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NATIONAL VETERANS LEGAL SERVICES PROGRAM

ASSISTING SURVIVORS WITH CLAIMS FOR VA BENEFITS ASSOCIATED WITH MILITARY SEXUAL TRAUMA

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Mary Edokpayi

- Navy Veteran who has worked on veterans issues for 3 years
- MST Staff attorney at NVLSP for 2 years
- Mentors pro bono attorneys
- Represents MST survivors at the Court of Appeals for Veterans Claims



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Topics to Cover

- Overview – MST claims / service-connection
- Developments in law
- Advanced advocacy
- VA's proposed rule change for characterization of discharges and its potential impact on MST claims
- Choice of review/appeal options under the AMA
- Building client relationships with MST survivors
- NVLSP's MST program

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OVERVIEW: MST CLAIMS

- Definition of MST: Psychological trauma, which in the judgment of VA mental health professional, resulted from a coerced sexual act
 - Physical assault of a sexual nature
 - Battery of a sexual nature
 - Sexual harassment (verbal or physical with threat of violence)
 - 38 U.S.C. § 1720D(a)(1) & (f)

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OVERVIEW: MST CLAIMS

- MST is a type of “personal trauma” recognized as a PTSD stressor.
- Common conditions associated with MST:
 - Psychological: PTSD, Anxiety, Depression
 - Physical: Gynecological; Urological; Gastrointestinal
- 38 C.F.R. § 3.304(f)(5); Manual M21-1, IV.iii.1.D.5.a

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OVERVIEW: SERVICE-CONNECTION

- PTSD
 - Current Diagnosis of PTSD
 - Credible supporting evidence that a claimed in-service stressor occurred (relaxed in some cases)
 - A link/nexus, established by medical evidence, between diagnosis and stressor
 - 38 C.F.R. § 3.304(f)

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OVERVIEW: SERVICE-CONNECTION

- Non-PTSD Psychiatric Condition and Physical Conditions
 - Current disability
 - In-service event, injury, or disease
 - A nexus or link, established by medical evidence, between the current disability and in-service event
 - 38 C.F.R. § 3.303

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Survey #1

- What element of service-connection does MST satisfy?
 - Current disability
 - In-service event, disease, or injury
 - Nexus / link

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ANSWER

B

- MST is NOT a disability or diagnosis (although it may be listed as such in treatment records)
- It is the underlying event that has led to the condition for which the Vet has filed a service-connection claim

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Credible Supporting Evidence: NVLSP Markers of MST



- Evidence outside of military record
 - Law enforcement agency records
 - Rape crisis center records
 - Mental health counseling centers, hospitals, physicians records
 - Pregnancy or sexually transmitted disease tests
 - Statements from family members, roommates, fellow service members, clergy

R. § 3.304(f)(5)

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Credible Supporting Evidence: **NVLSP** Markers of MST



- Examples of changes of behavior
 - Request for transfer
 - Deterioration in work performance
 - Substance abuse
 - Episodes of depression, anxiety, panic attacks (unexplained)
 - Economic or social behavior changes (unexplained)
 - 38 C.F.R. § 3.304(f)(5)

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Credible Supporting Evidence: Markers of MST



- Sources of evidence from Manual M21-1, III.iv.4.O.3.c
 - Part of the MST checklist
 - Examples:
 - Rape or domestic violence centers
 - Counseling or health clinic records
 - Family members, roommates, fellow service members
 - Civilian police reports
 - Medical records
 - Chaplain or clergy
 - Personal diaries or journals

Annual Review of Entomology, Volume 45, 2000, pp. 1–26. © 2000 by Annual Reviews Inc.

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Credible Supporting Evidence: Markers of MST



- Manual M21-1, III.iv.4.O.3.d: evidence of markers
 - Listed in VA Form 21-0781a “Markers” section
 - Examples:
 - Increased use or abuse of leave
 - Medical or clinical treatment w/o specific diagnosis
 - Pregnancy or sexually transmitted disease tests
 - Request for change in job or unit assignment
 - Unexplained changes in behavior

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Survey #2



- Which commonly claimed MST-related conditions do MST markers play an evidentiary role?
 - a. PTSD
 - b. Mental disorders other than PTSD
 - c. Physical conditions
 - d. All of the above

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ANSWER



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- But you will have to be creative in how you argue this for Non-PTSD claims
- The more corroborative evidence you have, the better!

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Role of MST Markers

- PTSD Claims:
 - “credible supporting evidence” of stressor
 - With post-service medical opinions, can also establish nexus

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Role of MST Markers

- Non-PTSD Claims
 - Evidence of in-service incurrence of an event
 - Vet's statements play an equal role in corroborative evidence
 - VA tends to overlook markers in non-PTSD claims; however, the policy for markers is same regardless of the claim
 - There is no reason why they cannot help establish criteria #2 for service connection, even with lack of any other complaint, diagnosis, or treatment for the claimed condition

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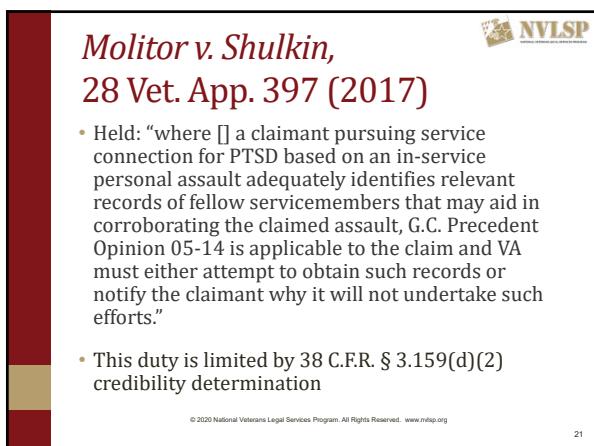
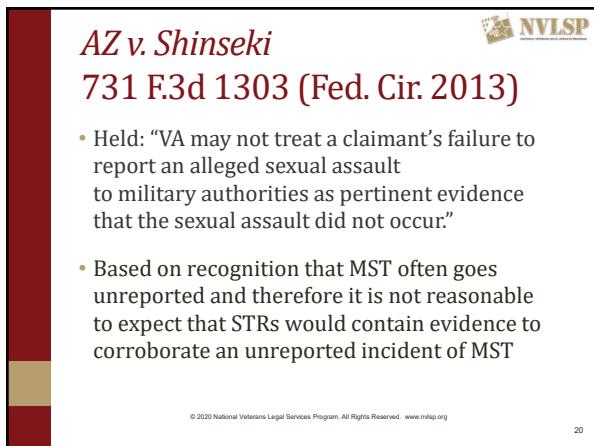
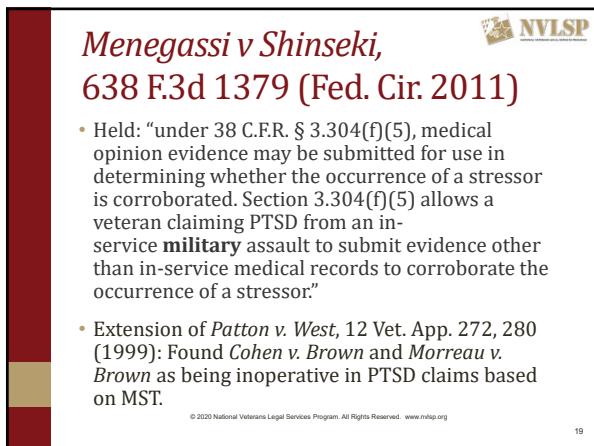

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Key Developments for MST Claims

- Caselaw:
 - 2011: *Menegassi v. Shinseki*
 - 2013: *AZ v. Shinseki*
 - 2017: *Molitor v. Shinseki*
- Oversight:
 - 2018: VA OIG Report on PTSD Claims Based on MST
 - 2020: House Committee on Veterans Affairs Letter

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Survey #3


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Answer

B

- Although, C is a nice benefit as well.


 A bronze statue of Lady Justice, blindfolded and holding a scale, sits on a wooden desk next to a laptop and papers.

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VA OIG Report: Denial of PTSD Claims based on MST

- Published Aug. 21, 2018; #17-05248-241
- Purpose was to determine whether VA correctly processed MST-related claims in accordance with VA's liberalized policy prior to denying claims
- Found 49% of denied MST-related claims NOT properly processed
 - Failed to request exam when required
 - Failed to request additional evidence
 - Failed to make required contact (call or letter) to determine whether MST was reported
 - Decisions based on insufficient medical opinions



VA OIG Report

- Why did this happen?
 - Lack of specialization
 - Pre-2016, VA used special teams for MST cases
 - In 2016, with implementation of the National Work Queue, VA stopped using specialized teams
 - Lack of additional level of review
 - Some complex claims (e.g. TBI) require additional level of reviews
 - MST claims do not

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VA OIG Report

- Discontinuance of special focus reviews
 - Quality assurance teams were reviewing MST claims from 2011 to 2015
 - Stopped: reduction in errors observed and volume of MST claims was low
- Inadequate training
 - VBA had not updated MST training since 2014
 - Issues found: improper development procedures and misstated roles and responsibility of MST Coordinators

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VA OIG Report

- Recommendations
 - Review previously denied MST-related claims since FY 2017
 - Reinstate specialized MST teams
 - Require additional level of review for all denied MST-related claims
 - Conduct focused quality improvement review of denied MST-related claims and take corrective action as needed
 - Update MST training
 - Update MST development checklist

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April 2020 House Committee on Veterans Affairs Letter



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- Noted that MST survivors remain among the most vulnerable Vets in need of healthcare and benefits
- 2/5/2020 hearing confirmed that MST remains widespread in the military
 - 25% of female veterans
 - 1% of male veterans
 - Estimate that 70% of cases go unreported
- Confirmed that VA processes and policies are deficient in service of MST survivors


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April 2020 Letter

- Call for VA to establish a working group to perform comprehensive review of its policies and procedures and how they impact MST survivors
 - Need improvement to MST compensation process to reduce re-traumatizing survivors
- Strengthen coordination and identification between VBA and VHA to improve communication with survivors
- Expand and bolster work of MST Coordinators in VBA and VHA
- Address sufficiency of training of VA employees regarding sexual harassment and assault within VA facilities

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Advanced Advocacy: Using these Key Developments

- Hypo:
 - Vet Smith files claim for depression, based on incident of MST that occurred as part of hazing on his ship known as Shellback Ceremony (equator crossing)
 - He has certificate of Shellback ceremony in his service records
 - This ceremony lists the ship and date of the ceremony
 - He was new on board and could only remember the name of one other sailor who was seriously injured during the ceremony
- Is this enough to trigger VA's obligation under *Moliter*?

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Using Key Developments

- Yes, but which one?
- The specificity of the command, the time, the incident, and the sailor's name could trigger VA's duty to attempt to obtain records from a 3rd party
- *Moliter* also discusses VA's duty to provide an exam in MST cases
 - Is there enough in the hypo to trigger VA's duty to provide a medical exam under 38 U.S.C. § 5103A(d)?
 - No – the stressor alone does not establish a current condition that could be reasonably linked to service

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Using Key Developments

- VA medical exams and *Menegassi*
 - 38 C.F.R. § 3.304(f)(5) – allows for VA to submit marker evidence to VA examiners for determination of corroboration of MST
 - VA examiners are pushing back on this with “outside the scope” language that also undermines the utility of markers
 - What should you do?

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Using Key Developments

- Suggestions (facts will dictate)
- Submit statement about how the markers in the case corroborate the MST account
 - Specifically for examiner, or
 - As part of initial claim for the examiner to review
- Challenge the exam as inadequate if the examiner's "outside the scope" language seems to undermine a favorable nexus
 - *Fear v. Wilkie*, 31 Vet. App. 308 (2019) – raise issue that examiner is possibly not competent

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Using Key Developments

- Independent medical exams
 - 38 C.F.R. § 3.304(f)(5): allows competent mental health providers to provide opinion regarding the markers as corroborating the MST
 - Work with examiner to clearly support the opinion
- Most commonly cited exam cases
 - *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008)
 - *Stefl v. Nicholson*, 21 Vet. App. 120 (2008)
 - *Molitor v. Shulkin*, 28 Vet. App. 397 (2017)

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Using Key Developments

- VA Adjudication Procedures Manual M21-1
 - www.knowva.ebenefits.va.gov
 - Regularly updated, even when training isn't
- M21-1 lists common inadequacies in PTSD exams
 - Inadequate identification or description of claimed stressors
 - Examiner does not discuss significance of, and reconcile, any differential diagnoses or changes in diagnosis
 - Examiner does not justify mere speculation conclusion
 - Not properly qualified examiner (*Fears v. Wilkie*)

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38 C.F.R. § 3.655(a): Good Cause and MST Claims

- § 3.655(b) allows for the denial of most claims when Vet fails to report for a VA-ordered exam
- § 3.655(a) prohibits this automatic denial if Vet has “good cause” for failing to appear
- What is good cause?

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Good Cause and MST

- VA has not defined “good cause”
- *Kowalski v. Nicholson*, 19 Vet. App. 171 (2005)
 - BVA correctly found that voluntary refusal to attend an exam is not good cause
 - RO denied the claim and BVA affirmed on the merits
 - CAVC noted other cases that found no “good cause”
 - News reports criticizing health care at VAMC
 - Financial hardship in traveling to exam
 - Claims of malpractice and discrimination
- **BUT....**

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Good Cause and MST

- *Cannady v. Wilkie*, Vet. App. 19-0079 (June 25, 2020)
 - Vet with PTSD refused to go to VAMC for exam
 - He feared going for various reasons
 - BVA interpreted § 3.655(a) as to only allow for “good cause” when there were circumstances outside of the Vet’s control
 - Court found that BVA failed to consider if his concerns, rooted in his psychiatric conditions, established “good cause” and remanded claim

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Good Cause and MST

- Survivors of MST usually have mental health issues *and* have a genuine issue with going to VAMC or any place military-related
- 2018 VA OIG report confirms that VA is not consistent in adequately developing and adjudicating MST claims
- April 2020 Letter notes the need to revamp the MST adjudication process to limit the re-traumatizing nature of the process, in particular, VA C&P exams

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Good Cause and MST

- Facts of case will dictate whether to fight against VA exam, BUT...
 - Congress has recognized that MST survivors are one of the most vulnerable population of Vets, so
 - If the record contains adequate evidence, including a medical opinion, and
 - Vet has suffered through multiple VA exams already or otherwise exhibits fragile psychological state
 - It *may* be worth fighting the exam request

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Character of Discharge

- VA determines whether Vet's service is other than dishonorable for purposes of VA benefits
- Statutory Bars (38 U.S.C. § 5303)
 - Conscientious objector who refuse to perform duty, wear uniform, or comply with lawful order
 - Reason of sentence of General court-martial
 - Resignation of an officer for good of the service
 - Deserter
 - Alien during period of hostilities who requested release from service
 - Absent without leave (AWOL) for at least 180 consecutive days absent compelling circumstances

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Character of Discharge

- Regulatory Bars: 38 C.F.R. § 3.12(d)
 - Acceptance of undesirable discharge to escape trial by general court martial
 - Mutiny or spying
 - An offense involving moral turpitude (e.g. felony conviction)
 - Willful and persistent misconduct (not including minor offense)
 - Homosexual acts involving aggravating circumstances or other factors impacting performance of duties

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Character of Discharge

- Compelling Circumstances – ONLY APPLIES TO AWOL
 - Length and character of service exclusive of period of AWOL
 - Reasons for going AWOL, to be assessed by:
 - Person's age
 - Cultural background
 - Educational level
 - Judgmental maturity
 - Hardship or suffering incurred during overseas service or combat wounds are to be carefully and sympathetically considered
 - Valid legal defense exists for the absence that would prevent conviction for AWOL

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Proposed Changes: 85 FR 41471

- Some changes to text of 38 C.F.R. § 3.12, including:
 - Removing reference “homosexual” acts
 - Changing “undesirable discharge” to “other than honorable”
 - Changing “to escape from” to “in lieu of” general court-martial

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Proposed Changes: 85 FR 41471

- Most significant is to expand application of compelling circumstances to:
 - Offense involving mortal turpitude
 - Willful and persistent misconduct
 - Sexual acts involving aggravating circumstances or other factors effecting performance of duty

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Benefit for MST Claims

Benefit for MST Claims

- Moral turpitude – drug use, adultery
- Willful and persistent misconduct – drug use, treatment failure, disobeying orders, repeated minor infractions
- DoD Guidance – Liberalizing standards
 - *Hagel Memo* – PTSD/TBI as mitigation for misconduct
 - *Kurta Memo* – PTSD/TBI/MST as mitigation for misconduct
 - *Wilkie Memo* – Youthful indiscretion as mitigation for misconduct

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Survey #4

- Do the proposed changes to 38 C.F.R. § 3.12(d) include a “compelling circumstances” exception for Other Than Honorable discharges in lieu of a general court-martial?
 - a. Yes
 - b. No

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Answer

NO ☺

- VA's position is that the military process for administrative discharges adequately informs service members of their options for accepting an administrative discharge, such that a compelling circumstances exception is not warranted
- NOTE: NVLSP has submitted comments arguing that VA is should allow a compelling circumstances exception for these kinds of cases as well

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Choice of AMA Review/Appeal Option

- Supplemental Claims
 - Pros: can add evidence; quick turnaround
 - Cons: most inexperienced rater; overlooking evidence
- Higher-Level Review
 - Pros: more experienced adjudicator; quicker than BVA
 - Cons: rubber-stamping of supplemental claims; no new evidence

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Choice of AMA Review/Appeal Option

- BVA Appeal
 - Pros: legal analysis can occur; most experienced; choices of lane
 - Cons: it takes the longest; cannot trigger DTA (but will remand if RO committed DTA error)
- Opting into AMA from Legacy appeal
 - Pros: potentially faster; preserve effective date
 - Cons: stuck in the restrictions of the AMA; delay appeal

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MST Survivor as Client

- Recognize their perspective
 - Survivors of trauma have difficulty trusting
 - They can be easily triggered by telling their experience
 - This may be the first time they are telling their story
 - They may not identify as a veteran; do not assume they want you to “thank them for their service”

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MST Survivor as Client

- Be Patient
 - They will need a lot of attention
 - They may take longer to get you info and evidence, return your call, meet with you
 - It will get easier once the trust is established

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MST Survivor as Client

- **BELIEVE THEM!**
 - It is not your job to “prove” the MST occurred
 - You are only working to “corroborate” your client’s description of the incident
 - They can tell when you do not believe them and that will undermine your relationship

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MST Survivor as Client

- Interview Tips
 - Be clear about what you are trying to do and why
 - Reassure them that you are on their side and support them
 - Give them options for how they want to discuss their trauma
 - Be sensitive to any accommodations they may need

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MST Survivor as Client

- Interview Tips (cont.)
 - Use affirming language and avoid any suggestion that it was their fault
 - Do not mirror any negative labeling terms they may use (e.g. "Crazy")
 - Take your time

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Referrals

- Hopefully your client is already getting treatment
- However, here are some resources:
 - Vet Centers -www.vetcenter.va.gov
 - Focus on MST trauma treatment
 - Do not need service-connected disability or honorable discharge
 - Veterans Crisis Line: 1-800-273-8255
 - VA Mental Health Website:
<https://www.va.gov/health-care/health-needs-conditions/mental-health/>

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NVLSP's MST Program

NVLSP's MST Program Process

- Vets apply to LSW for legal assistance. Their records are requested for evaluation of the claim.
- LSW staff attorneys review the application and supporting documents and place meritorious cases with volunteer law firm / corporate counsel attorney
- The volunteer attorney serves as lead counsel
- LSW staff attorneys serve as mentors, helping the volunteer attorney prepare a successful case


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NVLSP's MST Program

- Volunteer attorneys represent Vets seeking service-connected disability benefits for conditions related to MST
- Volunteer attorneys develop supporting evidence (as necessary) and submit 5-10 page brief in support of claims.
- When appropriate, they will appear with Vets at hearings before the VA

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NVLSP's MST Program

- Vets and advocates can request assistance through NVLSP's website:
www.nvlp.org/what-we-do/lawyers-serving-warriors
- Direct referrals are accepted from veteran services organizations
- Contact:

info@nvlsp.org
202-265-8305, option 4

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VA Benefit Identifier

- **Questionnaire/App:** Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to
- **3 WAYS to Access:**
 - [NVLSP Website](#)
 -  Download on the [App Store](#)
 -  [Google play](#)


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NVLSP Training Opportunities

- NVLSP offers private in-person and webinar training tailored to the needs of your organization
- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, at richard@nvlsp.org

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