady influx of money to buy groceries and gas. The law students research the provisions of the Americans with Disabilities Act (ADA) and contact the disability coordinator at the veteran's school to discuss with him the possibility of intervening in the veteran's case. The disability coordinator agrees to assist the veteran by working with financial aid to waive the school-imposed deadline requirements due to his disability. The law students also work with the disability coordinator to put mechanisms into place to allow the school to remind the veteran to turn his forms in on time. The law students then work with the psychology students to adjust the recommendations of the veteran's almost-completed evaluation to provide the disability coordinator with potential classroom accommodations for the veteran. Finally, the law students reach out to social work students at a nearby university who contact a number of local

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<sup>239</sup> This hypothetical client is an amalgamation of a number of actual veteran clients served in the Puller Clinic and Stetson University's Veterans Advocacy Clinic.

veterans' organizations to help the family find emergency short-term loans so that the family can eat until the money from the VA comes in.<sup>240</sup>

In cases like the one above, law students specifically gain the invaluable experience of learning and working with members of other professions, which is a skill that most attorneys will need during their careers.<sup>241</sup> Medical students receive the same benefit, in that they understand the effects that a diagnosis or, more specifically, a poorly worded medical record, has on a patient's legal matters. One attorney who worked in the Puller Clinic as a student wrote of his experience:

In one case involving PTSD . . . we succeeded because of the collaboration between the legal and psycholog[y] professionals. The [psychology students] helped the [law students] precisely describe the nature and etiology of our client's injury . . . . [The law students] helped the [psychology students] understand how the VA would interpret the terms of a diagnosis in light of the regulatory rating framework.<sup>242</sup>

Both sets of students will learn to differentiate between a "legal standard" and a "medical standard."<sup>243</sup> The students will learn the valuable skill of "translat[ing] the medical information to the legal standard. The student must see the medical information as evidence used to prove that the legal criteria are satisfied and take on the responsibility of developing that evidence."<sup>244</sup> Barbara Wood, a student participating in Stetson University's Veterans Advocacy Clinic, sees the value of learning the craft of law in this collaborative environment:

[This medical-legal relationship] provides clinic students with a unique opportunity to dialogue with [medical students]. This dialogue helps us better understand how to communicate more effectively with medical professionals to gather the evidence . . . . This experience is valuable not only for student[s] who are interested in practicing [veterans law]; in fact, the ability to communicate legal concepts to non-lawyers is a valuable skill for any attorney.<sup>245</sup>

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<sup>240</sup> See also Va. Commonwealth Univ., *Moral Injury Among the Issues Facing Combat Veterans*, MEDICAL XPRESS (Mar. 8, 2013), <http://medicalxpress.com/news/2013-03-moral-injury-issues-combat-veterans.html>.

<sup>241</sup> See Wettach, *supra* note 204, at 311.

<sup>242</sup> E-mail from Jeff Bozman, Assoc., Covington & Burling LLP, to author (Oct. 25, 2014, 15:26 EST) (on file with author).

<sup>243</sup> Wettach, *supra* note 204, at 311.

<sup>244</sup> *Id.*

<sup>245</sup> E-mail from Barbara Wood, Candidate for J.D., 2016, Stetson Univ. Coll. of Law, to author (Oct. 13, 2014, 09:38 EST) (on file with author).

In a similar manner, the medical student learns to take the legal standard and determine how the medical evaluations, diagnoses, and opinions can address or incorporate the necessary legal standards. Dr. Isis Marrero, Assistant Professor and the Director of the Adult Psychiatry Training Program at the Morsani College of Medicine, sees great value in training the students in her department alongside law students.

A collaboration between Stetson University College of Law and USF Department of Psychiatry and Behavioral Neurosciences is an excellent opportunity to introduce future psychiatrists and lawyers to the interface of mental health and the law. From their first year of training, USF psychiatry residents work with veterans in a variety of clinical settings under a doctor-patient relationship where the main focus is the patient's well-being. The experience of conducting disability evaluations where trainees are assessing a veteran's mental health status as it relates to their military work allows them to function as forensic examiners. In this capacity their main task is to provide an objective professional opinion to the [veteran's] legal counsel which may or [may] not be in the best interest[s] of the veteran. This new skill[ ] set prepares residents to better advocate for their veteran patients when interacting with them in a clinical environment.<sup>246</sup>

Dr. Marrero's observations are supported by the Association of American Medical Colleges (AAMC), which has recognized (as early as 1965)<sup>247</sup> that medical professionals learn most effectively in an interdisciplinary environment.<sup>248</sup> Although this report focuses on interdisciplinary learning and work within the scope of health care practice, the most important competencies for medical professionals are achieved by working with legal professionals. The competencies the AAMC finds necessary, such as understanding the roles of different professionals to optimize patient care and learning to communicate effectively without professional jargon, can be practiced in an interdisciplinary teaching environment.<sup>249</sup>

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<sup>246</sup> E-mail from Dr. Isis Marrero, Assistant Professor, Univ. of South Fla. Coll. of Med. Psychiatry and Behavioral Neurosciences, to author (October 24, 2014, 09:23 EST) (on file with author).

<sup>247</sup> See INTERPROFESSIONAL EDUC. COLLABORATIVE, CORE COMPETENCIES FOR INTERPROFESSIONAL COLLABORATIVE PRACTICE 6 (2011), [https://www.aamc.org/download/186750/data/core\\_competencies.pdf](https://www.aamc.org/download/186750/data/core_competencies.pdf).

<sup>248</sup> See *id.*

<sup>249</sup> See *id.* at 19, 23.

### 3. The Benefit of the Medical-Legal Partnership for the VA

The benefits to the VA alone should encourage this type of alliance and joint work. Bringing the private sector to help with a public sector problem can be helpful to the federal government in a number of ways and is encouraged by many federal agencies.<sup>250</sup> The VA also recognizes the importance of bringing private groups to the table to help the VA deliver its services to veterans:

We must develop a partnership culture that entails trust, transparency, mutual benefit, responsibility, productivity, and accountability. Increased public-private partnership opportunities empower staff with effective tools and resources for collaborations, and allow for building open innovation platforms. *Strategies*: VA will leverage responsible and productive partnership opportunities that can supplement VA services and help fill urgent or emerging gaps in services. We will pursue opportunities for partnering with organizations that can best provide what we cannot or should not.<sup>251</sup>

The type of advocacy promoted in this Article can help the VA fill gaps in its services by providing what the VA cannot: thorough investigation of the claims submitted by veterans. This is evidenced by the rate of success in specific claims worked on by law students. For instance, the national average for establishing service connection of post-traumatic stress disorder (excluding sexual trauma) is 73%.<sup>252</sup> With the help of medical evidence provided through collaboration, law students were able to prove service connection in 92% of cases of PTSD overall and 100% of the combat cases claiming PTSD.<sup>253</sup> Often the psychological evaluation reopens what was a final decision by the VA, and the law student's research marshals the facts to support the veteran's contentions. For example, students search Facebook for "battle buddies" who may have a

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<sup>250</sup> See, e.g., *Public-Private Partnerships*, U.S. DEP'T OF TRANSP., <http://www.fhwa.dot.gov/ipd/p3/default.aspx> (last visited Nov. 17, 2014) (recognizing that "[e]arly involvement of the private sector can bring creativity, efficiency, and capital to address complex transportation problems facing State and local governments"). The VA itself has used public-private partnerships in a number of ways to its benefit, including a partnership in Indiana at a VA Medical Center that saved the VA \$16.7 million. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-99-23, *PUBLIC PRIVATE PARTNERSHIPS: KEY ELEMENTS OF FEDERAL BUILDING AND FACILITY PARTNERSHIPS* (1999), <http://www.gao.gov/assets/230/226973.pdf>.

<sup>251</sup> DEP'T OF VETERANS AFFAIRS, *FY 2014–2020 STRATEGIC PLAN 28* (2014), <http://www.va.gov/op3/docs/StrategicPlanning/VA2014-2020strategicPlan.PDF>.

<sup>252</sup> See AM. CIVIL LIBERTIES UNION & SERV. WOMEN'S ACTION NETWORK, *BATTLE FOR BENEFITS: VA DISCRIMINATION AGAINST SURVIVORS OF MILITARY SEXUAL TRAUMA* 5 (2013), <https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf>.

<sup>253</sup> See Simcox, *supra* note 225.

recollection of a moment in combat, in theater, or in garrison. The students scour electronic bulletin boards on the internet that veterans frequent to find witnesses of, for example, a veteran's perimeter duty outside of U-Tapao Royal Thai Navy Airfield in Thailand, to prove that the veteran may have been exposed to herbicides sprayed by the United States military.<sup>254</sup> In other instances, students track down elusive references to anyone with connections to a certain chaplain who served in a specific battalion in the 1980s in order to verify a contemporaneous report of sexual assault that was never documented in medical or military records. Students also call authors of after-action reports to get more details on a unit's operations in specific actions, and often interview spouses and parents to gather the particulars of the severity of a condition.<sup>255</sup> While all of these things are time-consuming and in a law firm would probably be parsed out to a paralegal, they are invaluable training moments for law students.

In another example, the national average for service connection of post-traumatic stress disorder related to sexual assault (also referred to as "military sexual trauma" or MST) is 57%.<sup>256</sup> The Puller Clinic students, as of June 2014, had achieved a rate of 100% service connection for this condition in the cases that had received a decision from the VA.<sup>257</sup> Most of these cases were male-on-male assaults. These decisions granting service connection were significant wins for the veterans. The VA reversed previous denials to make these grants. In one veteran's case, the medical evidence from a psychological evaluation provided by graduate psychology students was key to reopening the veteran's case and countering poor C&P examinations.<sup>258</sup> A licensed clinical psychologist who was part of the psychology clinic performed a records review of all of the competing mental health evaluations to provide an objective overview and comparison of each opinion. That analysis was the deciding factor in this veteran's case. After the medical evidence obtained was used to reopen the claim, the law students scrutinized the veteran's files to find evidence that had been buried in the documents previously reviewed by the VA to meet the circumstantial requirements of proving PTSD related to a military sexual trauma.<sup>259</sup> Proof of requests to leave the unit, misbehavior and counseling statements that had never been reviewed by the

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<sup>254</sup> *Thailand Military Bases and Agent Orange Exposure*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/locations/thailand.asp> (last visited Nov. 15, 2015).

<sup>255</sup> *See id.*

<sup>256</sup> *See* AM. CIVIL LIBERTIES UNION & SERV. WOMEN'S ACTION NETWORK, *supra* note 252, at 5.

<sup>257</sup> *See* Simcox, *supra* note 225.

<sup>258</sup> *See id.*

<sup>259</sup> *See* 38 C.F.R. § 3.304(f)(5) (2013).

VA (because they were buried in the personnel file), mysterious physical illnesses, and declining work performance reports lingering in the records were brought to the attention of the VA examiner in a brief that explained the evidence, medical opinions, and their legal relevance. These submissions are much more efficient for the examiner to review than the piles of paperwork that are often dropped on the examiner's desk.<sup>260</sup>

Making the right decisions at the lowest levels of the agency can only help the VA's dismal record of claims processing timelines. The Government Accountability Office (GAO) noted that the VA has been falling behind on appeals; more appeals are filed every year than are being adjudicated.<sup>261</sup> "As a result, the number of Notice of Disagreements awaiting a decision grew 76 percent from fiscal years 2009 to 2012 and, during that period, the time it took VA to process a Statement of the Case increased 57 percent—from 293 days to 460 days on average."<sup>262</sup> These numbers, reflecting a backlog of decisions pending appeal, could drastically diminish by involving law and medical students at the beginning of the process, before mistakes are made.

The VA, which has documented its desire to work with partners toward better outcomes for veterans, will benefit from these medical-legal partnerships. The partnerships ease the burden on the VA employees and bring together a number of professionals to ensure that veterans have the appropriate benefits promptly.

#### CONCLUSION

The problems within the Department of Veterans Affairs are widely known and often criticized. Although a number of proposals attempt to fix the VA from the inside out, the reality is that the VA needs urgent help with delivery of disability compensation benefits in the system's current condition. The VA has long displayed concern and animosity toward attorneys helping veterans at the earliest stages of the benefits process, but there is no doubt that the intervention of legal professionals can benefit veterans trapped in the administrative morass of the VA. The addition of medical professionals who are trained in the VA's regulatory requirements for benefits also fills the need for adequate and competent medical evidence.

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<sup>260</sup> See Byron Pitts, *Why the VA Frustrates Veterans*, CBS News (Jan. 1, 2010), <http://www.cbsnews.com/news/why-the-va-frustrates-veterans/>.

<sup>261</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-453T, VETERANS DISABILITY BENEFITS: CHALLENGES TO TIMELY PROCESSING STILL PERSIST 7–8 (2013) During the fiscal year 2012, there were 121,786 appeals (Notices of Disagreement) filed to the initial rating decisions of the VA; the VA only processed 76,685 mandatory responses to these appeals in the same time frame. *Id.*

<sup>262</sup> *Id.*



Filling these needs with students' aid makes sense. Students benefit from the collaboration that this type of interdisciplinary approach provides, and the veterans are bettered because they receive diagnoses, assistance with their claims, and potential referrals to other community resources in a streamlined manner. These benefits also flow to the VA, resulting in a more efficient and accurate process and better results.

Our nation's military veterans deserve no less than our full attention to these issues. Veterans volunteer to serve, fight, and, if necessary, die for our country. It is only befitting that we should honor that service. President Harry S. Truman reminded Americans of our obligation to our veterans near the end of World War II:

Our debt to the heroic men and valiant women in the service of our country can never be repaid. They have earned our undying gratitude. America will never forget their sacrifices. Because of these sacrifices, the dawn of justice and freedom throughout the world slowly casts its gleam across the horizon.<sup>263</sup>

May we continue to strive to find ways to bind up the wounds of our nation's veterans using the ingenuity, compassion, and hard work that Americans exemplify.

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<sup>263</sup> President Harry S. Truman, Address Before a Joint Session of the Congress (Apr. 16, 1945).

