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**Reservists Who Are Attorneys Are Not Precluded from
Representing Veterans in VA Claims Process**

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9.0—Miscellaneous

11.0—Veterans’ Claims

Q: I am a Sergeant First Class (SFC) in the Army Reserve, not presently on active duty. I joined ROA recently, after you amended your constitution to permit noncommissioned officers to join. I am a practicing lawyer in Connecticut.

The United States Department of Veterans Affairs administers an accreditation program for lawyers who want to represent clients in the VA claims process. Lawyers are required to obtain VA accreditation before undertaking such cases. I applied, and I meet all the VA requirements for this accreditation.

Four months ago, a Deputy Assistant General Counsel at the VA told me by letter that “we cannot at this time determine whether you are eligible for VA accreditation.” The issue is whether I am a “federal employee.” Federal employees are not permitted to represent clients in claims against the Federal Government, so federal employees are not eligible for VA accreditation in this process.

The VA put the burden on me to provide research information as to whether a part-time reservist is a “federal employee” for this purpose. What do you think?

A: I contacted the Honorable Will Gunn, the VA General Counsel, by e-mail, and he investigated this issue expeditiously and thoroughly. Within a week after receiving my inquiry, he determined that Reserve Component (RC) members² not on active duty, and not otherwise employed by the Federal Government, are not “federal employees” for this purpose and are

¹ Title shown for purposes of identification only. The views expressed in this article are the views of the authors and not necessarily of the United States Marine Corps, the Department of the Navy, the Department of Defense, or the United States Government. Gavriel Swerling is a Service Members Law Center associate. He is a third year law student at the University of Maryland School of Law. After he graduates and passes the bar exam, he will be on active duty as a judge advocate. Thank you to RADM James J. Carey and the Washington Scholars for sending him our way.

² There are seven Reserve Components: The Army Reserve, Army National Guard, Air Force Reserve, Air National Guard, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve.

not precluded from obtaining VA attorney accreditation letters. The VA has issued you an accreditation letter, and I have seen a copy of it.

Your situation involving the VA is reminiscent of the situation addressed in Law Review 1220 (February 2012). Customs and Border Protection of the United States Department of Homeland Security (DHS-CBP) administers a licensing program for “licensed customs brokers.” For many years, DHS-CBP took the position that reservists (officer or enlisted) are “federal employees” and are not permitted to take the examination to become licensed customs brokers. An Army Reserve Master Sergeant challenged this rule, but DHS-CBP adhered to its position that he would not be permitted to take the examination. He retained an attorney and filed suit, and he was permitted to sit for the examination. Eventually, DHS-CBP accepted that reservists not on active duty are not disqualified, but only after many months of litigation.

For decades, ROA has supported increased reliance on the Reserve Components as a cost-effective way to provide national defense. RC members like you are paid only for days when you are on active duty, active duty for training, or inactive duty training. The cost of a Sergeant First Class in the Army Reserve is a small fraction of the cost of a Sergeant First Class in the Regular Army, on active duty full-time. But if we as a nation are to rely on these part-time service members, we must recognize that they need jobs or professions to support themselves and their families when they are not on active duty, which is most of the time.

Almost a century ago, the issue of reservists not on active duty acting as attorneys for individuals with claims against the Federal Government came up in the United States Court of Claims.³ The case is *Simmons v. United States*, 55 Ct. Cl. 56 (United States Court of Claims 1920). Attorney Frederick A. Fenning served on active duty as a judge advocate in the “Great War” (as World War I was then known). After victory was achieved, Mr. Fenning left active duty and was commissioned a Lieutenant Colonel in the Officers Reserve Corps, inactive status. The Court of Claims explicitly held that Mr. Fenning (as a private attorney) was permitted to represent a client in a contract dispute with the Federal Government, in a Court of Claims case.

Section 205 of title 18 of the United States Code (18 U.S.C. 205) makes it a crime for “an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States” who “acts as an agent or attorney in prosecuting any claim against the United States.” Under 18 U.S.C. 202(a), Reserve and National Guard *officers* are exempted from section 205 and sections 203, 207, 208, and 208 of title 18 except when they are on *voluntary* active duty for *more than* 130 days.

We thought that this could be a problem for you, since you are an enlisted member of a Reserve Component, but then we found a sentence in section 202(a) providing: “The terms ‘officer or employee’ and ‘special Government employee’ as used in sections 203, 205, 207

³ The Court of Claims was a court that heard and adjudicated contract claims against the Federal Government. In 1982, Congress merged the Court of Claims with the Court of Customs and Patent Appeals and formed the United States Court of Appeals for the Federal Circuit.

through 209, and 218, shall not include *enlisted members of the Armed Forces.*" 18 U.S.C. 202(a) (emphasis supplied).

This language is confusing and cumbersome. We are working with a Member of Congress on a statutory amendment that would make it clear beyond any possible misunderstanding that RC members of whatever grade or rank are not precluded from practicing their chosen professions when not on active duty or otherwise employed by the Federal Government.

Thank you for bringing this important matter to our attention and thank you for joining ROA as one of our first noncommissioned officer members.