

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement of

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Before the

**House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs
Subcommittee on Oversight and Investigations**

Joint Oversight Hearing

**“At What Cost? – Ensuring Quality Representation in the Veteran Benefit
Claims Process”**

April 27, 2022

On behalf of the National Organization of Veterans' Advocates (NOVA), I would like to thank Chairmen Luria and Pappas, Ranking Members Nehls and Mann, and members of the Subcommittees for the opportunity to offer our views on the administration and oversight of the Department of Veterans Affairs' Accreditation, Discipline, and Fees Program for agents, attorneys, and Veterans Service Organization (VSO) representatives; the process for filing and investigating veterans' complaints about accredited and unaccredited agents, attorneys, and representatives; and potential improvements to increase monitoring and protection of the accreditation program.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 750 attorneys, agents, and other qualified members practicing across the country and assisting tens of thousands of our nation's military veterans, their survivors, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits.

NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the United States Court of Appeals for Veterans Claims (CAVC), United States Court of Appeals for the Federal Circuit, and Supreme Court of the United States. As an organization, NOVA advances important cases and files amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011) (amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review); *Buffington v. McDonough*, No. 21-972 (February 7, 2022) (amicus in support of petition for writ of certiorari); *George v. McDonough*, No. 21-234 (March 7, 2022) (amicus; decision pending before the Supreme Court).

The most important facet of NOVA's mission is to educate veterans' advocates. NOVA currently conducts two conferences per year, each of which provide approximately 15 hours of continuing legal education (CLE) credit for attendees. Experts from within and outside the membership present and train on the latest developments and best practices in veterans law and policy. NOVA sustaining members must participate in at least one conference every 24 months to maintain eligibility to appear in our public-facing advocate directory. In addition to conferences, NOVA offers webinars, online support, and other guidance to its members to enhance their skills.

Background

History of Attorney/Agent Representation

Historically, Congress permitted attorneys and agents to represent veterans before the Veterans' Administration, but they could not charge more than \$10.00 for such representation. *See, e.g.*, Pub. L. 85-857, § 3404, Sept. 2, 1958, 72 Stat. 1238 (“[t]he Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees – (1) shall be determined and paid as prescribed by the Administrator; (2) shall not exceed \$10 with respect to any one claim; and (3) shall be deducted from monetary benefits claimed and allowed”). When Congress created the United States Court of Appeals for Veterans Claims in 1988, which for the first time allowed veterans to seek judicial review of disability claims denied by VA, attorneys and agents were permitted to charge more than \$10.00 for representation. Veterans' Judicial Review Act, Pub. L. 100-687, § 104, Nov. 18, 1988, 102 Stat. 4108 (fee permitted when attorney or agent retained within one year of date when Board of Veterans' Appeals made a final decision; limited to 20 percent of past-due benefits). In 2006, Congress updated the statute to allow an attorney or agent to charge a fee for representation after filing a notice of disagreement to the Board of Veterans' Appeals. Pub. L. 109-461, title 1, § 101(c)(1), Dec. 22, 2006, 120 Stat. 3407.

With the passage of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Congress again amended the statute to allow attorneys and agents to charge a fee for representation earlier in the process, *i.e.*, when the claimant “is provided notice of the agency of original jurisdiction's initial decision.” Pub. L. 115-55, § 2(n), August 13, 2017, 131 Stat. 1110. This amendment reflects the new choices permitted under the AMA for a claimant when faced with an adverse decision, *i.e.*, filing a higher-level review, supplemental claim, or appeal to the Board of Veterans' Appeals. In other words, after an initial denial by the Regional Office, a claimant can hire an agent or attorney to represent them and determine the best course of action to contest the denial. VA recognized the importance of this change when it issued the final rules implementing the AMA “to allow paid representation with respect to the claimant's expanded options for seeking review of an initial decision on a claim.” Department of Veterans Affairs, VA Claims and Appeals Modernization, Final Rule, 84 FR 138, 150 (Jan. 18, 2019).

Therefore, under current law, the **only time** an accredited advocate **cannot** enter into a fee agreement with a veteran is for assistance with filing an **initial claim** for benefits.

Military-Veterans Advocacy v. Secretary of Veterans Affairs, 7 F.4th 1110, 1135-1141 (Fed. Cir. 2021) (Federal Circuit invalidated 38 C.F.R. § 14.636(c)(1)(i) and determined fees can be sought for work on all supplemental claims, whether filed within a year of a decision or after a year has passed).

This policy reflects Congress’s recognition of the claims process as nonadversarial and VA’s position that it “must have an opportunity to decide a matter before paid representation is available.” Department of Veterans Affairs, VA Claims and Appeals Modernization, Final Rule, 84 FR 138, 150 (Jan. 18, 2019) (citing 73 FR 29852, 29868 (May 22, 2008)).

This policy also reflects the long-standing recognition of the role of VSOs, at the national, state, and county level, who are available in large numbers to assist veterans with an initial claim for free. In addition, attorneys who work for legal services and legal aid organizations, as well as law school veterans clinics, provide free assistance with filing initial claims. Private attorneys and agents may also provide such assistance. For example, many NOVA members report providing pro bono assistance to a surviving spouse for filing an initial Dependency and Indemnity Claim (DIC) claim after representing the veteran for many years prior to his or her death.

How Attorneys and Agents are Accredited and Regulated

Congress has long recognized that, to prepare, present, and prosecute claims on behalf of veterans, VA can require a demonstration of competence. *See, e.g.*, Pub. L. 85-857, 72 Stat. 1238, Sept. 2, 1958 (“[t]he Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and are otherwise competent to assist claimants in presenting claims”). Likewise, Congress empowered VA to discipline those who fail to meet these standards. *Id.* at 72 Stat. 1238-1239 (“[t]he Administrator . . . may suspend or exclude from further practice . . . any agent or attorney recognized under this section if he finds that such agent or attorney – (1) has engaged in any unlawful, unprofessional, or dishonest practice; (2) has been guilty of disreputable conduct; (3) is incompetent; (4) has violated or refused to comply with any of the laws administered by the Veterans’ Administration, or with any of the regulations governing practice before the Veterans’ Administration; or (5) has in any manner deceived, misled, or threatened any actual or prospective claimant”).

As amended and expanded, these standards currently reside in 38 U.S.C. § 5904, and VA has promulgated regulations at 38 C.F.R. § 14.632 governing the conduct of accredited attorneys and agents. *See also* VA Accreditation Program: Standards of Conduct for VA-Accredited Attorneys, Claims Agents, and VSO Representatives, <https://www.va.gov/OGC/docs/Accred/StandardsofConduct.pdf>. Upon a determination that an accredited representative violates the standard of conduct, VA “may suspend or cancel your accreditation. VA is authorized to report the suspension or cancellation to any bar association, court, or agency to which you are admitted. In addition, VA may collaborate with State and Federal enforcement authorities if it is suspected that your

actions may have implications under State or other Federal laws.” *Id.*; *see also* 38 C.F.R. § 14.633.

Attorneys and agents (unless employed by a Congressionally-chartered Veterans Service Organization) are accredited on an individual basis, not through their firm or organization. An attorney seeking accreditation must complete the VA Form 21a and provide a recently dated certificate of good standing from any state bars, courts, or agencies to which he or she is admitted to practice. Within the first year of accreditation, the attorney must complete three hours of qualifying CLEs and an additional three hours no later than three years after initial accreditation and every two years thereafter. VA Accreditation Program: How to Apply for VA Accreditation as an Attorney or Claims Agent, <https://www.va.gov/OGC/docs/Accred/HowtoApplyforAccreditation.pdf>.

Similarly, agent candidates must submit the VA Form 21a, complete the CLE requirements, and submit any certificates of good standing if available. Prior to granting accreditation, however, VA conducts a background check and requires the applicant to pass a test demonstrating knowledge of relevant VA statutes and regulations. Claims Agent Examination, <https://www.va.gov/ogc/accreditation.asp>.

How Fees Are Charged and Regulated

Congress has also provided a statutory scheme for how fees are charged and VA has promulgated regulations and policies that govern the process. *See* 38 U.S.C. § 5904; 38 C.F.R. § 14.636. While VA may find a fixed fee or hourly rate reasonable, the statutory scheme generally favors a contingency model, consistent with legal practice in many other areas of disability or personal injury law. Under this model, an attorney or agent will only recover if he or she prevails for his or her client and accepts payment from past-due benefits, not out of future, recurring disability payments.

Attorneys and agents can enter into a “withholding” contract with a client and VA will hold back 20 percent (a presumed reasonable fee) from the past-due benefits recovered. 38 C.F.R. § 14.636(h). The attorney or agent must submit the fee agreement to the Regional Office within 30 days of its execution. *Id.* at (h)(4). In the alternative, attorneys and agents can enter into a “nonwithholding” contract with a client and be paid directly from the client. These contracts must be filed with VA’s Office of General Counsel.

VA regulations provide multiple safeguards to ensure fees are reasonable and claimants have due process if they believe they have been unfairly charged. *See, e.g.*, 38 C.F.R. § 14.636(i) (OGC may review a fee agreement between a claimant or appellant and an agent or attorney upon its own motion or upon the motion of the claimant or appellant and order a reduction); How to Challenge a Fee, <https://www.va.gov/OGC/docs/Accred/HowtoChallengeaFee.pdf>.

Proliferation of Unaccredited Representatives

Over the past several years, there has been a proliferation of companies offering “consulting” services for veterans seeking disability compensation benefits. While the terms of the contracts vary from company to company, there are common elements among many of them. These companies consist of employees who are not accredited by VA, who work with veterans to gather information (including medical opinions frequently prepared by affiliate companies) in support of a claim (typically a claim for an increased rating). The veteran is “coached” to submit the claim or, in some circumstances, the claim is submitted by an employee using the veteran’s own private eBenefits log-in information on VA’s website. Sometimes, veterans are advised to drop existing appeals in favor of a “faster” decision on a new claim for an increased rating. (While this action may, indeed, result in a faster decision, the veteran is unknowingly forfeiting months or years worth of retroactive benefits because the effective date of any award of benefits is the date VA receives the “claim.”) VA states it has no ability to oversee these individuals and veterans have no due process rights when working with these companies.

Unaccredited employees of these firms prepare claims. While many of these companies claim that they do not prepare, present, or prosecute claims, NOVA maintains that their activities rise to, at the very least, preparation of claims. Merriam-Webster defines “prepare” as “to make ready beforehand for some purpose, use, or activity,” clearly encompassing the activity described above.

VA appears to agree with this analysis, stating in its FAQ guidance for applicants: “You must be accredited to aid in the preparation, presentation, or prosecution of a VA benefit claim. **Advising a claimant on a specific benefit claim or directing the claimant on how to fill out their application, even if you never put pen to paper, is considered claims preparation.**” VA Accreditation Program: How to Apply for VA Accreditation as an Attorney or Claims Agent, <https://www.va.gov/OGC/docs/Accred/HowtoApplyforAccreditation.pdf> (emphasis added).

These companies charge fees outside the framework established by Congress and implemented by VA. Contracts executed by these companies charge out of future benefits, which is clearly not contemplated under 38 C.F.R. § 14.636. Specifically, fees may be lawfully based on a “fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases,” and past-due benefits are “non-recurring payments.” Contracts charging five or six months of the veteran’s future increase, yet to be received, violate the regulations and may also violate 38 U.S.C. § 5301(a)(3)(a) as a prohibition against assignment of benefits.

Without executing a power of attorney with a claimant, unaccredited representatives cannot provide competent assistance. Accredited representatives sign a power of attorney with the claimant. This relationship allows the representative to request necessary records on behalf of the veteran, obtain access to the veteran’s electronic claims file and relevant VA databases, and present themselves to VA employees as the accredited representative to access information and advocate on behalf of the claimant. Accredited attorneys, agents, and VSOs have the “big picture” of the claimant’s history, claims, and appeals. Veterans understand who is representing them and has someone to rely on for ongoing advice. Able to review the entire claims file and relevant records, accredited representatives can find pending claims, unadjudicated claims, identify potential claims for clear and unmistakable error, and provide a coordinated plan for representation before the agency, the Board of Veterans’ Appeals, and federal courts as needed.

VA also understands who the veteran’s accredited representative is – and is required to provide this representative with notice of decisions and of any VA action on the veteran’s pending claims and appeals. This “notice” requirement is especially beneficial for unhoused veterans, or those with unstable housing, as the representative is able to comply with VA requests for information in a timely manner and ensure that deadlines are met.

By contrast, unaccredited employees of these consulting companies are unable to represent the veteran fully and frequently abandon the veteran once the increased rating is achieved or denied. Because these unaccredited claims “consultants” cannot represent veterans in appeals before VA or the courts, veterans often turn to accredited attorneys, agents, or VSOs to step in and resolve pending matters.

Obtaining a veteran’s eBenefits log-in information to assist the veteran or bank information to obtain funds for payment violates the veteran’s privacy and violates VA policy. NOVA has been made aware that some of these companies require a veteran to provide log-in information to VA’s eBenefits site and access to the veteran’s bank information. VA rightfully is concerned with protecting a veteran’s privacy and identifying information. Accredited individuals do not use a veteran’s log-in credentials or require bank account access; accredited individuals are able to access the veteran’s electronic VA records and files as the representative lawfully recognized by VA. Regarding eBenefits: “Unauthorized attempts or acts to either (1) access, upload, change, or delete information on this system, (2) modify this system, (3) deny access to this system, or (4) accrue resources for unauthorized use on this system, are strictly prohibited. Such unauthorized attempts or acts may be considered violations subject to criminal, civil, or administrative penalties.” eBenefits: My Gateway to Benefit Information, <https://www.ebenefits.va.gov/ebenefits/about/policies>.

Some consulting companies have employment or financial relationships with medical providers that compromise the use of private medical opinions. VA is required to

consider all the evidence of record, including private medical evidence. Private medical treating evidence and private medical opinions can be a powerful tool in a veteran's claim or appeal when ethically obtained. These opinions, however, must be obtained by independent medical professionals who are not part of a company's staff or part of an owned subsidiary.

Analysis

To continue to ensure quality representation to veterans, their survivors, and their families, NOVA offers the following recommendations:

Congress should reinstate criminal penalties for unaccredited representatives violating 38 U.S.C. § 5904. VA maintains it has limited authority to stop unaccredited representatives. Congress should reinstate criminal penalties for violation of the statute so VA and the Department of Justice have a pathway to stop unaccredited representatives.

In fact, spearheaded in the last Congress by Senator Daines, the Senate Veterans' Affairs Committee voted penalty language out of committee that would have allowed for prosecution of unaccredited representatives. See S. 4511, <https://www.congress.gov/bill/116th-congress/senate-bill/4511/text#toc-id9763de71-85ab-452e-877c-de824c5b889e>. This Congress, Senator Rubio has introduced S. 2678, Protect Our Disabled Heroes Act of 2021. This bill would penalize unaccredited individuals who contract for fees for the provision of advice on how to file a claim for benefits, or the preparation, presentation, or prosecution of such a claim. S. 2678, <https://www.congress.gov/117/bills/s2678/BILLS-117s2678is.pdf>.

We urge this committee to introduce similar penalty language.

Accreditation should continue to be required for individual attorneys and agents, not companies or firms. NOVA sees no compelling reason to modify VA's current system of accreditation, which reflects Congressional intent. The current system provides a pathway for any individual who wants to represent a veteran and charge a fee – even if they are not a VSO or attorney – as a claims agent. It is critically important that each representative be accredited so that VA knows who is representing veterans within the agency and veterans have a due process right to report incompetent representation and unreasonable fees. There should be no “company” accreditation.

Congress should ensure VA has resources necessary for the existing accreditation program and the ability to investigate those who violate the law and standards of representation. Protecting veterans from predatory practices is an important function of VA's Office of General Counsel. Congress must ensure VA has adequate resources to staff its accreditation functions, as well as promptly investigate and resolve complaints

about representation or fees.

VA should strengthen its services for members leaving active duty. When a member leaves service, he or she participates in the VA Transition Assistance Program (TAP). There should be ongoing efforts to improve the program to ensure that departing service members understand the importance of using accredited representatives when seeking their earned benefits.

Conclusion

NOVA is committed to working with Congress, VA, and fellow accredited stakeholders to ensure veterans receive the quality representation they deserve. Thank you again for allowing NOVA to provide our views, and I would be happy to answer any questions the Subcommittee members might have.

For more information:

NOVA staff would be happy to assist you with any further inquiries you may have regarding our views on this important topic. For questions regarding this testimony or if you would like to request additional information, please feel free to contact Diane Boyd Rauber by calling NOVA's office at (202) 587-5708 or by emailing Diane directly at drauber@vetadvocates.org.

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Prior to joining NOVA in September 2015, Ms. Rauber worked as the Associate General Counsel for Appeals with Paralyzed Veterans of America (PVA). In this capacity, she oversaw PVA client representation before the Board of Veterans' Appeals (Board), provided support and training to PVA's service officers, and analyzed cases for potential appeal to the United States Court of Appeals for Veterans Claims (CAVC).

She previously worked as of counsel to the Law Office of Wildhaber and Associates and as a staff attorney for the National Veterans Legal Services Program, representing veterans and their families before the Board and the CAVC. She has presented at numerous veterans' law conferences, on topics including successful advocacy and military history research. She also served as a consultant to the American Bar Association (ABA) Center on Children and the Law, writing and editing publications on an array of child welfare issues, to include court improvement, education, child custody, parent representation, and judicial excellence.

Ms. Rauber received her B.S. in Communication Disorders from the Pennsylvania State University, M.Ed. in Special Education from the University of Pittsburgh, and J.D. from the Catholic University of America School of Law. She is a member of the Maryland and District of Columbia Bar Associations, the CAVC Bar Association, and the Maryland Bar Association Veterans Affairs and Military Law Section, as well as current Vice President of the CAVC Historical Society. She is the co-author of *Justice and The American Veteran: A History of the United States Court of Appeals for Veterans Claims* (CAVC 2022).