Federal Bar Association
Veterans & Military Law Section

Veterans and Military Law Section

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May 17, 2017

Hon. John Hardy Isaakson
Chair
Senate Committee on Veterans Affairs

Hon. Jon Tester
Ranking Member
Senate Committee on Veterans Affairs

Dear Senators Isaakson and Blumenthal:

The Veterans and Military Law Section (V&MLS) of the Federal Bar Association is pleased to submit comments on the proposed legislation on today's Agenda. The opinions herein asserted are those of the Veterans and Military Law Section and not necessarily those of the entire Federal Bar Association. We have not commented on each piece of legislation, restricting our comments to S. 1024, S. 324 and S. 591

As a general matter, review of this proposed legislation clearly demonstrates that the Secretary desires a more traditional adjudicatory process. However, if this is the legislative intent, then there must be a concomitant acceptance of the traditional role of paid counsel within that system. The claims system within the Department of Veterans Affairs is the only system within the Executive branch of government in which the right to paid representation is precluded until the initial record is complete. If the claims system iis to become more adversarial, it should also provide to the veterans/claimant a right to qualified representation from the beginning of the process.

The Committee should also, in the opinion of V&MLS be aware of other general issues that significantly affect the quality and the efficiency of the claim and appeal process, i.e. the environment within which this legislation will operate.

1. Jurisdiction of the Court of Appeals for Veterans Claims (CAVC) and the Federal Circuit: The CAVC is the only Article I court without the judicial authority to provide the litigants before it with a final resolution in any case that comes before it. It is a Court which may decide but never make disposition. The only relief it may grant an appellant is to either reverse/remand or affirm, and even with grounds in the record for reversal, remand is the only possible ultimate resolution at the Court. While historically this may have been politically justifiable at the inception of the Court, that justification no longer exists. Granting the CAVC the judicial authority to issue dispositive rulings should terminate the potential for repeated remands of appeals on the same issues would have an ameliorative effect on backlogs. Similarly, the restriction of the Federal Circuit's jurisdiction to regulatory and legislative interpretation is an artificial limitation on the

traditional jurisdiction of a U.S. Circuit Court of Appeals and limits the recourse of the veteran population to a full and fair hearing of the issues raised.

2. Qualifications of Board hearing examiners: In 2016, the Veterans Law Judges at the Board of Veterans Appeals were reversed or remanded at the highest rate in twelve years. This troubling trend demands, at a minimum, the identification and evaluation of those VLJs whose decisions are consistently overturned by the Court. Another approach that would address the existing culture at the Board is to require that all hearing examiners at the Board meet Title V Administrative Law Judge standards of qualification. Attached to this statement is a graph of the remand rate for cases appealed from the Board to the Court for the sixteen years from 2000 to 2016. Of those sixteen years, ten of them show a rate of 80% or higher. While transition to Title V ALJs may require considerable initial expense, the reduction in necessary remands and improvement in quality and consistency of decisions will reduce the number of remands and improve the quality and consistency of decisions, making the system feel less like a "hamster wheel" for veterans and their survivors or dependents.

3. Training Issues: There is no transparency regarding the sources or resources utilized by the Agency to train its rating personnel. Nor is there any discussion of the minimal qualifications for employment as a rater or as a trainee. It is the position of V&MLS that at a minimum applicants for these positions should be required to have an Associate Arts degree from a community college with required courses in biology, physiology and preferred health care related subjects. Most preferred would be a four-year college degree with courses identifiably relevant to the nature of subject matter of claims and health care within the VA environment. Congress has not recently required VA to reveal the curricula or the personnel constituting its training programs for either VARO raters (whose bad decisions are kicked up to the Board rather than resolved at the AOJ level) or Board personnel responsible for the reversal/remand rate at the CAVC. It is time to include these issues in any hearings on appeals reform.

   The increasing reversal / remand rate at the CAVC calls into question the training of Board personnel. The 2016 Annual Report issued by the CAVC shows that of the 3717 dispositions of appeals made by the CAVC in 2016, (excluding 495 dismissals) only 457 were affirmances of Board decisions. 88% of the dispositions of appeals were reversed or remanded on at least one ground. There were 2835 EAJA petitions granted (3 other denied and 15 dismissed) by the Court during this time; a rate of 76% of the remands & reversals, indicating that the Agency was substantially in error at least 67% of the time. Education of Board personnel could be a significant contributing factor to the increasing reversal/remand rates. Anecdotal evidence finds that there are two full time staff personnel (neither of them trainers) for the training office at the Board. Peer mentoring is

the preferred mechanism for training. It is time to consider hearings on this issue; particularly in view of the abysmal performance of the last year.

4. Leadership Issues: Disposition statistics like these raise two important questions: First, is the Board resistant to the developing CAVC case law by which its decision-making processes are governed? Second, does the Board have adequate administrative leadership? Answering the first question may obviate the first, as a qualified Board Chairman with author8ity to decertify underperforming hearing examiners would help improve the quality of decision-making processes at the Board. Too many appeals are at the Court for the second, third and fourth time; the result of the failure of the hearing examiners to follow clear instructions given by the Court. It is time to insist that a qualified Board Chairman be appointed and confirmed and give the authority to decline to recertify those hearing examiners whose decisions result in excessive remands and reversals at the CAVC.

Discussion of S. 1024

Definitions: The initial proposals to redefine the process by modernizing the definitions under Sect. 101 of Title 38 seek to remove any barriers perceived to exist to the adjudication of claims through reassignment from the Regional Office with geographical jurisdiction over the veteran's claim to "specialty offices" often far removed from the veteran. While there may be some value in doing that in the instances regarding subject matter, codification provides too much incentive to remove the matter from any reach by a veteran or representatives of the veteran requesting a review within the Agency of Original Jurisdiction (AOJ).

The Agency seeks to remove the term "Material evidence" throughout this bill, replacing it with "Relevant evidence." Black's Law Dictionary defines "**Material evidence**" as "that evidence which tends to influence the trier of fact because of its logical connection with the issue. Evidence which has an effective influence or bearing on the question on issue." "**Relevant evidence**" is defined as "Evidence tending to prove or disprove an alleged fact. Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This raises the evidentiary bar for "supplemental claims." During the several round-table discussions held on this effort in 2016, the consensus was to restrict the terminology for "supplemental" claims to "new evidence;" the introduction of the term "relevant" came afterward, ignoring the consensus. If one modifier to "new" must be retained, there is at least a body of law in place defining "Material evidence;" changing it to "Relevant," notwithstanding the higher evidentiary bar, invites years of litigation.

What is clear is that the bar for re-opening a previously denied or insufficiently adjudicated claim with these changes in definition, would be much higher, and if filed within a year of the

original decision, no notification would be required. These provisions contribute to the Agency's increasing view of the claims system as an adversarial environment.

As matters stand, the claimant veteran, widow or dependent may only retain counsel prior to the promulgation of a rating decision on a pro bono basis. The basis for this limitation was the premise that the benefits claims system is non-adversarial. The national VSOs were deemed more than capable of assisting the veteran in pursuit of compensation. Since the passage of the VJRA there has been a gradual shift in the nature of the claims system from non-adversarial to a system increasingly governed by an escalating body of decisional law which is entirely inconsistent with the concept of non-adversarial. The proposals in this Bill advance the adversarial elements further than ever before. It is, in the opinion of the V&MLS time to revisit the denial of paid representation at the initiation of the claim, as this is likely to result, in those claims filed by counsel, in better, cleaner claims more susceptible to efficient adjudication. This legislation does allow representation at the point of Notice of the AOJ decision. V&MLS advises that the bar to paid representation needs to be eliminated.

Duty to Assist: "(c) Section 5103A(f)" underscores the raising of the evidentiary bar to re-adjudication of disallowed claims to a standard that requires that new evidence "prove" the claim rather than be simply "material."

Any doubt as to the shift to an adversarial environment is removed with the proposed addition of Sect. 5103B removing the obligation of the duty to assist from any stage above the initial rating decision. S. 1024 does impose some duty on the Board to be cognizant of violations of the duty to assist, but there is far too much opportunity for the total disregard of obvious errors in the initial rating process. It would, under the provisions of (a), (b) and (c) of this amendment exist only within the original rating process and after the issuance of a "notice" of the rating decision apply neither to any "higher review within the AOJ" nor to any obligation on the part of the Board. Further, the correction of a duty to assist error during a "higher level review" within the AOJ [(1)] is dependent upon the "identification" of said error by the reviewer. There is, regardless of the language requiring review by the Board insufficient duty imposed upon the reviewer to search for or identify a violation of the duty to assist. Remand for correction is required if the claim cannot be granted in full.

Identification of a duty to assist error at the Board [(2)], if the failure occurred prior to the "notice" of the original rating decision, triggers remand for correction if the claim cannot be granted in full. This provision also includes a provision that allows the Board to order an advisory medical opinion as part of the correction. Flaws in the original rating decision are in most instances the result of reliance on an inadequate medical exam, followed by failure to obtain critical records and failure to appropriately consider lay evidence. Current litigation and Agency investigations indicate that this aspect of the claims system is far more troubled than was previously considered with the revelation that an estimated 25,000 veterans may have had improperly conducted exams for TBIs by unqualified examiners. V&MLS believes it essential to provide opportunity for paid representation and to provide for submission of additional

evidence simultaneously or immediately subsequent to the Notice of Disagreement (NOD). These steps would enhance the cost effectiveness of the system, as well as the perception of fairness. Further, eliminating the major part of Sect. 5109 regarding IMEs is contrary to full and fair evaluation of a wide variety of medical issues.

Ancillary to this concern is that of the lack of any discovery in either the initial AOJ rating process or in the review process. Credentials of examining personnel and often the identities of examiners and rating personnel are barred from discovery procedures available in similar proceedings in other agencies that are in those jurisdictions considered elementary administrative due process. Transparency in this aspect of the system would conserve agency resources in the long run and diminish the lengthy appeals and litigation surrounding the issue of adequacy of examinations.

The Duty to Assist is a cornerstone concept of Veterans Law. It is the creature of a paternalistic, veterans-first adjudicatory philosophy inherent in the claims system. It is the concept upon which the entire structure of that system rests. It is also the rationale by which paid representation has been limited to the appellate stages of the claims process. The imposition of the Duty to Assist at every stage of the claims process from the initial processing of the claim through the hearing and the consideration before the Board is also the cornerstone of nearly every decision by the CAVC. The limitation of the Duty to Assist as proposed by this legislation poses a significant impediment to administrative due process on the part of the impaired or pro se veteran, survivors or dependents before the Agency at any stage of the proceedings. V&MLS strongly opposes any limitation of the duty to assist requirement anywhere in either initial claim or the review of denial of the claim.

Sect. 5104A: V&MLS has no issue with this provision. Any favorable finding should be, as a matter of the law of the case binding on further adjudicatory action.

Sect. 5104B: The provision, under (b) of this Section requires that a request for review by the AOJ be specific as to which office of the AOJ is requested. This requires more precise language. It appears to allow for review by a different set of eyes in another office, i.e. more independent review. ***If*** this is the case, V&MLS is not opposed, and continues to urge that the duty to assist be continued, especially for the impaired or pro se claimant.

(a) V&MLS does not disagree with the concept of permitting a request for higher level review within the AOJ. This appears to retain the process of the Decision Review Officer. When this process functions as it was designed to function, it was/is beneficial to efficiency of time and resources and eliminates the need for appeals to the Board by resolving the issues at the AOJ. V&MLS urges the retention of the DRO review process within the review available in the same office promulgating the original rating decision.

(b) V&MLS approves of retaining the one year time allocation for filing a Notice of Disagreement (NOD). However, V&MLS has significant reservations about prescribing overly

restrictive provisions governing the form such disagreement must take. The forms "prescribed by the Secretary" are, in their current versions, very narrowly worded and spaced. They are clearly designed to limit the scope of the disagreement and are antithetical to allowing the veteran/claimant any freedom of expression. They are also contrary to existing case law regarding the definition of a NOD. V&MLS urges the Committee to provide guidelines for content of the NOD but to phrase it in the permissive "should" rather than exclusionary mandatory language and to require that the "form prescribed by the Secretary" include sufficient space for addressing the claimant's concerns.

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(c) V&MLS urges language added to this provision that requires that copies of Notices under this provision be supplied to both the claimant and any representative, either Veterans Service Organization (VSO) or counsel. V&MLS recommends that all communication relating notices of decisions or decisions be sent by certified mail. V&MLS further urges the Committee to provide for pre-decisional consultation with any representative of record for the purpose of resolving evidentiary and legal issues that may have arisen in the course of investigating and developing the claim. The purpose for this is to avoid unnecessary higher level review and permitting early resolution of issues presented. V&MLS notes that "previewing" decisional action is common procedure between rating personnel and VSOs who are often co-located in ROs. This should be standard procedure for all representatives, as it is conducive to filling in evidentiary gaps, clarification and administrative best practices.

(d) Evidentiary Record: The added Section 5104B also seeks to close the evidentiary record at the issuance of the initial rating decision. While there are provisions in later elements of this Bill for the submission of further evidence at the Board level, to the average pro se veteran, this shuts the door to submission of further evidence. Under this modification of existing law, either a VSO or an attorney retained subsequent to the NOD would be ethically bound to seek by motion to modify the notice of disagreement to provide for utilizing the "hearing option" track at the Board in order to fill in the evidentiary gaps left by either inadequate representation or by the omissions of the pro se veteran.

The unrepresented veteran who fails to ask for the "hearing option" docket in the NOD and fails to comprehend the consequences of failing to do so loses any opportunity to submit additional evidence in this forum short of filing a supplemental claim, in which the evidentiary bar is much higher. Entry into the appellate stage with either paid or lay representation, under this provision, would require a motion to amend the notice of disagreement. There is no provision for requesting a "hearing option" docket or higher AOJ review, which allows an opportunity to fill in the evidentiary gaps or argue evidence that is relevant but otherwise not of record.

V&MLS categorically disagrees with this provision as it constitutes as a denial of procedural due process and is utterly contrary to the concept of a "veteran-centric VA," unless provision is made for notice of this limitation prominently articulated within the body of the rating decision. Such notice should also advise the claimant that selection of the "hearing option" docket in an appeal to the Board will permit the submission of further evidence.

The fact remains that the combined effect of limitation of submission of further evidence, limitation of the duty to assist and raising the evidentiary bar for supplemental claims / readjudication leaves very little that is non-adversarial within the system. While amending Sect. 5904 to allow the veteran paid representation subsequent to the notice of decision by the AOJ is somewhat ameliorative it fails to permit the veteran access to paid representation in order to better ensure that the AOJ adequately develops the record from the beginning. It should be noted that doing so accords the veteran the Sixth Amendment right to representation by counsel enjoyed by every claimant before every other Administrative agency.

(e) V&MLS agrees that any review by any entity within the Agency at any level should be DE NOVO

Sect. 5104(b): The enumeration of required contents of any notice of denial of benefits is certainly useful, but the language of this amendment appears to codify that which has previously appeared as "Statement of the Case." Limitations should be included which preclude the utilization of endless "explanations" which yield no aids to comprehension and serve only to obfuscate the obvious. The inclusion of the requirement that the content state simply and precisely the basis for the decision in terms readily understood by an unrepresented claimant. V&MLS would then be supportive of this provision.

Proposed Sect. 5104(b) requires, within the enumeration of elements of a denial, (if applicable), identification of criteria that must be satisfied in order to grant (the benefit sought). Yet, any higher review must be done on the basis of evidence considered in the initial development. This is utterly inconsistent and will engender substantial numbers of "supplemental" claims. It makes no sense to require the Agency to advise the claimant of what evidence is missing and at the same time preclude the introduction during the Higher Review of evidence that will satisfy the missing elements. This is not an issue of legal sufficiency or insufficiency; it is a matter of common sense.

Sect. 5108 Supplemental Claims—This amendment of Sect. 5108 replaces "reopened claims" with "supplemental claims:" Under this provision "new and relevant" evidence is required for the adjudication of a supplemental claim. This once again raises the adjudicatory bar much further than does the language of the existing provision. Whereas "material" requires only that the evidence tend to influence the trier of fact because of its logical connection to the issue, "relevant" would raise the bar to evidence that relates to or bears directly on point or fact in issue; proves or has tendency to prove a pertinent theory in the case. This is a technical, legal requirement imposed on a process that is required to be veteran-centric. This language is a trap for the pro se claimant, inviting a quick denial. V&MLS urges the Committee to recognize that this is once again a further shift to an adversarial process in which paid representation should be a recognized right accruing to the claimant.

Sect. 5109 is given a new subsection under which the Board may remand a claim to the AOJ for procurement of an advisory medical opinion to correct an error by the AOJ to satisfy its duties under 5103A ***when*** the error occurred prior the AOJ decision on appeal. This adds an unnecessary step to the review process – requiring the matter to be remanded yet again. Nor does it specify whether this applies to errors on the part of a "higher-level reviewing authority" within the AOJ. As a significant number of duty to assist errors are incident to inadequacies of medical exams, this should be clarified.

Sect. 5904 Amendment: The proposed amendment of (c)1 and (c)2 appears to move the point at which paid representation becomes available to the veteran to the point of the issuance of the decision on the initial claim by the AOJ; "notice of the Agency of Original Jurisdiction's initial decision under Section 5104 of this Title." Under the existing statutory provisions paid representation is not available to a veteran / claimant until the point at which the Notice of Disagreement is filed.

Given the existing political climate, the ban on the availability to the veteran of paid representation at the initial submission of a claim may be unlikely to be lifted. However, it should be noted that Congress has, within the last decade, recognized the advisability of allowing paid representation before the Agency. Merely providing an opportunity for paid representation prior to submission of the notice of disagreement is a benefit without practical application; there is no mechanism for repairing a deficient record prior to filing the Notice of Disagreement before the door to submission of additional evidence is closed. The pro se veteran, especially an impaired pro se veteran is out in the cold. In view of the proposed significant restriction of the opportunities for introduction of additional evidence, it is critical that these provisions be as broad as possible. V&MLS supports this provision with significant reservations as stated above.

Sect. 7105 Amendments:

V&MLS is supportive of the proposed amendment (b)(1), establishing the time for the filing of the notice of disagreement within one year of the mailing of the notice of the AOJ's decision. We do note that nowhere in this legislation is there any provision for time limits on any Agency action.

The proposed amendment of (b)(2) establishes legal, technical requirements of allegation of specific errors of law or fact to be inscribed on the Secretary's specific form. Once again, the process shifts further toward an adversarial process in which the unrepresented claimant is presumed to have an unrealistic level of knowledge or expertise. While the opportunities for representation are broadened, the fact is that significant numbers of claimants / appellants before the Board and the Court are unrepresented (28% of appellants at the Court were pro se at filing the NOA in 2016). It is critical to the veteran-centric intent of the claims process that there are provisions for liberal interpretation of what constitutes conformity with the requirement of this provision as proposed. V&MLS urges careful attention to language in this provision as proposed and implementing regulations to avoid adverse impact on the pro se claimant.

V&MLS is not entirely in agreement with the proposed amendment that establishes a three-track option for appealing the decisions of the AOJ to the Board. We suggest that the language more clearly identify the tracks by enumeration, and that the non-evidentiary track and the no hearing track be combined. We also suggest that the fully developed appeal be incorporated with this track.

V&MLS is supportive of the proposed language of Sect. 7105(c), maintaining the jurisdictional finality of Agency of Original Jurisdiction decisions that remain unappealed after one year.

The provisions of 7105 (d) as amended eliminate the Statement of the Case and the laborious process it entailed. V&MLS agrees with this provision with the proviso that in order to maintain the veteran-centric character of the claims process that the language also provide that submissions by pro se claimants be read liberally for allegations of error of law and fact. The unschooled or impaired pro se claimant must not be penalized by technical legalistic requirements he/she is incapable of meeting.

Sect. 7106; V&MLS supports the deletion of Sect. 7106.

Sect. 7107; V&MLS supports the amendment of Sect. 7107(a), (b) and (c) as proposed. V&MLS does, however, urge that sub-section (f) be amended to require that the Board screen those cases in which the claimant is pro se for adequacy of the record and undertake such further development as may be necessary to satisfy the duty to assist. In this regard V&MLS re-iterates our strong disagreement with the elimination of the duty to assist after the initial rating decision.

Sect. 7113; V&MLS supports the provisions of this Section with the caveat that the due process requirements of the duty to assist be afforded the pro se appellant, particularly if review of the record demonstrates that the appellant is impaired. This additional provision is consistent with V&MLS position regarding the proposed restrictions on duty to assist, submission of evidence and the impact of these measures on the pro se and impaired claimant.

Accountability and reporting provisions; V&MLS supports those provisions requiring detailed reporting and preparatory measures for the inception of these reform provisions. The General Accounting Office report made it abundantly clear that the Agency was in too much of a hurry to adequately test and vet the changes it is proposing. Let there be no mistake that this legislation inures almost solely to the benefit of the Agency – not the veteran. We do strongly recommend that training be addressed far more in the final version of this bill than it is currently. The woeful and inexcusable performance of the Board in cases that have been appealed to the CAVC is a glaring example of the lack of training and skill rampant at the Board. One wonders about the thousands of denials that are not appealed to the CAVC.

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Medical Examinations and Opinions.

While V&MLS are cognizant of the perceived increase in efficiency in eviscerating Sect. 5109, we also are concerned that there are many issues involved with medical exams that need address. As a part of the appeals system, we would urge this Committee to ensure that any issue remanded for an IME carry an array of procedural protections for the veteran. Copies of any such request should be supplied to the claimant and his/her representative, as well as the resulting report. Such examinations, or IMEs should be conducted, in the event of an actual examination, by an appropriate specialist practicing in the field giving rise to the issue; not a PA or NP.

It should also be noted that implementation of a treating physician rule, wherein the VA treating physician (as well as the private physician when appropriate) are required consultants on the issues of nexus, would improve the quality of medical evaluations and go a long way in relieving the stress of physician availability in VHA. The rationale that treating physicians will have too much sympathy for the patient to provide an unbiased opinion is specious at best as well as demeaning to the professional integrity of the treating physician. At a time when VHA is suffering from an acute shortage of medical personnel and veterans are waiting inordinately long for medical care, the continued duplication of effort in this regard is a waste of taxpayer dollars.

S. 23 V&MLS supports this legislation.

S. 112 V&MLS has no comment on this bill.

S. 324 V&MLS encourages this Committee to consider, within the purview of this legislation, the establishment by the Department, in cooperation with Indian Health Service and Bureau Indian Affairs, on Indian lands, of facilities to accommodate aging and wounded Indian veterans in need of nursing home care, particularly on reservations in the Northern Plains and Southwest, with high unemployment and limited resources.

The rationale for such facilities is the general unavailability of state homes within reasonable distances and the nearly total lack of cultural competence in treatment and care modalities in those that may be within reach of families. Please note that the older Indian veterans frequently lose the ability to speak English and can no longer communicate with institutional caregivers.

S. 591

V&MLS supports this bill, noting that it should have covered all veterans from its inception. Each generation of veterans includes those in need of family caregiver opportunities by virtue of illness and the residuals of injuries incurred in the line of duty.

When this legislation was under initial consideration, V&MLS strongly urged that training of family care-givers was better accomplished within the community through LPN and nursing training where available. The rationale we provided was that nearly every community has such programs and they not only provide licensure-level training, but ongoing support structures after the training with concomitant availability of emergency care with which they became familiar during training.

S. 609 V&MLS takes no position on this legislation.

S. 681 V&MLS Strongly supports this legislation with one recommendation. We recommend that a provision be added in which VA is required to coordinate with Indian Health Service to develop culturally competent mental health and suicide prevention programs for Indian women veterans. There are now no culturally competent mental health programs for Indian veterans. Indian women veterans, particularly those with MST/PTSD are at a very high risk because of the cultural consequences of their experiences. This legislation must address this issue.

S. 764 V&MLS takes no position on this legislation.

S. 804 V&MLS strongly supports this legislation. We recommend that the same or similar measures as suggested for S. 681 be included in this legislation. Women veterans, regardless of ethnicity have for too long been second citizens in the male environment of VA facilities. "She" has borne the burden as well, often with more severe mental and emotional trauma than her male comrades in arms, frequently being far more reluctant to self-identify as a veteran. The very nature of modern warfare distributes the risks and the trauma evenly among the genders. This legislation is overdue.

S. 899 V&MLS has no comment on this legislation.

Accountability and Whistleblower Protection V&MLS supports this legislation

S.2210 V&MLS strongly supports this legislation as it will provide a degree of integration of health care which is not always present even in larger medical centers. This provides an extra protective layer to veterans' health care which will be most effective in those times in which there is a crisis and extraordinary measures are necessary.

Serving our Rural Veterans Act of 2017

This legislation would support and extend coordination between the Department of Veterans Affairs (VA) and Indian Health Services (IHS) and other tribal health organizations serving rural veterans across the country. It also has the potential to create a pipeline for health care providers to serve rural communities, where veterans struggle to access quality health care. Finally, it would build the force of health care providers educated in the unique needs of rural veterans, including health needs and access in rural

health care delivery systems. For these reasons, this legislation has the potential for great positive impact on rural veterans.

Rural residents face barriers to many services that urban residents do not, and this includes access to basic health care. For example, according to a recent report from Grantmakers in Aging, rural residents experience higher rates of chronic disease, greater impacts from the national opioid epidemic, and higher rates of preventable deaths. These issues impact rural veterans as well, as noted by the Office of Rural Health, even though rural veterans are often eligible for more health care services than their civilian counterparts. For rural veterans who are eligible for health care at IHS facilities, barriers created by rural isolation can be exacerbated by lack of coordination between the VA and IHS, which creates confusion about eligibility and discourages rural veterans from seeking appropriate care. Improved coordination between the VA and IHS would result in improved access and quality of care for rural veterans eligible for services from both organizations.

To ensure this legislation has the greatest positive impact on the most vulnerable and underserved rural veterans, some issues related to program location and curriculum should be considered and addressed. In addition to the points below, the drafters and the Committee should reach out to and engage with tribes directly, particularly those that have contracted to provide health services directly to their members and veterans on their reservations. The tribes may have additional issues or thoughts that would not be obvious to others, and outreach for direct input would be most consistent with the federal Government's trust obligations.

Defining "Rural or Remote Area"

The draft legislation leaves to the Secretary's discretion the definition of "rural or remote area" for purposes of both loan repayment and locating the pilot program to establish medical residency programs serving rural veterans in Indian country. Defining "rural" and "remote rural" is no simple task. If the pilot program is to address communities in which rurality most significantly impacts access to quality health care, it should be located in states with larger relative land area, where rural veterans are truly isolated from urban resources. One measure of rurality that accounts for not only population, but also distance to the nearest metropolitan area, is the Index of Relative Rurality. To focus resources for greatest impact, Secretary could identify potential program locations by cross-referencing the location's IRR score with data on healthcare workforce shortages, numbers of rural veterans enrolled in the VHA, and numbers of rural veterans who are enrolled tribal members. The draft legislation could offer the Secretary more specific guidance on this process by more clearly defining "rural or remote area."

Cultural Awareness

The draft legislation acknowledges the need for education on unique health needs of veterans, and rural veterans in particular. One critically-important topic to include in the

curriculum is cultural awareness in diagnosis and treatment. When a rural veteran's culture influences the way that veteran communicates health symptoms and mental health distress, the health care provider must be aware of those cultural differences in order to accurately evaluate and diagnose the veteran and provide culturally-appropriate basic and alternative care. The draft legislation leaves to each facility the task of developing curriculum and training the medical residents and faculty. However, to ensure consistent training that comprehensively prepares health care providers to address cultural issues, the legislation should offer more specific guidance regarding the training curriculum or provide for a uniform curriculum that includes cultural competence instruction. This is another point on which to consult with tribes directly, as well as with experts in culturally-informed diagnosis and treatment of chronic illness and mental health conditions.

These comments were prepared in consultation with the Veterans Advocacy Clinic and Margery Hunter Brown Indian Law Clinic, both located in the Alexander Blewett III School of Law at the University of Montana, of which the Director, Prof. Hillary Wandler, is a contributing member of The Federal Bar Association and of V&MLS. We deeply appreciate her contribution to this discussion of one aspect of the considerable needs of Indian veterans, who serve this country in far greater proportion than any other ethnic group.

Also contributing to these comments and preparation is Thomas Bandzul, Esq. Legislative Counsel for Veterans and Military Families for Progress; a member of The Federal Bar Association and V&MLS

Respectfully submitted,

Carol Wild Scott, Esq.
Legislative Chair
The Veterans & Military Law Section
Federal Bar Association

Year	Dispositior	Affirmance	Percent of Dispositions Reversed/Remanded
2016	3717	457	87.71%
2015	3522	445	87.37%
2014	3218	589	81.70%
2013	3076	714	76.79%
2012	3610	1061	70.61%
2011	3892	1051	73.00%
2010	3803	741	80.52%
2009	3270	571	82.54%
2008	3542	693	80.43%
2007	3211	1098	65.81%
2006	2135	448	79.02%
2005	1281	271	78.84%
2004	1337	155	88.41%
2003	2152	129	94.01%
2002	972	109	88.79%
2001	2853	27	99.05%
2000	1619	526	67.51%