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**STATEMENT OF
VETERANS AND MILITARY FAMILIES FOR PROGRESS**

**By;
Thomas Bandzul, Esq.**

**STATEMENT ON THE RECORD
FOR THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS**

**Subcommittee on Disability Assistance and Memorial Affairs
with
Subcommittee on Oversight and Investigation**

HEARING ON:

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

April 27, 2022

Chairwoman Luria, Ranking Member Nehls; Chairman Pappas, Ranking Member Mann; Honorable members of the House Veterans Affairs Committees.

On behalf of Veterans and Military Families for Progress (VMFP), I would like to thank you for this opportunity to make this Statement for the Record before your

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Committees. It is an honor and a privilege to be afforded the opportunity to present our views.

Our organization has been engaged in the past trying to highlight issues in need of Oversight and appreciates the work both Committees do for all our Veterans.

In recent years, accreditations and oversight of Veterans Service Organizations (VSOs), representatives and lawyers has become something of a critical topic from the perspective of the Veteran and the legal community. More specifically, the need for the Department of Veterans Affairs (VA) to have ANY oversight role of representatives has been questioned. The basic, “Who polices the attorneys?” is a good question but the answer is really, no one. The professional communities (local and state Bar Associations) do a good job because of the standards that must be upheld in order to maintain the integrity of the legal profession and thus that of the individual practitioner.

VA has the responsibility of oversight of complaints against representatives and they do serve as a barrier to non-qualified lawyers. However, the Agency does not seem to have any repository for this information follow up for types of complaints or actions taken, which should be part of the oversight process.

The history of allowing lawyers to help Veterans with ANY business with the VA is significant since the original system did not allow a Veteran any representation before the Agency other than a pro bono attorney. There were no agents and VSOs did not have a structure for representation. It was considered a “non-adversarial” process. Some 15 years ago the changeⁱ to the process that allowed representation by an attorney after a Notice of Disagreement (NOD) was issued was not really welcomed by all. The legal community could then have a fee agreement but it was limited in the amounts a law firm could chargeⁱⁱ. In 2008, with this change came some idea this process would be monitored and

outcomes would be measured. I don't believe this took place.

In the title of this hearing there is the term, "Quality" implies there was some level of measurement in client satisfaction, case outcome, improved decisions (or the decision process), smoother claims process etc. The only known measurement of claims and Veterans case results is the amount and the number submitted and classified for appeals before the Agency and for action by the Court. VA does use a "quality" number on the Monday Morning Workload Report (MMWR) but this cannot possibly be an accurate measurement of either the client or the legal representative when over 90% of the claims filed are remanded by either the Board of Appeals or the Court because of errors in the original decision by VA. This system of measurementⁱⁱⁱ used by VA is a "sampling" methodology and targets workload outcomes and not real "accuracy" as the average person would think of this term related to client satisfaction. This alone would, and has, indicated a specific need for oversight of the Regional Office (RO) decisions and the processes used to arrive at their conclusions.

For many years the VSO community has suggested improved training, enforceable standards and measurable process review on a scheduled basis for the ROs. Each time this issue is raised, the responding argument of the expense associated with training and review oversight. I would offer that the cost of delays in appeals, hearings and fees for filing in the CAVC, Federal Circuit or, rarely, the Supreme Court is much higher. No cost analysis has been done on these factors. I would also offer, the cost of delay and error filled decisions by VA for Veterans can and too often does result in homelessness, illness, depression, unemployment and even suicide. These costs should be measured as well.

The need for improved measurement and oversight INSIDE of VA seems more critical. A review of the cumbersome and often unjust system of "qualifying" a legal representative for assisting with a benefits claim should also be done. This

has been seen as a barrier to some lawyers since the process is time consuming and costly to their firms. The need for review and oversight, above that of their own state regulations, is an extension of an issue outside the practice of helping Veterans.

At the same time, the law(s) surrounding Veterans and the claims process are not something the average lawyer knows anything about. It is a specialty. There is no disagreement concerning the need for oversight of lawyers, agents and VSOs. However, the process should be incorporated into the state Board of Bar Overseer's (BBO) function. In all the professional firms^{iv} representing Veterans, all the lawyers belong to state bar associations.

There are approximately 1,800 Full Time Employees (FTE) classified as lawyers or legal staff. According to the General Accounting Office (GAO) the average number of hours for a lawyer inside VA is 335^v per year. Since the average number of hours per year for a worker based on full time employment is 2,080, the question becomes its own enigma; what review is VA under?

VA has one of the largest legal staffs in the country. Combined with the non-legal community involved with initial claims decisions [Veterans Benefits Administration (VBA) has approximately 19,300 FTE] there no standards. The only review and training (other than the initial training) is local oversight by management and union representatives. The issues for oversight and legal process should be focused within VA's processes, as was highlighted in the Office of the Inspector General (OIG) Report^{vi} "Attorney Misconduct, Inadequate Supervision, and Mismanagement in the Office of General Counsel". Several issues concerning conflicts outside of VA were reported by the in-depth review of the internal legal staff. No critical review has ever been done by any independent review process.

Since changes in the responsibilities on the part of VA Duty to Assist^{vii} and other

legal provisions with the passage of the Appeals Modernization Act^{viii}, a Veteran's ability to appeal VA denials was completely re-vamped. One of the new review options includes requesting a 'Higher-Level Review' of the prior VA decision. This Higher-Level Review **does not allow Veterans** to submit any new evidence, but instead looks at the adequacy of the prior decision – including whether the RO complied with the 'duty-to-assist' (Veterans Claims Assistance Act – PL 106-475). This has become something of an oxymoron. (It should be asked whether this law, and similar provisions, provide RO decisions a measure of immunity for flawed decisions. This indicates an arguable need for more scrutiny of VA's internal operation at the RO level.)

Over 80% of the problems with claims are errors in the original decisions from the RO. As required under the duty to assist, VA is supposed to assist the Veteran to obtain evidence and medical examination to evaluate his/her disability. However, this will be in the form of a VA provider and not a private medical expert. The results are often pre-determined as in the case of Sen. Tammy Duckworth. She has no legs and to require a medical exam for this injury is a bit nonsensical.

To often the medical examiner is not professionally qualified to make a statement concerning the claimant's condition or the nexus to service in the military. This becomes a legal issue and the person assuming this task can, and often does, have a process that is neither expedient nor in the best interest of the client. Sometimes, attorneys refer to this VA practice as "developing to deny" because an exam will be scheduled with the hopes of obtaining an unfavorable opinion used solely to deny the request for benefits. (Whenever possible, a lawyer will recommend a private medical opinion to support both the diagnosis and the severity of symptoms or illness). This too, is a potential issue subject to questioning of conduct.

In reviewing the accreditation process for a lawyer, the basic principles are well

designed yet they are overly burdensome. The systems lack any real “check and balance.” VA has an elaborate systems and mechanisms for denying access by qualified practitioners within the legal community to records and information on their Veteran clients held by VA and necessary to successfully prosecute the claims. These barriers serve no real purpose, other than to prevent a representative from being able to do their job to protect VA’s decision-making process from anyone seeking critical review of the process.

All lawyers are overseen by state and federal BBO’s; many bar associations have processes to review complaints against its members. Every state has a path to address anyone’s concerns that they have been harmed by a representative’s wrongdoing. Along with the Courts, the rights of the individual are protected by several legal and historic processes provided by the lawyers themselves; they don’t want “bad actors” trying to help individuals. (This includes paralegals, court administrators, law clerks and judges).

The use of 38 CFR § 14.629 - Requirements for accreditation of service organization representatives; agents; and attorneys is duplicative of everything already in place for conduct of a lawful representative of a client. Veterans are clients. 38 U.S.C. §§ 5901-5905 et seq. Representation of Department of Veterans Affairs Claimants; Recognition of Organizations, Accredited Representatives, Attorneys, Agents; Rules of Practice and Information Concerning Fees digs deeper and only explain the overview of/for VSO and is still an “add on” to the existing practice of law. It would be beneficial if this included a section on reports and reporting/working with state BBOs.

In researching this topic, we found no central repository for reviewing complaints against the VSOs, lawyers, agents, paralegals or advisors for Veterans claims or any advice given to a Veteran. Since the issue is in need of measurement, the need to manage the process is screaming for attention.

The similar system used for benefits is the Social Security Administration. They use a system called Hallex ^{ix}. This process tracks the complaints and results of complaints associated with anyone assisting with a claim. We strongly suggest that this process be reviewed for adaptation by VA.

CONCLUSION

VA's disability claims process at the initial review level is in serious need of evaluation for compliance to existing laws and any conflict in the law should be revised initially at this level. Our focus is on Veterans' outcomes; we all need to understand the impact of any practice or procedure on Veterans' outcomes. If more monitoring improves that aspect of a claims process, this would be good. However, resources are better used by the VA focusing on current practice and procedure. The suggestions to modify these processes so the objective of serving Veterans is improved, so those processes that do not do that should be altered.

As implied here, the need to measure the existing systems and analyze the cost of filing and prosecuting a claim. This would include the oversight provided by the OGC. The suggestions for improvements to the processes in use today should be compared and contrasted against other system (like the one in Social Security) and evaluate potential uses of other reporting systems.

As suggested here, the need to incorporate VA's oversight of lawyers into the existing oversight by BBO's, the state bars and federal courts would be useful. This integration would help VA, the Veteran, the legal community in general and would lower the overhead of VA while seeking to improve their own internal issues of oversight. Oversight of non-attorney agents and VSOs must remain with VAOGC, although there is room for improving VSO oversight within the individual national organizations.

Again, thank you for allowing this presentation.

About Veterans and Military Families for Progress

VMFP is organized in the District of Columbia as a not-for-profit corporation under the laws governed under the Nonprofit Corporation Act 501 C-4. Our primary objective is to be an advocate on behalf of veterans, military members, and their families for progressive legislation and initiatives that reflect their experience and concerns, and which support the organization's goals.

We support all political offices dedicated to the organization's goals and educate veterans, military members, their families, and the public-at-large as to the rights and needs of veterans, military members and their families. We also reach out to and support veterans, military members and their families and demand the responsible use of the military in United States Foreign Policy.

VMFP's primary mission is to:

- a) Advocate on behalf of veterans, military members, and their families for progressive legislation and initiatives that reflect their experience and concerns, and which support the organization's goals.
- b) Support candidates for political office who support the organization's goals.
- c) Educate veterans, military members, their families, and the public-at-large as to the rights and needs of veterans, military members and their families.
- d) Reach out to and support veterans, military members and their families.
- e) Demand the responsible use of the military in United States Foreign Policy.
- f) Raise and expend funds and conduct such other activities as may be reasonable and necessary to implement other lawful projects and objectives authorized by the Board of Directors.
- g) Have and exercise any and all powers and privileges now or hereafter conferred by formed under such laws.

REFERENCES

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- ⁱ Veterans Judicial Review Act 1988 - PL 100-687
 - ⁱⁱ 38 CFR § 14.636 - Payment of fees for representation by agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals.
 - ⁱⁱⁱ VBA Compensation Service Quality Assurance Sampling Methodology
 - ^{iv} Nation Veterans Legal Service Program; Bergman & Moore; The Pro Bono Consortium
 - ^v Section 505 Data - Annual Report – 2021 - VA Mission Act Section 505 Data
 - ^{vi} VA OIG REPORT #18-06501-158 JUNE 24, 2020
 - ^{vii} 38 USC § 5103A: Duty to assist claimants as part of Veterans Claims Assistance Act – PL 106-475
 - ^{viii} Pub. L. 115–55 applicable to all claims for which the Secretary of Veterans Affairs provides notice of a decision under section 5104 of this title on or after the later of 540 days after Aug. 23, 2017, or 30 days after the date on which the Secretary submits to Congress a certification of certain capabilities of the Department of Veterans Affairs to carry out the new appeals system established by Pub. L. 115–55
 - ^{ix} Social Security Hallex link - https://www.ssa.gov/OP_Home/hallex/I-01/I-1-1.html