General / Employment 1 CREDIT

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Employing veterans in California

4th Appellate District, Division 3

Eileen C. Moore

Associate Justice, 4th District Court of Appeal

In a former life, Justice Moore served as a combat nurse in Vietnam in the Army Nurse Corps. She was awarded the Vietnam Service Medal, the National Defense Service Medal, and the Cross of Gallantry with Palm. She is a member of the Vietnam Veterans of America. Since 2008, she has chaired the Judicial Council's Veterans and Military Families Subcommittee. For nine years, she served as a mentor in a Veterans Treatment Court, primarily to women veterans. In 2015, her book "Gender Results" received a Benjamin Franklin award. (Cool Titles, 2014)

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With their ethos of accomplishing the mission, those who have served in the armed forces make very good employees. Veterans tend to be diligent, hard-working and have a strong work ethic. They work well in teams and have an inbuilt sense of duty. Adding to their value, veterans are often cross-trained in multiple skills and have experience performing various tasks. In the military, they received state-of-the-art instruction involving the latest technological advances.

Probably because of what happened to our veterans after the Vietnam War, when they were sometimes shunned and rejected, the California Legislature has passed numerous statutes favoring veterans. One such statute states: "The opportunity to seek, obtain, and hold employment without discrimination because of ... veteran status is hereby recognized as and declared to be a civil right." Gov. Code Section 12921. Another statute, this one aimed at

getting veterans who have gone sideways with the law back on track and employed states: "It is in the interests of justice to restore a defendant who acquired a criminal record due to a mental health disorder stemming from service in the United States military to the community of law abiding citizens." Pen. Code Section 1170.9. To encourage employers to hire veterans, the Legislature has given a tax incentive to hire a veteran as a full-time employee. Rev. & Tax Code Section 23626.

Attorneys involved in employment litigation must be aware of the many safeguards provided veterans who are job applicants and employees. This article will briefly discuss some of the unique circumstances that might occur when a veteran applies for a job or already holds a job.

Is the job applicant or employee a veteran?

For purposes of applying the law, whether the job applicant or employee is a veteran may depend on the circumstances. In alphabetical order, the branches of the service are the Air Force, Army, Coast Guard and Navy. The Marines are part of the Navy, but are often considered a separate branch of the armed forces. There are also the Reserves and National Guard, and that's where matters can get confusing.

All branches of the United States armed forces have Reserve components. Reservists are military personnel who serve on a part-time basis. The Reserves are always under the control of the president. One can join the Reserves without any prior military service or after having served in the military. Reservists work alongside their active duty counterparts, working a minimum of one weekend per month and two full weeks a year. Reservists can be activated or mobilized to serve overseas.

National Guards are primarily controlled by the states, generally under command authority of the state governor, though the federal government picks up much of the bill. In 1878, Congress passed the Posse Comitatus Act which makes it a crime for anyone in the federal military to enforce civilian law. The law was originally intended to prevent federal troops from enforcing Reconstruction-era race laws in the South. Governors, however, may call up the National Guard troops of their state to serve as a kind of adjunct police, such as enforcing curfew laws during civil riots or after a hurricane. Nonetheless, National Guard troops may be federalized, under Title 10 U.S.C., should the president declare a national emergency. Then command authority over the state National Guard troops shifts from the state governor to the president of the United States. That happened when we went into Iraq. Part-timers who normally trained one weekend a month and two additional weeks a year, were called to active duty for two-year stints. And the federal government can go one step further: A full mobilization is possible if Congress declares a national emergency. At that point, the National Guard may be called to duty for the length of the emergency plus six months.

How can the issue of who is veteran get confusing? Let's look a few statutes. In criminal matters, some statutes apply to those who saw service in "the United States military." Pen. Code Sections 1001.80, 1170.9, 1170.91. The arraignment statute, however, applies to "individuals who have active duty or veteran status." Pen. Code Section 858. The Fair Employment and Housing Act (FEHA) simply states "military and veteran status." Gov. Code

Section 12920. Another part of the Government Code defines a veteran as "any person who has served full time in the armed forces in time of national emergency or state military emergency or during any expedition of the armed forces and who has been discharged or released under conditions other than dishonorable." Gov. Code Section 18540.4. Yet another section says, "'Armed forces' means the United States Air Force, Army, Navy, Marine Corps, and Coast Guard." Gov. Code Section 18540.

Thus, a person who served in the National Guard, but who was never deployed by the federal government may or may not be covered by some of the statutes. Even though Reservists serve under the president, if they have never been activated or mobilized, they, too, may or may not come under some of the statutes.

The veteran job applicant or employee may have a criminal conviction

Whether or not a job applicant or employee is a veteran, California has statutes relating to an employer's consideration of criminal histories. No public or private employer may ask for information concerning an arrest or detention that did not result in a conviction or about a conviction that was dismissed or sealed. Lab. Code Section 432.7. Employers with five or more employees may not inquire about a job applicant's criminal history until after a conditional offer of employment has been made, and if the history is an arrest without a conviction or participation in a diversion program, the employer may not consider that information at all. Gov. Code Section 12952.

But if the applicant or employee is a veteran and the employer finds out about a conviction, there is yet another consideration. That is, under one statute, if a veteran had been convicted of a felony and thereafter had the conviction dismissed, the veteran "is not obligated to disclose the arrest on the dismissed action, the dismissed action, or the conviction that was set aside when information concerning prior arrests or convictions is requested to be given under oath, affirmation, or otherwise." Pen. Code Section 1170.9. In other words, the Legislature has given its blessing for a veteran to sometimes lie about his or her criminal history, even under oath.

Many employers conduct criminal background checks on job applicants. One can easily imagine a veteran's criminal conviction being set aside pursuant to Penal Code Section 1170.9, and the employer's investigator copying a record of conviction before a court clerk or the California Department of Justice has actually effectuated the court's order to seal or set aside that record. Under those circumstances, a veteran who was not hired or fired for either having the criminal conviction or lying about having it, may have the makings for a civil suit under FEHA, and its array of damages and other remedies. *See* Gov. Code Sections 12920.5, 12926, 12964, 12965, 12974, 12989.2.

An employer may not deny a job opportunity or benefits to a veteran

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. Section 4301 et seq.) prohibits employment discrimination and is geared toward eliminating or minimizing the disadvantages to civilian careers and employment resulting

from serving in the military. Employers may not subject employees who miss work due to absence for military duty or training to loss of seniority, status, pay or vacation. 38 U.S.C. Sections 4311-4319. In *Staub v. Proctor Hospital*, 131 S. Ct. 118 (2011), the U.S. Supreme Court heard a case in which the supervisors of an Army Reservist were hostile to his military obligations. The plaintiff contended he was fired as a result of that hostility and brought an action under USERRA in which a jury awarded him $57,640 against the employer. The federal intermediate court reversed, finding instructional error because the jury was told a corporation can act only through its employees and the animus shown toward plaintiff due to his military obligations was not shown by the person who fired him. The high court said it was obvious the plaintiffs' supervisors acted within the scope of their employment when they took the alleged actions against the plaintiff, and the decision of the federal appeals court was reversed.

In *Paxton v. City of Montebello*, 712 F.Supp.2d 1007 (C.D.Cal. 2010), Army National Guard members brought an action against a city for violation of USERRA, claiming the city failed to employ them as police officers upon their return from active duty, with the same seniority and rate of pay, and by retaliating against them for taking military leave. The court awarded them damages in the amount of their annual leaves along with any interest thereon, costs and attorney fees.

California statutes also provide some protections to returning members of the armed services. Mil. & Vet. Code Section 394. In *Haligowski v. Superior Court*, 200 Cal. App. 4th 983 (2011), the plaintiff was terminated when he returned after serving six months in Iraq. He was allowed to proceed against the employer, but not his supervisor. Under FEHA, however, another employee is personally liable for any prohibited harassment, regardless of whether the employer knows or should have known of the conduct. Gov. Code Section 12940(j)(3).

When a full-time employee is absent from work while performing active service in the National Guard of any state, the employer, if it is not "impossible or unreasonable," shall restore the employee to the former position or to a position of similar seniority status and pay, without loss of retirement or other benefits. Mil. & Vet. Code Section 395.06. That statute provides the employer shall not discharge the former employee from the position without cause within one year after restoring the person to the position. Similar mandates cover part-time employees returning from National Guard duty. A specific mechanism for forcing the employer to comply with these requirements is set forth in the statute, and, further, that a city prosecutor may appear and act as the employee's attorney.

FEHA prohibits discrimination in employment on account of military or veteran status. Gov. Code Section 12920. It provides that it is an unlawful employment practice for an employer, because of military or veteran status to refuse to employ, hire, train, select or discharge a person from employment. Gov. Code Section 12940. The Department of Fair Employment and Housing may bring an action to eliminate an unlawful employment practice, and if the department does not proceed with an action, an individual aggrieved person or a class of aggrieved persons may sue under FEHA. Gov. Code Section 12965.

Benefits due a veteran employee may be different from those due other employees. For example, if a veteran works as a state officer or employee and has a service connected disability rated at 30 percent or more by the Department of Veterans Affairs, the veteran may be entitled to more sick leave than other employees. Credit for the additional sick leave is given immediately after the veteran is given the disability rating or on the first day of employment, whichever is later. Gov. Code Section 19859.

A veteran suffers from a malady as a result of of military service

Not all wounds are obvious. Re-entry into marriage, family, jobs and the community presents challenges for returning soldiers and their families. Actions that are expected and normal in the military are often unacceptable, and sometimes even criminal, in civilian life. Logically connected to combat situations are hypervigilance, increased startle response, depression and emotional numbing. These manifestations don't fit well in the workplace. Worse are Post-traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), Military Sexual Trauma (MST) as well as a myriad of mental health disorders that can make the transition into the civilian world quite tough.

Psychiatric casualties of combat are as old as war itself. PTSD was officially acknowledged as a disabling psychiatric injury in the third edition of the "Diagnostic and Statistical Manual of Mental Disorders" in 1987. PTSD is recognized as a human response to trauma that is beyond the capacity of a particular individual to manage. Physical problems may also result from combat injuries. Sometimes the injuries are visible and sometimes they are not. TBI usually results from a jolt to the head or body, such as an explosion. TBI may affect brain cells and can cause short-term or long-term problems. MST can have long term effects on victims.

It is possible PTSD, TBI, MST or some other military-related malady may rear its ugly head while a veteran is employed. Under FEHA, in addition to the fact that it is against public policy to discriminate in employment on the basis of military or veteran status, an employer must not discriminate on the basis of physical disability, mental disability or medical condition. Gov. Code Section 12920. Reasonable accommodations might be in order if a veteran is experiencing a military-related disability. Gov. Code Sections 12926, 12926.1, 12940, 12940.3.

Family members of veterans may require an accommodation

Suppose an employee has a family member who was in the military and the family member who is a veteran has a disability. Suppose further the veteran in the family sometimes suffers from anxiety episodes in the form of nightmares as a result of PTSD that require the employee to provide comfort or care. Lastly, suppose the employee is still able to perform the required job duties, but sometimes might need to work through lunch to make up for work time missed in the morning. Would that employee be entitled to an accommodation for the disability of the family member who is a veteran? Maybe.

In *Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal. App. 5th 1028 (2016), an employee's son required daily dialysis and the employee was the only person in the family who could administer it. For several years, his supervisors scheduled him so that he could be

home at night for his son's dialysis. When a new supervisor took over, the plaintiff was terminated for refusing to work a shift that did not permit him to be home on time for his son's dialysis. The employee sued his employer under FEHA, and the trial court granted the employer's motion for summary judgment.

Under FEHA, the definition of disability includes a person who is associated with a person who has a protected characteristic, such as a disability. Gov. Code Section 12926(o). In *Castro-Ramirez*, the Court of Appeal reversed summary judgment in favor of the employer with regard to the FEHA claim of disability discrimination because the disability from which the employee suffered was his association with his disabled son.

What if another employee claims gender discrimination when an employer recognizes veteran status?

It should come as no surprise that most people in today's military are men, although the number of women in the military is increasing. According to a Council on Foreign Relations report, in 2016, about 20 percent of the Air Force and less than 8 percent of Marines were women. The other branches were somewhere in between. During former times, the percentage of women was much less, so the number of male veterans far outnumbers women veterans.

FEHA prohibits both gender discrimination and veteran status discrimination. Suppose in today's workplace, a woman non-veteran claims gender discrimination when a male veteran is given a job. Well, the Legislature must have also thought of that possibility. FEHA states that nothing "relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection." Gov. Code Section 12940(a)(4). FEHA also states that an employer is not prevented from identifying members of the military and veterans for purposes of awarding veteran's preference as permitted by law. Gov. Code Section 12940(p).

Placing the court and other parties on notice that a party to an employment dispute is a veteran

It may be advantageous to both an employee and an employer to "officially" place all parties on notice of a litigant's veteran status. The Judicial Council has forms relating to present and former members of the military for both mandatory and optional use. These forms may be found here. Form MIL-100, an optional-use form, may be used in any type of case to give notification of military or veteran status. It may be filed by a party or someone else on that person's behalf. Once filed, the court and the parties are on notice that a current or former member of the military is involved in the case.

Conclusion

Lawyers might want to keep in mind that what appears to be a run-of-the-mill employment situation may be anything but. When veterans are involved, the usual concerns might not apply.

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Law Practice,
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Apr. 5, 2019

California lawyers married to a military spouse

Yet another example of the sacrifices military families make

4th Appellate District, Division 3

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Picture this. You're a member of the bar in good standing in some other state. You have a trial scheduled in two months. Your lease isn't up for another year. Your legal malpractice insurance and continuing education requirements are all up to date. And you get a phone call from your spouse who is in the military: "Honey, I'm being transferred to California."

According to the Military Spouse JD Network, MSJDN, a group formed by military

spouses frustrated with the challenges of maintaining a legal career that seemed incompatible with the military lifestyle, there are more than 1,000 military spouses from all branches of the military who are bar certified attorneys. When the military transfers their spouses from one state to another, these lawyers face big headaches trying to practice law in the new state.

Last year, the offices of the Secretaries of the Army, Navy and Air Force issued a memorandum to the National Governors Association, asking the states to consider reciprocity of professional licensure for military families, pointing out that these families move often and that a frequently cited drawback to military service is the difficulty for military families to relocate when the military family member is transferred. The memorandum states that spouses in professionally licensed fields such as the law face challenges due to delays or the cost of transferring a license to a new state or jurisdiction, and that eliminating or mitigating these barriers will improve quality of life for our military families. In 2012, the American Bar Association urged states to adopt rules, regulations and procedures that accommodate the unique needs of military spouse attorneys who move frequently in support of the nation's defense. That same year the Conference of Chief Justices passed a resolution urging bar authorities in each state to consider rules permitting admission without examination for attorneys who are dependents of service members and are already admitted to practice law in another state or territory.

Effective March 1, both the California State Bar and the Judicial Council adopted rules for military spouses, including those in civil unions and registered domestic partners, to practice law in California without having to take the state's notoriously difficult, time-consuming, and expensive bar exam. The State Bar rules are found in Rules of the State Bar, Title 3, Sections 3.350-3.356, and the Judicial Council's rule is California Rules of Court, Rule 9.41.1.

California requires military spouse lawyers to be supervised by an attorney who assumes professional responsibility for any work performed by the registered military spouse attorney. The supervising attorney must provide a declaration of responsibility to the State Bar, and thereafter directly supervise the military spouse attorney, approve in writing any appearance in court or any deposition or any arbitration or any proceeding and then review such activities with the supervised attorney. In addition to assuming professional responsibility for the lawyer, the supervising lawyer must also "read and approve any documents prepared by the registered military spouse before their submission to any other party." It sounds as if a registered military spouse can't even send an email to another party's lawyer without approval.

Supervising a military spouse attorney to that extent might very well result in a member of the California Bar concluding, "it's easier for me to just do it myself." In fact,

a similar supervision requirement in Virginia has resulted in military spouse attorneys being unable to find a sponsor.

A military spouse attorney on the job hunt is unable to register with the State Bar to practice under its new rules without the declaration of the supervising attorney. But while job hunting, there is no supervising attorney. Even under the best of circumstances, there is a delay in receiving income while the wheels of bureaucracy slowly turn. Plus, it is not likely many would hire an attorney *before* the attorney is registered with the State Bar. Another job applicant with a license in hand will likely be the one to land the job. The supervision requirement is especially difficult for lawyers new to California without an established network of contacts.

Another problem for the military spouse attorney is how they may claim their years in practice. In many states, lawyers do not have to take the bar examination if they have practiced a set number of years. If one is required to act only under the supervision of a member of the California Bar, is one actually practicing law under California's special admission registration for military spouse attorneys? It's unclear.

In April 2012, Idaho became the first state to approve a military spouse licensing accommodation. Of the 36 states and territories that have established special rules for military spouses to temporarily practice law, many have less onerous requirements than California. Florida's Rule 21-4.1 requires that a committee establish a mentor network and that the military spouse attorney must either be employed by or in a mentorship relationship with a member of the Florida Bar. Arizona's Rule 32-4302 provides reciprocity to military spouses who are members of another state's bar. Illinois's Rule 719 provides a temporary license for the military spouse to practice law. Under Rule 1:27-4, New Jersey issues a temporary license to practice law to a military spouse who works for a New Jersey lawyer or firm or who has engaged in the practice of law in another state for five out of the previous eight years.

Accommodating the unique needs of military spouse lawyers does not cost much, but greatly contributes to the well-being of military families by eliminating real barriers to smooth transitions from one state to another. It's good to see California provide some accommodation to military spouse attorneys, but few if any other state's rules are as rigorous and restricting as those adopted in California. MSJDN's website says that California's supervision requirements stigmatize military spouse attorneys already facing an estimated 28 percent unemployment rate. It is too bad California does not do more to ease the unique mobility burden of military spouse lawyers.

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Daily Journal

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Unique risks for women who serve in combat

It is expected that by 2020, more than 2 million women will be in the veteran population. Their health experiences and needs are often unlike those of male veterans.

4th Appellate District, Division 3

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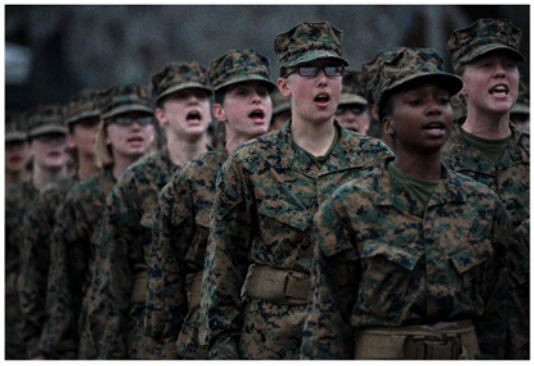
Women have served in the U.S. Armed Forces since the Revolutionary War, but not always as combat soldiers. The issue of women in combat was tangentially before the public following the end of the draft in 1973. Two years later, registration for the military draft was discontinued. But after the Soviet Union invaded Afghanistan in 1980, President Jimmy Carter determined it was necessary to reinstitute the registration process. The president requested funds to reactivate the Selective Service



Female marine recruits at Parris Island, S.C., in February. (New York Times News Service)

system for registration of both men and women, but Congress only allocated funds for the registration of men. In 1981, *Rostker v. Goldberg* was issued by the U.S. Supreme Court. The case held that Congress had acted well within its constitutional authority to raise and regulate armies and navies when it authorized the registration of men but not women. It noted that deference to Congress is perhaps most appropriate in the areas of national defense and military affairs. The court stated that Congress held hearings in response to the president's request for authorization to register women, and its decision to exempt them was not the accidental byproduct of a traditional way of thinking about women.

Over a decade after the *Rostker* decision, limitations on women in combat were made official. In 1994, the Department of Defense issued a "ground combat exclusion policy, excluding women from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground. In 2012, 14,000 additional jobs were opened for women in the military, primarily in the Army and Marine Corps. Nonetheless, upward of 238,000 military jobs were still off limits to women. Since Jan. 24, 2013, however, women have been officially authorized to serve in combat. They fought long and hard for that right. But we are learning the physical challenges to women who serve in combat are sometimes different than those faced by men.

At the conclusion of military service, just like the men, women transition back into civilian life. It is expected that by 2020, more than 2 million women will be in the veteran population. Their health experiences and needs are often unlike those of male veterans.

Surprise, surprise, that testosterone makes a difference. The hormone causes the development of a heavier and stronger skeleton in males and shapes the male pelvis in a way that allows for greater strength and load bearing. It also increases heart and lung function, affecting endurance. Because of estrogen, women have less lean body mass and greater laxity of ligaments. The upper and lower body mass muscles are much greater in men than in women. Military studies report that women have 40 to 50 percent less muscle strength than men.

Just like the men, the women are expected to carry 100-pound packs, and, depending on their jobs, other heavy equipment. In armor units, for example, they have to load 35-pound rounds again and again. Long term pelvic pain can result from routine military maneuvers performed repeatedly. All in all, women have to exert themselves

more to achieve the same output as men. Consequently, the attrition rate of women versus men in combat units is greater. An article published by the Office of the Surgeon General reports that the diagnosis of pelvic stress fracture has been reported in one out of 367 female recruits as compared to one in 40,000 male recruits. Army women are approximately 67 percent more likely than Army men to receive a physical disability discharge for a musculoskeletal disorder.

Another difference is that women are typically shorter than men. And shorter soldiers are usually assigned to the rear of marching formations. Thus, the shorter soldiers need to overstride to keep pace with the taller ones, increasing the tension placed on ligaments and sometimes causing stress fractures.

Gynecology related conditions such as urinary tract infections are more common in severe climate and environment. Some literature suggests abnormal Pap smears are increased in war zones. Sometimes pelvic organ prolapse comes about from repeated load bearing. Even menstruation can be logistically challenging in combat settings, resulting in problems. Sleep deprivation and stress can cause a cessation of menstruation, a decrease in female hormones, and eventually may result in osteoporosis.

We must not forget military sexual trauma. Several law review articles report that the likelihood that a woman veteran suffered from sexual abuse in the service is so high that a woman serving in combat is far more likely to be sexually assaulted by a fellow service member than to be killed by enemy fire. Rapes are sometimes referred to as friendly fire. Women suffer from the effect of these assaults for years after leaving the military. Sexual violence contributes to chronic illness, major depression and diminished overall health. It can also lead to chronic alcohol and drug abuse.

Where do women receive treatment for their injuries? Many women who have accessed treatment at hospitals operated by the Department of Veterans Affairs feel unwelcome, perceiving the staff to be under-skilled and insensitive to their needs. So they often discontinue their care at the VA and seek civilian help instead.

Alarmingly, a 2016 press release issued by Vietnam Veterans of America states that since 2001, "the rate of suicide among female veterans who use VA services increased 4.6 percent, while the rate of suicide increased 98 percent among female veterans who do not use VA services."

The military is aware that much of its equipment such as backpacks, vehicles, weapons, camouflage gear are designed and structured to fit the average male soldier's physique, and is trying to deal with the challenges. The Department of Veterans Affairs is also well aware of the increased needs of women veterans for health services, and has been trying to prioritize improved services for female veterans.

Hopefully, adjustments will be made to assign soldiers to their physiological abilities, and improvements in health care for women veterans will be forthcoming.

Most of us don't think of women as veterans, and lawyers should be aware that women don't tend to identify themselves as veterans. Accordingly, women should be asked if they ever served. The answer to such a question could lead to a discussion that might be important in personal injury cases where past, current and future health matters are at the heart of the action. Employment disputes could be somehow associated with problems encountered in the military. Child custody disagreements may very well be related to injuries or illnesses arising from military service. Domestic violence issues appear across the gamut of cases throughout the courthouse, and a woman's exposure to violence in both combat and non-combat situations in the military may have bearing on how that topic is presented to the court. In criminal matters, a woman's prior military service might make all the difference in the disposition of her case. A routine question ought to be, "Have you ever served in the military?"

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Military Law, Family
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Bookmark

Fit for paternal duty: Those who serve and their children

One might assume the home front would carefully guard the parental rights of those who serve or have served in our armed forces. In fact, some lawyers are advising their clients that child custody and military service are incompatible.

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Attachments

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One might assume the home front would carefully guard the parental rights of those who serve or have served in our armed forces. In fact, some lawyers are advising their clients that child custody and military service are incompatible.

The U.S. Supreme Court has held that parents have a fundamental right to rear their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923). Meanwhile, courts throughout California make decisions about child custody every day by selecting a custody plan that is in the best interest of the child. One of the factors courts consider is the amount of contact each parent has with the child. A parent in the military can be at a distinct disadvantage in demonstrating the amount of time spent with a child when the soldier is deployed. Thus, there can be a tension between the rights of military parents and the best-interest of the child standard.

It's not clear just how much weight should be given to the best interest of a child when squared off against the constitutional rights of a parent. The U.S. Supreme Court, when faced with overwhelming evidence that grandparents could provide tremendous advantages to two little grandchildren, concluded a Washington statute that allowed for visitation by persons who "serve the best interest of a child," violated a mother's "due process right to make decisions concerning the care, custody, and control of her daughters." *Troxel v. Granville*, 530 U.S. 57 (2000).

Nor is everyone sympathetic to deployed soldiers who lose their children. A mother in New York, whose National Guard unit was deployed to Iraq and Afghanistan, was praised for her parenting by a New York court, but nonetheless the court found the deployment contributed to an unstable home life. Devoid of appreciation for the mother's service to her country, the father's attorney contended: "She was not drafted. This was a job choice. She went into it with open eyes." Custody of the boy was awarded to his father. *Diffin v. Towne*, 47 A.D.3d 988 (2008); "Soldier Loses Custody of Child After Iraq Tour," NPR (Feb. 14, 2008).

Both attentive and sympathetic to our soldiers and veterans is the California Legislature. While the California's post-Vietnam legislators deserve an F for the lack of attention given to those who served their country, our current Legislature is approaching an A+. One appeals court noted that today's Legislature has a growing concern about military service members and is making continuing efforts to protect their parental rights.

Family Court

The Legislature first enacted Family Code Section 3047 in 2005, perhaps recognizing how tricky and delicate child custody issues can be. The statute creates a presumption that when a parent's absence is due to a deployment or change of assignment in the military, the parent's failure to visit by itself is insufficient to justify a modification of a custody or visitation order. If a modification in custody is necessary because of military orders, it is deemed to be a temporary modification.

Let's look at a case involving a military father who returned from deployment to Afghanistan and asked the court to reinstate the original physical custody arrangement with him, just as the statute prescribes. Instead of providing for an efficient and expeditious process as intended by Section 3047, protracted court proceedings followed, including a court-appointed expert evaluation followed by an evidentiary hearing. The expert recommended the father not regain primary physical custody, and the family court refused to reinstate the pre-deployment custody order. On appeal, the father argued that the situation was a good example of what returning service members should not have to face. The Court of Appeal found the lower court erred in refusing to revert to the pre-deployment custody order. *E.U. v. J.E.*, 212 Cal. App. 4th 1377 (2012).

Juvenile Dependency

Child custody issues are omnipresent in juvenile dependency cases as well. After the court has taken jurisdiction over a child, but before the court may terminate parental rights, child welfare services must be provided to give the parent an opportunity to reunify with a child.

A recent unpublished opinion demonstrates that courts are not always alert to the peculiar issues involved with veterans. An Iraqi War veteran with post-traumatic stress disorder was about to lose his child in juvenile court. The Court of Appeal criticized the trial court for not individualizing the reunification services provided to the father and for not coordinating with the Department of Veterans Affairs in overseeing the father's progress. The court said it expected the social services agency to think beyond the usual offerings of therapy, drug treatment, psychotropic medications and parenting classes when offering reasonable services for this disabled veteran. The appeals court concluded that reasonable services were not provided. *Paul Q. v. Superior Court*, A155455 (Dec. 28, 2018).

In another unpublished dependency case, the juvenile court considered a father's upcoming military deployment with the Navy as a factor in determining detriment to the child. The appeals court noted there was a finding the sailor's wife, the child's step mother, was loving and dedicated, and that there was no indication the child would not be safe with her while the father was at sea. Additionally, the court noted that the military has Fleet and Family Services available to help if necessary. The Court of Appeal remanded the matter for the juvenile court to again consider placement while the military father was away. *In re Patrick S. III*, D063016 (Aug. 15, 2013).

Education About Military Issues Is in Order

Military families often have unique qualities. They are sometimes more authoritarian than civilian families, and commonly have experience with transitioning environments. Because they often function without extended family support networks close by, they tend to readily cope to new locations and challenges.

In the above family law case, the judge noted that when he was a child, he did not enjoy frequently changing schools, and it was not in the boy's best interest to move him out of his current situation, stating the child was in the sixth grade and his friends and sports were paramount. OK. But if there is one thing we know for sure about military families, it is that they have considerable experience with deployments and relocations. Children in military families might move 20 times during their childhood. On average, military families move every two to three years. Applying civilian standards to military families may not be the best way to evaluate a situation.

When it comes to providing reunification services to a service member or a veteran with a disability suffered in the military, courts and lawyers can easily interact with someone from the military or the VA. Most counties have veterans service officers who routinely assist families. Plus, public agencies, volunteer groups and churches help service members and veterans every day. And wherever there is a military base, family services are readily available.

It is also important for lawyers and judges to be aware of a military/veteran component in a case in order to gauge possible misconceptions on the part of child custody evaluators. Military parents are sometimes absent from their children's lives during crucial developmental periods, and biases toward military families have been shown to influence the outcome of custody evaluations. 50 Fam. Ct. Rev. 310. With a background of knowledge about military culture, careful examination of the factors within a particular military family that contributed to the family's prior strength and resilience when the family "worked," is necessary.

While our country has seen many wars, we don't necessarily have much history with modern military family life. Prior to the end of the draft in 1973, our military forces

were primarily comprised of single men. Now women are about 15 percent of the military, and about 60 percent of those serving are married. And we can't forget all the single parents and blended families. With all-volunteer forces, we rely heavily on the Reserves and National Guard. They are really citizen soldiers, who drop their daily, mainly civilian lives when they are called. Faced with these evolving demographics, family and juvenile courts are seeing increasing numbers of child custody issues among families with a service member or veteran. It behooves all of us to learn more about military culture and veteran aftermaths to arrive at a reasonable balance that avoids penalizing a parent for military service, or the residuals of service, and at the same time meets the best interest of the child standard. Application of the same models ordinarily applied in civilian situations may be unwarranted. California courts and lawyers need to sit down and think these issues through, and then provide training and education so that military parents and children are not penalized because a parent is serving or has served in the military.

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A Vietnam veteran

Let's all hope that Lee Robbins continues to do well. He wants to move out of state and has been paying rent on a town home that sits empty waiting for him to get the green light to leave California.

4th Appellate District, Division 3

EILEEN C. MOORE

Associate Justice, 4th District Court of Appeal

In a former life, Justice Moore served as a combat nurse in Vietnam in the Army Nurse Corps. She was awarded the Vietnam Service Medal, the National Defense Service Medal, and the Cross of Gallantry with Palm. She is a member of the Vietnam Veterans of America. Since 2008, she has chaired the Judicial Council's Veterans and Military Families Subcommittee. For nine years, she served as a mentor in a Veterans Treatment Court, primarily to women veterans. In 2015, her book "Gender Results" received a Benjamin Franklin award. (Cool Titles, 2014)

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It was nine years ago that an article I authored about veterans' courts in California was published in VVA--The Veteran, the official publication of Vietnam Veterans of America. Soon afterward, I began receiving letters from incarcerated Vietnam veterans, mostly lifers. The letters kept coming. In 2015, the Veterans and Military Families subcommittee that I chair for a Judicial Council advisory committee, along with the Board of Parole Hearings and the Department of Veterans Affairs, provided training for volunteer lawyers to represent Vietnam veteran lifers at parole hearings.

Here is the story of just one of those incarcerated Vietnam veterans who was represented by volunteers. I only know the man through letters and emails as I have never met him.

Lee Robbins was one of those lifers who wrote to me. It was 2016 and he was in Folsom prison serving a life term. He wanted help.

In the war, Robbins was based in Chu Lai from 1969 to 1970. He served in a combat aviation unit as a crew chief on a helicopter. His unit was tasked with recovering downed aircraft and was involved with numerous fire fights. During one mission, Robbins and his crew were trying to remove the bodies of two Air Force pilots when they were attacked. A four-plus hour gun battle ensued. They were finally extracted by a Med-Evac, taken back to Chu Lai, given a swig of Jim Beam, and sent on another mission the next day.

Robbins never got involved with drugs and did not have problems with alcohol when he returned home. But the crime for which he was convicted might have been a disagreement of some sort about drugs, and a man was killed on New Year's Eve 1988. Robbins represented himself at his trial. That's how this Vietnam veteran ended up serving a life term in a California prison. He always denied any involvement with the murder. Five times he came up for parole and five times his requests were denied. Robbins felt trapped, frustrated and helpless. This is what I wrote back to him on March 16, 2016:

Dear Mr. Robbins,
You find yourself in a pretty rotten situation. It is sad for me to see a fellow Vietnam vet in prison for life. I was stationed at the 85th Evacuation Hospital in Quinhon.
As you have probably already figured out, since I am on the bench, I am not qualified to practice law. So, I cannot give you any legal advice.
When I received your letter, I did two things. First, I sent an email to Jo Bracken. She is not a lawyer, but she helps prepare longtime inmates to appear before the parole board. She will be at Folsom to see someone else in April or May. She is going to contact you regarding coming to see you. From what I understand, the kind of personality an inmate assumes in prison is a protective one; that is, he can't "be himself" and survive, so a certain attitude is developed. When the parole board members see that attitude, they conclude the person is not ready to be trusted in public. Jo will speak with you about overcoming that disability.
The second thing I did was to send an email to an administrator of the parole board. I informed him you want to be assigned a volunteer lawyer. He wrote back to tell me he is putting together a file on you and sending it out to the available volunteers. I have no control over when, how or even if a volunteer will step forward to represent you.
Thank you for serving our country. I hope things work out for you.
Sincerely,

That's when the volunteers stepped into Lee Robbin's life. Jo Bracken is not a lawyer. She is just a person who cares about the human condition. Jo retired, wanted to give back to others, and worked with lifers to help them prepare themselves to put their

best foot forward before the parole board. She attended the 2015 volunteer training and learned about the peculiar issues involved with Vietnam veterans. Jo literally forced Robbins to engage in self-reflection by writing a diary of all that has happened, how he was involved in the murder, how he conducted himself in prison and why he should be released.

Retired Judge Jim Jackman also attended the 2015 training. He was the volunteer lawyer who represented Robbins. Judge Jackman resolved to help a veteran; he thought it was the least a civilian ought to do for those who served in combat. And help Lee Robbins he did. Judge Jackman worked tirelessly with Robbins to prepare him for his sixth parole hearing. Both volunteers spent thousands of dollars out-of-pocket for the sole purpose of aiding another human being. Their work was cut out for them. Robbins had a huge chip on his shoulder that needed to be honed down so the board could envision his doing well upon release.

After he was found guilty in 1990 and sentenced to life in prison, his family and friends deserted him. During his 30 years in prison, Robbins had one visitor, in 1991 or 1992. Otherwise, Jo Bracken and Judge Jackman were his only visitors. One time, Judge Jackman cleared his schedule for a day, bought a plane ticket and flew to Northern California where he rented a car and drove over 100 miles. When he arrived at the prison, he was told there was a lockdown due to security and that he should return another day.

It is highly likely Judge Jackman's careful review of Robbins' voluminous file made all the difference for Lee Robbins. The parole board expects a person to take responsibility for his crime and to show genuine remorse to be eligible for parole. 15 California Code of Regulations Section 2281(d). But Robbins consistently denied he had anything to do with the murder. There can be a Catch-22 problem for those trying to secure parole. If they admit to committing a crime they didn't commit, they can be tripped up when they can't provide details about what happened. Our courts recognize this as being an inappropriate trap. Therefore, as a substitute to admitting guilt, an inmate may now "plausibly" deny the crime. In re Shaputis, 53 Cal.4th 192, 269 (2011). What Judge Jackman discovered after all these decades was that, based on eye witness testimony, the prosecutor had argued Robbins was present when the victim died. But the evidence was clear that Robbins had left the scene four and a half hours before the time of death recorded on the coroner's death certificate. Thus, Judge Jackman convinced the parole board that Robbins' denial of the crime was at least plausible, and he should not have to admit he committed it in order to be released on parole. The sixth time around, the Board of Parole Hearings granted parole. Lee Robbins was released on October 5, 2017.

The prison released Robbins to transitional housing provided by the VA. At the VA, he

was found to be 100 percent disabled because of PTSD and finally given treatment for it. The VA also gave him a life skills program and required daily face-to-face check-ins. They obviously wanted Robbins to succeed.

After he was released, I wrote to Robbins to remind him that the motto of Vietnam Veterans of America is, "Never again will one generation of veterans abandon another." I asked him to keep me updated on his progress. This is some of what Robbins wrote to me:

... I am doing really great, I am now seven months out. ... I was completely unprepared for the new technology. Phones, computers, and of course the internet. But after asking many questions I was finally able to answer and make phone calls. The internet was quite a shock. ... Driving was bad before I went to prison, but the advent of cell phones changed all that, they have actually gotten worse! ... When I first got out I was having trouble sleeping. I thought this was because I was on a real mattress, but oddly it turned out to be because it was dark. I was conditioned to sleep for so many years with lights on that turning the lights out made me uncomfortable, so I now sleep with a night light. ... It felt so strange to be able to walk up to a door and open it, I was so used to going up to doors and waiting for a guard to open it. ... I have been very busy in helping other vets here get settled, and taking them to all the appointments ... and of course shopping. I guess I had the same look on my face the first time I went into a shopping center, just absolute awe at everything there. ... I am counseling parolees I meet at the parole office as I am there many times a week bringing residents from the Veterans Transition Center for scheduled meetings. ... anytime I see one of the vets here start staying in their room too much I make them engage, get out, do anything. I watch their eating, sleeping habits also as these are red flags to me. ... just having some trouble with the retirement community I have been planning on living at, it seems that now that it is for sure that I am moving there they have decided that they do not want to allow a felon to live there. ... I no longer have the nightmares of waking up thinking I am in my cell, or that parole agents will come through my door saying it was all a mistake. ... I thank you, Ms. Bracken, and Mr. Jackman for the kindness all of you have shown me. I can never thank all of you enough for your unwavering faith in me and all the unselfish help. You, Jo Bracken and James Jackman will always hold a special place in my heart, and I thank all of you again for helping me.

Let's all hope that Lee Robbins continues to do well. He wants to move out of state and has been paying rent on a town home that sits empty waiting for him to get the green light to leave California. It's hard not to wonder whether, had we treated his PTSD when he came home from Vietnam, he would have gotten sideways with the law. As to Ms. Brackman and Judge Jackman, they are at the top of my list of persons I want to write to Rome about when I send in my recommendations for canonization.

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Daily Journal

Military Law,
Government
Aug. 5, 2019

Bookmark

Disposable Warriors

We send them there. We break them. Then we take away their benefits.

4th Appellate District, Division 3

EILEEN C. MOORE
Associate Justice,

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Understanding that post-traumatic stress disorder, traumatic brain injury and other combat maladies may increase risky, sometime violent, behavior, California courts, legislators and lawyers, along with various state and county agencies, have cobbled together a process to deal with United States military service members and veterans who commit crimes while suffering from these conditions. Basically, California understands we should not turn our backs on those who were hurt while serving our

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country.

We now have 34 Veterans Treatment Courts in California. In those courts, the person, who is either an active duty member of the military or a veteran of military service, must plead guilty and then earn his or her way back to a clean record. And those courts work; the typical recidivism rate for convicted criminals is somewhere around 77%, but a veterans' court study revealed that veterans recommit only 10.4% of the time. Also in California, there is a way for any service member or veteran convicted of a probation-eligible crime to avoid incarceration, even when the person is not in a Veterans Treatment Court. Plus, we have a process for diverting all active duty and veteran misdemeanants from prosecution.

Thus, it is perplexing when a service member literally begs a judge not to contact his or her commanding officer in order to coordinate civilian and military treatment. A typical scenario involves a member of the military, in the midst of sorely needed treatment, who receives deployment orders. Realizing that the soldier may represent a danger to self or others, the judge or a member of the court's collaborative team would like to contact the soldier's C.O. to try to either delay deployment or connect with a military contact to make sure the soldier's treatment is not interrupted. "You can't do that," the soldier pleads to the court, "They'll dishonorably discharge me and I'll lose my benefits."

It was in 1944 that Congress passed what became known as the G.I. Bill providing education and other benefits to facilitate readjustment of soldiers to civilian life. The benefits were intended to reflect respect for the sacrifices made by our armed forces who took on the responsibility of protecting all of us. See Michael J. Wishnie, "'A Boy Gets Into Trouble': Service Members, Civil Rights, and Veterans' Law Exceptionalism," 97 B.U. L. REV. 1709 (2017).

Could our military actually be discharging soldiers who suffer from a combat condition because the soldier is receiving treatment for that condition? And even if the military concludes the soldier is not fit for service due to the condition or because the soldier committed a crime as a result of that condition, why must the discharge be less than honorable? After all, the condition developed as a result of military service. A less than honorable discharge usually involves a loss of some or all benefits, such as the valuable education benefit, that likely induced the soldier to enlist in the first place. 38 U.S.C.A. Section 5303; 38 C.F.R. Section 3.354.

It is troubling to think that we tempt our young people to enter the military by promising them a free education and other services. Relying on that promise, they enlist, serve and are injured. As a result of their injuries, they engage in risky behavior that is sometimes criminal. Then we pull the plug and withdraw our promise, leaving these injured soldiers in a much worse situation than they were in before enlistment.

Here in California, several of our statutes mandate the same considerations for active duty service members and veterans. See Penal Code Sections 858, 1001.80, 1170.9. But if treatment for active duty criminal defendants under statutes intended to benefit them may result in their being drummed out of the military without an honorable discharge and its attendant loss of benefits, courts and counsel in California would be wise to ponder this situation. If active duty service members are given the "advantage" of our California statutes, geared toward returning them to the community of law-abiding citizens, and they end up being tossed out of the military without their benefits, we might not be doing them any favors.

In March 2018, a United States Marine filed a class action against the Department of the Navy. *Tyson Manker v. Richard V. Spencer, Secretary of the Navy*, 329 F.R.D. 110 (2018).

The plaintiffs are represented by the Yale Law School Veterans Legal Services Clinic and co-counsel. The allegations are that Navy and Marine Corps veterans suffering from PTSD or TBI attributable to their military service were discharged with less than honorable discharges and were thereafter denied discharge upgrades, affecting their eligibility for veterans' benefits and services. The lawsuit's allegations and evidence were credible enough that a federal court in Connecticut certified the case as a nationwide class action. The court's opinion granting the class action discusses a 2014 memorandum from former Secretary of Defense Chuck Hagel to the military services instructing them to give liberal consideration to discharge upgrade requests from veterans diagnosed with PTSD and TBI. Congress codified Hagel's liberal consideration policy. 10 U.S.C. Section 1553(d)(3)(A)(ii). The *Manker* judge wrote, however, that "notwithstanding the policy change, the NDRB [Naval Discharge Review Board] granted discharge upgrades in only 15 percent of cases in which PTSD was alleged to have been a factor in characterization."

The *Manker* opinion also states that the named plaintiff, Manker, developed PTSD from his time serving as a Marine in Iraq, was dishonorably discharged and then denied a discharge upgrade. Another plaintiff, John Doe, also had PTSD from his war service, was dishonorably discharged, and in denying his request for a discharge upgrade, the board stated his PTSD status did not excuse or mitigate his misconduct.

The Yale Law School Veterans legal clinic is also representing Army veterans in

another action. Stephen Kennedy v. Mark Esper, Secretary of the Army 2018 WL 6727353. A federal court also certified that action as a class action. In that action, Stephen Kennedy and other veterans of the Iraq and Afghanistan era are suing the Army, Army Reserve and Army National Guard for discharging them with less than honorable discharges when they were suffering from PTSD or PTSD-related conditions attributable to their service. They allege that under the Hagel Memo standards, they should have, but did not, receive discharge upgrades.

Based on allegations in the *Manker* class action against Navy/Marines and the Kennedy class action against the Army as well as experiences in California courts, there seems to be reason to suspect the military may actually discharge soldiers for misconduct committed as a result of PTSD or TBI. When the discharge is less than honorable, the veteran often loses treasured benefits. It is terribly unsettling that our healthy young people are enticed into military service but not provided full health support when they suffer from PTSD and other conditions acquired as a result of active duty service.

Research from the Department of Veterans Affairs shows that many of the service members who were deployed to Iraq and Afghanistan are returning with serious physical and/or mental health problems. More than half of veterans involved with the justice system have either PTSD, depression, high anxiety or substance abuse disorders. A large percentage of them are also homeless. https://www.research.va.gov/currents/0918-VA-researcher-examines-Vets-who-collide-with-criminal-justice-system.cfm. Many of the symptoms of PTSD relevant for understanding violence risk are dissociative in nature. The theory is that the sufferer of PTSD commits an act of aggression while reexperiencing the trauma. 38 L Humb 1 (2014)

After the Vietnam War, it took us decades to learn how to separate our warriors from our wars. That is, while we don't have to love our wars, we may nonetheless love our warriors. Perhaps it's now time for us to learn how to separate our wounded warriors from military service in a way that does not involve a loss of their cherished benefits. Or, at the very least, we should be able to treat them for the conditions they developed in the military without taking the chance they will lose their hard-earned benefits.

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Daily Journal

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Duty, honor, country... suicide

Sometimes, a lawyer might be the first responder

4th Appellate District, Division 3

EILEEN C. MOORE

Associate Justice,

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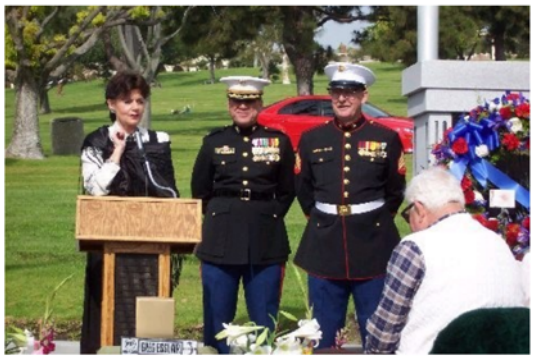
Every day 20 about veterans kill themselves. The experts don't really know why this is happening, surmising this self-destruction results from something that happened in combat. In 2016, 490 California veterans took their own lives. In 2014, about 65% of all veterans who died by suicide were ages 50 and older. Women veterans have particularly high suicide rates. All of them know how to use a firearm, and almost two-thirds pull a trigger.



Justice Moore speaks at a Vietnam veteran's funeral. (Courtesy of Justice Moore)

When I came back to the states after serving as a combat nurse in Vietnam, I walked right into the middle of the Women's Liberation Movement. Once I realized that a nobody like me, a girl, the daughter of a high school dropout, could actually study at a university, I grabbed for that brass ring and never looked back. Then in the late 1990s, someone from the local chapter of Vietnam Veterans of America asked me to speak at a special event at the Richard Nixon Presidential Library. When I arrived, a vet was standing outside waiting to escort me inside. He used a cane because of an injury to his leg. He was polite and kind and sweet. Later someone told me that the man, Greg, had lived on the street for 15 years. But at that time, he was in his last year of college. Little did I know that evening, but a few years later, I would speak at Greg's funeral.

What caught most of my attention that night were the three rows of bedraggled men off to the side of the auditorium. They were wearing old fatigues and looked as if they were homeless and self-medicating. After I spoke, those men completely surrounded me. Each one had to touch me somewhere on my arm or shoulder or back. One stroked his pointer finger over and over the top of my hand. They just wanted to stand there and make contact with one of their nurses. I'm not sure it even registered with them that I was also a judge.

After other wars, soldiers came back with at least some amusing anecdotes. Reader's Digest used to have a column called "Humor in Uniform." One story was about a Sergeant driving a jeep in Korea. He held his arm out to signal a left turn and someone stole his watch. He jumped out of the jeep and took chase, to no avail. When he got back, his jeep was gone as well. But Vietnam vets didn't come home with fun stories. Those men at the Nixon Library, I realized, seemed to have only one positive memory from Vietnam, the nurses.

Sure, I had seen veterans standing at freeway offramps holding a sign in one hand and a tin cup in the other, but being surrounded by all those lost souls at the Nixon Library, some with tears in their eyes, shook me to my very core. Since that night, I have been involved with veterans' activities in one way or another. I also reactivated my license as a Registered Nurse. I still take the continuing education courses to keep it active.

Weeks before Greg's death one of the vets told me he was holed up in his room drinking himself to death. I mailed him a letter explaining how important he was to the chapter and what a shining example of success he was to all veterans. Had I known

then what I know now, I would have done more.

I suspect some of our soldiers did things that make them feel ashamed. Also, I assume some made pacts with God or with their souls: "If can just live, I won't complain." I think that because when they woke up from anesthesia in Vietnam and we had to tell them they lost an arm, a leg or an eye, they'd often say something like, "Charley can't get me now; I'm goin' home." What kind of terror would a person have to face in order to feel relieved at losing a limb?

We went into Iraq in March 2003 and we've had our troops in harms way in the Middle East at least since then. Many from California were deployed from the National Guard or the Reserves, part timers. They were pulled from their civilian lives and sent far away. We don't know what happened to them or what they did over there. But we do know that many of them come back in a very troubled state, even when they don't have visible injuries.

Moral injuries are said to be a signature wound of those who served in Iraq and Afghanistan. They gnaw at the hearts of combat veterans. Largely based on World War II studies finding that the majority of soldiers in war did not ever fire their weapons because of an innate resistance to killing, Lt. Col. Dave Grossman's book points out there are great psychological costs on combat soldiers. He says that at the moment of truth when they could and should kill the enemy, the vast majority of combatants have found themselves to be conscientious objectors. Thus, in training our post-World War II soldiers, conditioning techniques designed to enable killing in the modern soldier have been utilized. Grossman's book says one researcher found a 95% firing rate among American soldiers in Vietnam as compared to estimates of only 15 to 20% firing at the enemy during World War II.

Since Vietnam, our soldiers have been psychologically enabled to kill to a far greater degree than during previous wars. There must be grave consequences when one overcomes the natural inhibition against killing. One thing we know for sure is that pervasive mental health issues are plaguing our veterans.

The term "moral injury" was coined by Dr. Jonathan Shay, a psychiatrist who treated combat veterans, primarily those who served in Vietnam, at the VA for several decades. A New York Times article about Shay states that after he suffered a stroke, he filled in the gaps in his education by reading "The Iliad" and "The Odyssey," and it was clear to him that his VA patients were echoing many of the sentiments expressed by the warriors in those ancient texts: betrayal by those in power, guilt for surviving, deep alienation on their return from war. Shay points to the words of Lady Percy in "Henry IV" as possibly the earliest historical reference to PTSD: "Thy spirit within thee hath been so at war, And thus hath so bestirr'd thee in thy sleep, That beads of sweat have

stood upon thy brow, Like bubbles in a late-disturbed stream."

Major Erik D. Masicka asks us to imagine a transgression of core beliefs, values or morals that is so severe and traumatic that a soldier's very concept of right and wrong is fundamentally transformed. Masicka says that is a moral injury. The military is said to be slow in accepting that such a phenomenon even exists, but the branches of service are slowly coming around. The Army now mentions moral injury in its Family Fitness Program. The Navy and Marine Corps prefer the term "inner conflict."

Minnesota lawyer Brockton D. Hunter notes that while the majority of Vietnam veterans served a single tour in-country, many veterans of Iraq and Afghanistan have served two, three, four or more tours. "People aren't designed to be exposed to the horrors of combat repeatedly. And it wears on them," Gen. George Casey, Army chief of staff, told reporters in 2008.

What does all this have to do with the law? Suicide experts say we need to look beyond the usual risk factors, such as PTSD or a major depressive disorder, and address the role a major life crisis plays in veteran suicide. Lawyers and judges regularly deal with people undergoing major life crises. The legal community can play a role in veteran suicide prevention, beginning with asking if a client or party ever served in the armed forces. Preventative law is already in use to a certain extent. According to Hunter, prosecutorial sympathy for veterans has been significant, viewing veterans as less blameworthy than nonveterans, at least for low level offenses.

California has about 10% of all our country's veterans. The chances of a lawyer or a judge coming in contact with a veteran are probable. Intimate partner violence, whether the person is the victim or the perpetrator, employment problems and sexual minority status can be significant risk factors for veteran suicide. Restraining order petitions, employment matters and discrimination cases are omnipresent in our courts. Plus, in days gone by when we still had a draft, many service members tended to be young single men. In today's volunteer military, there are more and more older persons of both genders who have families. Where we find families, we find family problems. Like the rest of us, veterans face financial, insurance and mortgage issues and go through divorces. Few life crises get more major than a child custody battle. Veterans already carrying invisible wounds from military service can be teetering at the edge when trying to get themselves through a legal problem such as the fear of losing their children.

To a certain extent, lawyers are sometimes first responders since a veteran's ability to manage the uncertainty and frustration of the legal process might be seriously impaired due to something that happened in the military. It just might be the lawyer who first recognizes the need for mental health evaluation and treatment.

The VA says the warning signs of suicide are people threatening or talking about ways to harm or kill themselves. Additional warning signs are hopelessness, rage, anger, seeking revenge, acting recklessly, feeling trapped, increasing alcohol or drug use, withdrawing from family and friends, anxiety, mood changes or perceiving there is no reason to live. There is a 24/7 Veterans Crisis Line [1-800-273-8255 and Press 1], and it has a texting option [text to 838255]. To chat online, go VeteransCrisisLine.net/Chat. Skilled responders are trained for suicide prevention and prepared for crisis intervention.

Our armed forces placed their lives and their health on the line to protect all of us. The least civilians can do is to help watch over those who protected us. VA Secretary Robert Wilkie declared September the Suicide Prevention Month and called for all Americans to work together to prevent suicide among our veterans.

#354150

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