



NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

SERVICE CONNECTION CLAIMS BASED ON MILITARY SEXUAL TRAUMA

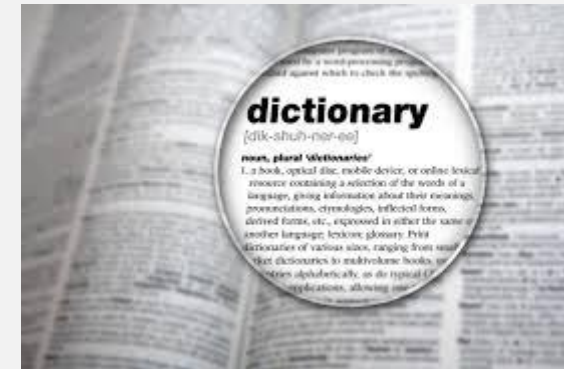
TRAINING OVERVIEW

- Definition of MST
- How Common is MST
- Service Connection
- Evidence & Markers
- Stressors
- Nexus Opinions
- Recent Legislation
- Case Study
- NVLSP's MST Program

DEFINITION OF MST

DEFINITION

What is “military sexual trauma”?



PERSONAL TRAUMA

- For the purpose of VA disability compensation claims based on PTSD, personal trauma refers broadly to stressor events involving harm perpetrated by a person who is not considered part of an enemy force
 - *Examples:* Assault, battery, robbery, mugging, stalking, harassment
- MST is a subset of personal trauma and refers to sexual harassment, sexual assault, or rape that occurs in a military setting
 - Manual M21-1, VIII.iv.1.B.1.a (change date July 29, 2021)

DEFINITION OF MILITARY SEXUAL TRAUMA

- MST is the term used by VA to refer to experiences during military service of
 - sexual assault
 - repeated, threatening sexual harassment
 - www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf

DEFINITION OF MILITARY SEXUAL TRAUMA

- **Definition from 38 U.S.C. § 1720D(a)(1):**
 - Psychological trauma, which in the judgment of a VA mental health professional, resulted from
 - a physical assault of a sexual nature,
 - battery of a sexual nature, or
 - sexual harassment
 - Which occurred while the Vet was serving on active duty, active duty for training, or inactive duty training

DEFINITION OF MILITARY SEXUAL TRAUMA

- Sexual harassment is:
 - repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character
 - 38 U.S.C. § 1720D(f)
 - www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf

DEFINITION OF MILITARY SEXUAL TRAUMA

- MST includes any sexual activity where a service member is involved against his or her will
 - Pressured into sexual activities
 - **Unable to consent to sexual activities**
 - Physically forced into sexual activities
 - **Subjected to sexual harassment**

HOW COMMON IS MST?

DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FY 2020



- Incidents of MST often go unreported
 - 5.1 of every 1,000 Service Members reported a sexual assault
 - DoD received 6,290 reports of an incident that occurred during military service
 - DoD estimates that approximately 20,500 service members experienced sexual assault (FY 2018)

UNRESTRICTED REPORTS OF SEXUAL ASSAULT BY OFFENSE ALLEGED AND MILITARY STATUS FY 2020



Most Serious Offense Alleged in Report	Total Unrestricted Reports	Reports Made by Service Members	Reports Made by Non-Service Members	Relevant Data Not Available
Rape	590	439	151	0
Aggravated Sexual Assault and Sexual Assault	1,921	1,520	393	8
Aggravated Sexual Contact	72	65	7	0
Abusive Sexual Contact	2,300	2,029	257	14
Wrongful Sexual Contact	1	1	0	0
Indecent Assault	20	15	5	0
Forcible Sodomy	16	15	1	0
Attempts to Commit Offenses	47	42	5	0
Offense Data Not Available	673	657	16	0
Total Unrestricted Reports	5,640	4,783	835	22

DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FY 2018



Fiscal Year 2018: Sexual Assault in the Military

DoD Sexual Assault Prevalence

0.7% indicated an experience of sexual assault



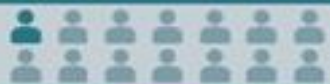
6.2% indicated an experience of sexual assault



More Service Members Are Coming Forward to Make a Report

After experiencing a sexual assault, how many Service members reported it to a DoD authority?

About 1 out of 14



2006

About 1 out of 3



2018

Individual Service Sexual Assault Prevalence



Army



Navy



Marine Corps



Air Force

2018

Women: 5.8%

Men: 0.7%

Women: 7.5%

Men: 1.0%

Women: 10.7%

Men: 0.8%

Women: 4.3%

Men: 0.5%

2016

Women: 4.4%

Men: 0.6%

Women: 5.1%

Men: 0.9%

Women: 7.0%

Men: 0.7%

Women: 2.8%

Men: 0.3%

Bolded text indicates a statistically significant increase from 2016

DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FY 2018

Fiscal Year 2018: Sexual Assault in the Military

Sexual Harassment Rates in the Military

6.3% indicated an experience of sexual harassment



24.2% indicated an experience of sexual harassment



Sexual harassment is a leading factor affecting the unit climate on sexual assault. Controlling for paygrade, Service, and deployment status...



▶ **1 in 5 women** who experienced sexual harassment also experienced sexual assault



▶ **1 in 12 men** who experienced sexual harassment also experienced sexual assault

DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FY 2018



- Sexual assault occurred most often between junior enlisted acquaintances who are peers or near peers in rank
- The vast majority of sexual assaults of service members occurred between people aged 17 to 24 who work, train, or live in close proximity
- Military women indicated that offenders:
 - Were most often military men whom they considered to be a friend or acquaintance, acting alone
 - Rank was most often the same as the victim's or one rank higher, with most alleged incidents involving junior enlisted women in the grades E3 and E4

DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FY 2018



- Military men reported:
 - Experiencing fewer sexual assaults than women
 - Endorsing many of the same offense experiences
 - A different combination of offenders with regard to sex:
 - Just over half of men indicated their offender was male
 - 30% indicated their offender was female
 - 13% indicated their offenders were a mix of men and women acting together

VA'S NATIONAL SCREENING PROGRAM

- Every Vet seen for health care is asked whether he or she experienced MST
- National data from this program reveal that about 1 in 4 women and 1 in 100 men respond “yes,” that they experienced MST
- Data speaks only to the rate of MST among Vets who have chosen to seek VA health care
- Vet who respond “yes” when screened are asked if they are interested in learning about MST-related services available
- Not every Vet who responds “yes” necessarily needs or is interested in treatment

SERVICE CONNECTION

SERVICE CONNECTION

WHAT ARE THE 3 ELEMENTS OF SERVICE CONNECTION?



3 ELEMENTS FOR SC FOR MENTAL DISORDERS (OTHER THAN PTSD)

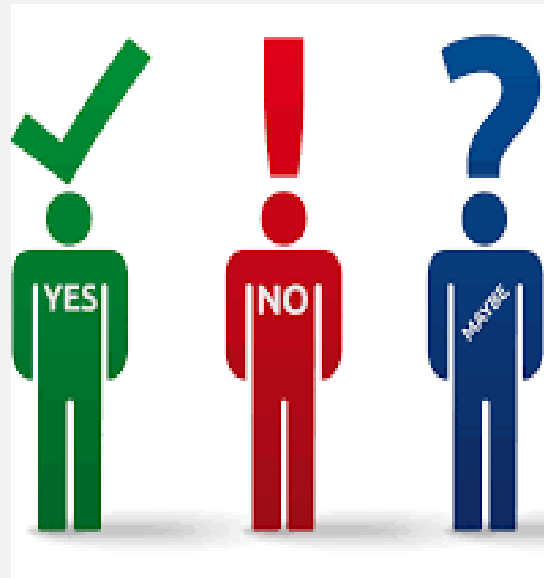
- Current diagnosis
- In-service event, injury, or disease
- A link, established by medical evidence, between the current diagnosis and in-service event

3 ELEMENTS FOR SC FOR PTSD

- Current diagnosis of PTSD
- Credible supporting evidence that a claimed in-service stressor occurred (relaxed in some situations)
- A link/nexus, established by medical evidence, between current symptoms and in-service stressor

POLL #1

Can a Vet file a claim for MST?



SERVICE CONNECTION



- A Vet cannot file for SC for MST
- MST is an event, not a disability
- Vet needs to have a DSM-5 mental health diagnosis or diagnosis of a physical disability related to the MST

POSSIBLE MENTAL HEALTH DIAGNOSES

- **Potential psychiatric disorders related to MST:**
 - PTSD
 - Major Depressive Disorder
 - Generalized Anxiety Disorder
 - Panic Disorder



EVIDENCE & MARKERS

SERVICE CONNECTION FOR MENTAL DISORDERS

- Diagnosis will determine what evidence is required
 - PTSD: 38 C.F.R. § 3.304(f)(5)
 - Must have credible supporting evidence of MST
 - Other mental disorders: 38 C.F.R. § 3.303
 - Do not necessarily need credible supporting evidence of MST

IN-SERVICE ASSAULTS AND MST

- There are no evidentiary presumptions for in-service assaults or MST
- Vets who allege an in-service assault or MST must provide credible supporting evidence that the incident occurred for PTSD claims

CREDIBLE SUPPORTING EVIDENCE

- There must be some believable evidence that tends to support Vet's assertion
 - Vet's statement alone not enough
- VA considers
 - Plausibility
 - Consistency with other evidence in the case
 - Source

CREDIBLE SUPPORTING EVIDENCE

- VA may not treat the absence of documentation of the MST or in-service assault in service records as negative evidence
 - Because MST often goes unreported, it is not reasonable to expect that the event would be reported and/or recorded
 - VA may not find Vet's statements not credible simply because an injury was not recorded in service records
 - **Exception:** cases where it is reasonable to expect that the event would be recorded
 - *AZ v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013)

CREDIBLE SUPPORTING EVIDENCE

- Because Vets face unique problems documenting claimed stressor in personal assault cases, VA has provided for special evidentiary-development procedures in these cases
 - *Bradford v. Nicholson*, 20 Vet. App. 200 (2006)
- Under **38 C.F.R. § 3.304(f)(5)**, evidence from sources other than Vet's service records may be used to corroborate the existence of an in-service personal assault stressor

CREDIBLE SUPPORTING EVIDENCE

- According to Manual M21-1, VIII.iv.1.E.1.d:
 - A **marker** is an indicator of the effect or consequences of a personal trauma on a Vet
 - A marker could be one or more behavioral events, or a pattern of changed behavior
 - Evidence of behavioral changes around the time of, and after, the incident(s)
 - Even if there is no reference to the personal trauma, evidence of certain behavior changes may circumstantially support the possibility that the claimed stressor occurred

EXAMPLES OF MARKERS FOR MST CASES

- Police records
- Medical records
- STD or pregnancy tests
- Statements from family members, friends, roommates, clergy

- 38 C.F.R. § 3.304(f)(5)



EXAMPLES OF MARKERS FOR MST CASES

- Evidence of behavioral changes
 - Episodes of depression
 - Drug/alcohol use
 - Fights
 - Requests for transfer
 - Unexplained economic changes
 - Deterioration of work performance



▪ 38 C.F.R. § 3.304(f)(5)

ALTERNATIVE SOURCES OF EVIDENCE OF IN-SERVICE PERSONAL TRAUMA

- Manual M21-1, VIII.iv.1.E.1.c provides examples of *alternative sources of evidence*, which include:
 - Rape crisis center or center for domestic abuse
 - Counseling facility or health clinic
 - Family members or roommates
 - Faculty member
 - Civilian police reports
 - Medical reports from civilian physicians or caregivers who treated the Vet immediately following the incident or sometime later
 - Chaplain or clergy
 - Fellow service members
 - Personal diaries or journals

EVIDENCE THAT MAY CONSTITUTE A MARKER OF PERSONAL TRAUMA

- Evidence that may be a marker of trauma listed in Manual M21-1, VIII.1.E.1.d:
 - Increased use or abuse of leave without an apparent reason, such as family obligations or family illness
 - Episodes of depression, panic attacks, or anxiety without identifiable reasons
 - Visits to a medical or counseling clinic or dispensary without a specific diagnosis or specific ailment
 - Use of, or increased interest in, pregnancy tests or tests for STDs (including the HIV) around the time of the incident
 - Sudden requests that the Vet's MOS or duty assignment be changed without other justification

EVIDENCE THAT MAY CONSTITUTE A MARKER OF PERSONAL TRAUMA

- Markers of trauma (cont.):
 - Changes in performance and performance evals
 - Increased or decreased use of prescription medications
 - Increased use of OTC medications
 - Alcohol or drug abuse
 - Increased disregard for military or civilian authority
 - Obsessive behavior such as overeating or undereating
 - Unexplained economic or social behavior changes
 - Treatment for physical injuries around the time of the claimed trauma, but not reported as a result of the trauma
 - The breakup of a primary relationship

STRESSORS

POLL #2

For PTSD claims based on personal assault/MST, can after-the-fact medical opinions corroborate the claimed stressor?

- A. Yes
- B. No
- C. Maybe



STRESSORS



MENEGASSI V. SHINSEKI, 638 F.3D 1379 (FED. CIR. 2011)

- For PTSD claims based on personal assault/MST, after-the-fact medical opinions can corroborate the claimed stressor and must be considered by VA in determining whether the evidence establishes that the claimed stressor occurred
- VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that MST occurred

CONSIDER NON-MST STRESSORS

- Main goal is to obtain SC for Vet's mental health conditions
 - Ask if Vet had any other military-related stressors
 - A non-MST stressor may be easier to prove
 - If Vet has another stressor that will make it easier to obtain SC, use that stressor to the Vet's advantage



DUTY TO ASSIST

- VA must make **reasonable efforts** to assist in obtaining relevant records not in the custody of a federal department or agency
- VA must make efforts to obtain Vet's STRs, other records relating to military service held or maintained by a government agency, VA medical records, and any other relevant records held by a federal agency
- VA must provide an exam when necessary

STRESSOR: VA'S OBLIGATIONS UNDER ITS DUTY TO ASSIST

- Under what circumstances does the duty to assist require VA to attempt to obtain records of service members, other than the claimant, to aid in corroborating a claimed personal assault for a claim for an SC mental disorder?

STRESSORS

- Vet filed a claim for SC for PTSD due to MST
 - Reported she was sexually assaulted in Germany during an initiation/hazing ceremony, but did not report incident due to fear of retribution
 - Provided details about the date, location, unit, and last names and ranks of several witnesses (including the name of one of her assailants)
 - Stated that she fought back and injured a sergeant during the attack
 - Provided names of other women she served with in Germany whom she thought were also sexually assaulted by the same assailant

STRESSORS

- BVA found Vet's statements about in-service sexual assaults not credible
- Vet appealed BVA's denial of claim and argued:
 - BVA did not adequately explain how VA satisfied the duty to assist, since VA did not attempt to obtain records from other service members she specifically identified, including one of her alleged assailants, that may have aided in corroborating the MST

POLL #3

- Does the VA have a duty to obtain records from other service members to aid in corroborating MST?
 - A. Yes
 - B. No
 - C. It depends



MOLITOR V. SHULKIN

28 VET. APP. 397 (2017)

- VA may not refuse to provide assistance in obtaining records simply because it believes the claimant is not credible
- The claim must be “inherently incredible or clearly lack merit” in order for VA to refuse assistance
- 38 C.F.R. § 3.159(d)

MOLITOR HOLDINGS

- When Vet identifies another service member's records as relevant to a claim, and those records would aid in substantiating the claim, VA's reasonable efforts to obtain those records under its duty to assist may include:
 - **Seeking written consent of 3rd party on behalf of claimant**
 - **Obtaining a court order to disclose the records**
 - VA thinks that, in most cases, this would be beyond the scope of "reasonable" efforts
 - **Soliciting written statements from adequately identified service members**

MOLITOR TAKEAWAYS

- Records from other service members could aid in substantiating Vet's claim
 - Assailant may have sustained injuries that could be reflected in assailant's service records
 - Women stationed in Germany with Vet may have filed VA claims for SC for residuals of MST and have service records that establish rape culture at base
- For more on this issue, see VA General Counsel Precedent Opinion 05-14

PTSD NEXUS

NEXUS: MULTIPLE TRAUMAS

- **More challenging cases involve multiple traumas or stressors**
 - Childhood physical and/or sexual abuse
 - Post-service domestic abuse
 - Other current stressors
 - Death in family or other family situations
 - Financial situations
 - Co-morbid disorders

NEXUS: MULTIPLE TRAUMAS

- Examiner may opine that the disability was caused by pre-service stressors, but “exacerbated” and/or “aggravated” by MST
- Important to figure out what examiner means by “aggravated” or “exacerbated”

NEXUS: MULTIPLE TRAUMAS

- If examiner finds that MST contributed in any way to the development of a mental health disorder, VA should grant service connection
- When it is not possible to determine what portion of the current disability is related to service and what portion is unrelated to service, the entire disability must be attributed to service
 - *Mittleider v. West*, 11 Vet.App. 181 (1998)

NEXUS: DEVELOPING EVIDENCE TO SUPPORT CLAIM

- Have Vet draft a statement about continuous mental symptoms since separation from service
- Obtain additional lay evidence of continuity of symptoms from other people (family members, friends, fellow service members, etc.)
- Obtain medical evidence that documents symptoms following service (closer in time to service the better)
- Obtain a nexus opinion linking symptoms to service

NEXUS: OPINIONS

- When obtaining a private opinion, advocates should ask the following questions:
 - Is it at least as likely as not that Vet has a current mental disorder?
 - If so:
 - Assuming that the MST event(s) in service occurred based on the markers the Vet has presented, is it at least as likely as not that the mental disorder(s) is/are linked to any event in service (including the MST), or to service itself?

RECENT LEGISLATION

JOHNNY ISAKSON AND DAVID P. ROE, M.D. VETERANS HEALTH CARE AND BENEFITS IMPROVEMENT ACT OF 2020, PUB. L. 116-315

- Signed into law on Jan. 5, 2021:
 - Ensures that service members and Vets seeking access to care and counseling related to MST can seek this care at any VA healthcare facility, not limited to Vet Centers
 - Requires VA to establish special teams to process claims for comp for PTSD, anxiety, depression, or other mental health diagnoses based on MST. Teams must be trained to identify MST markers
 - 38 U.S.C. § 1164
 - Requires VA to allow Vets who require a VA exam in support of a claim for comp for a mental or physical condition that resulted from MST to choose the gender of their VA or contract examiner
 - 38 U.S.C. § 1165

CASE STUDY

BACKGROUND

- Vet served in the Coast Guard from May 2007 to Sept. 2010
- STRs not complete
- She received a general discharge for involvement with drugs
 - Based on a self-report of drug use
 - Vet never tested positive for drugs
- She did not meet DSM-IV criteria for substance abuse or dependence



DURING SERVICE

- She alleged that from Oct./Nov. 2009 to Dec.2009, her XO:
 - Made “inappropriate comments about my body” or “said what he would like to do to me sexually”
 - Attempted to have her come over multiple times, and on “several occasions,” “tried to break into my apartment in the middle of the night,” trying to open her door and go upstairs to try to enter through a glass door
 - She tried to report it to her chain of command, “but didn’t get anywhere with it since he was my XO. He denied everything and had me investigated on bogus charges.”

DURING SERVICE

- She stated that the atmosphere turned hostile to the point that she told people she was abusing pain medication to leave the military
- She reported that she started to experience panic attacks and high anxiety, and began to drink heavily

IS THIS MST?

- **Yes!**
- **Vet subjected to:**
 - **Sexual harassment**
 - **Threatening sexual harassment**
 - **Repeated unsolicited verbal or physical contact of sexual nature that was threatening**

ARE THERE MARKERS?

- **Yes!**
 - **Alcohol/drug abuse (or false reports of substance abuse) to get out of Coast Guard**



MARCH 2017 VA EXAM

- Vet submitted applications for SC PTSD in 2016, and for depression in Aug. 2016
- Mar. 2017 PTSD C&P exam:
 - Diagnosed with PTSD and alcohol use disorder
 - Examiner noted childhood sexual abuse by her mother's boyfriend, adoptive father, and adopted brother, as well as the fact that she discovered the body of her boyfriend after he committed suicide in 2014

MARCH 2017 VA EXAM

- VA examiner also stated:
 - There were significant emotional symptoms first experienced in childhood, and worsening emotional symptoms following sexual harassment during military service
 - Therapy from 2016 primarily focused on symptoms related to childhood sexual abuse and suicide of boyfriend. Although Vet's reported sexual harassment in the military is documented repeatedly, it is rarely referred to directly as the focus of treatment
 - It appears that Vet attempted to magnify the extent of her symptoms which are due to sexual harassment in the military and minimize the effect of pre and post-military traumas

MARCH 2017 VA EXAM

- VA examiner continued:
 - It is as likely as not that MST occurred
 - It is less likely than not that MST caused PTSD and alcohol use disorder
 - It is likely that reported MST exacerbated pre-existing emotional symptoms. It appears that the Vet is most traumatized by childhood sexual abuse and suicide of boyfriend
 - MST resulted in increased abuse of alcohol

APRIL 2017 RATING DECISION

- VA conceded in-service stressors
- VA denied the claim because the VA examiner indicated that symptoms of PTSD associated with childhood sexual abuse clearly pre-existed service and there is no evidence to show that this condition was aggravated until the post-service suicide of her boyfriend in 2014



DENIED

APRIL 2017 RATING DECISION

Is this a good rating decision?





WHAT'S HELPFUL?

- What type of evidence could be helpful when appealing the case?



HELPFUL: MEDICAL EVIDENCE

- 5/2015 – VA Initial Intake Evaluation Form:
 - Vet’s PTSD symptoms began after her commanding officer broke into her apartment while she was in the USCG
 - There was a flare-up in her symptoms after her boyfriend shot himself
- 1/2017 VA treatment records
 - Depressed after in-service incident – she drank excessively
 - Sober from 2010 to 2014
 - Started drinking again after her boyfriend’s suicide
 - She was diagnosed with PTSD related to MST

HELPFUL: LAY STATEMENTS

- Vet's ex-husband:
 - Discussed Vet's behavior prior to service
 - Driven
 - No alcohol or drug problems
 - He visited her after the assault
 - It was clear that she was different, completely shut-off, running on auto-pilot
 - She no longer had a sense of humor
 - She was withdrawn
 - After service she was very fragile

HELPFUL: LAY STATEMENTS

- Vet's parents:
 - Prior to service she was very happy
 - She reported the assault to her mother shortly after it happened
 - After the MST:
 - She lost her direction
 - Kept to herself
 - Afraid to go out
 - Became sad and isolated
 - Became insecure and unsatisfied with life



HELPFUL: LAY STATEMENTS

- Fellow service member/roommate discussed:
 - The in-service MST
 - The abuse
 - The inappropriate behavior
 - The attacks on her house



HELPFUL: LAY STATEMENTS

- If the RO already conceded the MST, why are these statements helpful?



RESULTS

- 12/2018 VA Exam:
 - VA examiner confirmed the diagnosis of PTSD
 - VA examiner confirmed that markers supported the reported stressors
 - VA examiner stated that the in-service MST aggravated her symptoms
- 12/2018 RO granted SC for PTSD



ADVOCACY ADVICE

- If either a VA examiner or VA states that a Vet's mental health diagnosis is due to either pre-service or post-service events, provide evidence/markers that show the Vet's disability is due, at least in part to, or aggravated by, MST
- Just because there are pre-service or post-service tragic events, it does not mean that the Vet's mental health condition is not related to the MST



NVLSP'S MST PROGRAM

NVLSP'S MST PROGRAM

- NVLSP's Lawyers Service Warriors® program Provides pro bono assistance with the following claims:
 - VA claims for mental disorders related to MST
 - Discharge upgrades where conduct was related to MST

NVLSP'S MST PROGRAM

- LSW pro bono attorneys represent Vets with claims for SC for PTSD or other mental conditions as a result of sexual trauma that occurred during military service
- Volunteer attorneys submit a legal brief to VA and gather medical and lay evidence (“markers”) indicating that the sexual trauma occurred during service
- Some MST cases may involve a personal appearance hearing

NVLSP'S MST PROGRAM

- Vets and advocates can request assistance through the NVLSP website
- Direct referrals accepted from VSOs. Contact:

Abigail Reynolds

Staff Attorney

Abigail@nvlsp.org

(202) 621-5686

QUESTIONS

