

Charging Fees and Ethics in the VA World

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Where are we and how did we get here?

- Brief History of Fees in the VA system
- Civil War to 1988 \$10 Fee Limitation
- 1988 to 2007 - After the First Final BVA decision and in Court.
 - How many people earned a fee in this window?
- 2007 to 2019 After an NOD has been filed and in Court.
 - How many people earned a fee in this window?
- 2019 to the Present After the Initial Decision on a claim and in Court.
 - How many people earned a fee in this window?



Introduction to Fees

- EAJA Fees (1995)
- Retroactive Fees (First NOVA Denver Conference circa 1998?)
- Been thinking about it ever since...



What about fees for Initial Claims?

The Line

Nope



Can I Pay a Fee to a VLJ ?

- Can I pay a VLJ a fee for a win on a case?
- Anything wrong with this?
- Has it been done before?
- Maybe in another system?



What Ethical Rules Govern VA Practice?

- **38 U.S.C. § 5904 (a)(2)**

The Secretary shall prescribe in regulations (consistent with the Model Rules of Professional Conduct of the American Bar Association) qualifications and standards of conduct for individuals recognized under this section.

- **CAVC Rule 4(a) Rules of Admission and Practice**

Unless otherwise provided by specific rule of the Court, the disciplinary standard for practice is the Model Rules of Professional Conduct adopted by the American Bar Association on August 2, 1983, as amended.



ABA Model Rules

Rule 1.5(a)

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;



ABA Model Rules

Rule 1.5(a) (cont.)

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.



ABA Model Rules

Rule 1.5(c)

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or **other law**. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined . . .



ABA Model Rules

Rule 1.5 (e) Referral Fees

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.



VA Statutes on Fees

- 38 U.S.C. § 5901

Except as provided by section 500 of title 5, no individual may act as an agent or attorney in the **preparation, presentation, or prosecution** of any claim under laws administered by the Secretary ***unless such individual has been recognized*** for such purposes by the Secretary.

- 38 U.S.C. § 5904 (a)(1)

Except as provided in paragraph (4), the Secretary may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Secretary.



VA Regulations on Fees

38 C.F.R. § 14.636

(a) *Applicability of rule.* The provisions of this section apply to the services of accredited agents and attorneys with respect to benefits under laws administered by VA in all proceedings before the agency of original jurisdiction or before the Board of Veterans' Appeals regardless of whether an appeal has been initiated.



VA Regulations on Fees - Who?

38 C.F.R. § 14.636(b) *Who may charge fees for representation.* Only accredited agents and attorneys may receive fees from claimants or appellants for their services provided in connection with representation.

When read together §§ 5901, 5904 and 14.636 mean that ONLY ACCREDITED REPRESENTATIVES may charge fees



VA Regulations on Fees – When?

38 C.F.R. § 14.636

(c) *Circumstances under which fees may be charged.* Except as noted in paragraph (d) of this section, agents and attorneys may only charge fees as follows:

(1) (i) Agents and attorneys may charge claimants or appellants for representation provided **after an agency of original jurisdiction has issued notice of an initial decision on the claim** or claims if the notice of the initial decision was issued on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.



VA Regulations on Fees – When?

14.636(c)(2)(i) a Notice of Disagreement has been filed with respect to that decision on or after June 20, 2007; and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.

14.636(c)(3) In cases in which a Notice of Disagreement was filed on or before June 19, 2007, agents and attorneys may charge fees only for services provided after both of the following conditions have been met:

(i) A final decision was promulgated by the Board with respect to the issue, or issues, involved in the appeal; and

(ii) The agent or attorney was retained not later than 1 year following the date that the decision by the Board was promulgated.



VA Regulations on Fees – What Kind?

38 C.F.R. § 14.636(e)

Fees permitted for services of an agent or attorney admitted to practice before VA **must be reasonable**. They may be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases.



VA Regulations on Fees

WHAT IS A REASONABLE FEE?

Factors VA will consider:

- (1) The extent and type of services the representative performed;
- (2) The complexity of the case;
- (3) The level of skill and competence required of the representative in giving the services;
- (4) The amount of time the representative spent on the case;



VA Regulations on Fees

WHAT IS A REASONABLE FEE?

Factors (cont.):

- (5) The results the representative achieved, including the amount of any benefits recovered;
- (6) The level of review to which the claim was taken and the level of the review at which the representative was retained;
- (7) Rates charged by other representatives for similar services;
- (8) Whether, and to what extent, the payment of fees is contingent upon the results achieved; and
- (9) If applicable, the reasons why an agent or attorney was discharged or withdrew from representation before the date of the decision awarding benefits.



To Withhold or Not to?

- If you want to have the VA withhold and pay you fees directly, your fee agreement must be limited to 20% of the retroactive award.
- 20% contingency is presumptively reasonable.
- Anything over 33.3% is presumptively unreasonable.



What is your process when your client is awarded benefits?

- You should have a process to determine whether you are entitled to fees. Do not rely on the VA to give you the answer if it is a withholding agreement. Develop your own process to determine your entitlement to a fee in each case.
- Be sure you know which case you are receiving a fee on (i.e. who is the client?) and reconcile your fees with your cases before accepting a fee.
- Here is why I say that: CCK has received fees that were not from CCK clients and I know other law firms have received CCK fees.



Fee Process - Generally

1. You need to know when your client is about to be paid an award.
2. Access to VBMS is critical for this. Usually there will be a decision awarding benefits in VBMS before the veteran/survivor is paid benefits.
3. SHARE is the VA Platform we no longer have access to that shows exactly what was paid to the veteran and when.
4. Make your own fee entitlement assessment: (Was there a fee triggering event, did you perform services on the matter, any special factors to think about, etc.?).
5. Call the client and have a discussion about the award and your decision on fee entitlement decision.



Fee Process - Withholding FA

1. Determine if VA withheld the fee
2. Did you receive a favorable Attorney Fee Decision?
3. What if VA fails to withhold?
4. What if VA finds you are not entitled to a fee?



Fee Process - Non-Withholding

FA

1. Find out how much money the veteran was paid.
2. Call up the veteran asking them to wire the fee to you.
3. If not ask them to send a check.
4. If client refuses, good luck trying to collect.
5. What if VA wrongfully withholds 20% and your FA calls for 33.3%?



Case Law on Fees

- Rich history
- Reading Case Law will prepare you for what to expect when you practice in this area and it will help you draft your fee agreement.
- Mistakes happen, learn from them.
- You know you have “made it” when you become an appellant in a case at the CAVC.



Case Law on Fees

- Cox v. Gober, 14 Vet.App. 148 (2000)
 - Attorney Cox had valid direct pay (20%) FA with client.
 - When Veteran was paid retroactive benefits, VA incorrectly disbursed the whole amount to the Veteran.
 - Secretary argued that it was out of their hands and there were no funds remaining from which VA had legal authority to make a disbursement to the attorney.
 - CAVC disagreed and held that VA was still obligated to directly pay Mr. Cox his attorney fee.



Case Law on Fees

Snyder v. Nicholson, 19 Vet.App. 445 (2006)

- Veteran convicted of felony, sentenced 30 years in prison.
- April 2000 BVA decision denied SC psych, Veteran retained Mr. Snyder and executed 20% FA.
- July 2002, RO issued decision granting SC bipolar disorder, assigned 70% rating back to July 1994.
- Vet was still incarcerated at this time.
- RO notified Veteran that because he was incarcerated, VA would only be paying him at 10% rate. (38 U.S.C. § 5313)
- RO withheld \$1,820.45 to pay Snyder for attorney fee based on 20% of what would actually be paid to Veteran.



Case Law on Fees

Snyder (cont.)

- February 2004 BVA decision upheld RO's determination – attorney fee calculated by lump sum paid to Veteran, not on total award amount.
- Snyder appealed to CAVC.
- CAVC affirmed Board's decision. Court's analysis was based on 38 C.F.R. § 20.609, which defines “past-due benefits” as lump sum payment which represents the total amount of recurring cash payments accrued between the effective date and the grant. Court found that the Attorney fee was based on actual payment to the claimant.
- Snyder appealed to the Federal Circuit.



Case Law on Fees

Snyder (cont.)

- Federal Circuit reversed and remanded.
- Statutory limitation on payments to incarcerated veterans does not change monthly compensation awarded on the basis of the claim. Awarded compensation vs. payable compensation is analogous to gross salary vs. net salary. Section 5313 is a withholding device, does not serve to restate the award of past due benefits.
- The Federal Circuit reversed, remanded, and instructed VA to calculate Snyder's fee on basis of the Veteran's 70% award.
- This case was perhaps the single most important fee decision that a Court has made on contingency fees (putting aside the EAJA offset line of cases).



Case Law on Fees

MVA v. Secretary, 7 F.4th 1110 (2021)

- This case was a regulation challenge to AMA regulations that were released for notice and comment in 2019. It has a detailed analysis of standing. But for our purposes the critical holding is that the Circuit held 38 C.F.R. § 14.636(c)(1)(i) is contrary to the plain language of 38 U.S.C. § 5904(c)(1). Why is that important you may ask?
- That regulation provided that you can only charge fees after a supplemental claim is denied. The Circuit held you can charge fees for work on any supplemental claim.



Case Law on Fees

MVA, (cont.)

- *MVA* basically stands for the proposition that you can charge fees for everything except an initial claim.
- But did the Federal Circuit really mean what it said? VA has not changed the regulation nor has it withdrawn the regulation. VA keeps rejecting our fees for supplemental claims (and based on the NOVA forum, it seems like it is happening to some of you too).
- We are appealing all of them to the BVA. And there are now a few of these fee cases floating around the CAVC.



Case Law on Fees

Cornell v. McDonald, 28 Vet.App. 297 (2016)

- Attorney is hired by veteran. The attorney helps the veteran get a grant of service connection for bilateral hearing loss and tinnitus. The grant is for 80% for the hearing loss and 10% for the tinnitus. VA withholds and pays the attorney \$18,308.81 from that award for the work on the hearing loss and tinnitus.
- Attorney then sends a letter to the veteran stating I am closing the file “because at this time there is no further work to be done on your claim.”
- Two months later the veteran appoints a VSO and files for TDIU and that is eventually granted.



Case Law on Fees

Cornell, (cont.)

- VA determines that the attorney is entitled to a 20% fee in the amount of \$20,204.16.
- VA releases the fee to the attorney in July 2012 but in December 2012 sends her a letter informing her the fee was paid in error.
- The Court found she was not entitled to a fee on the TDIU grant because it was never raised directly in her pleadings on behalf of the veteran nor was it reasonably raised by the record.



Case Law on Fees

Cornell, (cont.)

- Take away is people make mistakes representing veterans. Here, it was the failure to recognize TDIU as part and parcel of the bilateral hearing loss.
- You will make mistakes representing veterans, as have I in my 30 plus years.
 1. Failure to know I could file for EAJA fees on the first 3 Court cases I won.
 2. Not understanding SMC benefits.



Case Law on Fees

Jackson v. McDonald, 635 F. Appx. 858 (2015)

- Attorney represents veteran beginning in 1998. In May 2007 BVA finds a number of conditions are service connected for the veteran.
- Veteran dies January 20, 2008. RO does not know the veteran died and issues a RD on January 31, 2008. But VA never issues payment to the veteran or his estate.
- The attorney then files an accrued claim for the surviving wife and the RO awards all the benefits set forth in the January 31, 2008 RD to her.
- The attorney asks the RO to withhold the 20% from the \$136,000 award.



Case Law on Fees

Jackson, (cont.)

- The attorney did NOT have a fee agreement with the surviving spouse and argued he was entitled to fees because of his fee agreement with the now deceased veteran.
- The Board found Mr. Jackson was not entitled to fees. He appealed to court.
- The CAVC found the VA never awarded the veteran any past-due benefits on the basis of the claim within the meaning of 5904(d).
- He appealed to the Federal Circuit.



Case Law on Fees

Jackson, (cont.)

- The Federal Circuit found that VA made an award of past-due benefits in the January 31, 2008 RD based upon the veteran's claim. The ruling applies 5904's language to the award based on the claim of the veteran with whom the attorney had a fee agreement not to the award based on the distinct, though purely derivative, claim of the surviving spouse.
- What is interesting here is if Mr. Jackson had a fee agreement with the surviving wife he may have been paid right away.



Case Law on Fees

Gumpenberger v. Wilkie, 973 F.3d 1379 (2020)

- Veteran is receiving compensation. VA then informs him that he has been improperly paid \$199,158.70 because he was a fugitive felon from 2001-2009. VA then starts withholding part of his monthly check to pay back the debt.
- The veteran hires Mr. Gumpenberger to appeal the RO's decision and enters into a 20% fee agreement with Mr. G.



Case Law on Fees

- Gumpenberger, (cont.)
 - The Board eventually reverses the debt finding. At that time the VA had recouped \$65,464.00 from the veteran.
 - VA withheld 20% of \$65,464 or \$13,092.80 to pay Mr. G. Mr.
 - G. did not like that and argued that he was entitled to 20% of
 - \$199,158.70.
 - The Circuit held the invalidation of the debt did not result in a past-due benefit equal to the total amount of the overpayment debt. Rather, the unpaid or owed amount due to the veteran was the amount that had been erroneously withheld from his monthly benefits until the debt was overturned -65,464.



Case Law on Fees

Gumpenberger, (cont.)

- Was there a way to draft a fee agreement to recover a percentage of the entire amount 199K?
- What about a flat fee for 38K if you are successful representing the veteran?



Case Law on Fees

Cox v. McDonough, 34 Vet.App. 112 (2021)

- Here the fee agreement provided, “if the client discharges Attorney without good and adequate cause after the attorney has fully performed, substantially performed or contributed in any way to the results finally obtained by the Client, the Client shall be liable of the Attorney’s fees in quantum meruit.”
- Here the issue is drafting of your fee agreement because if the client fires you for good cause then the client is not liable to pay fees.



Case Law on Fees

Cox v. McDonough, (cont.)

The Court in this Cox case outlines a three-prong analysis that should be done in each fee case.

1. Validity of the Fee Agreement (think signed FA etc.)
2. Eligibility - is there a fee trigger under § 14.636(c)?
3. Reasonableness § 14.636



Case Law on Fees

Cox v. McDonough, (cont.)

- The court found there is “no principled reason to conclude the Board could not base the denial of any fee, as it did, on the parties all-or-nothing contract term.”
- Takeaway: be careful what you put in your contracts. While we as lawyers tend to be overinclusive. Maybe less is more.



Case Law on Fees

Wells v. McDonough, 35 Vet.App. 325 (2022)

- Wells, an attorney, filed a writ of mandamus asking to get paid his outstanding fees and to force VA to promulgate a process to waive the 60-day waiting period.
- There is a good discussion on mootness. VA paid the first batch of fees while the writ was pending, but Mr. Wells amended the petition and alleged more fee payments were delayed. So, the Court found the case was not moot.



Case Law on Fees

Wells, (cont.)

- The Court explained that the Federal Circuit held in *Scates* that disputes involving the direct payment of fees are simultaneously contested claims. And each side has 60 days to file an NOD in that situation. VA's policy of suspending disbursement of fees for 60 days avoids the prospect of overpaying either side. And aligns with § 7105A's statutory command concerning the time to file an NOD so it was not arbitrary or capricious.
- The Court also went through the TRAC factors and found they weighed in favor of the VA.



Case Law on Fees

Wells, (cont.)

This line is interesting:

“The Court acknowledges Mr. Well’s argument that unpredictability in the disbursement of fees earned for successful representation poses a challenge for those who represent veterans . . .and may constitute a barrier to the practice of veteran’s law.”



Case Law on Fees – Other Considerations

The moment you win a veteran's case (and many times this is a years-long process), the next moment you go to collect the fee, you are essentially in an adverse position with your client because of the simultaneously contested claims process.

In fact, the Court in Wells, said VA did not have to create a waiver process because of the ethical challenges presented by a potential waiver process.



Concluding Thoughts

- Who gets to decide your entitlement to fees and make reasonableness determinations? The Office of General Counsel. Many of us litigate against them daily in the CAVC. Anything wrong with that?
- What could be next for fees?
 1. Fee Caps
 2. Fee Trigger Changing to Initial Claims
 3. Bringing back Criminal Penalties in 5905



Questions?

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