

Ethical Representation of Veterans and Claimants Before the VA

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Overview

- Who may represent Veterans and claimants before the VA
- Sources of ethics rules applicable to representation before the VA
- Establishing and maintaining competency
- Diligence in the representation of VA claimants
- Managing clients and client expectations
- Engaging with VA with professionalism and civility

Who May Represent a Claimant Before VA

- **Accredited** attorneys, agents, and Veteran Service Officers (VSO)
- A non-accredited person may be authorized for one claim only, but with no compensation - 38 C.F.R. § 14.630(a)
- NOTE: An **accredited agent** is a non-attorney individual authorized by the VA to assist with claims, while a **VSO representative** is from a recognized organization (like the DAV, VFW, etc.) who also helps with claims but works for a non-profit and offers services for free. Both require VA accreditation.

Sources of Ethics Rules for VA Claims

- ABA Model Rules of Professional Conduct
- State rules of professional regulation
 - *See* 38 C.F.R. § 14.632(d) – “In addition to complying with standards of conduct for practice before VA in paragraphs (a) through (c) of this section, an attorney shall not, in providing representation to a claimant before VA, engage in behavior or activities prohibited by the rules of professional conduct of any jurisdiction in which the attorney is licensed to practice law.
- VA regulations - 38 C.F.R. §§ 14.626-14.637

38 C.F.R. § 14.629 - Accreditation

(b) Accreditation of Agents and Attorneys.

(1) No individual may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits as an agent or attorney unless he or she has first been accredited by VA for such purpose.

38 C.F.R. § 14.629 - Accreditation

What acts are included within the “practice before VA” and the “**preparation, presentation, and prosecution**” of a claim for which VA accreditation is necessary?

- Preparing a benefits claim generally includes, but is not limited to, **consulting** with or giving **advice** to a claimant or potential claimant in **contemplation of filing** a benefits claim, **gathering evidence** in support of a benefits claim on behalf of a claimant or potential claimant, or **filling out VA forms** for their submission to VA.
- Presenting and prosecuting a benefits claim generally includes, but is not limited to, **filing**, or pursuing in any way, an initial claim for VA benefits, **a request for further review** of a decision by the agency of original jurisdiction, or **an appeal to the Board of Veterans' Appeals**.

38 C.F.R. § 14.629 - Accreditation

Question: If an attorney advises a client as to eligibility requirements for VA benefits, but does not file the application for them, do they need to be accredited?

- **Yes.** In answering this question, we assume that (1) the client is a Veteran or potential VA claimant who has expressed intent to file for such VA benefit, and (2) that the advice provided includes those acts in making the claim ready for filing, but not the actual filing of the claim. Here, the advice constitutes **preparation** of a claim and therefore requires accreditation.

38 C.F.R. § 14.629 - Accreditation

Question: I am providing **pro bono** representation to a veteran. Does this require VA accreditation?

- **Yes.** Generally, all attorneys who assist claimants in the preparation, presentation, and prosecution of claims for VA benefits must be accredited by VA. An exception exists for attorneys who initiated representation on a claim prior to June 23, 2008 (effective date of VA's final rules that implemented section 101 of Public Law 109-461 (Dec. 22, 2006)). Those attorneys need not seek accreditation for representation provided on that claim. Initiation of a representation before June 23, 2008, would be indicated by appointment on a VA Form 21-22a or an attorney's letterhead.

38 C.F.R. § 14.629 - Accreditation

Question: Do paralegals or administrative support staff working under the supervision of a VA-accredited attorney also need to be accredited?

- **No**, but only if they are working under the direct supervision of the attorney of record and with the specific written consent of the claimant. 38 C.F.R. § 14.629(c)(3). But, in a law firm where several attorneys and paralegals work on VA claims for a single accredited attorney properly appointed on a VA Form 21-22a as the attorney of record, each attorney must be accredited if their work involves assisting claimants in the preparation, presentation, and prosecution of claims for veterans' benefits. Paralegals may assist the attorney of record subject to the written consent of the claimant but may not independently provide representation to claimants.

Why is Representation Limited?

A Brief History of Legal Representation of Veterans

- Statutory provisions proscribing a veteran's right to counsel in veteran benefit proceedings date back to the Civil War.
- In 1862, Congress enacted a law limiting the fee that an attorney was permitted to charge a veteran for benefits-related services to \$5.
- Two years later, on July 4, 1864, Congress increased that cap to \$10, where it remained unchanged for 124 years until the passage of the Veterans' Judicial Review Act in 1988.

Why is Representation Limited?

- The motivation behind the Civil War-era attorney fee limitation was congressional concern about unscrupulous lawyers bilking unsuspecting veterans out of their hard-earned entitlements.
- During an 1886 debate about veteran and widow pension reform, Senator Edward Bragg of Wisconsin characterized attorneys' fees as “blood taken from the soldiers whom they pretend to love.” He went on to say: “[T]hese (attorneys) that present to be ‘friends of soldiers’ are the friends of soldiers as vultures are the friends of dead bodies—because they feed and fatten them. . . . They have the voice of Jacob, but their hand has the clutch of Esau.”

Why is Representation Limited?

- In 1983, a group of veterans, veterans' organizations, and a veteran's widow filed suit in federal district court challenging the constitutionality of the \$10 attorney fee limitation in *National Ass'n of Radiation Survivors v. Walters*. 589 F. Supp. 1302, 1306 (N.D. Cal. 1984), rev'd, 473 U.S. 305 (1985).
- The fee cap effectively precluded the *Walters* plaintiffs from hiring qualified attorneys to advocate their VA disability and death claims in violation of their Fifth Amendment right to procedural due process and First Amendment rights to free association and redress of grievances.

Why is Representation Limited?

- The District Court rejected VA's repeated argument that permitting veterans to hire counsel would undermine the pro-claimant, informal, and non-adversarial system.
- Applying the *Matthews v. Eldridge* factors, the Court concluded: (1.) veterans' interest in obtaining death and disability benefits is "extremely high"; (2) the risk of erroneously depriving veterans' significant interests was substantial without adequate representation; and (3) VA failed to demonstrate that it would suffer any harm if the fee limitation were lifted.
- VA immediately appealed to the U.S. Supreme Court

Why is Representation Limited?

- The Supreme Court adopted VA's arguments in their entirety, and in a 6-3 decision, upheld the attorney fee cap.
- Three years after *Walters*, Congress repealed the \$10 limitation and replaced it with a statute that permitted veterans to hire an attorney for a reasonable fee – but only after the Board of Veterans Appeals had reached a final decision.

Why is Representation Limited?

- Congress has since adjusted the fee structure and several times. Under the current structure, effective 2008, veterans are prohibited from hiring an attorney until the VA has made an initial decision on their claim.
- As attorney/agent participation has been expanded in the claims/appeals system, VA has also established and refined definitions and requirements for accreditation and representation of VA claimants in 38 CFR 14.627.

38 C.F.R. § 14.626

“The purpose of the regulation of representatives, agents, attorneys, and other individuals is to ensure that claimants for Department of Veterans Affairs (VA) benefits have responsible, qualified representation in the preparation, presentation, and prosecution of claims for veterans' benefits.”

38 C.F.R. § 14.632 – Standards of Conduct

Accredited agents, attorneys, and representatives **shall**:

- Be **diligent** and prompt.
- Be truthful with claimants and VA.
- Provide **competent representation**.
- **Communicate** and keep claimants informed.
- Avoid conflicts, overreaching, and improper fees.
- Protect VA-provided information.

ABA Model Rules 1.1, 1.3, 1.4, 4.1, 8.4

38 C.F.R. § 14.632 – Standards of Conduct

Accredited agents, attorneys, and representatives **shall not**:

- Violate the standards of conduct set forth in 38 C.F.R. § 14.632.
- Circumvent the rules of conduct through the actions of another.
- Enter into an agreement for, charge, solicit, or receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation.
- Solicit, receive, or enter into agreements for gifts related to representation provided before an agency of original jurisdiction has issued a decision on a claim or claims

38 C.F.R. § 14.632 – Standards of Conduct

Accredited agents, attorneys, and representatives **shall not**:

- Delay, without good cause, the processing of a claim at any stage of the administrative process.
- Mislead, threaten, coerce, or deceive a claimant regarding benefits or other rights under programs administered by VA.
- Engage in, or counsel or advise a claimant to engage in, acts or behavior prejudicial to the fair and orderly conduct of administrative proceedings before VA.
- Disclose, without the claimant's authorization, any information provided by VA for purposes of representation
- Engage in any other unlawful or unethical conduct

Competent Representation

- **38 C.F.R. § 14.632 (b)(1)**
 - Competent representation requires the knowledge, skill, thoroughness, and preparation necessary for the representation. This includes understanding the issues of fact and law relevant to the claim as well as the applicable provisions of title 38, United States Code, and title 38, Code of Federal Regulations.

Competent Representation

- **38 U.S.C. § 5904(b)(3)**
 - The Secretary ... may suspend or exclude from further practice before the Department any agent or attorney recognized under this section if the Secretary finds that such agent or attorney ... is incompetent; ...

Competent Representation

- **38 C.F.R. § 14.633 (d)(1)**
 - Accreditation ***shall*** be canceled “when the OGC finds that the performance of [a representative] demonstrates a lack of the degree of competency necessary to adequately prepare, present, and prosecute claims for veterans’ benefits.”

Competent Representation

- **ABA Model Rule 1.1**
 - “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
 - Comment [2] describes the Duty of Competence not as a duty to **be** competent but as a duty to **become** competent.
 - Comment [8]: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...”

Competent Representation

- **Texas Disciplinary Rule 1.01**
 - “(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence, unless:
 - (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
 - (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

Competence in VA Representation

- Know which VA appeals system controls (there are potentially 2!)
- Know what stage of the process the veteran's claim is in and what appeal deadlines and options are available.
- Do not take a case you cannot handle without help.
- Do your research – especially with complex medical issues.
- Stay up-to-date on changes in the law and precedent caselaw.
- Use supervision, consults, co-counsel, or referrals early.

Diligent Representation

- 38 C.F.R. §14.632 (b)(2)
- Representatives must “act with reasonable diligence and promptness in representing claimants. This includes responding promptly to VA requests for information or assisting a claimant in responding promptly to VA requests for information.”

Diligent Representation

- ABA Model Rule 1.3 Comment [3]
- “A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when [an advocate] overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the [advocate’s] trustworthiness.”

Diligent Representation

- **Texas Disciplinary Rule 1.01**
 - (b) In representing a client, a lawyer shall not:
 - (1) neglect a legal matter entrusted to the lawyer; or
 - (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.
 - (c) As used in this Rule neglect signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Diligence in VA Representation

- **Manage Appeal Deadlines** – Ensure timely *and appropriate* filing of Supplemental Claims, Requests for Higher-Level Review, and appeals to the Board of Veterans' Appeals (BVA).
- **VBMS Access & Monitoring** – Attorneys **MUST** obtain and utilize PIV card access to the Veterans Benefit Management System (VBMS) to monitor claim status, review evidence, and identify missing records in real(ish)-time
- **Medical Record Development** – Actively requesting private medical records and securing nexus letters from doctors to link current disabilities to service (when needed).

Diligence in VA Representation

- **Identifying Clear and Unmistakable Errors (CUE)** - Reviewing past ratings to find errors that can reopen claims, which requires in-depth knowledge of VA regulations.
- **Proactive Communication** - Regularly inform veterans of progress and timely respond to client communication.

Communication Duties

ABA Model Rule 1.4

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Communication Duties

Texas Disciplinary Rule 1.03

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Managing VA Claimant Expectations

VA disability processes are commonly measured in years (sometimes decades).

- New claims/claims for increase average 107.4 days (July 2025).
- Higher-Level Review appeals (closed record – no new evidence) – 128.5 days
- Supplemental Claims (previously denied claims, improperly rated claims with new evidence) – 92.5 days
- But, beware the hamster wheel.....



Managing VA Claimant Expectations

But, those aren't even the worst of the wait times...Let's look at the Board of Veterans Appeals (BVA).

- Direct Appeal Docket (closed record) – 506 days
- Evidence Submission Docket (90 days from election to submit new evidence) – 713 days
- Hearing Docket (in-person or teleconference) – 791 days to infinity (my last 2 Board hearings were on appeals filed in 2019)

Managing VA Claimant Expectations

So, what can we as advocates do to improve communication with Veterans in an ethically responsible, effective way and reduce frustration due to administrative action/inaction often outside our control?

Managing VA Claimant Expectations

Set communication expectations from the beginning of representation.

- **How** will you primarily communicate? Phone, email, secure portal, text, mail
- **Who** will be involved in that communication? Staff/other representatives, Veteran's family members/friends. 38 C.F.R. § 14.632(c)(10) (An individual providing representation on a particular claim under §14.630, representative, agent, or attorney shall not: ... Disclose, without the claimant's authorization, any information provided by VA for purposes of representation.)

Managing VA Claimant Expectations

- **When** can the Veteran expect to hear from you? When a decision is made, an appeal is filed, a hearing/conference is scheduled, something is needed from them, an update is requested by the Veteran, a C&P exam is ordered etc.
- **When** should you hear from the Veteran? Address/phone changes, responses to your requests for information, revocation of permission to speak with family/friends, significant changes in health or employment status

Managing VA Claimant Expectations

Avoid creating unreasonable time expectations from the beginning of representation.

- We need to be responsive, but our brains are not designed to shift rapidly between “always-on” communication and work tasks. Also, hyper-responsive interactions can set up client expectations that cannot be met during busy time periods.
- Hyper-responsive interactions can set up client expectations that will not be met during busy periods. Your initial responsiveness sets the tone – while it is important to be available, it is equally important to not be *too* available.

Managing VA Claimant Expectations

- It is also important to not create unreasonable expectations of timetables for resolution of the Veteran's claims from the beginning of representation.
- Often, we do this unintentionally. Regardless of how you phrase it, mentioning a specific number only gives your Veterans something to hang their hats on when things don't go as planned.

Managing VA Claimant Expectations

- “Realistic” numbers are difficult to accept...So, AVOID creating client expectation and PARTICULARLY avoid mentioning numbers at the outset. No matter how many times you say “only if,” “assuming everything breaks our way,” or “in the best case scenario,” the Veteran may only remember the number and forget the caveats and contingencies. Despite your outstanding representation in a difficult claim, the Veteran is more likely to feel disappointed.

Managing VA Claimant Expectations

Be clear about what you CAN and CANNOT do.

- Move claims, processes, and appeals along the most efficient path.
- Increase the chance of success.
- Monitor claims/appeals to make sure they stay on track to a decision.
- BUT, many times we cannot speed up the process.

Managing VA Claimant Expectations

What about challenging/difficult clients?

- Not all challenging clients are difficult.
- “A challenging client has high expectations; a difficult client lacks respect and acts hostile.”
- You are not “stuck” with difficult clients. You control the representation; you’re the professional expert. The client controls the goal; you control how you go about achieving it.

Managing VA Claimant Expectations

- 38 C.F.R. § 14.631(c) – governs withdrawal at the agency level. A representative “may withdraw ... if such withdrawal would not adversely impact the claimant’s interests.”
- 38 C.F.R. § 20.6 – withdrawal at the Board.
- U.S. Vet. App. R. 46(c) – withdrawal at the CAVC.
- *See* state rules re: document retention.
- *See also* U.S. Vet. App. R. 37(c).

Interactions with the VA

38 U.S.C. § 5904(b)(3)

The Secretary...may suspend or exclude from further practice before the Department any agent or attorney recognized under this section if the Secretary finds that such agent or attorney—

- (1) has engaged in any unlawful, unprofessional, or dishonest practice;
- (2) has been guilty of disreputable conduct; ...

Interactions with the VA

- Assume that **everything** you put in writing –and everything that is said at a recorded and transcribed hearing – **will be read by a Judge or other adjudicator.**
- Judges and other decision-makers in the system “are more likely to be impressed by an advocate who is courteous and respectful to the decision- maker, opposing counsel, the litigants, and the legal process.” Kevin Dubose & Jonathan E. Smaby, *The Power of Professionalism: Civility as a Strategy for Effective Advocacy*, 79 Tex. B.J. 432, 433 (2016).

Interactions with the VA

- “...good manners, disciplined behavior and civility—by whatever name—are the lubricants that prevent lawsuits from turning into combat.”
- “[L]awyers who know how to think but have not learned how to behave are [a] menace and a liability, not an asset, to the administration of justice.”

Chief Justice Burger, *Excerpts From the Chief Justice’s Speech on the Need for Civility*, N.Y. Times, May 19, 1971, at 28.

Final Thoughts

- Make sure you are competent before worrying about building your practice.
- Manage your caseload to preserve your own health and sanity.
- Talk with your client – and lose the jargon.
- Manage your client's expectations.
- Know when and how to withdraw representation at the RO, Board, Court.
- Be nice (or, at least be professional).

Questions?

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