NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Statement of

Diane Boyd Rauber, Esq.
Executive Director

Before the

House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs

on

H.R. 1732, Governing Unaccredited Representatives Defrauding VA Benefits Act; H.R. 1656, Preserving Lawful Utilization of Services for Veterans Act of 2025; and Discussion Draft: To amend title 38, United States Code, to allow for certain fee agreements for services rendered in the preparation, presentation, and prosecution of initial claims and supplemental claims for benefits under laws administered by the Secretary of Veterans Affairs, and for other purposes

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On behalf of the National Organization of Veterans' Advocates (NOVA), I would like to thank Chairman Luttrell, Ranking Member McGarvey, and members of the DAMA Subcommittee for the opportunity to offer our views on legislation that would amend important laws regulating the accreditation and practice of attorneys and claims agents who represent veterans, family members, survivors, and caregivers before the Department of Veterans Affairs (VA). As an organization representing the only group of advocates who can legally charge veterans for services related to their VA disability benefits, we are uniquely qualified to speak to this topic.

WHAT NOVA DOES

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents over 850 accredited attorneys, agents, and other qualified members practicing across the country and assisting tens of thousands of our nation's military veterans, survivors, family members, and caregivers 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 advocates for laws and policies that advance the rights of veterans and provide for competent representation. For example, NOVA collaborated with Veteran Service Organizations (VSOs) and other accredited representatives, VA, and Congress on appeals modernization reform. Those efforts resulted in passage of the *Veterans Appeals Improvement and Modernization Act* (AMA), P.L. 115-55, 131 Stat. 1105, which was signed into law by President Trump in 2017. At the time of its passage, VA emphasized the AMA would provide claimants with more choice and control over the disability claims and appeals adjudication process by expanding their review options.

NOVA also advances important cases and files amicus briefs in others. *See, e.g., 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); *National Organization of Veterans' Advocates, Inc., et al., v. Secretary of Veterans Affairs*, 981 F.3d 1360 (2022) (Federal Circuit invalidated knee replacement rule); *Arellano v. McDonough*, 598 U.S. 1 (2023) (amicus); *Terry v. McDonough,* 37 Vet.App. 1 (2023) (amicus); *Bufkin v. Collins*, S.Ct. No. 23-713 (argued October 16, 2024) (amicus).

A critical part of NOVA's mission is to educate advocates. NOVA currently conducts two conferences per year, each offering 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, peer-to-peer mentorship, and other guidance to its members to enhance their advocacy skills.

WHAT NOVA MEMBERS DO

NOVA members are primarily accredited attorneys and agents who represent veterans in disability claims and appeals as a singular area of practice or as one specialty area in a more expansive practice. NOVA members can be found in large, medium, small, and solo practices across the country. Many are veterans, military spouses, and/or members of a military/veteran family.

Providing competent representation to veterans consists of many professional responsibilities. Accredited attorneys and agents interview their clients, family members, and buddies. Accredited agents and attorneys obtain access to and review their clients' VA claims files that include service treatment records, military records, private health records, VA health records, and VA correspondence and decisions. Accredited attorneys and agents research the latest federal statutes, VA rules and policies, and federal court decisions that impact their clients' cases. As result of the AMA, as noted above, veterans now have more choice and control over how to contest an adverse decision. This expanded choice comes with complexity. Accredited agents and attorneys counsel their clients as to the best path forward based on the specifics of each claim or appeal and in concert with their clients' preferences. These actions can include staying within the Regional Office for a higher-level review or supplemental claim, proceeding to the Board of Veterans' Appeals (and choosing one of three options there), and possibly seeking relief at the U.S. Court of Appeals for Veterans Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court. These options can entail writing legal briefs, taking clients to informal conferences at a VA Regional Office, or appearing at a hearing before the Board of Veterans' Appeals. When necessary, accredited attorneys and agents can contact specific VA employees, file motions to advance on the docket when appropriate (i.e., for clients who are elderly, seriously ill, or facing significant financial hardship), or petition the U.S. Court of Appeals for Veterans Claims to provoke action on the part of VA, particularly where VA has unduly or unlawfully delayed issuing a decision. Representing a veteran always requires keeping on top of VA's process and progress, managing clients' multiple claims and appeals (which can involve multiple disabilities at various stages in the adjudication process), and communicating with clients along the way.

NOVA members work to resolve cases for their clients in a manner that ensures accuracy, maximizes benefits, and minimizes delay. Contrary to the false narrative pushed by some unaccredited claims consultants, NOVA members do **not** intentionally delay cases to

collect higher fees. Such conduct violates VA standards, as set forth in 38 C.F.R. § 14.632(c)(7), and can be cause for VA to cancel an advocate's accreditation or a state bar to impose sanctions against a member. Veterans who are unhappy with the services provided by their accredited representatives have recourse—through VA and through the state bar. No such recourse is available to veterans who are unhappy with unaccredited claims consultants.

Furthermore, the notion that accredited representatives would somehow delay VA from issuing a favorable decision to get a higher fee is a terrible business model and makes no sense. Veterans rightfully share information about their representation experiences with others, and on various rating platforms, e.g., Google or Yelp. If you violate standards of conduct, your client will not refer you to friends seeking competent representation. And why would an advocate delay getting paid? Moreover, because fees are based on retroactive benefits awarded, there would be added risks associated with delaying cases including losing a client through death or termination of representation, which could preclude any payment of fees at all.

Finally, the VA process is filled with delay, and as accredited representatives, NOVA members work to reduce that delay as much as possible, as described above, sometimes for no compensation whatsoever.

ADDITIONAL BACKGROUND

The history of attorney/agent representation, how agents and attorneys are accredited and regulated, how fees are charged and regulated, the proliferation of unaccredited claims consultants, and additional background, is set out in Exhibit 1. *See also* National Organization of Veterans' Advocates, *Statement Before the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs and Subcommittee on Oversight and Investigations, Joint Oversight Hearing*, "At What Cost?—Ensuring Quality Representation in the Veteran Benefit Claims Process" (Apr. 27, 2022), https://docs.house.gov/meetings/VR/VR09/20220427/114660/HHRG-117-VR09-Wstate-RauberD-20220427-U1.pdf.

NOVA supports a strong accreditation process to ensure competent representation. All people assisting veterans, survivors, family members, and caregivers must be accredited, whether in the early stages of consulting, educating, advising, assisting, or coaching throughout the more complex claims and appeals process. Accreditation must be required on an individual basis. Accredited individuals must submit a signed power of attorney to VA and, for anyone charging a fee, a properly executed fee agreement as well.

Any legislative proposal that expands choice must put veterans first. NOVA maintains that a federal solution, with preemption and reinstatement of criminal penalties, is critical

to ensure ongoing compliance and recourse for veterans. As described in more detail below, if expanded paid representation is the goal of Congress, the simplest and best option for veterans is to "move the line" and amend current 38 U.S.C. § 5904 to extend the current system to initial claims. This solution allows all individuals who wish to become accredited to do so, expands access to quality claims assistance, ensures protections for veterans, and prevents veterans from going into debt to receive qualified assistance.

H.R. 1732, Governing Unaccredited Representatives Defrauding VA Benefits Act (GUARD)

NOVA continues to support the return of penalties to the statute, as it has since the 116th Congress when the Senate Veterans' Affairs Committee approved a measure 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. We thank Rep. Pappas and McGarvey for reintroducing this language, along with the other 52 bipartisan original cosponsors. Likewise, we appreciate the bipartisan support for GUARD in the 118th Congress, which resulted in 221 co-sponsors in the House and 55 co-sponsors for the Senate companion bill introduced by Senators Boozman and Blumenthal.

Any bill that amends the current statute must contain penalty language for illegal action and a path for VA to refer those who break the law to the appropriate law enforcement authority.

Another issue requiring Congressional action is the proliferation of confusing and disparate state laws being introduced and passed in some states that purport to regulate the charging of fees and other aspects of representation before VA. As these laws are being passed, some are being challenged in court. Title 38 governs federal veterans benefits as defined by Congress and regulated by VA, and federal law preempts these state efforts. However, because the federal scheme is being called into question in some of the lawsuits, and to prevent the confusion of veterans and advocates across the country, Congress must include language that the tenets of Title 38 supersede any state law that is inconsistent with the rights established under it and is, therefore, preempted.

H.R. 1656, Preserving Lawful Utilization of Services for Veterans Act (PLUS)

NOVA cannot support the PLUS Act as written. While we support that the PLUS Act would permit accredited practitioners to continue with their current practice, NOVA does not support the charging of prospective fees for initial claims as it could result in a veteran accruing debt to pay a fee that exceeds their retroactive award.

In addition, we support the portions that reinstate criminal penalties and emphasize federal preemption.

DISCUSSION DRAFT: To amend title 38, United States Code, to allow for certain fee agreements for services rendered in the preparation, presentation, and prosecution of initial claims and supplemental claims for benefits under laws administered by the Secretary of Veterans Affairs, and for other purposes

NOVA cannot support the discussion draft as written and offers comments on certain items in the bill that deserve greater attention, including, but not limited to, the following:

1. **Accreditation reform should not prevent a veteran from choosing continuous representation with one accredited attorney or agent or accredited members of a firm.** NOVA does not support legislation that sets up two different models for charging for representation on initial claims versus appeals, i.e., a separate category of representatives that only charge for initial claims. Section 3(a)(8)(A)(vi) is confusing and appears to prohibit a veteran from being represented by members of the same firm in subsequent matters. As written, this language would severely hinder a veteran's choice should they want to stay with one representative or a particular firm for all related matters. It appears to require a veteran who hired an accredited representative to file initial claims to hire a new representative if they subsequently desire to file a request for review of a decision on one of the initial claims. Example: A veteran uses a representative to file three claims: one for an orthopedic claim, one for asthma, and one for a condition related to military sexual trauma (MST). VA grants the orthopedic condition, grants the asthma claim (but assigns an improper effective date), and denies the MST-related claim. The veteran is satisfied with the outcome of the orthopedic claim, for which the representative may collect a fee, but seeks to file a higher-level review to address the improper effective date and a supplemental claim to contest the MST-related claim. This individual is now prevented from staying with same representative if they prefer to do so and could not use anyone else in the same firm. They are forced to take time that could be spent expeditiously filing those reviews to find a new representative and, once finding a new one, they essentially must start from scratch to build the relationship and trust they had with the original representative. Not only is this outcome inefficient for, and detrimental to, the veteran, it would create unnecessary bureaucracy at VA and be difficult to enforce.

2. **Considering the Supreme Court's decision in *Loper Bright*, Congress should provide clear definitions of proposed terms.** As discussed by the full committee in the 118th Congress, *see* House Committee on Veterans' Affairs, "Restoring Power Over VA After *Loper Bright Enterprises v. Raimondo*" (hearing held December 18, 2024), the statutory language must clearly define what is included

under the law and Congress is in the best position to determine what those definitions should be.

a. **The terms preparation, presentation, and prosecution should be defined in statute and should include advising, assisting, educating, consulting, and coaching.** Unaccredited claims consultants assert that Title 38 does not apply to them because they do not "prepare, present, or prosecute" claims. This proposal does not adequately address the advising, consulting, assisting, educating, or coaching functions that some companies hide behind as alleged cover for their preparation of claims. Failure to clearly define the scope of an accredited advocate's work will only enable bad actors to find new ways to skirt the law.

b. **The term "business" relationship as it relates to procuring private medical opinions.** As described below, some unaccredited claims consultants retain medical professionals on their payrolls or refer to the same professional as part of an employment relationship that may compromise the independence of an opinion. While we understand the intent of the proposed amendment to 38 U.S.C. § 5904(b)(1)(J) is to prevent those employment relationships with medical providers, without precise definition of a "business" relationship, this provision as written may interfere with obtaining independent medical or vocational rehabilitation reports that can be an important part of developing the record in certain claims and appeals.

3. **Provisional accreditation must be extended to anyone waiting to become accredited, just not new applicants.** NOVA is aware of applicants for VA accreditation who are waiting for VA to issue decisions on their applications. Any "provisional" accreditation must include those applicants first—and must also be based on successfully passing an examination. Veterans need and deserve effective representation. This area of law is complex, and anyone seeking accreditation by VA as an agent should be required to demonstrate, at the very least, a basic understanding of the law.

4. **Blanket amnesty is not appropriate when considering whether individuals should be accredited.** The discussion draft at Section 3(a) would amend 38 U.S.C. § 5904(a) by adding (1)(C)(i) to prohibit VA from denying accreditation of an individual as an agent or attorney solely because they charged fees for services on an initial claim prior to enactment of the law. However, VA must have the ability to consider whether other aspects of that representation violated standards of conduct so as to warrant a denial of accreditation. If an unaccredited individual's conduct during the provision of such advice or assistance violated those standards or if other unethical or criminal conduct comes to light, VA must be able to

consider it in its decision on the application.

5. **Prospective charging in this bill would frequently cause a veteran to go into debt to pay the representative.** The discussion draft would amend 38 U.S.C. § 5904(c)(1) to allow for charging of a fee that is the lesser of $10,000 or a fee that is "equal to the product of five and the amount of the monthly increase of benefits awarded to the claimant pursuant to the claim." As of February 21, 2025, VA reported that the average time for completion of a non-Pact Act claim is 128.9 days, which equals slightly over 4 months. *VA PACT Act Performance Dashboard*, https://department.va.gov/pactdata/wp-content/uploads/sites/18/2025/02/VA-PACT-Act-Dashboard-Issue-46-022125_Final_508.pdf. Under this scenario, a veteran (without a spouse or dependent) who is awarded a 50-percent rating for a condition after an initial claim would receive approximately $4,400 in a retroactive award, but would owe $5,500 for the assistance they received. This outcome is not veteran centric, as it may result in the veteran incurring debt to pay that fee.

   Furthermore, by striking the existing (c)(1), this discussion draft appears to eradicate the current system for no good reason. Congress initially recognized veterans needed choice when it created the U.S. Court of Appeals for Veterans Claims in 1988. At that time, Congress lifted the restriction on attorneys and agents accepting fees for work before the agency by allowing for a fee to "be charged, allowed, or paid in the case of services provided after such date only if an agent or attorney is retained with respect to such case before the end of the one-year period beginning on that date. *Veterans' Judicial Review Act*, P.L. 100-687, §104, Nov. 18, 1988, 102 Stat. 4105, 4108. Not only did veterans obtain the right to challenge Board of Veterans' Appeals' decisions in a federal court for the first time in history, Congress recognized a place for competent, paid representation not only before the court, but before the agency. On two occasions since that time, Congress has "moved the line," i.e., allowed for hiring representatives with specific parameters on retroactive fees. These amendments provided for veterans, survivors, and family members to hire accredited representatives to assist with review decisions offered to them and to provide complete scope of services. *See Veterans Benefits, Health Care, and Information Technology Act of 2006*, P.L. 109-461, § 101, Dec. 22, 2006, 120 Stat. 3403, 3407 (amending 38 U.S.C. § 5904 to allow for paid attorney representation at the agency level after the filing of an appeal (Notice of Disagreement)); *Veterans Appeals Improvement and Modernization Act of 2017*, P.L. 115-55, § 2, Aug. 23, 2017, 131 Stat. 1105, 1110 *(*amending § 5904 to allow for paid attorney representation at the agency level after VA issues notice of an initial decision). Congress has **never** contemplated paid representation on an **initial** claim for VA benefits, recognizing that this would destroy the non-adversarial, claimant-friendly nature of the VA benefits scheme.

If, after considering the overall impact to a system intended to be nonadversarial to veterans at the initial claims stage, Congress decides that veterans should be able to hire an accredited advocate at the initial claims stage, it should proceed as it has in the past and simply move the line. Amending § 5904 to allow for paid representation at the initial claims stage is the most veteran friendly and manageable way to accommodate that desire for choice.

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.

EXH. 1

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 U.S. 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). 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 23, 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).

As the result of statutory changes in 2006 and 2017, as interpreted by the Federal Circuit, currently 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 initial claims process as nonadversarial, as affirmed in the bipartisan AMA. After President Trump signed the bill in 2017, VA emphasized 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) (emphasis added)). NOVA has long supported this view, as VA is bound by the statutory duty to assist the veteran in gathering the information necessary to support a claim. 38 U.S.C. § 5103A.

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 at no cost to the veteran. In addition, attorneys also provide free assistance with filing initial claims through legal services and legal aid organizations, as well as law school veterans clinics. Many NOVA members also provide assistance on a pro bono basis.

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 VSO) 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.

Recently, VA proposed regulations that would make some changes to the process of accrediting agents and attorneys. Specifically, VA plans to require prospective agents and attorneys to complete the initial CLE requirements before applying and to have agents sit for the examination before conducting the background check. *See* Department of Veterans Affairs, *Improving Accreditation Process and Strengthening Legal Education Requirements for Accredited Agents and Attorneys*, 89 FR 82546 (Oct. 11, 2024). NOVA filed comments in support of these proposed regulations and recommended a fourth hour of initial CLE be dedicated to the standards of conduct and ethics required in this practice. *See* National Organization of Veterans' Advocates, *RIN 2900-AR94, Improving Accreditation Process and Strengthening Legal Education Requirements for Accredited Agents and Attorneys* (filed Dec. 6, 2024).

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. Under 38 C.F.R. § 14.636(f)(1), fees that exceed 33 1/3 percent of past-due benefits awarded under a nonwithholding agreement are presumed unreasonable.

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 initial 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.") Other companies regularly advise veterans to decline to attend disability examinations ordered by VA. When a veteran does not show for a scheduled contract examination, the medical examination contractor is still paid, wasting taxpayer dollars. The 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, their activities indeed 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 agrees 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 homeless veterans, or those with unstable housing, as the representative can 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 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.