

## **Firm Associate Secures Sua Sponte En Banc Ruling for Veterans Seeking VA Benefits**

In a rare action, the U.S. Court of Appeals for the Federal Circuit issued a *sua sponte* order granting rehearing en banc in *Francway v. Wilkie*. The en banc Court revised the [previous precedential decision](#) in Mr. Francway's case to partially overrule certain earlier decisions applying the "presumption of competency," under which the U.S. Department of Veterans Affairs' Veterans Benefits Administration and its reviewing courts presume that a medical examiner is competent to assess a veteran's medical claims. The full Court also re-characterized the presumption as simply a "requirement."

This *pro bono* case was argued by Associate [William H. Milliken](#) on behalf of Ernest L. Francway, a U.S. Navy veteran who was injured while serving on an aircraft carrier in 1969. The main issue on the appeal was whether the Federal Circuit should overrule its prior precedent in *Rizzo v. Shinseki*, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009), which held that the Board of Veterans Appeals and the Veterans Court may properly apply a presumption of competency in reviewing the opinions of VA medical examiners. After the en banc Court's action, *Rizzo* stands partially—but not fully—overruled. The Sterne Kessler team will be filing a petition for certiorari to ask the Supreme Court to finish the Federal Circuit's work and dismantle the entire presumption—an outcome which would entitle Mr. Francway to a new medical examination compliant with the statutory scheme.

Regardless of the outcome of Mr. Francway's petition, future veterans are likely to rely on this decision to vindicate their right to obtain medical examinations from qualified providers.

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