

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 1, 14, 19 and 20

RIN 2900-AM62

#### Accreditation of Agents and Attorneys; Agent and Attorney Fees

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its regulations governing the representation of claimants for veterans benefits in order to implement provisions of the Veterans Benefits, Health Care, and Information Technology Act of 2006, and to reorganize and clarify existing regulations. As amended, the regulations establish the procedures and rules necessary for VA to facilitate the paid representation of claimants by accredited agents and attorneys after a Notice of Disagreement has been filed with respect to a case. The purpose of these regulations is to fulfill Congress' direction that agents and attorneys may be paid for services rendered after a Notice of Disagreement is filed with respect to a decision by an agency of original jurisdiction while ensuring that claimants for veterans benefits have responsible, qualified representation.

**DATES:** *Effective Date:* The final rule is effective June 23, 2008. See

**SUPPLEMENTARY INFORMATION** for initial compliance dates.

*Applicability Dates:* Some amendments in this final rule are for prospective application only. For more information concerning the dates of applicability, see the **SUPPLEMENTARY INFORMATION** section.

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**SUPPLEMENTARY INFORMATION:** In a document published in the **Federal Register** on May 7, 2007 (72 FR 25930), VA proposed to amend its regulations governing the representation of claimants for veterans benefits, accreditation of individuals who may provide representation, and limitations on fees charged for representation. The public comment period ended on June 6, 2007. VA received 44 comments from interested individuals and organizations, including agents, attorneys, law firms, pro bono groups, and veterans service organizations (VSO). The comments generally

concerned VA's proposed attorney accreditation requirements and the centralization of attorney accreditation and disciplinary proceedings in the Office of the General Counsel (OGC). The comments are discussed below. Based on the rationale described in this document and in the notice of the proposed rulemaking, VA adopts the proposed rule as revised in this document.

#### Section 14.627—Definitions

Noting some confusion in the comments concerning accreditation of individuals and when those individuals would be considered to be providing representation in a proceeding before the Department for purposes of charging fees, we modified the definitions in 38 CFR 14.627(a) and (n) to clarify that "accreditation" means authority to assist claimants in the preparation, presentation, and prosecution of claims for VA benefits, and that "representation" means the acts associated with representing a claimant in a proceeding before the Department pursuant to a properly executed and filed VA Form 21-22 (appointment of service organization) or VA Form 21-22a (appointment of individual).

In § 14.627(d), we amend the definition of "attorney" to mean a member in good standing of a State bar who has met the requirements prescribed in 38 CFR 14.629(b) for practice before VA. One commenter opined that changing the definition of "attorney" as proposed in § 14.627(d) was unnecessary. Another commenter, without taking a position on the appropriateness of the proposed definition, suggested VA address the question of whether the Agency Practice Act, 5 U.S.C. 500(b), prohibits VA from regulating attorney practice before the Department. We discuss VA's authority to regulate attorney practice before VA below under § 14.629.

We disagree that a change in the definition of "attorney" is unnecessary. Prior to the enactment of Public Law 109-461, VA accredited attorneys for practice before the Department based solely upon being a member in good standing of a State bar. However, Public Law 109-461 amended 38 U.S.C. 5904(a) and directed VA to prescribe, in regulations, qualifications and standards of conduct for practice before the Department. As discussed in greater detail below, the final rule does not require attorneys to submit to a character and fitness evaluation or pass a written exam to be accredited. Nonetheless, attorneys must apply for accreditation, certify their standing annually, and complete continuing legal

education (CLE) requirements established by VA. Because these are requirements beyond bar membership we retain the definition of "attorney" as proposed.

Four commenters suggested that VA amend the definition of "claim" in § 14.627(g). One commenter suggested that we place the definition in 38 CFR part 3.

We agree that clarification is necessary concerning when a fee is payable for representation, especially in circumstances where more than one representative, agent, or attorney is involved. A number of commenters requested that we reconcile the definition of "claim" in § 14.627(g) with case law, including *Carpenter v. Nicholson*, 452 F.3d 1379 (Fed. Cir. 2006). Because the definition of "claim" in § 14.627(g) is identical to the prior definition we will retain it as proposed but will address commenters' concerns and reconcile the case law in § 14.636(c), the section pertaining to the circumstances under which fees may be charged.

One commenter recommended that the definition of "service" under § 14.627(o) include a proof of receipt component. We disagree. The commenter makes this suggestion based upon the alleged failure of VA to properly deliver correspondence related to benefit claims. However, requiring proof of service under part 14 does not address the commenter's concerns about benefit claims. Under part 14, claimants and attorneys are required to "serve" documents related to claimants' or the General Counsel's motions for review of fee agreements. Such service is not related to the manner in which VA mails or proves mailing of documents related to claims. Furthermore, we modeled our proposed service rules after the rules of practice and procedure generally followed by litigants, practitioners and courts, such as Rule 5(b) of the Federal Rules of Civil Procedure and Rule 25(c) of the Federal Rules of Appellate Procedure, both of which provide that service by mail is complete on mailing.

#### Section 14.629—Requirements for Accreditation of Representatives, Agents, and Attorneys

In 38 CFR 14.629, we proposed to continue administering VA's accreditation program in OGC and to clarify that the Assistant General Counsel has primary responsibility for the program. We received numerous comments regarding the requirements for accreditation. Several commenters suggested that it was a conflict of interest and a violation of due process

for OGC to administer the accreditation program because the General Counsel is the Secretary's legal advisor and represents the Secretary in benefits matters that are appealed to the U.S. Court of Appeals for Veterans Claims. These commenters asserted that OGC *might* use the accreditation program to screen out opposing counsel or to retaliate against parties in benefits litigation.

We agree that individuals seeking accreditation have the right to a timely decision based solely on the merits of their application by an impartial and unbiased decision maker. However, the argument that VA's accreditation program, as clarified by the amendments in 38 CFR 14.629, creates a conflict of interest and violates due process is not supported in law or in fact.

The VA General Counsel or his designee may lawfully determine whether an applicant satisfies the requirements for accreditation. In 38 U.S.C. 5904, Congress granted the Secretary of Veterans Affairs the authority to accredit agents and attorneys for practice before VA. *See also* 38 U.S.C. 5901 (“[N]o 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.”). Congress has also authorized the Secretary to delegate authority to act and to render decisions under the laws administered by VA as he deems necessary. *See* 38 U.S.C. 512. The Secretary, then the Administrator of Veterans Affairs, first delegated the authority for the accreditation program to the General Counsel in 1954 in a new 38 CFR part 14.19 FR 5556, Aug. 31, 1954. The United States Supreme Court has held that such delegations, involving the combination of functions in a single decision maker, do not violate due process. *See Withrow v. Larkin*, 421 U.S. 35 (1975). Further, general allegations of conflict are not sufficient to rebut the strong presumption “that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations.” *Haley v. Department of the Treasury*, 977 F.2d 553, 558 (Fed. Cir. 1992) (quoting *Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982)), *cert. denied*, 508 U.S. 950 (1993). *See also Assoc. of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (agency decision-maker “should be disqualified [for a conflict of interest] only when there has been a clear and convincing showing that the

agency member has an unalterably closed mind on matters critical to the disposition of the proceeding”).

In a case in which a corporation regulated by a Federal agency asserted that an agency decision maker participating in an investigation of a regulatory violation had prejudged its claim resulting in a violation of procedural due process, the U.S. Court of Appeals for the Federal Circuit held that the corporation could prevail on its claim “only if it can establish that the decision maker is not ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’” *NEC Corp. v. United States*, 151 F.3d 1361, 1373 (1998) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). *See also Hortonville Jouc. Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976). “This standard is met when the challenger demonstrates, for example, that the decision maker’s mind is ‘irrevocably closed’ on a disputed issue.” *NEC Corp.*, 151 F.3d at 1373 (other citations omitted).

The commenters have not alleged any facts indicating an actual conflict of interest in OGC's administration of the accreditation program. The comments also suggest a misunderstanding of VA's organizational structure and the scope of VA's authority under 38 U.S.C. Chapter 59. Claims for VA benefits are adjudicated by agencies of original jurisdiction within one of the Department's administrations (Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration) and those decisions are generally subject to review by the Board of Veterans' Appeals (Board), which makes the final agency decision on benefit claims. Although the Board is obligated by law to follow precedent opinions of the General Counsel, the Chairman of the Board is appointed by the President and is directly responsible to the Secretary, not the General Counsel. 38 U.S.C. 7101(a), 7104(c). Staff attorneys assist Board members in rendering decisions on benefit claims, but these attorneys are employees of the Board, not OGC. Also, VA's authority is to regulate agents' and attorneys' practice before the agencies of original jurisdiction and the Board, not practice before Federal appellate courts. *See* 38 U.S.C. 5904 (authorizing suspension or exclusion from “practice before the Department”). Although OGC attorneys represent the Department before the Court of Appeals for Veterans Claims, they are not involved in the adjudication of claims before VA's agencies of original jurisdiction or the Board, the two forums in the

Department where the accreditation provisions in 38 CFR part 14 are applicable. Under its limited accreditation authority, OGC cannot control or otherwise limit attorney admission to practice before the courts. In our view, continuing administration of the accreditation program in OGC is necessary to avoid conflicts that might arise from involvement of VA officers with claim adjudication responsibility and to ensure that only individuals with the appropriate legal expertise are involved in accreditation determinations.

We received four comments regarding the process for appealing an adverse initial accreditation decision of the Assistant General Counsel to the General Counsel. One commenter stated that although a final decision of the General Counsel may not be appealable within VA, “it is clearly appealable under the Administrative Procedure Act [(APA)] and the Department should revise proposed § 14.629 to so state.” We agree. A decision to deny accreditation under 38 U.S.C. 5904(a) is based solely upon a determination of whether an applicant has satisfied the requirements prescribed in regulations for accreditation. VA did not propose to deny judicial review of these decisions, only to clarify that review is in the U.S. District Court under the Administrative Procedure Act (5 U.S.C. 701–706) rather than in the administrative review system that Congress designed for adjudicating veterans benefit claims.

Although the Court of Appeals for the Federal Circuit held in *Bates v. Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005), that section 5904 is a law that affects the provision of veterans benefits for purposes of the Board's jurisdiction, the court did not address the distinction between decisions denying accreditation under section 5904(a) and decisions cancelling accreditation under section 5904(b). Whereas a decision to cancel or suspend accreditation may indirectly affect the provision of benefits because it may result in withdrawal of representation and delay in adjudication, a decision to deny accreditation has no effect on pending adjudications. An unsuccessful accreditation applicant has had no lawful contact with VA's benefits system as a representative, agent, or attorney. Moreover, we do not interpret section 5904(a) as expressing congressional intent to extend VA's informal and nonadversarial adjudication process to individuals seeking admission to practice before VA. As such, an initial decision to deny accreditation to practice before VA under 38 CFR 14.629 is separate and

distinct from a decision to suspend or cancel accreditation under 38 CFR 14.633, which may be appealed to the Board under *Bates*. We will amend the introduction to § 14.629 to clarify that the General Counsel's decision denying accreditation is a final agency action for purposes of 5 U.S.C. 702.

Another commenter recommended that VA adopt a procedure for appeal of initial accreditation decisions similar to that provided in 38 CFR 14.633 for suspension or cancellation of accreditation because a denial of accreditation would impact a VSO representative's ability to remain employed. We disagree and will not make any changes based on this comment.

A service organization representative may not represent claimants before VA without VA accreditation under § 14.629(a); therefore, any employment by a VSO of an individual for purposes of providing representation before VA must be conditional. Procedural due process requires that an individual receive notice and an opportunity to respond before being deprived of a protected property or liberty interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). However, an applicant does not have a protected liberty or property interest sufficient to warrant notice and opportunity for a hearing prior to VA making a decision on an accreditation application. See *White v. Office of Pers. Mgmt.*, 787 F.2d 660, 663–64 (D.C. Cir. 1986) (“before the right to a hearing attaches, a deprivation greater than the denial of a particular job application must be involved”).

To the extent the commenter suggests that a decision of the General Counsel to deny accreditation warrants some procedural due process, the process provided in the introduction to § 14.629 provides both notice and an opportunity to respond adequate to the nature of the interest involved. In the event the Assistant General Counsel denies an application for accreditation, the Assistant General Counsel will notify the applicant of the reasons for disapproval and provide the applicant with an opportunity to submit additional information. If the Assistant General Counsel continues to deny the application, the applicant may appeal the decision, in writing, to the General Counsel for a final decision. For the reasons discussed above, the appropriate forum for review of the General Counsel's decision denying initial accreditation is the U.S. District Court under the provisions of the APA.

One commenter expressed concern with the provision in the introduction to § 14.629 restricting the General

Counsel's review of a determination to deny accreditation to the evidence of record before the Assistant General Counsel at the time the decision was made. The commenter suggested that this requirement would deny the appellant's right to due process because the rationale underlying the decision may not be apparent until the applicant receives notice of the decision.

It is not our intent to prevent individuals from submitting additional evidence necessary to satisfy the accreditation requirements or to limit the General Counsel's review of a decision denying accreditation to the initial application for accreditation. Under the introduction to § 14.629, the Assistant General Counsel will notify the unsuccessful applicant of the decision and provide the applicant an opportunity to submit additional information for the purpose of correcting any deficiencies or omissions. If, after receiving and considering the additional information, the Assistant General Counsel continues the denial of accreditation and the applicant appeals the decision to the General Counsel, the record forwarded to the General Counsel for review will include the additional information submitted by the applicant in response to the initial denial. Timely decisions on accreditation are important to both applicants and the Department; consequently, this provision is designed to encourage applicants to provide information in a timely manner to facilitate final resolution of the matter by the General Counsel.

We received many comments regarding the proposed requirement in § 14.629(b) that attorneys achieve a score of 75 percent or higher on a written examination as a condition of accreditation. We received eight comments in favor of testing, and 27 comments opposed to testing.

Among those commenters generally favoring testing, four stated that testing alone was insufficient to ensure continued competency to represent veterans before VA and recommended that VA require some form of CLE to ensure continued competency. Three commenters, while acknowledging the value of testing as a means to ensure competency, expressed concern that such a requirement would discourage pro bono representation of indigent veterans. Similarly, the two most prevalent reasons provided for opposition to testing was that CLE was necessary to maintain competency and that testing would discourage pro bono representation of indigent claimants. The majority of the remaining comments expressing opposition to

testing as a requirement for attorney accreditation fell into one of four general categories: (1) The proposed rule failed to consider other alternatives to testing; (2) testing is contrary to Congressional intent; (3) testing is contrary to 5 U.S.C. 500, the Agency Practice Act; and (4) a testing requirement is redundant because attorneys have already demonstrated competency by passing a bar examination.

In drafting the accreditation provisions in the proposed rule, VA was required to reconcile the competing interests reflected in section 101 of Public Law 109–461. In section 5904(c), Congress directed that veterans were to be provided the option of retaining paid representation earlier in the administrative appeals process, after a Notice of Disagreement was filed with respect to a case. However, in section 5904(a), Congress introduced a new requirement that VA establish in regulations qualifications for practice before VA to ensure that agents and attorneys have specialized training or experience where VA had previously only required membership in good standing with a State bar as a requirement for attorney accreditation. Sections 5904(a) and (c) require VA to develop a program of agent and attorney accreditation that ensures competent representation while facilitating choice of representation.

In section 5904(a)(2), Congress gave VA the choice of prescribing in regulations a requirement that, as a condition of accreditation as an agent or attorney, an individual must have either a specific level of experience or specialized training. In drafting the proposed rule, we considered alternative means including practical experience through which applicants for accreditation could demonstrate either experience or training and concluded that testing provided balance between ensuring competence and providing choice of representation. After weighing all the options and considering the comments, we decided, with respect to attorneys, that a law degree, bar membership in good standing, and CLE in veterans benefits law and procedure is the best method to fulfill congressional intent as expressed in section 101 of Public Law 109–461. Although VA has authority under section 5904(a)(2) to ensure attorney competence through testing, we considered the formal education and testing already required of licensed attorneys, the potential chilling effect of further testing on pro bono representation of indigent veterans, and the absence of complaints concerning

attorney competence in representation before the Department under former law, and concluded that completion of CLE requirements is a better choice for veterans, their attorneys, and VA. Accordingly, we will take a measured approach in regulating the practice of attorneys before the Department and will amend the rule to remove the testing requirement and instead require the completion of State-bar-approved CLE credits to maintain accreditation. We will evaluate this method of ensuring competent attorney representation and may revisit the issue of testing at a later date.

After drafting the proposed rule, we learned that several State bar associations have offered, currently offer, or will offer CLE courses in veterans benefits law and procedure, some of which are available in formats capable of supporting distance learning for persons outside the jurisdiction. Other organizations offer veterans benefits law and procedure training that has been approved for CLE credit by some States. Accordingly, we will amend § 14.629(b) to provide that an initial 3 hours of State-bar-approved CLE in veterans benefits law and procedure is required for agents and attorneys. Additionally, to maintain accreditation, agents and attorneys would be required to periodically complete 3 hours of State-bar-approved CLE in veterans benefits law and procedure. VA will review available training as necessary to ensure sufficiency. Agents and attorneys applying for accreditation must satisfy the initial CLE requirement during the first year of accreditation and must satisfy the follow-on CLE requirement every 2 years thereafter. Upon completion of the initial and follow-on CLE requirements, agents and attorneys must certify in writing to OGC that they have completed qualifying CLE, such certification to include the date and time of the CLE and identification of the CLE provider. VA intends that agents and attorneys will include information concerning their compliance with the CLE requirements in the annual certification required by § 14.629(b)(4).

Even though we will not require testing for accreditation of attorneys under § 14.629(b), the question remains whether any additional requirements for attorney accreditation, such as the CLE requirement, are contrary to the Agency Practice Act, 5 U.S.C. 500, as some commenters asserted. Until Congress enacted Public Law 109-461, VA's attorney accreditation requirements were limited to those prescribed in the Agency Practice Act, bar membership in good standing and a written declaration

of representation. However, in amended section 5904(a), Congress expressly directed VA to prescribe in regulations additional requirements for practice before the Department. In amending section 5904(a), Congress is presumed to have been aware of the Agency Practice Act, and, as a result, section 5904(a) as implemented by VA in § 14.629(b) should not be read as being in conflict with that act or the intent of Congress. See 2A Norman J. Singer, *Statutes & Statutory Construction* § 45.12 (6th ed. 2000) (In construing legislation, we must presume that Congress was aware of existing law and the rules of statutory construction.).

One commenter noted that, in amending 38 U.S.C. chapter 59, Congress did not remove provisions regarding the Agency Practice Act from 38 U.S.C. 5901. Section 5901 provides, “[e]xcept 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.” The commenter went on to suggest that because Congress did not amend section 5901, it did not authorize VA to exceed the requirements in 5 U.S.C. 500, specifically bar membership in good standing and a written declaration of representation.

Congress did not remove the reference to 5 U.S.C. 500 in section 5901; however, to give effect to the commenter's suggestion would be to ignore Congress' amendment to section 5904(a) requiring VA to establish as a condition of accreditation a specific level of experience or specialized training, either of which goes beyond section 500's requirements for attorney practice before Federal agencies. The commenter incorrectly reads section 5901 in isolation from section 5904 and does not account for an applicable rule of construction. The provisions of chapter 59 must be read as a whole to give effect to amended section 5904. See *Splane v. West*, 216 F.3d 1058, 1068 (Fed. Cir. 2000) (“We must construe a statute, if at all possible, to give effect and meaning to all its terms.”) (citing *Lowe v. Securities & Exch. Comm'n*, 472 U.S. 181, 207–08 n.53 (1985)); see also *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006) (statutes “should not be read as a series of unrelated and isolated provisions”) (citation omitted); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”).

As discussed above, 5 U.S.C. 500 is a statute of general applicability, enacted in 1965 and binding on nearly all Federal agencies. In 1969, Congress amended former 38 U.S.C. 3401, now section 5901, to incorporate a reference to section 500. Public Law 91–21, § 12(a), 83 Stat. 34 (1969). Section 5904 is applicable only to VA and was amended in 2006. See *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). (“The meaning of one statute may be affected by other acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”); see also *Pioneer Hi-Bred Int'l, Inc. v. J.E.M. AG Supply, Inc.*, 200 F.3d 1374, 1376–77 (Fed. Cir. 2000) (It is a basic principle of statutory construction that “a general statute must give way to a specific one.”). Because provisions incorporating section 500 were added to section 5901 over 37 years before the last amendment to section 5904(a), and because Congress expressly directed VA in section 5904(a) to establish attorney accreditation requirements that exceed those in section 500, a reasonable harmonization of sections 5901 and 5904 is that the reference to section 500 in section 5901 is for the purpose of establishing attorney practice requirements for VA to the extent Congress has not specifically provided otherwise in chapter 59.

One commenter stated that the proposed testing requirement for attorney accreditation was inconsistent with the requirement in section 5904(a)(2) that VA prescribe in regulations qualifications and standards of conduct consistent with the American Bar Association's Model Rules of Professional Conduct (Model Rules). The commenter noted that the comment to Model Rule 1.1 states, “a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.” Although we have decided to remove testing as a requirement for attorney accreditation, we do not agree that VA's authority to prescribe qualifications standards for agents and attorneys is limited by the comment to Model Rule 1.1.

The comment fails to distinguish between the general provision in section 5904(a)(2) and subsequent specific provisions modifying the general provision. In section 5904(a)(2), Congress directed VA to prescribe in regulations qualifications for accreditation consistent with the Model Rules. In section 5904(a)(2)(B), Congress further directed VA to establish as a condition of accreditation, a

requirement that an individual must have “such level of experience or specialized training as the Secretary shall specify.” Section 5904(a)(2)(B), as a specific provision, must be given effect as against the general provision provided in section 5902(a)(2). Thus, to the extent testing, or CLE, or any or any other accreditation requirement related to level of experience or specialized training may be inconsistent with the comment to Model Rule 1.1, it is consistent with the specific provision in section 5904(a)(2)(B).

Several commenters stated that testing of attorneys would be unnecessary and redundant because attorneys, as a condition of licensing, have already established a minimum level of competency by completing formal legal training and passing a State bar examination. One commenter questioned why VA would require the same testing for attorneys as is required for agents who have not completed similar legal education or passed a State-bar administered examination. To the extent the comments are limited to the proposed testing requirement, VA agrees that it is appropriate at this time to limit the regulation of attorney practice before the Department to membership in good standing with a State bar and subsequent completion of CLE requirements.

Although Congress did not distinguish between agents and attorneys in amending chapter 59 and directing VA to establish standards of conduct and qualifications as conditions for accreditation, formal legal education and State bar membership requirements for attorneys clearly distinguish them from agents. As discussed above, Congress intended that the legislation would increase standards for all individuals who provide paid representation before VA. Consequently, to ensure that claimants receive the same level of competence regardless of whether they are represented by an agent or an attorney, VA will continue to test agents as a condition of initial accreditation to verify their competence to represent claimants and will require both agents and attorneys to complete veterans benefits law and procedure CLE as a condition of maintaining accreditation. We will amend the final rule to incorporate these changes.

One commenter remarked that VA should consider a system for accreditation similar to that used by the Social Security Administration in its pilot program. The commenter suggested that VA should accept bar membership in good standing as sufficient for attorney accreditation and should test non-attorney representatives

and require that they possess liability insurance as a condition of accreditation. VA’s representation regulations, like those of Social Security, are limited by the authorizing statutes unique to each agency. As discussed earlier, the statute governing VA’s accreditation of agents and attorneys requires a specific level of experience or specialized training in addition to membership in good standing in a State bar, as qualification requirements for accreditation. The pilot program to which the commenter refers is authorized by a specific statutory directive to the Commissioner of Social Security enacted in section 303 of Public Law 108–203. Clearly, if Congress had wanted VA to adopt a pilot program similar to that used by the Social Security Administration, it could have enacted similar authorizing legislation. Because VA’s authority to regulate representation is limited to that provided in chapter 59, we will make no changes to the final rule based on the comment.

We received two comments stating that it is not necessary to evaluate the character of attorneys who are members in good standing of a State bar because they have already met the State’s character and fitness requirements. VA agrees that a State bar’s comprehensive character and fitness determination, which is a prerequisite to licensure, is generally sufficient for practice before VA. To fairly recognize the comprehensive nature of a State bar character and fitness evaluation, VA will generally accept an attorney’s certification of membership in good standing with a State bar under § 14.629(c)(1)(B) as satisfactory proof of fitness to practice. Absent information to the contrary, VA will presume an attorney’s continued fitness to practice upon the receipt of a completed VA Form 21a and self-certification of membership in good standing in those jurisdictions in which he or she is licensed under § 14.629(b). Accordingly, we will amend the final rule to reflect these changes.

Additionally, in regard to character and fitness, VA finds it necessary to differentiate between agents and attorneys. Because agents have not completed a background investigation comparable in scope to a State bar character and fitness evaluation, VA will conduct an expanded inquiry consisting of additional personal history questions on the VA Form 21a to provide a more complete basis for the Department’s determination of good character and reputation. VA’s experience with agent applications supports this decision, as several

applications have omitted mention of circumstances that required further inquiry before we had enough information necessary to make a decision regarding accreditation. Agents, unlike representatives, work without the oversight and monitoring required of recognized organizations under § 14.628(d)(1). Additionally, without such an expanded inquiry, OGC simply cannot verify that an agent is who he or she claims to be.

One commenter requested that we clarify whether § 14.629(b)(4) permits self-certification of the State bars, courts, and agencies before which an attorney is authorized to practice. The commenter also asked us to clarify whether certification is an annual requirement.

Pursuant to 38 U.S.C. 5904(a)(3), VA must prescribe regulations requiring that “each agent or attorney \* \* \* provide annually \* \* \* information about any court, bar, or Federal or State agency \* \* \* to which such agent or attorney is admitted to practice or otherwise authorized to appear \* \* \* and a certification *by such agent or attorney*” that they are in good standing. We interpret the phrase “by such agent or attorney” to mean that self-certification is appropriate. Requiring certified statements from every bar, court, or agency to which an agent or attorney is admitted might be onerous, and some agencies and courts might not routinely provide such certification. We believe self-certification is sufficient, provided that the certification advises VA of any change in status. VA may verify such information as necessary, and false certification of good standing would be grounds for initiating disciplinary proceedings under 38 CFR 14.633. Concerning the requirements for periodic recertification, the plain language of section 5904(a)(3) is clear that Congress intended to require annual re-certification. We will amend § 14.629(b)(4) to clarify these certification requirements. Finally, we amended the regulation to clarify that an agent or attorney must notify VA within 30 days of any change in status in any jurisdiction in which he or she is admitted to practice. This is necessary because 38 U.S.C. 5904(a)(4) prohibits VA from recognizing an agent or attorney who has been suspended or disbarred and VA may not otherwise become aware of the suspension or disbarment until many months after the fact.

One commenter expressed concern that § 14.629(b)(5), which provides that VA will not accredit an agent or attorney “if the individual has been suspended by any court, bar, or Federal

or State agency in which the individual was previously admitted and not subsequently reinstated," is overbroad in that lack of reinstatement in one jurisdiction following suspension and reinstatement in another jurisdiction may simply reflect an attorney's decision not to practice in a given jurisdiction. The commenter recommended that VA should accredit individuals as long as they are licensed to practice in one state.

The plain language of section 5904(a)(4) prohibits VA from recognizing an individual as an agent or attorney if such individual has been suspended or disbarred by any court, bar, or Federal or State agency to which the individual was previously admitted to practice and has not been subsequently reinstated. The statute contemplates a situation in which an attorney has not been reinstated after suspension or disbarment because he or she has been deemed ineligible for reinstatement by the admitting authority. The situation described by the commenter presents a slightly different situation in that suspension in one jurisdiction may be purely derivative of the action taken by another jurisdiction. The suspended attorney has subsequently demonstrated fitness to practice in one jurisdiction and has been reinstated in that jurisdiction, and the attorney voluntarily chooses not to seek reinstatement in the other jurisdiction. We do not interpret section 5904(a)(4) as precluding accreditation in these derivative suspension or disbarment situations. Accordingly, we will amend the rule to distinguish between an independent suspension or disbarment proceeding and a derivative disbarment proceeding for purposes of VA accreditation. In a situation where an attorney is suspended or disbarred in jurisdiction B solely based upon suspension or disbarment in jurisdiction A and the attorney is reinstated in jurisdiction A, the General Counsel may accredit such individual based on an evaluation of the particular facts and circumstances of the situation. However, in situations where an attorney is suspended or disbarred in jurisdictions A and B, and neither action is derivative of the other, reinstatement in both jurisdictions is a prerequisite to VA accreditation.

One commenter objected to VA asking an agent or attorney seeking accreditation for information relevant to whether the applicant has any physical limitation that would interfere with the completion of the written accreditation exam without further explanation of the purpose and relevancy of this information. This is not a new

requirement as it applies to agents. Prior § 14.629(b)(viii) required individuals to submit relevant information concerning physical limitations as part of the application process for claims agents. VA uses this information to determine whether appropriate accommodations are necessary for administering the accreditation exam to individuals with disabilities who seek accreditation as a claims agent.

We proposed to revise § 14.629(c)(3) to clarify the nature of consent required by the claimant to permit a legal intern, law student, or paralegal to assist an attorney in representing the claimant. Several commenters expressed concern that requiring a claimant to provide written consent specifically identifying the names of the legal interns, law students, or paralegals assisting in the case would be overly burdensome. One commenter objected to the provision claiming it violated equal protection because the requirement does not apply to a VSO's support staff. A final commenter recommended that we exempt accredited legal interns, law students, and paralegals from this requirement.

We disagree that requiring a claimant to specifically identify any legal intern, law student, or paralegal assisting in the claim is overly burdensome. The purpose of this requirement is to ensure that a claimant affirmatively acknowledges that a specific individual will be working in a representative capacity on his or her claim and will have access to the claimant's private information. Section 14.629(c)(3) authorizes legal interns, law students, or paralegals to assist in the preparation, presentation, or prosecution of a claim under a duly appointed attorney. This authority allows legal interns, law students, and paralegals, under the direct supervision of an attorney, to directly engage claimants, review files, and appear on a claimant's behalf at any hearing. Current law, 38 U.S.C. 5701(a), makes files, records, reports, and other papers related to a claim confidential and privileged except when disclosure is authorized. Section 5701(b)(1) authorizes disclosure to a "duly authorized agent or representative of a claimant." Given that legal interns, law students, and paralegals are authorized to represent a claimant in a limited capacity when supervised by an accredited attorney, we believe it is appropriate to require the claimant to identify by name any legal intern, law student, or paralegal authorized to represent the claimant.

We note that Rule 606 of the Board's Rules of Practice, 38 CFR 20.606, requires written consent by a claimant

specifically identifying, by name, any legal intern, law student, or paralegal assisting in their claim. Thus, § 14.629(c)(3) merely applies current rules for practice before the Board to practice before VA's agencies of original jurisdiction. For the foregoing reason, we also decline to exempt any legal intern, law student, or paralegal, who is separately accredited by VA, from this requirement.

We also disagree that requiring a claimant to specifically identify a legal intern, law student, or paralegal assisting an accredited attorney violates the Due Process Clause of the Fifth Amendment, and in particular its equal protection component. The comment is based upon the commenter's mistaken belief that VSO support personnel may assist in the representation of a claimant without the claimant's consent and are thus similarly situated but treated differently. Under § 14.629(c)(3), legal interns, law students, and certified paralegals may assist in the preparation, presentation, and prosecution of a claim under the direct supervision of an attorney of record, provided that the attorney obtains the claimant's consent on a VA Form 21-22a. These individuals are deemed qualified to represent claimants under an attorney's supervision as a result of their specialized legal training. VSO support personnel, unlike legal interns, law students, and paralegals assisting accredited attorneys, are not authorized to assist in preparing, presenting, and prosecuting claims. Accordingly, the commenter's equal protection concern, that we require claimants' consent for legal interns, law students, or paralegals assisting accredited attorneys in providing representation but do not require claimants' consent for VSO administrative personnel assisting accredited VSO representatives, is unfounded.

One commenter opposed to testing stated that the quality of the examination would be dependent on the competency of VA Regional Counsel administering the examination and would introduce inconsistency in accreditation. Another commenter expressed concern about the format of the examination, the manner in which it would be developed, and the manner in which it would be graded. Although we have amended the rule to remove the testing requirement for attorneys, we will address these comments to the extent that they can be construed as relating to the testing of agents.

The role of Regional Counsel is limited to administering the examination to prospective agents. To ensure nationwide access to the

examination, it will be offered at the Regional Counsel of jurisdiction upon receipt of a complete application at the VA Central Office. To ensure uniformity, the Regional Counsel will administer the examination according to OGC's standard procedures. To ensure objectivity, the examination will be offered in a multiple-choice format and be graded by OGC personnel at VA's Central Office.

The sole purpose of VA's accreditation examination is to objectively determine whether an agent has the qualifications necessary to provide competent representation before the Department. To that end, VA's accreditation examination has been developed to fairly assess the minimum level of competence required for practice before the Department. Examination questions have been centrally developed by OGC's subject matter experts before incorporating them into the examination.

We received one comment regarding the term "agency of original jurisdiction" as it is used in § 14.629. The introduction to § 14.629 provides that upon a determination that an individual meets the requirements for accreditation in paragraph (a) or (b) of this section, VA will provide notification of accreditation authorizing the preparation, presentation, and prosecution of claims before "an agency of original jurisdiction and the Board of Veterans' Appeals." One commenter, a VSO, expressed concern that language in the introduction to § 14.629 was not sufficiently broad to authorize practice before the Veterans Benefits Administration's Appeals Management Center and Resource Centers where claims may be forwarded for disposition. The commenter misunderstands VA's intent.

In drafting the introduction to § 14.629, VA's intent was to clarify that representation of claimants, and the rules governing such representation, were not limited to claims before the Board. VA's current policy is that authorization to provide representation on a claim decided by an agency of original jurisdiction includes the inherent authority to provide representation before other VA facilities to which the claim may be forwarded for disposition, including, but not limited to the Appeals Management Center and Resource Centers. We will amend the final rule for greater clarification.

#### **Section 14.630—Authorization for a Particular Claim**

A number of commenters recommended revising § 14.630 to

authorize any individual to represent an unlimited number of claimants. These commenters seemed to interpret § 14.630 as a pro bono attorney representation provision. Two commenters recommended that we amend § 14.630 to authorize any unaccredited individual to represent an unlimited number of individuals so long as a fee is not charged. We will not make any changes to the rule based on these comments.

VA has long interpreted 38 U.S.C. 5903, the statutory authority for § 14.630, as a provision under which "any individual" may represent a claimant on a one-time-only basis on a "particular claim" for benefits. The individual must generally seek accreditation under 38 U.S.C. 5902 (service organization representatives) or 5904 (agents and attorneys) to provide representation for a claimant on any other claim. VA does not have authority under section 5903 to permit individuals to represent an unlimited number of claimants without VA accreditation as the commenters suggest. *See* 38 U.S.C. 5901 ("no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim \* \* \* unless such individual has been recognized for such purposes by the Secretary") and 5903 (authorizing VA to permit representation on a "particular claim" only). We addressed the issue of attorney representation of claimants on a pro bono basis above regarding § 14.629.

Section 14.630(a) requires a person authorized to provide representation on one claim to file a VA Form 21-22a "with the agency of original jurisdiction where the claim is presented." One commenter requested that we clarify the filing requirement because the case may be pending at a Resource Center, the Appeals Management Center, or the Board when the claimant seeks representation. The commenter recommended that the form be filed with the VA facility in possession of the claim.

We decline to change § 14.630(a) to require a claimant to file a representation form with the VA facility in possession of the claim. When a claimant files a claim with their local VA regional office they presumably know where they filed the claim and may have established contacts with VA personnel. We recognize that there will be instances in which the claim has been temporarily moved to another VA facility. However, it will be easier for the claimant if he or she files the representation form with the agency of original jurisdiction where the claim

was presented. We understand that slight delay may result because of processing and forwarding. This section in no way prohibits a claimant from also forwarding a copy of the form to the VA facility that is handling the claim. A final situation may arise where a claimant moves from the jurisdiction of one regional office to the jurisdiction of another regional office. In that instance, the claim and case file will be transferred to the new regional office of jurisdiction, and the claimant should treat the new regional office as the "agency of original jurisdiction where the claim is presented."

#### **Section 14.631—Powers of Attorney; Disclosure of Claimant Information**

We received five comments regarding proposed § 14.631. One commenter expressed concern that under § 14.629(b), claimants currently represented by attorneys would have their representation revoked on the effective date of the new regulations unless and until a VA Form 21-22a is completed by the claimant. The commenter, while recognizing VA had good reasons to have a standardized consent form, stated that requiring the form to allow representation is a different matter because the claimants have a contract, on file with VA, indicating appointment of an attorney as their representative. The commenter recommended that we amend the rule to eliminate the requirement that a VA Form 21-22a be submitted as a requirement for representation, particularly for claimants represented by attorneys as of the effective date of the rule. We will not make any changes to the rule based on this comment.

Section 14.631(a) requires that claimants use a standard form, VA Form 21-22a, to appoint individuals providing representation on a particular claim under § 14.630, representatives, agents, and attorneys, and to authorize the disclosure of claimant information. We have authority under the amendments to 38 U.S.C. Chapter 59 in Public Law 109-461 to regulate agent and attorney practice before the Department, and we interpret this authority as permitting us to exceed the limitations in 5 U.S.C. 500 by, among other things, requiring the use of a standard form to indicate appointment. *See* 38 U.S.C. 5904(a)(2) ("[t]he Secretary shall prescribe in regulations \* \* \* qualifications and standards of conduct for individuals recognized under this section"). We also interpret current law as requiring a claimant's written authorization before VA can release information protected by the Privacy Act, and 38 U.S.C. 5701 and

7332, and we have determined that VA Form 21-22a is legally sufficient to authorize release of such information. This is reflected in VA's current policy of releasing claimant information to attorneys only upon receipt of a VA Form 21-22a signed by the represented claimant.

We understand the need to ensure continuity of representation, and it is not our intent to revoke representation on the effective date of this rule if we do not have a VA Form 21-22a signed by the agent or attorney on file. Rather, the requirement pertains to claimants' designation of agents and attorneys occurring on or after the effective date of this rule. Accordingly, for all representation before the Department initiated *on or after* the effective date of this regulation, June 23, 2008, VA will not recognize the designation of an agent or attorney for purposes of representation or disclose claimant information to the agent or attorney without a properly executed VA Form 21-22a on file. As to representation initiated before the effective date of the regulation, because Federal law prohibits release of claimant information without claimants' written authorization, VA will not disclose such information to a claimant's attorney unless the claimant has authorized the disclosure on a Form 21-22a.

We also disagree with the suggestion that VA should accept non-standard authorizations for the release of claimant information and will not make any changes based upon the comment. VA has previously accepted non-standard authorizations for the release of claimant information from attorneys, but found many of these to be legally insufficient requiring additional review and communication with attorneys delaying both the processing of the claim and the release of information to attorneys.

One commenter approved of the requirement in § 14.631(a) that a person providing representation under § 14.630, or an accredited representative, agent, or attorney must sign the VA Form 21-22a to indicate acceptance of appointment for purposes of representation. The commenter stated that this provision would help to ensure that claimants contact VSOs in a timely manner if they need assistance.

We received a comment concerning the circumstances under which an attorney may terminate representation. The commenter requested that we add language similar to that provided in Model Rule 1.6 requiring an attorney to withdraw from representation when "representation will result in a violation of the rules of professional

conduct or other law.'" We note that under State bar rules attorneys will generally have duties in addition to those prescribed by VA and that these rules typically contain the Model Rule 1.6 provision. Section 14.632(d) prohibits attorneys, in representing claimants before VA, from violating the rules of professional conduct of the jurisdictions in which they are licensed to practice law. Accordingly, we do not agree that it is necessary to add the model language and will not make any changes to the rule based on the comment.

One commenter disagreed with the requirements in § 14.632(c) to notify the agency of original jurisdiction of withdrawal from representation and to surrender of documents provided by VA in the course of the representation. Concerning the requirement to notify the agency of original jurisdiction in the event of withdrawal from representation, the commenter stated, among other things, that the provision does not account for the fact that the claim or appeal could be at a facility other than the agency of original jurisdiction. The commenter's experience also indicates that the agency of original jurisdiction "does not notify other VA facilities or update the necessary databases in a timely manner." The commenter suggested that VA amend the final rule to require the individual or organization desiring to withdraw from representation to notify the VA facility in possession of the claim or appeal in addition to the agency of original jurisdiction and the claimant. VA agrees that additional notification upon withdrawal from representation would be helpful. Accordingly, we will amend the final rule to incorporate the suggestion.

Concerning the requirement for surrender of documents provided by VA upon withdrawal of representation, the commenter expressed support for the requirement in the proposed rule and suggested that it be extended to all documentation belonging to the claimant. The commenter also suggested that VA provide guidelines for situations in which an individual providing representation under § 14.630, representative, agent, or attorney loses contact with a claimant, and how long the documentation should be maintained for the protection of the claimant and the representative. Another commenter suggested it might not be appropriate to require that individuals withdrawing from representation return all documents to the claimant because several provisions in 38 CFR part 1 proscribe disclosing information to claimants if it would

affect their physical or mental health. We agree that VA's withdrawal provisions should not conflict with other provisions intended to protect claimants from harmful information. Accordingly, we will amend § 14.630 to provide that upon withdrawal from representation, all documents provided by VA must be returned to the agency of original jurisdiction or pursuant to the claimant's request, provided to the organization or individual taking over the representation. *See* Model Rules of Prof'l Conduct R. 1.16(d) (steps to take upon termination of representation). However, we do not agree with the commenter's suggestion that we expand the rule to require individuals to provide all documents, including those obtained from the claimant and other sources, to the agency of original jurisdiction. We intend that individuals providing representation will maintain or dispose of these documents according to State law.

Two commenters stated that § 14.631(c) and (d) fails to "address VA's role once a power of attorney has been withdrawn or revoked." The commenters suggested that the final rule should address whether VA intends to provide timely notice to all concerned parties in such situations and, if so, describe how VA would provide such notice. Commenters further stated that without timely notice by VA, claimants may be confused as to who represents them on a particular claim and seek advice from a party who is no longer their representative.

When a power of attorney is withdrawn or revoked, VA's role is to ensure that that communications regarding an affected claim or claims are provided only to the appropriate representative of record. It is the responsibility of the claimant and the organization, individual providing representation on a particular claim under § 14.630, representative, agent, or attorney to ensure that the claimant fully understands the scope of representation, particularly when an agent or attorney is providing limited representation on a particular claim under § 14.631(f)(2). Moreover, a claimant and his or her organization, individual providing representation on a particular claim under § 14.630, representative, agent, or attorney are in a better position than VA to understand who represents whom on a given claim. Therefore, VA will not provide additional notification of withdrawal or revocation to claimants or representatives. Additionally, the rule is not intended to preclude withdrawal from representation until a claimant obtains alternative representation. After

an organization, individual providing representation on a particular claim under § 14.630, representative, agent, or attorney complies with § 14.631(c), in part by providing time for the claimant to obtain alternative representation or proceed pro se, the organization or individual may withdraw from representation.

The commenters also expressed concern about § 14.631(f)(1) and (f)(2), under which agents and attorneys may limit the scope of their representation to a particular claim. They suggested that the final rule address VA's provision of timely notice to all individuals that a new power of attorney is limited to a particular claim and that the new power of attorney does not pertain to the veteran's other claims. VA disagrees with the premise that the responsibility for notifying claimants and other interested parties of arrangements to provide limited representation rests with VA and will not make any changes based on the comments. In enacting the amendments to 38 U.S.C. chapter 59, Congress provided claimants for VA benefits choice in representation. It is the claimant who designates the source and scope of representation on VA Form 21-22a and enters into fee agreements, not VA. Moreover, § 14.631 clearly identifies the effect of withdrawal from representation and the effect of a revocation of a power of attorney, a concept that organizations and accredited individuals are obligated to follow.

Under § 14.631(f)(1), receipt of a new power of attorney by VA, without limitation, revokes existing powers of attorney. Generally, there can be only one power of attorney. As a result, the organization or individual is appointed for representation on any and all claims the claimant has before the Department. Under § 14.631(f)(2), however, an agent or attorney may limit the scope of his or her representation to a particular claim by describing the limitation on VA Form 21-22a. Under this section, organizations or individuals with an unlimited power of attorney retain representation for all claims before VA with the exception of the particular claim indicated on the VA Form 21-22a. Agents and attorneys advising claimants concerning limited representation are obligated to exercise care in ensuring that claimants understand the precise scope of the representation to be provided by the agent or attorney, and that which will be provided by other individuals or organizations, if any. In such cases, the agent or attorney should inquire whether the claimant has an existing power of attorney appointing a VSO as his or her representative, and,

when necessary, communicate with the other individuals or organizations representing the claimant before the Department. In the event that an agent or attorney withdraws from representation on a particular claim and the claimant has an existing power of attorney in favor of a VSO, representation on the particular claim defaults to the VSO, and, as a result, VA would send future information on the particular claim to the VSO. It is the shared obligation of the claimant and the organization, representative, agent, or attorney, to fully communicate concerning any modification to the scope of representation.

Commenters also expressed concern that VA lacked the capacity to distinguish between a claimant represented by an agent or attorney for all purposes and one represented by an agent or attorney only on one particular claim. Because such inability could result in miscommunication between VA, the claimant, and the representative, the commenters suggested that VA develop such capability. VA's current benefits delivery database does not have the capability described by the commenter, but VA has procedures in place to communicate with organizations and individuals providing a claimant with representation on different claims. VA is currently developing a replacement database, but it is unknown at this time whether the capability described will be included in the final version.

#### **Section 14.632—Standards of Conduct for Persons Providing Representation Before the Department**

We received a number of comments opposing the requirement in § 14.632(a)(2) that individuals representing claimants "conduct themselves in accordance with the non-adversarial nature of the practice before the agency of original jurisdiction and the Board." One commenter suggested that attorneys are by nature adversarial and that VA incorrectly assumed Congress intended them to act in a non-adversarial way before VA. The same commenter also suggested that an attorney's ethical obligation to represent a client with "zeal" and the proposed regulation's mandate that attorneys adhere to the non-adversarial procedure cannot co-exist. Two commenters recommended that agents be permitted to represent claimants with "zeal," presumably, in an adversarial manner.

We agree that Congress did not intend to prohibit "adversarial" conduct to the extent that such conduct meets the standard established by VA in 38 CFR 14.632 and is consistent with ethical

advocacy on behalf of a claimant contesting an initial VA decision on a claim. However, we do not interpret the amendments to chapter 59 as expressing Congress's intent to create a new adversarial system of adjudication. In amending section 5904, Congress specified that claimants may pay for the "services" of agents and attorneys with respect to proceedings before the Department after the date on which a Notice of Disagreement is filed in the case. Congress did not define the scope of the services provided by agents and attorneys, except to specify that they involve, among other things, assisting claimants who challenge a VA decision. We interpret these provisions to mean that VA's adjudication system shall be flexible enough to permit agents and attorneys to act as advocates for their client in contested matters. Accordingly, we will modify § 14.632(a)(2) to remove the requirement that individuals providing representation shall conduct themselves in accordance with the non-adversarial nature of practice before VA. The remaining provisions in § 14.632, which are comprehensive in prohibiting disruptive conduct, are sufficient to protect the VA system.

One commenter suggested that we amend § 14.632(c) to proscribe "knowing" violations. The commenter speculated that VSO representatives are not familiar with the Model Rules and could unknowingly violate them.

First, the Model Rules have not been adopted, nor do they govern practice before VA. Section 5904(b) requires VA to prescribe regulations concerning standards of conduct for practice before VA that are *consistent with* the Model Rules. In other words, Congress directed VA to take them into account when establishing standards of conduct and qualifications for practice before VA. While 38 U.S.C. 5902 and 5903 subject representatives and individuals to suspension or exclusion from practice before VA as prescribed by 38 U.S.C. 5904(b), neither section adopts the Model Rules. Rather, in implementing the statute, VA is establishing standards of conduct for all persons representing claimants before VA in § 14.632. These standards are based upon the Model Rules and we intend to look to the commentary to the Model Rules and relevant administrative and judicial opinions on the Model Rules when interpreting them. Section 14.632(d) is clear that attorneys must additionally comply with the rules of professional conduct of any jurisdiction in which they are admitted to practice to the extent that those rules do not conflict with VA's regulations. Because the Model Rules have not been adopted, the

commenter's concern that a non-attorney representative may unknowingly violate them is unfounded.

The commenter also expressed concern that the General Counsel would discipline a representative based upon an unknowing violation of the Model Rules and recommended that we amend § 14.633(c) to clarify that disciplinary action is appropriate only for knowing violations. An individual representing a claimant before VA should be capable of comprehending what is required of them under the standards of conduct in § 14.632 and act accordingly. However, upon further review, we believe that the General Counsel should consider the circumstances surrounding a violation of those standards and have sufficient discretion to impose the proper remedy. While we opt not to add a knowledge element § 14.632(c), we will address the General Counsel's discretion in suspension and cancellation of accreditation proceedings in § 14.633(c).

One commenter expressed concern that § 14.632(b)(2), which requires individuals representing claimants before VA to "act with reasonable diligence and promptness in representing claimants," fails to clearly define what constitutes a "prompt" response. The commenter also sought clarification of "good cause" under § 14.632(c)(7) and as it relates to § 14.632(b)(2). The meaning of "prompt" and "good cause" for purposes of this provision cannot be defined according to a set of criteria, such as particular number of days, given the variety of circumstances that may arise in claim adjudication. Rather, we intend only that individuals interacting with VA in a representational capacity be ready and quick to act as the occasion demands. We expect individuals representing claimants before VA will make reasonable efforts to expedite the administrative process and not use dilatory tactics. When VA requests information from a claimant or his or her representative, reasonable efforts should be made to respond to VA's request as soon as practicable as this is in the best interest of the claimant. This section is intended to put all representatives on notice that unreasonable delay will not be tolerated.

One commenter stated that § 14.632(c)(5), which prohibits agents and attorneys from entering into fee agreements that are "clearly unreasonable [or] excessive," is ambiguous. We agree in part and disagree in part. First, the term "excessive" is redundant because any excessive fee will be "unreasonable."

Therefore, we will remove "excessive" from the regulation text.

We disagree, however, that there is ambiguity in our use of the term "unreasonable" and will not change the rule based upon the comment. As an initial matter, 38 CFR 14.636(e) lists eight factors that VA considers when reviewing a fee agreement for reasonableness. They are the same factors that the Board considered under former law, and we did not intend any substantive change when we moved those criteria to 38 CFR Part 14. Second, § 14.636(f) implements the statutory presumption that fees of 20 percent or less are presumed reasonable. The presumption of reasonableness, combined with the criteria for reviewing fee agreements, provides agents and attorneys sufficient notice concerning the reasonableness of fees.

A number of commenters also expressed concern about § 14.632(c)(9) and requested clarification of the "acts or behavior prejudicial to the fair and orderly conduct of the administrative proceedings before VA." While § 14.632(c)(7) concerns an individual's obligation to provide prompt representation to a claimant, § 14.632(c)(9) concerns an individual's use of dilatory or obstructive tactics during representation. Such tactics might include advising a claimant to withhold cooperation, filing duplicative pleadings, unnecessarily disrupting hearings, intentionally misleading adjudicators, or other tactics that cause unnecessary delay. In our view, this provision is sufficiently clear to put individuals on notice that they cannot employ such tactics when providing representation in a proceeding before the Department. Accordingly, we will not make any changes based upon the comments.

One commenter recommended that we amend § 14.632(c)(10) to clarify that disclosure of a claimant's information to paralegals and other support staff is not prohibited and not a violation of VA's standards of conduct. We disagree and will not make any changes based on the comment. As discussed above regarding § 14.629(c)(3), a claimant must specifically authorize a legal intern, law student, or paralegal to assist an attorney in providing representation. The change recommended by the commenter would conflict with § 14.629(c)(3) and interfere with our obligation to protect the confidentiality of claimants' information.

One commenter opposed § 14.632(c)(11), which prohibits, among other things, a claimant's representative from engaging in "unprofessional" conduct. The commenter suggested that

there is no universal definition of "professional" and that determining what is "unprofessional" for purposes of enforcing VA's standards of conduct would be difficult absent precise guidance. We agree and will remove engaging in "unprofessional" conduct as violation of VA's standards of conduct.

#### **Section 14.633—Termination of Accreditation or Authority To Provide Representation Under § 14.630**

We received numerous comments regarding the proposed regulations governing suspension and cancellation of accreditation under 38 CFR 14.633. In general, commenters expressed concern about the role of OGC in suspension and cancellation proceedings, suspension and cancellation procedures, the types of sanctions that could be imposed, and the grounds for suspension and cancellation of accreditation.

We received ten comments expressing concern about OGC's role in accreditation matters. Under proposed § 14.633, the Assistant General Counsel managing VA's accreditation program investigates and presents disciplinary matters to a hearing officer and forwards the hearing officer's findings to the General Counsel with a recommendation for a final decision. A commenter questioned whether the Assistant General Counsel should have responsibility for both the prosecutorial function and the adjudicative function, recommending a final decision, in disciplinary proceedings. According to the commenter, the procedure in § 14.633 "raises the perception of unfairness or conflict of interest in cancellation proceedings." The commenter recommended that we amend the rule to provide a more independent disciplinary counsel to investigate and present VA's case in suspension and cancellation proceedings. The commenter also recommended that the rule explicitly provide that the presiding hearing officer "not directly or indirectly report to, or be employed under, the General Counsel or others designated to decide disciplinary matters" and "that the hearing officer not be a VA employee."

Other commenters also expressed concern about the General Counsel's broad authority in accreditation matters. One commenter stated that there was an inherent conflict with the same entity making accreditation and disbarment decisions. Another commenter suggested that OGC, as his "adversary," would use the authority under § 14.633 to find that he was not competent to represent claimants before the Department. One individual generally

suggested that concentration of accreditation authority in OGC invited abuse. To remedy the potential for and/or perception of conflict, one commenter suggested that VA appoint an independent body, not under the supervision of the General Counsel, to conduct initial investigations, hold hearings, and make accreditation decisions. Another commenter stated that the General Counsel, as the Secretary's counsel of record before the U.S. Court of Appeals for Veterans Claims, would be biased, or at least conflicted, in making disciplinary determinations as to whether an attorney's conduct was unprofessional or that an attorney's representation lacked competence; therefore, such decisions should be decided by an independent third party, not the commenter's opposing counsel.

It is well-settled that a Federal agency may police the behavior of attorneys and other professionals practicing before it. See *Polydoroff v. Interstate Commerce Comm'n*, 773 F.2d 372, 374 (D.C. Cir. 1985). Moreover, the combination of investigative and adjudicative functions in a single entity to regulate the conduct of professionals, as proposed in § 14.633, without more, does not violate due process. In *Withrow v. Larkin*, 421 U.S. 35, 56 (1975), the Supreme Court held, “[i]t is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.” The Secretary of Veterans Affairs may lawfully delegate authority for accreditation matters to OGC. 38 U.S.C. 5904 (Secretary's authority to recognize individuals for practice before the Department); 38 U.S.C. 512 (Secretary's delegation authority concerning decisions under laws administered by VA). The General Counsel has made the final decision on matters of accreditation concerning representatives, agents, and attorneys since 1954 without being challenged based upon evidence of actual conflict of interest or bias. See 38 CFR 14.629 (1954) (“[a]ny cause considered sufficient to reject the application of an attorney or agent or to cancel recognition previously granted will be reported through the Chief Attorney to the General Counsel for final determination”); 38 CFR 14.637 (1954) (“[i]f the charge or charges be sustained, the General Counsel if he concurs in the

recommendation, will suspend or revoke the recognition of such attorney or agent”).

Management of VA's accreditation program is a proper function of OGC. The office is staffed by attorneys who have the necessary expertise to administer the program and these attorneys are not involved in the adjudication of claims before VA's agencies of original jurisdiction or the Board where accredited individuals provide representation. Further, VA does not have authority to regulate the practice of individuals before the Court of Appeals for Veterans Claims and the OGC attorneys that represent VA before that court are under the supervision of a separate Assistant General Counsel who is not involved in administration of the accreditation program. The commenters did not raise any issue of actual conflict or bias sufficient to disturb VA's long-standing practice of managing the accreditation program in OGC. Nonetheless, we agree that the process for suspending or cancelling accreditation can be improved to minimize the appearance of conflict and bias. To that end, we will amend the rule to clarify that the hearing officer will not directly or indirectly report to, or be employed under, the General Counsel or the head of any VA agency of original jurisdiction before which the individual provides representation.

To further insulate the General Counsel's adjudication of suspension or cancellation decisions from investigation, prosecution, and fact finding, we will amend the rule to remove the procedural requirement in proposed § 14.633(f) that the Assistant General Counsel provide a recommendation on a final decision to the General Counsel after reviewing the record provided by the hearing officer. Instead, the rule provides that the hearing officer shall submit the entire hearing transcript, any pertinent records or information, and a recommended finding to the Assistant General Counsel within 30 days after closing the record. Participation of the Assistant General Counsel following the investigation and prosecution of any disciplinary matters will be limited to providing administrative support to the hearing officer in compiling the record and forwarding it to the General Counsel with the hearing officer's recommendation.

The amendments described above, which ensure a neutral hearing officer and insulate the General Counsel's adjudicative decision from the investigative and prosecutorial functions of the Assistant General Counsel, are sufficient to minimize the

appearance or perception of a conflict of interest. Accordingly, we will not make further changes to the proposed rule based on the comments.

We received three comments concerning the Assistant General Counsel's notice in disciplinary proceedings under § 14.633. One commenter suggested that we amend the rule to provide notice and opportunity to respond to allegations of misconduct or incompetence prior to initiating an inquiry. Another commenter suggested that we additionally provide “remedial notice” under § 14.633. Such notice would advise the individual of the infraction and provide an opportunity for the individual to correct the offending behavior in lieu of formal disciplinary proceedings. Finally, a commenter stated that an individual who requests a disciplinary hearing should receive all information about the complaint, including its source.

We agree that the notice provided to individuals in disciplinary proceedings could be expanded to improve the process and, consistent with current practice, may reduce the number of formal inquiries resulting from inadvertent acts or technical violations. Accordingly, we will amend the rule to provide that the Assistant General Counsel, before deciding whether to conduct an inquiry under § 14.633, will inform the individual of the allegations, potential violations of law, and the source of the complaint, and will provide the subject with an opportunity to respond. Additionally, we will amend the rule to provide that when appropriate, including but not limited to situations when the seriousness of the violation does not justify an inquiry because no harm results to the claimant or VA, the Assistant General Counsel will provide an opportunity for the subject to correct the offending behavior before deciding whether to conduct an inquiry. This clarification reflects current practice in that the Assistant General Counsel provided notice and opportunity for remedial actions prior to initiating formal inquiries in some cases under former law.

We received two comments regarding the absence of suspension as a sanction in proposed § 14.633. One commenter questioned the omission of suspension from proposed § 14.633 because section 5904(b) expressly provides that VA may suspend or exclude individuals from practice before the Department and stated that VA's failure to include the lesser sanction of suspension is an unreasonable interpretation of the statute. Another commenter disagreed with VA's use of terms “cancel” and “terminate” in § 14.633 when the statute

provides that “the Secretary may suspend or exclude.” The commenter recommended that VA use the statutory terms and specify several kinds of discipline with the most severe sanction being exclusion from practice before VA. This commenter also recommended that the timing and methods of seeking reaccreditation be specified.

We agree that suspension may be appropriate in cases involving extenuating circumstances or where the misconduct is not so severe as to warrant the harsher penalty of canceling accreditation. On October 12, 2007, VA published in the **Federal Register** (72 FR 58009) a final rule amending § 14.633 to provide for suspension of accreditation as a lesser sanction for conduct prohibited by section 5904. The amendments provide that the General Counsel may suspend accreditation for a definite period or until the individual satisfies the conditions established by the General Counsel for reinstatement. The General Counsel will reinstate suspended accreditations at the end of the period of suspension or upon verification that the individual has satisfied the conditions for reinstatement. The General Counsel’s decision to suspend or cancel an individual’s accreditation will be based on the facts and circumstances of the particular case, with suspension being appropriate in cases involving extenuating circumstances or less egregious conduct not warranting permanent cancellation.

VA’s use of the terms “cancel” or “terminate,” instead of “exclude,” in § 14.633 is intentional. In section 5904(b), the terms “suspend” and “exclude” refer to the General Counsel’s decision to temporarily or permanently prohibit an individual from providing representation before the Department. Accreditation is analogous to a license to practice before VA, which the General Counsel suspends, cancels or terminates. The General Counsel does not “exclude” an accreditation.

Two commenters disagreed about the provisions in § 14.633 that subject VSO representatives to suspension or exclusion from practice before VA on the same grounds as apply to agents and attorneys. The commenters found it “inherently inequitable” that the proposed regulation did not distinguish between individuals who provide paid representation and those who do so without charge. We disagree and will not change the rule based on these comments.

All claimants for VA benefits are entitled to responsible, qualified representation, and VA did not propose any change to § 14.633 to the extent that

it treated VSO representatives and agents and attorneys the same for purposes of discipline. In amending section 5904(b), Congress did not distinguish between paid and unpaid representation. Further, under the plain language of 38 U.S.C. 5902(a)(2), VSO representatives “shall be subject to the [disciplinary] provisions of section 5904(b) of this title on the same basis as” an agent or attorney accredited under section 5904(a).

Several commenters expressed concern with § 14.633(c)(4), which adds the submission of a frivolous claim, issue, or argument as grounds for suspension or exclusion from practice before VA. Two commenters stated that all veterans are entitled to representation and that it is VSO policy to present all claims to VA for processing, even if the claimant does not have evidence supporting a grant of benefits. These commenters are concerned that VSO representatives might be held responsible for claims and arguments submitted by claimants directly to VA without the knowledge of the representative or VSO. They also expressed concern about the definition of “frivolous” in VA’s regulation. Two commenters complained that the rule does not clearly define “good faith argument” and questioned whether an argument could shift from being non-frivolous to frivolous. The commenters all noted the tension between the need to file a claim to gain the earliest possible effective date and the need to determine whether a claim, issue, or argument is frivolous.

A veteran’s right to representation under 38 U.S.C Chapter 59 does not include the right to representation for frivolous claims. The plain language of section 5904(b)(6), made applicable to representatives by section 5902(b)(2), provides that the Secretary may suspend or exclude agents and attorneys who present a frivolous claim, issue, or argument. In the Committee Report accompanying the predecessor bill to S. 3421, S. 2694, the Senate Committee on Veterans’ Affairs specifically recognized the adverse impact that frivolous claims filed by service organizations have on VA’s system of adjudication. See S. Rep. No. 109–297, at 17 (2006) (“service organizations must ensure that \* \* \* frivolous claims are removed so that valid claims are not needlessly delayed”). Noting the growth in the number of claims filed with VA, the Committee resolved that “requiring all veterans’ representatives to advocate responsibly, by avoiding frivolous claims, arguments, or issues, could be of significant help in ensuring that ‘valid

claims are not needlessly delayed.’” *Id.* at 19 (citations omitted).

VA’s definition of “frivolous” in § 14.633(b)(4) is based on Model Rule 3.1. In our view, the regulation is sufficiently clear to provide notice of prohibited conduct. Additionally, were VA to discipline a representative, agent, or attorney for filing a frivolous claim, and such action were appealed to the Board, precedent opinions of the Court of Appeals for Veterans Claims and Court of Appeals for the Federal Circuit would control. In the Senate Committee’s report, it quoted *Abbs v. Principi*, 237 F.3d 1342, 1345 (Fed. Cir. 2001), in defining frivolous arguments or issues as those “‘that are beyond the reasonable contemplation of fair-minded people.’” S. Rep. No. 109–297, at 19–20. In *Abbs*, the court also noted that an action is frivolous when the individual providing representation “has significantly misrepresented the law or facts, or has abused the judicial process by repeatedly litigating the same issue in the same court.” *Abbs*, 237 F.3d at 1345.

Comment 2 to Model Rule 3.1 is instructive concerning whether filing a claim when all the facts are not known or all the evidence is not fully developed can be regarded as frivolous:

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. *What is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.* Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Model Rules of Prof’l Conduct R. 3.1 cmt. (2000) (emphasis added). Like agents and attorneys, VSO representatives must inform themselves about the facts of each case and the applicable law, and before providing further representation, determine whether they can make a good faith argument in support of a claim. In this context, VA interprets “good faith” as “honesty of purpose” and “freedom of intention to defraud.” *Black’s Law Dictionary* 477 (6th ed. 1991). In the event that a good faith argument cannot be made, representatives, agents, and attorneys must withdraw from representation or assume the risk of

suspension or exclusion from further practice before VA.

The commenters also asserted that certain unspecified State and County veterans agencies are prohibited by State and local law from refusing to represent veterans seeking benefits. As a result, the commenters claim that VA's regulation would be in conflict with State law. Without reviewing the specific State and local laws in question, it is difficult to respond to this comment. However, to the extent that the existence of a State or local law requiring an organization to provide representation conflicts with the prohibition on the filing of frivolous claims under section 5904(b)(6) and 38 CFR 14.633(c)(4), we do not agree that a change is necessary. Federal law generally preempts the application of State law by virtue of the preemption doctrine. See U.S. Const. art. VI, cl. 2. Despite the fact that Congress did not expressly command that State laws regarding representation would be superseded by those in 38 U.S.C. Chapter 59, Congress' intent can be inferred "because [the] scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Unless otherwise specified in statute, Congress has left no room for the States to supplement the law related to the provision of Federal veterans benefits. Federal regulations have the same preemptive effect as Federal statutes. *Id.* at 154. Accordingly, we will make no changes to the rule in this area based on the comments.

Two commenters recommended that VA discipline an individual for presenting a frivolous claim, argument or issue only if it was a knowing violation of the law. One commenter stated that adding a knowledge requirement would bring the proposed rule in line with the standard expressed in § 14.633(c)(2) that limits sanctions for presenting or prosecuting a fraudulent claim to those made "knowingly." The other commenter suggested that we amend the rule to provide that a service officer must have acted intentionally or recklessly in providing representation before VA takes disciplinary action. We agree that a violation of § 14.633(c)(4) should include a requirement that such violation was made knowingly and will amend the rule to add such language.

One commenter expressed concern that § 14.633(c)(7), which states that "any other unlawful, unprofessional, or

unethical practice" may be grounds for suspension or exclusion from practice before VA, is too broad and allows VA to disaccredit representatives for any unlawful practice, such as speeding.

Section 14.633(c)(7) is intended to provide the General Counsel with authority to cancel accreditation for any unlawful, unprofessional, and unethical practice adversely affecting an individual's fitness for practice before VA. Despite the fact that current § 14.633(c)(4) has contained similar language for many years, VA has never used this authority to disaccredit individuals for traffic violations or other conduct unrelated to fitness to practice before VA. However, for the reasons expressed above, we will strike the term "unprofessional" and amend the final rule to clarify that the General Counsel's authority to cancel accreditation for unlawful and unethical practices is limited to conduct adversely affecting an individual's fitness for practice before VA.

Three commenters were concerned that in proposed § 14.633(d) providing that accreditation shall be cancelled when the General Counsel finds that the performance of an individual providing representation under § 14.630, representative, agent, or attorney demonstrates a lack of the degree of competence necessary to adequately prepare, present, and prosecute claims for veterans benefits, was too vague and would lead to inconsistent disciplinary decisions. They suggested that VA establish specific and objective criteria in an effort to better define the concept. VA agrees that further explanation would improve understanding of the concept.

Competent representation encompasses many factors, among others, the level of knowledge and skill required for a particular case, the degree of preparation required for a particular case, and the analysis of the facts and issues required in a particular case. See Model Rules of Prof'l Conduct R. 1.1 cmt. (2000). A representative, agent, or attorney demonstrates a lack of the degree of competence necessary to adequately prepare, present, and prosecute a claim for veterans benefits when his or her performance indicates a lack of the knowledge, skill, or preparation required for a particular case. At a minimum, individuals representing claimants before VA must be familiar with the facts of the particular case, applicable law, and the procedures for filing claims and appeals. Because the facts and circumstances of a particular case and the skills possessed by a representative, agent, or attorney are unique, a checklist

of specific criteria demonstrating a lack of competence would necessarily be incomplete; however, we will amend the final rule to provide that a lack of the degree of competence required will be based on the factors discussed in the current commentary to Model Rule 1.1.

Concerning consistency in determining whether a representative demonstrates a lack of the degree of competence required to prepare, present, and prosecute a claim, the investigation of such allegations is centralized with the Assistant General Counsel managing VA's accreditation program under § 14.633. Centralization will result in uniform application of the disciplinary standards in § 14.633.

One commenter expressed concern about the provision in § 14.633(e) requiring VA to initiate an inquiry "upon receipt of information from any source." According to the commenter, without specific guidelines as to what type of information VA would act upon, VA will be overwhelmed with allegations of incompetent representation, some of which could be unfounded. To better balance the interests of individuals providing representation before the Department with the interests of the Department in ensuring the competent representation of claimants, we will amend the rule to specify that VA will initiate an inquiry under § 14.633 only upon receipt of credible, written information, including e-mail messages, indicating improper conduct or incompetence. As discussed earlier, when VA receives information concerning misconduct or incompetent representation of claimants before the Department, the Assistant General Counsel will provide notice to the individual concerned and an opportunity to respond before initiating a formal inquiry. Consistent with current practice, we believe that requiring written complaints and providing notice to the individual concerned will reduce the potential for unfounded complaints.

Two commenters stated that the 30-day period for an individual to respond to the Assistant General Counsel's notice of intent to suspend or cancel accreditation is an unreasonably short period of time to respond to such notice and request a hearing. One commenter stated that the 30-day period is "arbitrarily short" and "does not meet the standard for meaningful due process." The other commenter suggested that the final rule address whether time periods are based on calendar or business days and whether a response is deemed timely based on the date of mailing or date of receipt. It was also suggested that a 45-day time

period would avoid forcing individuals to choose between attending to client representation and responding to VA. We do not agree that the 30-day period for responding to the Assistant General Counsel's notice is unreasonable and will not make any changes to the rule based on these comments.

As we discussed above, procedural due process under the U.S. Constitution is a flexible concept depending upon the demands of the particular situation. VA is obligated under its accreditation authority to ensure the responsible, qualified representation of claimants for benefits. In our view, it would be unreasonable and prejudicial to claimants to provide accredited individuals more time than is reasonably necessary to respond in these disciplinary matters. Accordingly, we will not provide more than 30 days for responding to the Assistant General Counsel's notice of intent to suspend or cancel accreditation. The 30-day period is appropriate and fair because it strikes a balance between VA's interests in protecting claimants and the interests of individuals responding to a notice of intent to cancel accreditation. We note that § 14.633(e)(1)(i) requires the Assistant General Counsel to provide notice concerning the right to submit additional evidence during disciplinary proceedings and to request a hearing. Further, under § 14.633(f), individuals may present evidence at a hearing and may supplement that evidence during the 10-day period following the hearing. In our view, these measures reasonably balance VA's obligations to claimants and individuals who are the subject of disciplinary proceedings. Finally, should the 30-day period be insufficient to formulate an answer, § 14.633(e)(2)(iii) provides that the Assistant General Counsel "may extend the time to file an answer or request a hearing for a reasonable period upon a showing of sufficient cause."

We agree that we need to clarify the scope of the 30-day response period in § 14.633(e)(2)(i). Accordingly, we will amend the rule to provide that an individual providing representation under § 14.630, representative, agent, or attorney has 30 calendar days from the date on which the Assistant General Counsel mails notice of intent to suspend or cancel accreditation to file an answer and to request a hearing. In computing the time period for filing a response, the date on which the notice was mailed by the Assistant General Counsel shall be excluded from the 30-day period. A response postmarked prior to the expiration of the 30-day period shall be accepted as having been timely filed. If the 30th day falls on a

weekend or legal holiday, then the first business day thereafter shall be included in the computation. We define "legal holiday" consistent with Rule 6 of the Federal Rules of Civil Procedure.

Two commenters disagreed with the General Counsel's discretion under § 14.633(f) to hold disciplinary hearings at a VA Regional Office or at the VA Central Office. One commenter suggested that the individual who is the subject of the disciplinary proceeding should be allowed to choose where the hearing is held. The other commenter suggested that the final rule prescribe criteria for deciding the location of a hearing. According to this commenter, requiring a representative, agent, or attorney to travel to Washington, DC for a hearing would be a hardship and potentially impair the individual's ability to produce evidence or compel the appearance of witnesses. The commenter also noted that VA's regulation providing subpoena authority to officials in designated positions prescribes a 100-mile radius from the place of a hearing for such authority and questioned whether VA would extend the 100-mile limit for purposes of this regulation. *See* 38 CFR 2.2(b).

We agree that in promulgating regulations designating the location of hearings under § 14.633 we must consider the interests of individuals defending allegations of misconduct or incompetence. Individuals defending allegations of improper conduct or incompetence would indeed suffer costs in traveling to VA's Central Office and may be unable to compel the attendance of witnesses or the production of evidence outside the 100-mile radius provided in 38 CFR 2.2(b). The General Counsel, claimants, and those accused of improper conduct or incompetence have an interest in the consistency of the hearing process. To ensure equity and consistency in the hearing process, VA will amend the language of § 14.633(f) to provide that if a hearing is requested, it will be held at the VA Regional Office nearest the individual's principal place of business. If the individual's principal place of business is in Washington, DC, the hearing will be held at the VA Central Office.

Another commenter recommended that VA add provisions to § 14.633(f) prescribing the authority of the hearing officer. The commenter recommended that the regulation expressly provide the hearing officer with authority to change the time or place of a hearing and to deal with the conduct of the hearing. We believe that the hearing officer currently has the inherent authority necessary to conduct an efficient and orderly hearing. We will make no

changes to the final rule based on this comment.

One commenter stated that it would be unfair for the Board to use or seek General Counsel opinions during its review of the General Counsel's disciplinary decisions and suggested that we amend § 14.633(g) to prohibit the Board from doing so. We disagree and will not change the rule based on this comment.

The General Counsel is the Department's chief legal officer and is responsible for advising the Secretary concerning VA programs and policies. 38 U.S.C. 311; 38 CFR 14.500(b). A written legal opinion of the General Counsel involving laws administered by VA is binding as to all VA employees and officials, 38 CFR 14.507(a), to include the Board. 38 U.S.C. 7104(c) ("[t]he Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department"). The Board is responsible for providing one administrative review on appeal after considering all of the evidence of record and applicable provisions of law. 38 U.S.C. 7104(a). Accordingly, in reviewing the General Counsel's disciplinary decisions, the Board applies the law to the facts of the case and is bound by any precedent opinion of the General Counsel that interprets that law. VA does not have authority to create an exception to section 7104(c) as the commenter appears to suggest. This does not mean that the Board is bound by the General Counsel's decision in the matter on appeal. In fact, § 14.633(g) provides "[n]othing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 19.9 for any action that is essential or a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31." Additionally, we note that the Board is required to provide in its decision a written statement of the reasons and bases as to its findings on the material issues of fact based on the entire record and without deference to any factual findings of the General Counsel. *See* 38 U.S.C. 7104(d). Moreover, any reviewing appellate court would not be bound by a General Counsel precedent opinion. Therefore, the suggestion that the Board could use a General Counsel opinion to unfairly influence its review of a General Counsel accreditation decision is unfounded.

Another commenter asked whether General Counsel's disciplinary

decisions may be appealed to the Board and the Veterans Court and whether normal appeal procedures would apply. Under § 14.633(g), the General Counsel's decision to suspend or cancel accreditation "is a final adjudicative decision of an agency of original jurisdiction and may be appealed to the Board of Veterans' Appeals." Notwithstanding provisions for closing the record, "appeals shall be initiated and processed using the procedures in 38 CFR parts 19 and 20." Because the proposed rules address the commenter's concerns, we will not change the rule based on the comment.

**Section 14.636—Payment of Fees for Representation by Agents and Attorneys in Proceedings Before the Agency of Original Jurisdiction and Before the Board of Veterans' Appeals**

One commenter urged us to clarify the effect delayed implementation of the regulations will have on fee agreements entered into on or after June 20, 2007. We agree that clarification is necessary. The new regulations apply to fee agreements entered on or after June 23, 2008. They do not apply to fee agreements entered before June 23, 2008.

One commenter expressed concern that § 14.636(b), which authorizes only accredited agents and attorneys to charge fees for representation, conflicts with the standards of conduct in § 14.632(c)(5). Section 14.632(c)(5) prohibits individuals recognized under § 14.630, representatives, agents, and attorneys from entering into unreasonable or unlawful fee agreements.

We disagree that this section needs clarification. Section 14.632 establishes standards of conduct applicable to all persons authorized to represent claimants before VA. Section 14.636(b) implements 38 U.S.C. 5904, which permits agents and attorneys to charge fees for representation under specified circumstances. Individuals authorized under 38 U.S.C. 5902 and 5903 are prohibited by law from charging fees for representing claimants. Therefore, any attempt by these individuals to charge, solicit, or receive a fee for representation is a violation of the standards of conduct prescribed in § 14.632(c)(5). We will not change the rule based upon the comment.

Three commenters recommended that § 14.636(c) be amended to reflect the General Counsel's May 24, 2004, letter to the former Ranking Member of the U.S. House of Representatives Committee on Veterans' Affairs, which concluded that 38 U.S.C. 5904 permits attorneys to charge fees for pre-filing

consultation. In his letter to the Secretary, the former Chairman described two factual situations involving attorneys and requested the General Counsel's legal opinion as to whether the attorneys violated former 38 U.S.C. 5904. We do not believe that it is appropriate to incorporate the legal conclusions of that letter in this regulation. The General Counsel's response was based on two detailed, yet similar, fact patterns. There may be other fact patterns which the General Counsel did not consider that might result in a different legal conclusion. Therefore, we decline to include the legal conclusion reached in the May 24, 2004, letter to apply generally in all cases. Further, the law is clear that VA's authority to regulate is limited to accreditation for purposes of preparation, presentation, and prosecution of claims, and to reviewing the fees that agents and attorneys charge for representing claimants in "proceedings before the Department." See 38 U.S.C. 5904(a), (c). We do not think that it is necessary to expand the scope of VA's regulations to address the legal services that occur outside a proceeding before the Department on a claim for benefits.

One commenter, citing the potential for abuse, recommended that we limit the circumstances in which hourly or flat fees can be charged by agents or attorneys. We did not propose limiting claimants' options for contracting with agents and attorneys for representational services. In our view, it would be prudent to revisit the issue in a later rulemaking if we receive information concerning agents' and attorneys' abuse of hourly or flat-rate fees. Without such information, the current options (fixed fee, hourly rate, percentage of past-due benefits recovered, or a combination thereof) appear to provide claimants, agents, and attorneys flexibility in negotiating the appropriate compensation structure, and appear to promote choice in representation. Accordingly, we will not change the rule based on the commenter's recommendation.

Contingent fee agreements, however, present a more specific risk of exploitation. Attorneys who litigate before the VA have, on average, a better sense of the value of a particular veteran's claim than the veteran does. Contingent fees also provide attorneys with an incentive to take cases that can be easily resolved at the administrative level. Finally, a veteran may lack sufficient bargaining power to negotiate a fair deal on fees. Thus, contingent fees give rise to the potential that a significant portion of a veteran's past-

due benefits could be transferred to a lawyer for less work than was expected by the client at the time of the agreement. Indeed, experts such as the American Bar Association, while concluding that contingent fees are ethical, have noted such agreements must be individually evaluated to determine whether the final payment is appropriate and reasonable.

One commenter, citing *Silverman v. Brown*, 7 Vet. App. 487, 488 (1995) (fee of 50 percent of benefits awarded is patently unreasonable), recommended that we establish a regulatory presumption that a fee in excess of 33 $\frac{1}{3}$  percent of the past-due benefits awarded is unreasonable. The commenter went on to assert that "VA need only determine whether the fee called for is more or less than one-third of the past due benefits" when reviewing a non-direct-pay fee agreement for reasonableness. Public Law 109-461 amended 38 U.S.C. 5904 to provide that a fee that does not exceed 20 percent of the past-due benefits awarded "shall be presumed reasonable." Congress also authorized VA to "prescribe in regulations reasonable restrictions on the amount of fees that an agent or attorney may charge a claimant" for representation before the Department. In practice, agents and attorneys appear to agree with the commenter that any fee in excess of 33 $\frac{1}{3}$  percent of the past-due benefits awarded by VA to a claimant would generally be unreasonable. No fee agreement filed with the Department since the June 20, 2007, effective date of amended section 5904 has called for a fee in excess of 30 percent of past-due benefits. Accordingly, we will clarify in § 14.636(f) that fees which exceed 33 $\frac{1}{3}$  percent of any past-due benefits awarded shall be presumed to be unreasonable. We will also clarify that the presumptions prescribed in § 14.636(f) for fees that do not exceed 20 percent of any past-due benefits and fees that exceed 33 $\frac{1}{3}$  percent of any past-due benefits may be rebutted by clear and convincing evidence relating to the factors in § 14.636(e). As evidenced by the presumption for fees that exceed 33 $\frac{1}{3}$  percent, and the absence of such fees in the current market, we are not currently of the mind that such fees are justified. Accordingly, only in the rare case where there is clear and convincing evidence relating to the factors in § 14.636(e) would such fees be justified.

For fees above 20 percent but below 33 $\frac{1}{3}$  percent, additional scrutiny may be necessary if VA or the claimant or appellant challenges the reasonableness of the fee under the procedures in § 14.636(i). Under those procedures, the

burden is on the agent or attorney to demonstrate that this fee is reasonable under the individual circumstances. Such fees may not always, in every circumstance, be reasonable. Rather, VA will apply the factors in § 14.636(e) in a review that considers all of the individual circumstances of the representation.

Although we agree with the commenter's suggestion that some administrative efficiency will result from prescribing a presumption for fees which exceed 33 $\frac{1}{3}$  percent of any past-due benefits, we do not agree that VA need only determine whether a fee exceeds the 33 $\frac{1}{3}$  percent threshold when reviewing non-direct-pay fees for reasonableness. The commenter appears to suggest that we would create an implied presumption of reasonableness for non-direct-pay fees between 20 percent and 33 $\frac{1}{3}$  percent. However, in section 5904(c)(3)(A), Congress authorized VA to review any fee agreement filed with the Department under section 5904(c)(2) and to order a reduction in the fee if it is excessive or unreasonable. Therefore, we have adopted a three-tier system. In accord with the statute, fees of 20 percent or less are presumed reasonable, absent specific evidence to the contrary. Fees above 33 $\frac{1}{3}$  percent are presumptively unreasonable, absent specific evidence to the contrary. We interpret section 5904(c)(3)(A) to mean that any fee agreement, regardless of any applicable presumption, may be reviewed for reasonableness upon VA's own motion or upon the motion of the claimant or appellant. Accordingly, the presumptions in § 14.636(f) must be construed in the context provided by § 14.636(i) regarding motions for review of fee agreements.

We received two comments regarding § 14.636(g). One commenter objected to requiring the filing of fee agreements with OGC suggesting the provision is unnecessarily intrusive, unconstitutional, and that compliance would violate professional ethical standards. The second commenter suggested we could improve communication between the claimant and the attorney and ensure only reasonable fees are charged by requiring additional information in fee agreements; this commenter, however, made no recommendation as to what kinds of information VA should require, and we believe that we have prescribed sufficient information to permit us to determine whether a fee is reasonable.

We disagree that requiring an agent or attorney to file fee agreements with OGC is intrusive, unconstitutional, or violates ethical standards of conduct. First, 38

U.S.C. 5904(c)(2) expressly provides that agents and attorneys must file a copy of any fee agreement with VA. Therefore, VA has no choice but to implement the statutory requirement. Second, with respect to the constitutionality of the statute, given the requirement to file fee agreements with VA is current law properly passed by Congress and signed by the President, we presume its constitutionality. Finally, the commenter merely states that requiring fee agreements to be filed with OGC is a violation of professional ethical standards without further explanation. We do not see how such a requirement violates ethical standards. Furthermore, thousands of fee agreements have already been filed with VA, and we are unaware of any attorney having been found to have violated his or her rules of professional conduct for having done so. Therefore, we will make no change to the rule based on the comments.

We did not receive any comments with respect to § 14.636(g)(2) but have determined that changes pertaining to the presumption of reasonableness under § 14.636(e) warrant changes in this section. We still require fee agreements to clearly specify whether the agent or attorney is to be paid by VA directly out of an award of past due benefits. However, the regulation will be clarified to provide that any fee agreement that fails to clearly specify whether it is a direct-pay fee agreement will be deemed an agreement for which the agent or attorney is responsible for collecting fees for representation.

We received a number of comments on § 14.636(h). Two commenters expressed concern that § 14.636(h)(3) improperly permits paid representation in cases in which a Notice of Disagreement has not been filed. One commenter recommended that § 14.636(h)(3) be amended to clarify that ancillary benefits are not "past-due benefits." Two commenters recommended amending § 14.636(h)(3)(iii) and adopting a consistent definition of the terms "case," "claim," and "issue."

We disagree that § 14.636(h)(3) improperly permits paid representation in cases in which a Notice of Disagreement has not been filed. Congress amended 38 U.S.C. 5904(c)(1) to permit paid representation after the claimant files a Notice of Disagreement. Congress further amended section 5904(c)(1) to remove the requirement that an agent or attorney be hired within a year of a final Board decision in a case. We interpret this to mean that Congress wanted claimants to have the option to hire an agent or attorney at

any time so long as an agency or original jurisdiction has rendered a decision on a claim and a Notice of Disagreement has been filed with respect to that decision. Therefore, § 14.636(h) properly reflects congressional intent and we decline to amend it.

An agent or attorney may receive fees for representing a claimant before VA pursuant to a direct-pay fee agreement or an agreement specifying payment by the claimant. To the extent that an agent or attorney seeks payment from the claimant, there is no limitation on the parties' ability to include fees for representation on ancillary benefit claims in the fee agreement. Clearly, Congress generally intended that claimants would have choice in representation with respect to all claims for benefits when it enacted Public Law 109-461. However, under 38 U.S.C. 5904(d), VA's authority to honor direct-pay fee agreements is limited to payment out of "past-due" benefits.

Section 14.636(h)(3), interprets VA's authority in 38 U.S.C. 5904 to pay fees out of "past-due" benefit awards as being limited to payment out of "nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by an agency of original jurisdiction or the Board of Veterans' Appeals or the lump sum payment that represents the total amount of recurring cash payments that accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or an appellate court." Most ancillary benefits are not recurring cash payments and, therefore, fall outside the definition of "past-due" benefits for purposes of determining the amount to be paid directly to an agent or attorney under a direct-pay fee agreement.

As discussed with regard to § 14.627(g) above, we must reconcile our rules prescribing permissible fees with Federal Circuit case law. To accomplish this, we will amend § 14.636(c) to clarify when agents or attorneys may charge fees. However, we will not create new universal definitions for "case" and "claim" because the terms may have different meanings in contexts other than agent and attorney fees.

As an initial matter, we note that the Veterans Judicial Review Act of 1988 (VJRA) removed the long-standing limitation on fees but also, for the first time, restricted claimant's access to paid representation to the point after which the first administrative appeal of a claim is complete. In limiting fees to services

rendered after a first final Board decision, Congress ensured that VA would initially decide a matter and, upon request, review that decision before the Board without encountering paid representation. In this context, the Federal Circuit issued its opinions in *Stanley v. Principi*, 283 F.3d 1350 (Fed. Cir. 2002), and *Carpenter v. Nicholson*, 452 F.3d 1379 (Fed. Cir. 2006), both of which concerned the payment of fees after a first final Board decision.

Under the amendments to chapter 59, Congress shifted the entry point for paid representation to the filing of a Notice of Disagreement. Thus, paid representation is available in the administrative appeal process, which includes the Decision Review Officer process, the process for developing an appeal for certification to the Board, and the Board proceedings. We interpret this significant change as an expression of congressional intent to remove all restrictions on paid representation, provided that an agency of original jurisdiction has rendered a decision on a benefits matter and the claimant has filed a Notice of Disagreement with respect to that decision. In our view, Congress balanced claimants' choice in representation with its interest in ensuring that claimants' benefits are not unnecessarily reduced by payment of agents' and attorneys' fees. In balancing these competing interests, Congress concluded that an agency of original jurisdiction should have an opportunity to consider the merits of a claim on the basis of the available evidence of record and render a decision. Only if a claimant disagrees with that decision would the balance tip in favor of choice of representation.

We interpret Congress' designation of the Notice of Disagreement as the entry point for paid representation in section 5904(c) to mean that an agency of original jurisdiction must be allowed to initially decide a matter before a claimant seeks paid representation. Accordingly, with respect to claims to reopen based upon new and material evidence or claims for increase in rate of a benefit being paid based upon a change in disability or other circumstances, a claimant must seek an agency of original jurisdiction decision on the claim and file a Notice of Disagreement with respect to that decision before hiring an agent or attorney to provide representation before the Department. By definition, evidence that is new and material was not considered in any prior agency of original jurisdiction decision. See 38 CFR 3.156(a) ("new evidence means existing evidence not previously submitted to agency decisionmakers").

The same rationale applies to claims for increase. VA must have the opportunity to consider new evidence and, if appropriate, award the claimant the full amount of benefits due under law. Congress has determined that claimants for VA benefits should have the option of diverting benefits or other personal funds to agents and attorneys only after the claimant has expressed disagreement with an agency of original jurisdiction decision on a matter.

The rationale for proscribing paid representation for claims to reopen and for increase in rate of a benefit does not apply to requests for revision of decisions based on clear and unmistakable error. When a claimant asserts that the correct facts were not before an agency of original jurisdiction or the Board at the time of a decision, or the appropriate law or regulations extant at the time of the decision were incorrectly applied by an agency of original jurisdiction or the Board, he or she seeks to attack the prior decision based upon alleged error, not to obtain a new decision based upon new and material evidence or other change in circumstance. VA had an opportunity to initially decide the claim based on the same law and evidence, and under our interpretation of the amendments to chapter 59 there is no reason to preclude paid representation if the claimant filed a Notice of Disagreement with respect to the original, allegedly erroneous, decision on or after June 20, 2007.

For the reasons stated above, we will modify § 14.636(c) to clearly state the general rule that VA must have an opportunity to decide a matter before paid representation is available, and to clarify application of the rule in claims to reopen, claims for increase, and requests for revision based upon clear and unmistakable error.

We will also modify § 14.636(c) to clarify that it is generally the agency of original jurisdiction that issued the decision on a claim or claims identified in the Notice of Disagreement that will decide whether an agent or attorney is eligible for fees under the criteria in that section. In *Scates v. Principi*, 282 F.3d 1362, 1367 (Fed. Cir. 2002), the Court noted that the line between entitlement to and reasonableness of fees under former 38 U.S.C. 5904 was not always clear and might require a factual determination by an agency of original jurisdiction concerning eligibility for fees before the Board of Veterans' Appeals could consider the issue of reasonableness under its original jurisdiction. Under current section 5904, the Board has only appellate jurisdiction over fee matters and all

initial decisions regarding eligibility for and the reasonableness of fees are made by VA's agencies of original jurisdiction. See 38 CFR 14.627(b) (definition of *agency of original jurisdiction*). Whether an initial eligibility determination is made by the agency of original jurisdiction that decided the benefit claim or claims identified in the Notice of Disagreement, as will generally occur in the case of a direct-pay fee agreement filed with an agency of original jurisdiction under § 14.636(h)(4), or by the Office of the General Counsel as the agency of original jurisdiction with authority to review fee agreements for reasonableness, will depend on the facts of each case. Regardless, agency of original jurisdiction decisions concerning eligibility for fees under § 14.636(c) are appealable to the Board.

One commenter objected to § 14.636(h)(3)(iv), in which we proposed to clarify VA's policy of calculating agents' and attorneys' fees based on past-due benefits awarded and reduced due to certain conditions, such as incarceration. The Court of Appeals for the Federal Circuit recently interpreted 38 U.S.C. 5904 to mean that payment of agents' and attorneys' fees from past-due benefits must be based upon the amount of benefits awarded, not the amount actually paid to the claimant. *Snyder v. Nicholson*, 2007 U.S. App. LEXIS 13302 (Fed. Cir. 2007). The *Snyder* decision was issued after the proposed rule was published. In light of the need to further consider the scope of *Snyder*, we will remove § 14.636(h)(3)(iv).

We received numerous comments regarding § 14.636(i), which prescribes the procedures for seeking review of fee agreements. Three commenters, citing a conflict of interest, objected to OGC's authority to review fee agreements on its own motion. One commenter requested that we describe when VA could unilaterally review fee agreements. Two commenters asserted that the procedures for reviewing fee agreements are unfair because they do not provide for an increase in agents' and attorneys' fees. Two commenters also recommended that VA establish a set period of time in which VA or a claimant could seek review of a fee agreement. Finally, two commenters expressed concern that claimants will not know what it means to "serve" a motion for review and recommended that claimants merely ask for a fee review at the agency of original jurisdiction. These commenters also suggested that VA, not the claimant, should have the responsibility of notifying the agent or attorney of the claimant's request for review.

For the reasons discussed at length above regarding § 14.629, we disagree that there is a conflict of interest in OGC's review of fee agreements. With respect to the commenter's request that we clarify under what circumstances OGC will review fee agreements on its own motion, we believe § 14.636(e) and (f) are sufficiently clear. Section 14.636(e) describes in detail the fees that are permitted under current law. Section 14.636(f) implements the statutory presumption that fees that do not exceed 20 percent of past-due benefits awarded are reasonable. We interpret these provisions to mean that VA is not required to initiate the review of a fee that is less than or equal to 20 percent of past-due benefits awarded, and that any fee in excess of 20 percent does not benefit from the presumption and is subject to review by OGC on its own motion.

We also disagree with the commenters who suggested that OGC should also review fees to determine whether an agent or attorney is entitled to an increase in fees notwithstanding fee agreement terms. First, we note that in imposing fee limitations, Congress intended to protect veterans' benefits from unscrupulous lawyers. S. Rep. No. 109-297, at 6 (2006). Second, section 5904(c)(3)(A) clearly expresses Congress' intent that only VA or a claimant may seek review of a fee agreement and only for the purpose of reducing the fee called for in an agreement. Accordingly, VA does not have authority to review fees as the commenter suggests, and we will not make any changes based on the comment. We agree with the commenter's recommendation that we limit the period during which a fee agreement may be reviewed by OGC and have amended § 14.636(i) to prescribe that VA or a claimant may seek review of the fee agreement within 120 days of the final VA decision on the claim.

We disagree with the commenter who suggested that claimants will not know what it means to "serve" an agent or attorney with a motion for review of a fee agreement because they lack access to regulations. The predecessor provision, 38 CFR 20.609(i), required a party contesting the fee agreement to file the motion for review with the Board and certify that a copy was mailed to the other party. While the procedure for filing a motion for review is changing, the substance of what is required of the claimant seeking review is not. We note that VA regulations are available to the public through a variety of sources, including electronic media. To the extent that a claimant is unaware of the fee-agreement-review provisions and

seeks a review at an agency of original jurisdiction, the agency of original jurisdiction will forward the request to OGC for a decision. Therefore, we do not believe the provisions requiring claimants to complete service of documents are too onerous or confusing or in any way prejudice claimants. Further, we have defined "service" in § 14.627(o) to clarify the notice requirements applicable to individuals seeking review of fee agreements.

We also decline to change the procedure for filing motions for review of fee agreements. Under prior law, claimants mailed a copy of the motion and supporting evidence to the agent or attorney; this rule merely retains that requirement. Furthermore, disagreements are often the result of a communication breakdown between the parties to an agreement. We believe the notice requirements will help parties resolve fee disputes without getting VA actively involved. Finally, it is appropriate to place some burden on a claimant challenging an agreement he or she entered into. Requiring a claimant to serve the agent or attorney concerning their contract, as opposed to having VA do the work, will force the claimant to assume some of the effort required to dispute a fee agreement and to determine whether it is worth their time and effort. In our view, this procedure is reasonable in light of Congress' decision to expand choice of representation.

#### **Section 14.637—Payment of the Expenses of Agents and Attorneys in Proceedings Before the Agency of Original Jurisdiction and Before the Board of Veterans' Appeals**

One commenter objected to § 14.637(c), which establishes the types of reimbursable "expenses" that an agent or attorney may charge a claimant, and essentially disagreed with our determination that overhead costs are not reasonable expenses. Although we proposed to reorganize parts 14 and 20 of VA's regulations governing accreditation and fee matters, we did not make any substantive change to former 38 CFR 20.610(c), which we redesignated as § 14.637. In any event, we continue to believe that it would be unreasonable for agents and attorneys to charge claimants for costs that are not directly incurred as a result of providing representation in the case. Accordingly, we will not make any changes based on this comment.

#### **General Matters; Applicability of Accreditation Provisions**

We received five comments expressing concern with the lack of a

stated transition plan to implement the proposed changes in VA's accreditation program. More specifically, the commenters expressed concern that VA's implementation of new accreditation standards, without a transition plan for claimants currently represented by agents and attorneys before agencies of original jurisdiction and the Board, would potentially deny representation to such claimants.

We agree that implementation of its new accreditation rules should not impede or otherwise interfere with ongoing representation before agencies of original jurisdiction and the Board. To avoid that result, agents and attorneys providing representation in cases as of the effective date of the final rule need not meet the new accreditation requirements, unless the agent or attorney intends to provide representation in cases in which a Notice of Disagreement is filed after the effective date. An agent or attorney will be deemed to be providing representation on a claim before an agency of original jurisdiction or the Board if VA has evidence that the agent or attorney complied with the accreditation and power of attorney requirements in former 38 CFR 14.629 and 14.631 prior to the effective date of this final rule. Further, agents and attorneys providing representation as of the effective date may continue to do so through the final resolution of the claim. Agents and attorneys seeking to provide representation in a claim in which the Notice of Disagreement was filed after the effective date of the final rule, however, must file an application with OGC as provided in § 14.629(b) and receive notice of accreditation before providing representation. The delayed effective date, prospective application, and phased initial compliance dates for CLE will ensure that agent and attorney representation is uninterrupted during the transition period between the old and new accreditation programs. Accordingly, we will not make further changes based on these comments.

Several commenters also suggested that VA limit its authority to review applications for accreditation after a specified period of time has expired. OGC cannot commit to reviewing accreditation applications in a specific time period and will not establish a deadline following which an application must be approved notwithstanding that it may be incomplete or that the individual does not meet the standards in § 14.629. VA could not meet its obligation to ensure responsible, competent representation without sufficient administrative flexibility. While some applications may

be reviewed and approved very quickly, others may be delayed due to legitimate administrative concerns. However, we recognize that representation cannot begin without accreditation and that attorney applications may generally be approved upon submission of the supporting documents identified in § 14.629; therefore, we will attempt to review and respond to complete applications in less than 30 days.

We received one comment regarding section 101(c)(2) of Public Law 109-461, which requires VA to report to Congress on the effects of allowing agents and attorneys to charge fees for representation after a Notice of Disagreement has been filed. The commenter suggested that VA "begin gathering data now to provide Congress with a proper assessment" and "urged the Secretary to set forth specifically in regulation what data will be used to provide Congress with the assessment."

VA agrees that data gathering must begin as soon as possible to provide an accurate assessment of the effects of Public Law 109-461 and has already taken affirmative steps to measure the impact of the new law. However, the development and gathering of such information are internal agency procedural matters exempt from notice and comment. See 5 U.S.C. 553(b)(3)(A). Accordingly, we will make no changes based on this comment.

#### **Paperwork Reduction Act**

This final rule contains provisions that constitute collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) in 38 CFR 14.629 and 14.631. The collections are approved under Office of Management and Budget control number 2900-0605 and 2900-0321. We display the control numbers under the applicable regulation text in this final rule.

#### **Regulatory Flexibility Act**

The Secretary hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. At a minimum, this rule would affect the 117 attorneys who filed fee agreements with the Board under the predecessor law and the 47 agents currently accredited by VA. However, it would not have a significant economic impact on these individuals because it would only impose accreditation and reasonable fee requirements and the costs of which would not be significant. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final

regulatory flexibility analysis requirements of sections 603 and 604.

#### **Executive Order 12866**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. VA has examined the economic, legal, and policy implications of this rule and has concluded that it is a significant regulatory action under Executive Order 12866.

#### **Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### **Catalog of Federal Domestic Assistance Numbers and Titles**

There are no Federal Domestic Assistance programs associated with this final rule.

#### **List of Subjects**

##### *38 CFR Part 1*

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government contracts, Government

employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Privacy, Reporting and recordkeeping requirements, Seals and insignia, Security measures, Wages.

##### *38 CFR Part 14*

Administrative practice and procedure, Claims, Courts, Foreign relations, Government employees, Lawyers, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Surety bonds, Trusts and trustees, Veterans.

##### *38 CFR Parts 19 and 20*

Administrative practice and procedure, Claims, Veterans.

Approved: May 9, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

■ For the reasons set forth in the preamble, the Department of Veterans Affairs amends 38 CFR parts 1, 14, 19 and 20 as follows:

#### **PART 14—LEGAL SERVICES, GENERAL COUNSEL, AND MISCELLANEOUS CLAIMS**

■ 1. The authority citation for part 14 continues to read as follows:

**Authority:** 5 U.S.C. 301; 28 U.S.C. 2671-2680; 38 U.S.C. 501(a), 512, 515, 5502, 5902-5905; 28 CFR part 14, appendix to part 14, unless otherwise noted.

■ 2. Remove the undesignated center heading "Expanded Remote Access to Computerized Veterans Claims Records by Accredited Representatives" that precedes § 14.640 and redesignate §§ 14.640 through 14.643 as §§ 1.600 through 1.603, respectively.

■ 3. Revise § 14.626 to read as follows:

##### **§ 14.626 Purpose.**

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.

■ 4. Amend § 14.627 by:

■ a. Revising the introductory text.

■ b. Revising paragraph (a).

■ c. Redesignating paragraphs (b) through (l) and (m) and (n) as paragraphs (c) through (m) and (p) and (q), respectively.

■ d. Adding new paragraphs (b), (n), and (o).

■ e. Revising newly redesignated paragraphs (d), (e), (g), (l), and (m).

The revisions and additions read as follows:

**§ 14.627 Definitions.**

As used in regulations on representation of VA claimants:

(a) *Accreditation* means the authority granted by VA to representatives, agents, and attorneys to assist claimants in the preparation, presentation, and prosecution of claims for VA benefits.

(b) *Agency of original jurisdiction* means the VA activity or administration that made the initial determination on a claim or matter or that handles any subsequent adjudication of a claim or matter in the first instance, and includes the Office of the General Counsel with respect to proceedings under part 14 of this chapter to suspend or cancel accreditation or to review fee agreements.

\* \* \* \* \*

(d) *Attorney* means a member in good standing of a State bar who has met the standards and qualifications in § 14.629(b).

(e) *Benefit* means any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by VA pertaining to veterans, dependents, and survivors.

\* \* \* \* \*

(g) *Claim* means application made under title 38 U.S.C., and implementing directives, for entitlement to VA benefits, reinstatement, continuation, or increase of benefits, or the defense of a proposed agency adverse action concerning benefits.

\* \* \* \* \*

(l) *Recognition* means certification by VA of organizations to assist claimants in the preparation, presentation, and prosecution of claims for VA benefits.

(m) *Representative* means a person who has been recommended by a recognized organization and accredited by VA.

(n) *Representation* means the acts associated with representing a claimant in a proceeding before VA pursuant to a properly executed and filed VA Form 21–22, “Appointment of Veterans Service Organization as Claimant’s Representative,” or VA Form 21–22a, “Appointment of Individual as Claimant’s Representative.”

(o) *Service* means the delivery of a motion, response, or reply to a person or entity to which it is directed. Proof of service consists of a statement by the person who made service certifying the date and manner of service, the names of the persons served, and the addresses of the place of delivery. For service by mail, proof of service shall include the

date and manner by which the document was mailed.

\* \* \* \* \*

■ 5. Amend § 14.629 by:

- a. Revising the introductory text.
- b. In paragraph (a)(1), removing “the Department of Veterans Affairs”, and adding, in its place, “VA”.
- c. Revising the paragraph (b) heading.
- d. Redesignating paragraph (b)(2) as (b)(6), and paragraph (b)(1) as new paragraph (b)(2).
- e. Adding a new paragraph (b)(1).
- f. Revising newly redesignated paragraph (b)(2) introductory text and paragraph (b)(2)(i).
- g. Redesignating paragraphs (b)(2)(vii) and (viii) as paragraphs (b)(2)(viii) and (ix), respectively.
- h. Adding a new paragraph (b)(2)(vii).
- i. Revising newly redesignated paragraph (b)(2)(ix).
- j. Adding new paragraphs (b)(2)(x), (b)(3), (b)(4), and (b)(5).
- k. Revising newly redesignated paragraph (b)(6).
- l. Revising paragraph (c) heading.
- m. Revising paragraphs (c)(1) and (c)(3).
- n. Revising the note following paragraph (c)(4).

The additions and revisions read as follows:

**§ 14.629 Requirements for accreditation of service organization representatives, agents, and attorneys.**

The Assistant General Counsel of jurisdiction or his or her designee will conduct an inquiry and make an initial determination regarding any question relating to the qualifications of a prospective service organization representative, agent, or attorney. If the Assistant General Counsel or designee determines that the prospective service organization representative, agent, or attorney meets the requirements for accreditation in paragraphs (a) or (b) of this section, notification of accreditation will be issued by the Assistant General Counsel or the Assistant General Counsel’s designee and will constitute authority to prepare, present, and prosecute claims before an agency of original jurisdiction or the Board of Veterans’ Appeals. If the Assistant General Counsel determines that the prospective representative, agent, or attorney does not meet the requirements for accreditation, notification will be issued by the Assistant General Counsel concerning the reasons for disapproval, an opportunity to submit additional information, and any restrictions on further application for accreditation. If an applicant submits additional evidence, the Assistant General Counsel will consider such evidence and

provide further notice concerning his or her final decision. The determination of the Assistant General Counsel regarding the qualifications of a prospective service organization representative, agent, or attorney may be appealed by the applicant to the General Counsel. Appeals must be in writing and filed with the Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, not later than 30 days from the date on which the Assistant General Counsel’s decision was mailed. In deciding the appeal, the General Counsel’s decision shall be limited to the evidence of record before the Assistant General Counsel. A decision of the General Counsel is a final agency action for purposes of review under the Administrative Procedure Act, 5 U.S.C. 701–706.

\* \* \* \* \*

(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.

(i) For agents, the initial accreditation process consists of application to the General Counsel, self-certification of admission information concerning practice before any other court, bar, or State or Federal agency, an affirmative determination of character and fitness by VA, and a written examination.

(ii) For attorneys, the initial accreditation process consists of application to the General Counsel, self-certification of admission information concerning practice before any other court, bar, or State or Federal agency, and a determination of character and fitness. The General Counsel will presume an attorney’s character and fitness to practice before VA based on State bar membership in good standing unless the General Counsel receives credible information to the contrary.

(iii) As a further condition of initial accreditation, both agents and attorneys are required to complete 3 hours of qualifying continuing legal education (CLE) during the first 12-month period following the date of initial accreditation by VA. To qualify under this subsection, a CLE course must be approved for a minimum of 3 hours of CLE credit by any State bar association and, at a minimum, must cover the following topics: representation before VA, claims procedures, basic eligibility for VA benefits, right to appeal, disability compensation (38 U.S.C. Chapter 11), dependency and indemnity compensation (38 U.S.C. Chapter 13), and pension (38 U.S.C. Chapter 15).

Upon completion of the initial CLE requirement, agents and attorneys shall certify to the Office of the General Counsel in writing that they have completed qualifying CLE. Such certification shall include the title of the CLE, date and time of the CLE, and identification of the CLE provider, and shall be submitted to VA as part of the annual certification prescribed by § 14.629(b)(4).

(iv) To maintain accreditation, agents and attorneys are required to complete an additional 3 hours of qualifying CLE on veterans benefits law and procedure not later than 3 years from the date of initial accreditation and every 2 years thereafter. To qualify under this subsection, a CLE course must be approved for a minimum of 3 hours of CLE credit by any State bar association. Agents and attorneys shall certify completion of the post-accreditation CLE requirement in the same manner as described in § 14.629(b)(1)(iii).

(2) An individual desiring accreditation as an agent or attorney must establish that he or she is of good character and reputation, is qualified to render valuable assistance to claimants, and is otherwise competent to advise and assist claimants in the preparation, presentation, and prosecution of their claim(s) before the Department. An individual desiring accreditation as an agent or attorney must file a completed application (VA Form 21a) with the Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, on which the applicant submits the following:

(i) His or her full name and home and business addresses;

\* \* \* \* \*

(vii) Information concerning the applicant's level of education and academic history;

\* \* \* \* \*

(ix) Information relevant to whether the applicant for accreditation as an agent has any physical limitations that would interfere with the completion of a comprehensive written examination administered under the supervision of a VA Regional Counsel (agents only); and

(x) Certification that the applicant has satisfied the qualifications and standards required for accreditation as prescribed by VA in this section, and that the applicant will abide by the standards of conduct prescribed by VA in § 14.632 of this part.

(3) Evidence showing lack of good character and reputation includes, but is not limited to, one or more of the following: Conviction of a felony, conviction of a misdemeanor involving fraud, bribery, deceit, theft, or

misappropriation; suspension or disbarment from a court, bar, or Federal or State agency on ethical grounds; or resignation from admission to a court, bar, or Federal or State agency while under investigation to avoid sanction.

(4) As a further condition of initial accreditation and annually thereafter, each person seeking accreditation as an agent or attorney shall submit to VA information about any court, bar, or Federal or State agency to which the agent or attorney is admitted to practice or otherwise authorized to appear. Applicants shall provide identification numbers and membership information for each jurisdiction in which the applicant is admitted and a certification that the agent or attorney is in good standing in every jurisdiction in which admitted. After accreditation, agents and attorneys must notify VA within 30 days of any change in their status in any jurisdiction in which they are admitted to appear.

(5) VA will not accredit an individual as an agent or attorney if the individual has been suspended by any court, bar, or Federal or State agency in which the individual was previously admitted and not subsequently reinstated. However, if an individual remains suspended in a jurisdiction on grounds solely derivative of suspension or disbarment in another jurisdiction to which he or she has been subsequently reinstated, the General Counsel may evaluate the facts and grant or reinstate accreditation as appropriate.

(6) After an affirmative determination of character and fitness for practice before the Department, applicants for accreditation as a claims agent must achieve a score of 75 percent or more on a written examination administered by VA as a prerequisite to accreditation. No applicant shall be allowed to sit for the examination more than twice in any 6-month period.

(c) *Representation by Attorneys, Law Firms, Law Students and Paralegals.* (1) After accreditation by the General Counsel, an attorney may represent a claimant upon submission of a VA Form 21-22a, "Appointment of Attorney or Agent as Claimant's Representative."

\* \* \* \* \*

(3) A legal intern, law student, or paralegal may not be independently accredited to represent claimants under this paragraph. A legal intern, law student, or certified paralegal may assist in the preparation, presentation, or prosecution of a claim, under the direct supervision of an attorney of record designated under § 14.631(a), if the claimant's written consent is furnished to VA. Such consent must specifically

state that participation in all aspects of the claim by a legal intern, law student, or paralegal furnishing written authorization from the attorney of record is authorized. In addition, suitable authorization for access to the claimant's records must be provided in order for such an individual to participate. The supervising attorney must be present at any hearing in which a legal intern, law student, or paralegal participates. The written consent must include the name of the veteran, or the name of the appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable VA file number; the name of the attorney-at-law; the consent of the appellant for the use of the services of legal interns, law students, or paralegals and for such individuals to have access to applicable VA records; and the names of the legal interns, law students, or paralegals who will be assisting in the case. The signed consent must be submitted to the agency of original jurisdiction and maintained in the claimant's file. In the case of appeals before the Board in Washington, DC, the signed consent must be submitted to: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. In the case of hearings before a Member or Members of the Board at VA field facilities, the consent must be presented to the presiding Member of the hearing.

\* \* \* \* \*

**Note to § 14.629:** A legal intern, law student, paralegal, or veterans service organization support-staff person, working under the supervision of an individual designated under § 14.631(a) as the claimant's representative, attorney, or agent, may qualify for read-only access to pertinent Veterans Benefits Administration automated claims records as described in §§ 1.600 through 1.603 in part 1 of this chapter.

\* \* \* \* \*

- 6. Amend § 14.630 by:
- a. Revising paragraph (a).
- b. Revising paragraph (b)(1) introductory text.
- c. Adding paragraphs (c) and (d) immediately preceding the authority citation at the end of the section.

The revisions and additions read as follows:

**§ 14.630 Authorization for a particular claim.**

(a) Any person may be authorized to prepare, present, and prosecute one claim. A power of attorney executed on VA Form 21-22a, "Appointment of Attorney or Agent as Claimant's Representative," and a statement signed

by the person and the claimant that no compensation will be charged or paid for the services, shall be filed with the agency of original jurisdiction where the claim is presented. The power of attorney identifies to VA the claimant's appointment of representation and authorizes VA's disclosure of information to the person representing the claimant.

(b) \* \* \*

(1) The number of accredited representatives, agents, and attorneys operating in the claimant's geographic region;

\* \* \* \* \*

(c) Persons providing representation under this section must comply with the laws administered by VA and with the regulations governing practice before VA including the rules of conduct in § 14.632 of this part.

(d) Persons providing representation under this section are subject to suspension and or exclusion from representation of claimants before VA on the same grounds as apply to representatives, agents, and attorneys in § 14.633 of this part.

\* \* \* \* \*

- 7. Amend § 14.631 by:
  - a. Revising the section heading.
  - b. Revising paragraph (a) introductory text.
  - c. Adding paragraph (a)(1)(iv).
  - d. In paragraph (a)(2), removing "Department of Veterans Affairs" and adding, in its place, "VA".
  - e. Removing paragraph (b).
  - f. Redesignating paragraphs (c) through (g) as paragraphs (b) through (f).
  - g. Revising newly redesignated paragraphs (b) and (c).
  - h. In newly redesignated paragraph (e)(1), removing "the Department of Veterans Affairs" and add, in its place, "VA".
  - i. Revising newly redesignated paragraph (f).
  - j. Adding a parenthetical at the end of the section.

The revisions and addition read as follows:

**§ 14.631 Powers of attorney; disclosure of claimant information.**

(a) A power of attorney, executed on either VA Form 21-22, "Appointment of Veterans Service Organization as Claimant's Representative," or VA Form 21-22a, "Appointment of Attorney or Agent as Claimant's Representative," is required to represent a claimant before VA and to authorize VA's disclosure of information to any person or organization representing a claimant before the Department. Without the signature of a person providing

representation for a particular claim under § 14.630 of this part or an accredited veterans service organization representative, agent, or attorney, the appointment is invalid, and the person appointed to provide representation is under no obligation to do so. The power of attorney shall meet the following requirements:

(1) \* \* \*

(iv) An individual providing representation on a particular claim under § 14.630 of this part or an accredited veterans service organization representative, agent, or attorney; and

\* \* \* \* \*

(b) VA may, for any purpose, treat a power of attorney naming as a claimant's representative an organization recognized under § 14.628, a particular office of such an organization, or an individual representative of such an organization as an appointment of the entire organization as the claimant's representative, unless the claimant specifically indicates in the power of attorney a desire to appoint only the individual representative. Such specific indication must be made in the space on the power-of-attorney form for designation of the representative and must use the word "only" with reference to the individual representative.

(c) An organization, individual providing representation on a particular claim under § 14.630, representative, agent, or attorney named in a power of attorney executed pursuant to paragraph (a) of this section may withdraw from representation provided before a VA agency of original jurisdiction if such withdrawal would not adversely impact the claimant's interests. This section is applicable until an agency of original jurisdiction certifies an appeal to the Board of Veterans' Appeals after which time 38 CFR 20.608 governs withdrawal from representation before the Board. Withdrawal is also permissible if a claimant persists in a course of action that the organization or individual providing representation reasonably believes is fraudulent or criminal and is furthered through the representation of the organization or individual; the claimant fails to uphold an obligation to the organization or individual providing representation regarding the services of the organization or individual; or other good cause for withdrawal exists. An organization or individual providing representation withdraws from representation by notifying the claimant, the VA organization in possession of the claims file, and the agency of original jurisdiction in writing

prior to taking any action to withdraw and takes steps necessary to protect the claimant's interests including, but not limited to, giving advance notice to the claimant, allowing time for appointment of alternative representation, and returning any documents provided by VA in the course of the representation to the agency of original jurisdiction or pursuant to the claimant's instructions, to the organization or individual substituted as the representative, agent, or attorney of record. Upon withdrawing from representation, all property of the claimant must be returned to the claimant. If the claimant is unavailable, all documents provided by VA for purposes of representation must be returned to the VA organization in possession of the claims file. Any other property of the claimant must be maintained by the organization or individual according to applicable law.

\* \* \* \* \*

(f)(1) A power of attorney may be revoked at any time, and an agent or attorney may be discharged at any time. Unless a claimant specifically indicates otherwise, the receipt of a new power of attorney executed by the claimant and the organization or individual providing representation shall constitute a revocation of an existing power of attorney.

(2) If an agent or attorney limits the scope of his or her representation regarding a particular claim by so indicating on VA Form 21-22a, or a claimant authorizes a person to provide representation in a particular claim under § 14.630, such specific authority shall constitute a revocation of an existing general power of attorney filed under paragraph (a) of this section only as it pertains to, and during the pendency of, that particular claim. Following the final determination of such claim, the general power of attorney shall remain in effect as to any new or reopened claim.

\* \* \* \* \*

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0321.)

- 8. Revise § 14.632 to read as follows:

**§ 14.632 Standards of conduct for persons providing representation before the Department**

(a)(1) All persons acting on behalf of a claimant shall faithfully execute their duties as individuals providing representation on a particular claim under § 14.630, representatives, agents, or attorneys.

(2) All individuals providing representation are required to be

truthful in their dealings with claimants and VA.

(b) An individual providing representation on a particular claim under § 14.630, representative, agent, or attorney shall:

(1) Provide claimants with competent representation before VA. 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;

(2) 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.

(c) An individual providing representation on a particular claim under § 14.630, representative, agent, or attorney shall not:

(1) Violate the standards of conduct as described in this section;

(2) Circumvent a rule of conduct through the actions of another;

(3) Engage in conduct involving fraud, deceit, misrepresentation, or dishonesty;

(4) Violate any of the provisions of title 38, United States Code, or title 38, Code of Federal Regulations;

(5) Enter into an agreement for, charge, solicit, or receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation;

(6) 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 and a Notice of Disagreement has been filed with respect to that decision;

(7) Delay, without good cause, the processing of a claim at any stage of the administrative process;

(8) Mislead, threaten, coerce, or deceive a claimant regarding benefits or other rights under programs administered by VA;

(9) 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;

(10) Disclose, without the claimant's authorization, any information provided by VA for purposes of representation; or

(11) Engage in any other unlawful or unethical conduct.

(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.

(Authority: 38 U.S.C. 501(a), 5902, 5904)

■ 9. Amend § 14.633 by:

■ a. Revising the section heading.

■ b. Revising paragraphs (a), (b), (c) introductory text, and (c)(1).

■ c. Redesignating paragraph (c)(4) as paragraph (c)(7).

■ d. Revising newly redesignated paragraph (c)(7).

■ e. Adding new paragraphs (c)(4), (c)(5), and (c)(6).

■ f. Revising paragraphs (d) through (f).

■ g. Revising paragraph (h).

■ h. Adding new paragraph (i).

The revisions and additions read as follows:

**§ 14.633 Termination of accreditation or authority to provide representation under § 14.630.**

(a) Accreditation or authority to provide representation on a particular claim under § 14.630 may be suspended or canceled at the request of an organization, individual providing representation under § 14.630, representative, agent, or attorney. When an organization requests suspension or cancellation of the accreditation of a representative due to misconduct or lack of competence on the part of the representative or because the representative resigned to avoid suspension or cancellation of accreditation for misconduct or lack of competence, the organization shall inform VA of the reason for the request for suspension or cancellation and the facts and circumstances surrounding any incident that led to the request.

(b) Accreditation shall be canceled at such time as a determination is made by the General Counsel that any requirement of § 14.629 is no longer met by a representative, agent, or attorney.

(c) Accreditation or authority to provide representation on a particular claim shall be canceled when the General Counsel finds, by clear and convincing evidence, one or more of the following:

(1) Violation of or refusal to comply with the laws administered by VA or with the regulations governing practice before VA including the standards of conduct in § 14.632;

\* \* \* \* \*

(4) Knowingly presenting to VA a frivolous claim, issue, or argument. A claim, issue, or argument is frivolous if the individual providing representation under § 14.630, representative, agent, or attorney is unable to make a good faith argument on the merits of the position

taken or to support the position taken by a good faith argument for an extension, modification, or reversal of existing law;

(5) Suspension or disbarment by any court, bar, or Federal or State agency to which such individual providing representation under § 14.630, representative, agent, or attorney was previously admitted to practice, or disqualification from participating in or appearing before any court, bar, or Federal or State agency and lack of subsequent reinstatement;

(6) Charging excessive or unreasonable fees for representation as determined by VA, the Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit; or

(7) Any other unlawful or unethical practice adversely affecting an individual's fitness for practice before VA.

(d) Accreditation or authority to provide representation on a particular claim shall be canceled when the General Counsel finds that the performance of an individual providing representation under § 14.630, representative, agent, or attorney before VA demonstrates a lack of the degree of competence necessary to adequately prepare, present, and prosecute claims for veteran's benefits. A determination that the performance of an individual providing representation under § 14.630, representative, agent, or attorney before VA demonstrates a lack of the degree of competence required to represent claimants before VA will be based upon consideration of the following factors:

(1) The relative complexity and specialized nature of the matter;

(2) The individual's general experience;

(3) The individual's training and experience; and

(4) The preparation and study the individual is able to give veterans benefits matters and whether it is feasible to refer such matters to, or associate or consult with, an individual of established competence in the field of practice.

(e) As to cancellation of accreditation under paragraphs (c) or (d) of this section, upon receipt of credible written information from any source indicating improper conduct, or incompetence, the Assistant General Counsel of jurisdiction shall inform the subject of the allegations about the specific law, regulation, or policy alleged to have been violated or the nature of the alleged incompetence and the source of the complaint, and shall provide the subject with the opportunity to respond. If the matter involves an accredited

representative of a recognized organization, the notice shall include contact with the representative's organization. When appropriate, including situations where no harm results to the claimant or VA, the Assistant General Counsel will provide the subject with an opportunity to correct the offending behavior before deciding whether to proceed with a formal inquiry. If the subject refuses to comply and the matter remains unresolved, or the behavior subsequently results in harm to a claimant or VA, the Assistant General Counsel shall immediately initiate a formal inquiry into the matter.

(1) If the result of the inquiry does not justify further action, the Assistant General Counsel will close the inquiry and maintain the record for 3 years.

(2) If the result of the inquiry justifies further action, the Assistant General Counsel shall:

(i) Inform the General Counsel of the result of the inquiry and notify the individual providing representation under § 14.630, representative, agent or attorney of an intent to cancel accreditation or authority to provide representation on a particular claim. The notice will be sent to individuals providing representation on a particular claim by certified or registered mail to the individual's last known address of record as indicated on the VA Form 21-22a on file with the agency of original jurisdiction. The notice will be sent to accredited individuals by certified or registered mail to the individual's last known address of record as indicated in VA's accreditation records. The notice will state the reason(s) for the cancellation proceeding and advise the individual to file an answer, in oath or affidavit form or the form specified for unsworn declarations under penalty of perjury in 28 U.S.C. 1746, within 30 days from the date the notice was mailed, responding to the stated reasons for cancellation and explaining why he or she should not be suspended or excluded from practice before VA. The notice will also advise the individual of the right to submit additional evidence and the right to request a hearing on the matter. Requests for hearings must be made in the answer. If the individual does not file an answer with the Office of the General Counsel within 30 days of the date that the Assistant General Counsel mailed the notice, the Assistant General Counsel shall close the record and forward it with a recommendation to the General Counsel for a final decision.

(ii) In the event that a hearing is not requested, the Assistant General Counsel shall close the record and

forward it with a recommendation to the General Counsel for a final decision.

(iii) The Assistant General Counsel may extend the time to file an answer or request a hearing for a reasonable period upon a showing of sufficient cause.

(iv) For purposes of computing time for responses to notices of intent to cancel accreditation, *days* means calendar days. In computing the time for filing this response, the date on which the notice was mailed by the Assistant General Counsel shall be excluded. A response postmarked prior to the expiration of the 30th day shall be accepted as timely filed. If the 30th day falls on a weekend or legal holiday, the first business day thereafter shall be included in the computation. As used in this section, *legal holiday* means New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the State in which the individual resides.

(f) If a hearing is requested, it will be held at the VA Regional Office nearest the individual's principal place of business. If the individual's principal place of business is Washington, DC, the hearing will be held at the VA Central Office or other VA facility in Washington, DC. For hearings conducted at either location, the Assistant General Counsel or his or her designee shall present the evidence. The hearing officer shall not report, directly or indirectly to, or be employed by the General Counsel or the head of the VA agency of original jurisdiction before which the individual provided representation. The hearing officer shall provide notice of the hearing to the individual providing representation under § 14.630, representative, agent, or attorney by certified or registered mail at least 21 days before the date of the hearing. Hearings shall not be scheduled before the completion of the 30-day period for filing an answer to the notice of intent to cancel accreditation. The hearing officer will have authority to administer oaths. The party requesting the hearing will have a right to counsel, to present evidence, and to cross-examine witnesses. Upon request of the individual requesting the hearing, an appropriate VA official designated in § 2.1 of this chapter may issue subpoenas to compel the attendance of witnesses and the production of documents necessary for a fair hearing. The hearing shall be conducted in an informal manner and court rules of

evidence shall not apply. Testimony shall be recorded verbatim. The evidentiary record shall be closed 10 days after the completion of the hearing. The hearing officer shall submit the entire hearing transcript, any pertinent records or information, and a recommended finding to the Assistant General Counsel within 30 days of closing the record. The Assistant General Counsel shall immediately forward the record and the hearing officer's recommendation to the General Counsel for a final decision.

\* \* \* \* \*

(h) The decision of the General Counsel is a final adjudicative determination of an agency of original jurisdiction and may be appealed to the Board of Veterans' Appeals. The effective date for cancellation of accreditation or authority to provide representation on a particular claim shall be the date upon which the General Counsel's final decision is rendered. Notwithstanding provisions in this section for closing the record at the end of the 30-day period for filing an answer or 10 days after a hearing, appeals shall be initiated and processed using the procedures in 38 CFR parts 19 and 20. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 19.9 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(i) In cases where the accreditation of an agent or attorney is cancelled, the Office of the General Counsel may notify all agencies, courts, and bars to which the agent or attorney is admitted to practice.

\* \* \* \* \*

■ 10. Add § 14.636 to read as follows:

**§ 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.**

(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.

(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. Recognized

organizations (including their accredited representatives when acting as such) and individuals recognized under § 14.630 of this part are not permitted to receive fees. An agent or attorney who may also be an accredited representative of a recognized organization may not receive such fees unless he or she has been properly designated as an agent or attorney in accordance with § 14.631 of this part in his or her individual capacity as an accredited agent or attorney.

(c) *Circumstances under which fees may be charged.* Except as noted in paragraph (c)(2) and in paragraph (d) of this section, agents and attorneys may charge claimants or appellants for representation provided: after an agency of original jurisdiction has issued a decision on a claim or claims, including any claim to reopen under 38 CFR 3.156 or for an increase in rate of a benefit; 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.

(1) Agents and attorneys may charge fees for representation provided with respect to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. 5109A or the Board of Veterans' Appeals under 38 U.S.C. 7111 based on clear and unmistakable error if a Notice of Disagreement was filed with respect to the challenged 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.

(2) 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. (This condition will be considered to have been met with respect to all successor agents or attorneys acting in the continuous prosecution of the same matter if a predecessor was retained within the required time period.)

(3) Except as noted in paragraph (i) of this section and § 14.637(d), the agency of original jurisdiction that issued the decision identified in a Notice of Disagreement shall determine whether

an agent or attorney is eligible for fees under this section. The agency of original jurisdiction's eligibility determination is a final adjudicative action and may be appealed to the Board.

(d) *Exceptions—(1) Chapter 37 loans.* With respect to services of agents and attorneys provided after October 9, 1992, a reasonable fee may be charged or paid in connection with any proceeding in a case arising out of a loan made, guaranteed, or insured under chapter 37, United States Code, even though the conditions set forth in paragraph (c) of this section are not met.

(2) *Payment of fee by disinterested third party.* (i) An agent or attorney may receive a fee or salary from an organization, governmental entity, or other disinterested third party for representation of a claimant or appellant even though the conditions set forth in paragraph (c) of this section have not been met. An organization, governmental entity, or other third party is considered disinterested only if the entity or individual does not stand to benefit financially from the successful outcome of the claim. In no such case may the attorney or agent charge a fee which is contingent, in whole or in part, on whether the matter is resolved in a manner favorable to the claimant or appellant.

(ii) For purposes of this part, a person shall be presumed not to be disinterested if that person is the spouse, child, or parent of the claimant or appellant, or if that person resides with the claimant or appellant. This presumption may be rebutted by clear and convincing evidence that the person in question has no financial interest in the success of the claim.

(iii) The provisions of paragraph (g) of this section (relating to fee agreements) shall apply to all payments or agreements to pay involving disinterested third parties. In addition, the agreement shall include or be accompanied by the following statement, signed by the attorney or agent: "I certify that no agreement, oral or otherwise, exists under which the claimant or appellant will provide anything of value to the third-party payer in this case in return for payment of my fee or salary, including, but not limited to, reimbursement of any fees paid."

(e) *Fees permitted.* 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. Factors considered in

determining whether fees are reasonable include:

(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;

(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; and

(8) Whether, and to what extent, the payment of fees is contingent upon the results achieved.

(f) *Presumptions.* Fees which do not exceed 20 percent of any past-due benefits awarded as defined in paragraph (h)(3) of this section shall be presumed to be reasonable. Fees which exceed 33 $\frac{1}{3}$  percent of any past-due benefits awarded shall be presumed to be unreasonable. These presumptions may be rebutted through an examination of the factors in paragraph (e) of this section establishing that there is clear and convincing evidence that a fee which does not exceed 20 percent of any past-due benefits awarded is not reasonable or that a fee which exceeds 33 $\frac{1}{3}$  percent is reasonable in a specific circumstance.

(g) *Fee agreements.* All agreements for the payment of fees for services of agents and attorneys (including agreements involving fees or salary paid by an organization, governmental entity or other disinterested third party) must be in writing and signed by both the claimant or appellant and the agent or attorney.

(1) To be valid, a fee agreement must include the following:

(i) The name of the veteran,

(ii) The name of the claimant or appellant if other than the veteran,

(iii) The name of any disinterested third-party payer (see paragraph (d)(2) of this section) and the relationship between the third-party payer and the veteran, claimant, or appellant,

(iv) The applicable VA file number, and

(v) The specific terms under which the amount to be paid for the services of the attorney or agent will be determined.

(2) Fee agreements must also clearly specify if VA is to pay the agent or attorney directly out of past due benefits. A direct-pay fee agreement is a fee agreement between the claimant or

appellant and an agent or attorney providing for payment of fees out of past-due benefits awarded directly to an agent or attorney. A fee agreement that does not clearly specify that VA is to pay the agent or attorney out of past-due benefits or that specifies a fee greater than 20 percent of past-due benefits awarded by VA shall be considered to be an agreement in which the agent or attorney is responsible for collecting any fees for representation from the claimant without assistance from VA.

(3) A copy of the agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420. Only fee agreements and documents related to review of fees under paragraph (i) of this section and expenses under § 14.637 may be filed with the Office of the General Counsel. All documents relating to the adjudication of a claim for VA benefits, including any correspondence, evidence, or argument, must be filed with the agency of original jurisdiction, Board of Veterans' Appeals, or other VA office as appropriate.

(h) *Payment of fees by Department of Veterans Affairs directly to an agent or attorney from past-due benefits.* (1) Subject to the requirements of the other paragraphs of this section, including paragraphs (c) and (e), the claimant or appellant and an agent or attorney may enter into a fee agreement providing that payment for the services of the agent or attorney will be made directly to the agent or attorney by VA out of any past-due benefits awarded in any proceeding before VA or the United States Court of Appeals for Veterans Claims. VA will charge and collect an assessment out of the fees paid directly to agents or attorneys from past-due benefits awarded. The amount of such assessment shall be equal to five percent of the amount of the fee required to be paid to the agent or attorney, but in no event shall the assessment exceed \$100. Such an agreement will be honored by VA only if the following conditions are met:

(i) The total fee payable (excluding expenses) does not exceed 20 percent of the total amount of the past-due benefits awarded,

(ii) The amount of the fee is contingent on whether or not the claim is resolved in a manner favorable to the claimant or appellant, and

(iii) The award of past-due benefits results in a cash payment to a claimant or an appellant from which the fee may be deducted. (An award of past-due benefits will not always result in a cash

payment to a claimant or an appellant. For example, no cash payment will be made to military retirees unless there is a corresponding waiver of retirement pay. (See 38 U.S.C. 5304(a) and 38 CFR 3.750)

(2) For purposes of this paragraph (h), a claim will be considered to have been resolved in a manner favorable to the claimant or appellant if all or any part of the relief sought is granted.

(3) For purposes of this paragraph (h), "past-due benefits" means a nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by a VA agency of original jurisdiction or the Board of Veterans' Appeals or the lump sum payment that represents the total amount of recurring cash payments that accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or an appellate court.

(i) When the benefit granted on appeal, or as the result of the reopened claim, is service connection for a disability, the "past-due benefits" will be based on the initial disability rating assigned by the agency of original jurisdiction following the award of service connection. The sum will equal the payments accruing from the effective date of the award to the date of the initial disability rating decision. If an increased evaluation is subsequently granted as the result of an appeal of the disability evaluation initially assigned by the agency of original jurisdiction, and if the agent or attorney represents the claimant or appellant in that phase of the claim, the agent or attorney will be paid a supplemental payment based upon the increase granted on appeal, to the extent that the increased amount of disability is found to have existed between the initial effective date of the award following the grant of service connection and the date of the rating action implementing the appellate decision granting the increase.

(ii) Unless otherwise provided in the fee agreement between the claimant or appellant and the agent or attorney, the agent's or attorney's fees will be determined on the basis of the total amount of the past-due benefits even though a portion of those benefits may have been apportioned to the claimant's or appellant's dependents.

(iii) If an award is made as the result of favorable action with respect to several issues, the past-due benefits will be calculated only on the basis of that portion of the award which results from

action taken on issues concerning which the criteria in paragraph (c) of this section have been met.

(4) In addition to filing a copy of the fee agreement with the Office of the General Counsel as required by paragraph (g) of this section, the agent or attorney must notify the agency of original jurisdiction within 30 days of the date of execution of the agreement of the existence of an agreement providing for the direct payment of fees out of any benefits subsequently determined to be past due and provide that agency with a copy of the fee agreement.

(i) *Motion for review of fee agreement.*

Before the expiration of 120 days from the date of the final VA action, the Office of the General Counsel 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. The Office of the General Counsel may order a reduction in the fee called for in the agreement if it finds by a preponderance of the evidence, or by clear and convincing evidence in the case of a fee presumed reasonable under paragraph (f) of this section, that the fee is unreasonable. The Office of the General Counsel may approve a fee presumed unreasonable under paragraph (f) of this section if it finds by clear and convincing evidence that the fee is reasonable. The Office of the General Counsel's review of the agreement under this paragraph will address the issues of eligibility under paragraph (c) of this section and reasonableness under paragraph (e) of this section. The Office of the General Counsel will limit its review and decision under this paragraph to the issue of reasonableness if another agency of original jurisdiction has reviewed the agreement and made an eligibility determination under paragraph (c) of this section. Motions for review of fee agreements must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran, and the applicable VA file number. Such motions must set forth the reason, or reasons, why the fee called for in the agreement is unreasonable and must be accompanied by all evidence the moving party desires to submit.

(1) A claimant's or appellant's motion for review of a fee agreement must be served on the agent or attorney and must be filed at the following address: Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420. The agent or attorney may file a response to the motion, with any relevant evidence,

with the Office of the General Counsel not later than 30 days from the date on which the claimant or appellant served the motion on the agent or attorney. Such responses must be served on the claimant or appellant. The claimant or appellant then has 15 days from the date on which the agent or attorney served a response to file a reply with the Office of the General Counsel. Such replies must be served on the agent or attorney.

(2) The Assistant General Counsel shall initiate the Office of the General Counsel's review of a fee agreement on its own motion by serving the motion on the agent or attorney and the claimant or appellant. The agent or attorney may file a response to the motion, with any relevant evidence, with the Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, not later than 30 days from the date on which the Office of the General Counsel served the motion on the agent or attorney. Such responses must be served on the claimant or appellant.

(3) The Office of the General Counsel shall close the record in proceedings to review fee agreements 15 days after the date on which the agent or attorney served a response on the claimant or appellant, or 30 days after the claimant, appellant, or the Office of the General Counsel served the motion on the agent or attorney if there is no response. The Assistant General Counsel may, for a reasonable period upon a showing of sufficient cause, extend the time for an agent or attorney to serve an answer or for a claimant or appellant to serve a reply. The Assistant General Counsel shall forward the record and a recommendation to the General Counsel for a final decision. Unless either party files a Notice of Disagreement with the Office of the General Counsel, the agent or attorney must refund any excess payment to the claimant or appellant not later than the expiration of the time within which the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

(j) In addition to whatever other penalties may be prescribed by law or regulation, failure to comply with the requirements of this section may result in proceedings under § 14.633 of this chapter to terminate the agent's or attorney's accreditation to practice before VA.

(k) Notwithstanding provisions in this section for closing the record at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals shall be initiated and processed using the procedures in 38 CFR Parts 19 and 20. Nothing in this section shall be construed to limit the

Board's authority to remand a matter to the General Counsel under 38 CFR 19.9 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(Authority: 38 U.S.C. 5902, 5904, 5905)  
(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0085.)

■ 11. Add § 14.637 to read as follows:

**§ 14.637. Payment of the expenses of agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals.**

(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.

(b) *General.* Any agent or attorney may be reimbursed for expenses incurred on behalf of a veteran or a veteran's dependents or survivors in the prosecution of a claim for benefits pending before VA. Whether such an agent or attorney will be reimbursed for expenses and the method of such reimbursement is a matter to be determined by the agent or attorney and the claimant or appellant in the fee agreement filed with the Office of the General Counsel under § 14.636 of this part. Expenses are not payable directly to the agent or attorney by VA out of benefits determined to be due to a claimant or appellant.

(c) *Nature of expenses subject to reimbursement.* "Expenses" include nonrecurring expenses incurred directly in the prosecution of a claim for benefits on behalf of a claimant or appellant. Examples of such expenses include expenses for travel specifically to attend a hearing with respect to a particular claim, the cost of copies of medical records or other documents obtained from an outside source, and the cost of obtaining the services of an expert witness or an expert opinion. "Expenses" do not include normal overhead costs of the agent or attorney such as office rent, utilities, the cost of obtaining or operating office equipment or a legal library, salaries of the representative and his or her support staff, and the cost of office supplies.

(d) *Expense charges permitted; motion for review of expenses.* Reimbursement for the expenses of an agent or attorney may be obtained only

if the expenses are reasonable. The Office of the General Counsel may review the expenses charged by an agent or attorney upon its own motion or the motion of the claimant or appellant and may order a reduction in the expenses charged if it finds that they are excessive or unreasonable. The Office of the General Counsel's review of expenses under this paragraph will address the issues of eligibility under § 14.636(c) and reasonableness. The Office of the General Counsel will limit its review and decision under this paragraph to the issue of reasonableness if another agency of original jurisdiction has reviewed the fee agreement between the claimant and the agent or attorney and determined that the agent or attorney is eligible for reimbursement of expenses. Motions for review of expenses must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran, and the applicable VA file number. Such motions must specifically identify which expenses charged are unreasonable; must set forth the reason, or reasons, why such expenses are excessive or unreasonable and must be accompanied by all evidence the claimant or appellant desires to submit. Factors considered in determining whether expenses are excessive or unreasonable include the complexity of the case, the potential extent of benefits recoverable, and whether travel expenses are in keeping with expenses normally incurred by other representatives.

(1) A claimant's or appellant's motion for review of expenses must be served on the agent or attorney and must be filed at the following address: Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420. The agent or attorney may file a response to the motion, with any accompanying evidence, with the Office of the General Counsel not later than 30 days from the date on which the claimant or appellant served the motion on the agent or attorney. Such responses must be served on the claimant or appellant. The claimant or appellant then has 15 days from the date on which the agent or attorney served a response to file a reply with the Office of the General Counsel. Such replies must be served on the agent or attorney.

(2) The Assistant General Counsel shall initiate the Office of the General Counsel's review of expenses on its own motion by serving the motion on the agent or attorney and the claimant or appellant. The agent or attorney may file a response to the motion, with any accompanying evidence, with the Office

of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, not later than 30 days from the date on which the Office of the General Counsel served the motion on the agent or attorney. Such responses must be served on the claimant or appellant.

(3) The Office of the General Counsel shall close the record in proceedings to review expenses 15 days after the date on which the agent or attorney served a response on the claimant or appellant, or 30 days after the claimant, appellant, or the Office of the General Counsel served the motion on the agent or attorney if there is no response. The Assistant General Counsel may, for a reasonable period upon a showing of sufficient cause, extend the time for an agent or attorney to serve an answer or for a claimant or appellant to serve a reply. Unless either party files a Notice of Disagreement with the General Counsel's decision, the attorney or agent must refund any excess payment to the claimant or appellant not later than the expiration of the time within which the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

(e) In addition to whatever other penalties may be prescribed by law or regulation, failure to comply with the requirements of this section may result in proceedings under § 14.633 of this part to terminate the agent's or attorney's accreditation to practice before VA.

(f) Notwithstanding provisions in this section for closing the record at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals shall be initiated and processed using the procedures in 38 CFR parts 19 and 20. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 19.9 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(Authority: 38 U.S.C. 5904)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0085.)

## PART 1—GENERAL PROVISIONS

■ 12. The authority citation for part 1 continues to read as follows:

**Authority:** 38 U.S.C. 501(a), and as noted in specific sections.

■ 13. Amend newly redesignated § 1.600 by:

- a. Adding an undesignated center heading before the section heading .
- b. In paragraph (a) introductory text, removing “14.640 through 14.643” and adding, in its place, “1.600 through 1.603”.
- c. In paragraph (b)(1), removing “14.640 through 14.643” and adding, in its place, “1.600 through 1.603”.
- d. In paragraph (b)(4), removing “14.640 through 14.643” and adding, in its place, “1.600 through 1.603”.
- e. In paragraph (d) introductory text, removing “14.640 through 14.643” and adding, in its place, “1.600 through 1.603”.

The addition reads as follows:

### Expanded Remote Access to Computerized Veterans Claims Records by Accredited Representatives

#### § 1.600 Purpose.

\* \* \* \* \*

#### § 1.602 [Amended]

■ 14. Amend newly redesignated § 1.602 by:

- a. In paragraph (b), removing “14.643” and adding, in its place, “1.603”.
- b. In paragraph (c)(3), removing “14.640 through 14.643” and adding, in its place, “1.600 through 1.603”.

#### § 1.603 [Amended]

■ 15. Amend newly redesignated § 1.603 by:

- a. In paragraph (b)(1), removing “14.640 through 14.643” and adding, in its place, “1.600 through 1.603”.
- b. In paragraph (c), removing “14.643” and adding, in its place, “1.603”.

## PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

■ 16. The authority citation for part 19 continues to read as follows:

**Authority:** 38 U.S.C. 501(a) unless otherwise noted.

■ 17. Amend § 19.31 by adding a paragraph (d) and revising the authority citation at the end of the section to read as follows.

#### § 19.31 Supplemental statement of the case.

\* \* \* \* \*

(d) *Exception.* Paragraph (b)(1) of this section does not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7105(d); 38 U.S.C. 5902, 5903, 5904)

■ 18. Amend § 19.36 by adding a sentence at the end of the paragraph and

revising the authority citation to read as follows:

#### § 19.36 Notification of certification of appeal and transfer of appellate record.

\* \* \* Provisions in this section for submitting additional evidence and references to § 20.1304 do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to suspend or cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7105; 38 U.S.C. 5902, 5903, 5904)

■ 19. Amend § 19.37 by adding a paragraph (c) and revising the authority citation at the end of the section to read as follows:

#### § 19.37 Consideration of additional evidence received by the agency of original jurisdiction after an appeal has been initiated.

\* \* \* \* \*

(c) The provisions of this section do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7105(d)(1), 5902, 5903, 5904)

## PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

■ 20. The authority citation for part 20 continues to read as follows:

**Authority:** 38 U.S.C. 501(a) and as noted in specific sections.

■ 21. Amend § 20.608 by revising paragraph (a) to read as follows:

#### § 20.608 Rule 608. Withdrawal of services by a representative.

(a) *Withdrawal of services prior to certification of an appeal.* A representative may withdraw services as representative in an appeal at any time prior to certification of the appeal to the Board of Veterans' Appeals by the agency of original jurisdiction by complying with the requirements of § 14.631 of this chapter.

\* \* \* \* \*

#### §§ 20.609 and 20.610 [Removed]

■ 22. Remove §§ 20.609 and 20.610.

■ 23. Amend § 20.800 by adding a sentence at the end of the paragraph and revising the authority citation to read as follows:

**§ 20.800 Rule 800. Submission of additional evidence after initiation of appeal.**

\* \* \* The provisions of this section do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7105(d)(1); 38 U.S.C. 5902, 5903, 5904)

■ 24. Amend § 20.1304 by adding a paragraph (e) and revising the authority

citation at the end of the section to read as follows:

**§ 20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.**

\* \* \* \* \*

(e) *Relationship to proceedings before the General Counsel to cancel accreditation or to review the reasonableness of fees and expenses.* The provisions of paragraphs (a), (b),

and (d) of this section allowing appellants to submit additional evidence do not apply in proceedings before the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7104, 7105, 7105A; 38 U.S.C. 5902, 5903, 5904)

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