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Director
Office of Regulation Policy and Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue NW
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Washington, DC 20420

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RE: RIN 2900-Q81

Individuals Accredited by the Department of Veterans Affairs Using Veterans Benefits Administration Information Technology Systems to Access VBA Records Relevant to a Claim While Representing a Claimant Before the Agency - Proposed Rule

Dear Director:

The National Organization of Veterans' Advocates, Inc. (NOVA) provides these comments in response to the Department of Veterans Affairs (VA) notice to amend "regulations addressing when VA will allow individuals and organizations who are assisting claimants in the preparation, presentation, and prosecution of their claims before VA to use Veterans Benefits Administration's (VBA) information technology (IT) systems to access VA records relevant to a claim." 85 FR 9435 (February 19, 2020). According to VA, the proposal's purpose "is to ensure that claimants for VA benefits receive responsible, qualified services from VA-accredited attorneys, agents, or representatives of a VA-recognized service organization when seeking VA benefits, including ensuring that those individuals providing representation have appropriate access to VA records relating to their client's claim; that VA claimants understand who may access their claim records when they designate an attorney, agent, or service organization to provide representation; that attorneys, agents, or representatives of a VA-recognized service organization before VA take care to adequately protect their client's

privacy; and that VA meets its IT security obligations while providing access to its information systems to individuals who are not VA employees or contractors (non-VA users)." *Id.* For the reasons detailed below, this proposal is a woefully inadequate response to the requests of NOVA members for a fair regulation that acknowledges the modernization of VA procedures and the right of veterans to select non-VSO representation, as contemplated under 38 U.S.C. § 5904 and 38 C.F.R. § 3.103(e) ("claimants are entitled to representation of their choice at every stage in the prosecution of a claim").

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 600 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from the Department of Veterans Affairs (VA). NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. Our members represent veterans before all levels of VA's disability claims process.

Introduction

In the past decade, VA has transitioned from paper to electronic claims files. By digitizing veterans' claims files and implementing an electronic adjudication process, VA declared it was "moving from a cumbersome, paper-intensive process to an efficient electronic process – resulting in a faster, more accurate and transparent claims process." U.S. Department of Veterans Affairs, Office of Public Affairs and Media Relations, *VA achieves major milestone in effort to modernize claims processing* (October 23, 2018) (https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=5131).

The repository for the electronic claims file and the platform under which VA adjudicates claims and appeals is the Veterans Benefits Management System (VBMS). In 2016, VA officially permitted accredited attorneys and agents to have read-only access to VBMS and other systems, such as SHARE and CAPRI, all of which contain information critical to representing veterans before VA regional offices and the Board of Veterans' Appeals (BVA). *See* Department of Veterans Affairs, Veterans Benefits Administration, VBA Letter 20-16-08, *Internal VBA Systems Access for Claimants and Representatives* (September 22, 2016). The process to obtain access, separate from the accreditation process administered by VA's Office of General Counsel, is a lengthy one and involves, among other things, filing paperwork, submitting fingerprints, participating in mandatory training, and signing VA's rules of behavior.

In 2017, Congress passed the Veterans Appeals Improvement and Modernization Act (AMA). The purpose of the AMA is to "streamline VA's appeals process while protecting veterans' due process rights." H. REPT. 115-113, 115th Cong. 5 (2017). NOVA participated in stakeholder meetings discussing the proposed legislation and testified before Congress regarding its contents. NOVA highlighted the importance of electronic access for attorneys and agents, as well as their professional staff members, because the new system "is predicated on veterans making significant choices in relatively short periods of time." *See, e.g.,* National Organization of Veterans' Advocates, Inc., *Statement for the Record Before the House Committee on Veterans' Affairs Concerning Discussion Draft: Veterans Appeals Improvement and Modernization Act of 2017* 5 (May 2, 2017).

The subsequent implementation of the AMA also resulted in creation of new databases that are available to representatives. For example, as a result of a partnership between US Digital Services and VA, BVA is replacing its VACOLS system with Caseflow. Advocates are also able to use eFolder Express, which provides for an easier review of documents in VBMS. Access to these databases arms all representatives with the tools needed to provide competent representation to veterans and their families, ensuring receipt of earned benefits as quickly as possible.

When choosing a non-VSO representative, i.e., an attorney or agent, VA currently only permits the claimant or appellant to designate **one individual** on the *VA Form 21-22a*, not a law firm, legal organization, law school clinic, or similar organization.[1] Because of the challenges presented by this restriction, NOVA sought from VA reasonable amendments to the regulations governing electronic access. The resulting proposal falls far short of reasonable; it is in fact an even greater restriction upon the rights of representatives, not remotely "veteran-friendly," and will significantly impact VA's efficiency.

As discussed in more detail below, VA's proposed rule illegally limits attorneys and agents from competently representing veterans, in violation of 38 U.S.C. § 5904 and the Model Rules of Professional Conduct (MRPC). Furthermore, VA treats accredited attorneys and agents differently from accredited VSO representatives by only allowing one individual – as opposed to a law firm, legal organization, law school clinic, or similar organization – to execute the *VA Form 21-22a*. Under a cloak of concern for veterans' privacy, VA's proposal does nothing to enhance privacy protection or prevent security breaches, and will only add to VA employee workloads. Finally, VA's proposal lacks a reasonable process for challenging VA decisions to deny or revoke a representative's access.

VA's Rule As Proposed Violates 38 U.S.C. § 5904 And The Model Rules of Professional Conduct

The current note to section 14.629 provides that "[a] legal intern, law student, paralegal, or veterans service organization support-staff person, working under the supervision of an individual designated under §14.361(a) as the claimant's representative, attorney, or agent, may qualify for read-only access to pertinent" VBA automated claims records as described in part 1. By modifying 38 C.F.R. § 1.600(b)(1) and (b)(2)(ii), as well as eliminating 38 C.F.R. § 14.629 (note), VA violates 38 U.S.C. § 5904(a).

In adopting and modifying 38 U.S.C. § 5904(a), Congress has long recognized the right of attorneys and agents to represent veterans. Congress clearly mandated the Secretary adopt regulations "consistent with the Model Rules of Professional Conduct of the American Bar Association" to govern the practice of attorneys and agents. 38 U.S.C. § 5904(a)(2). VA's proposal is at odds with this mandate.

[1] By contrast, claimants who choose a VSO representative designate the organization as his or her representative. As such, any accredited representative of that VSO can obtain access to the claimant's records in relevant databases.

By eliminating the opportunity for paralegals, interns, students, and support staff to have access to the veteran's electronic records and limiting access to the individual who executed the *VA Form 21-22a*, VA is preventing the attorney or agent from providing competent representation. Under MRPC Rule 1.1, "[a] lawyer shall provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." A lawyer is also required to, among other things, "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required and "keep the client reasonably informed about the status of the matter." MRPC Rule 1.4.

To attain the level of preparation necessary to provide competent representation and keep a client informed, the MRPC contemplate the use of paralegals and support staff and charge the supervising attorney with responsibility for their actions. For example, MRPC Rule 5.3 states in pertinent part: "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

VA's proposal is in direct contradiction with the mandates of Congress and the professional ethical rules attorneys and agents are required to follow. VA should retain this note and clarify that these non-attorneys working for attorneys and agents in a firm, organization, or clinic can have access to VA electronic databases when supervised by an accredited representative.

VA Needs To Amend Its Regulation and *Form 21-22a* To Allow A Law Firm, Legal Organization, Law School Clinic, or Similar Organization To Be The Representative of Record

Not only does VA eliminate the ability of supervised paralegals, support staff, interns, and law students to access the electronics claims file of a veteran represented by an accredited advocate, VA restricts access to the lone individual who signed the *VA Form 21-22a*. The refusal to allow for more than one person at a law firm, legal organization, law school clinic, or similar organization to have access to an electronic file, even if accredited, demonstrates a lack of understanding of how legal practice works. In addition to executing the *VA Form 21-22a*, advocates typically also obtain a Privacy Act waiver from the veteran allowing for access to his or her records by other employees, interns, or students working for the firm, organization, or clinic. In other words, a veteran has already knowingly consented to more than one person having access to his or her records. Furthermore, different individuals within a firm, organization, or clinic have different roles. For example, one attorney might handle work before BVA, while a different attorney handles work at the regional office level. Veterans often have multiple claims and appeals ongoing at the same time; different individuals might be handling different claims and appeals for the same veteran. Paralegals or students may be assisting with evidentiary development, while support staff answers inquiries regarding claim or appeal status from clients. Limiting access to the one individual who signs the *VA Form 21-22a* creates tremendous inefficiencies and inevitably harms veterans.

In addition, the proposed regulations, as written, do not provide equal treatment for all representatives. As stated, if a veteran appoints an attorney or agent who works in a firm, organization, or clinic, only that individual will be able to view the electronic file. By contrast,

as previously noted, if the veteran selects a VSO as his or her representative, any employee of the VSO who has electronic access is able to view the individual's file. To be clear, NOVA is not suggesting VA should amend its regulations to change how VSOs obtain a veteran's consent to represent and access his or her electronic files. VSOs should remain free to decide who in their respective organizations is authorized to access files as they see fit. Likewise, however, VA should permit firms, organizations, and clinics, like VSOs, to be assigned one POA code under which all authorized employees may obtain electronic access to client records. As a practical matter, VA is capable of implementing this change – in fact, at least two Regional Offices have done so, interpreting current regulations to permit it.

Such a result would be in line with the evolution of the law. Writing a concurrence in a recent case before the United States Court of Appeals for Veterans Claims, Chief Judge Davis stated: "[A]lthough there is a long history of both a 'special relationship' between VA and VSOs and restrictions on attorney practice before VA, the practical differences between VSO and attorney representation are less significant now than they have ever been. . . . The increased involvement of attorneys in the adjudication process, both at the adversarial and nonadversarial stages, suggests that the disparate treatment of VSO representatives and attorneys has perhaps outlived its usefulness and may no longer be rationally justified." *Rosinski v. Shulkin*, 29 Vet.App. 183, 193 (2018) (per curiam order) (Davis, C.J., concurring opinion). Recently citing such cases, VA stated: "Some Veterans are now choosing accredited attorneys to help them process their disability and other claims for benefits. VBA must ensure that its practices do not create representational inequities for any Veteran, unnecessarily." VBA, *Information on Discontinuance of 48 Hour Review Policy for Certain Veterans Service Organizations*.

VA's current proposal indeed creates unnecessary representational inequities, with practical implications that negatively impact both a veteran's statutory right to choose a representative and the advocate's obligation to provide competent representation. Under VA's proposal, the sole designee on the *VA Form 21-22a* is shackled to VBMS. What happens when that individual needs to take medical leave for himself or to care for a family member? Suffers a medical emergency? Wants to take a vacation? In all of these scenarios, the advocate must take electronic access along in an attempt to competently represent clients. With elimination of unnecessary representational inequities, however, an attorney or agent could instead turn to a colleague for assistance and ensure his or her personal situation does not adversely impact clients.

Furthermore, the proposal provides no accommodations for advocates with disabilities. For example, an attorney or agent with visual impairment, cerebral palsy, or numerous other disabilities may need assistance to access VBMS or be limited by that disability in the amount of time he or she can practically spend on VA databases. VA's failure to address such considerations disparately impacts these advocates and their right to practice.

Because the current proposal creates unnecessary representational inequities for veterans, as well as impedes the ability of attorneys and agents to competently represent them, VA should amend the regulation and its *Form 21-22a* to allow for assignment of a unique POA code for each firm, organization, and clinic and allow authorized individuals within that entity to have electronic access under the code.

VA's Rule Does Not Enhance Veterans' Privacy/Security, Harms Veterans, And Will Result In Reduced Efficiency for VA

VA leans heavily on its duties to protect a veteran's privacy and secure records as justification for its amendments. NOVA members likewise take these obligations seriously. Attorneys not only are required to uphold the ethical standards outlined by the state bar(s) to which they belong; they must comply with the security requirements laid out by VA when obtaining access and sign the rules of behavior. Similarly, all other non-attorney advocates that have access to electronic systems, whether claims agents or VSOs, must also comply with VA's security standards and sign the rules of behavior. Failure to comply comes with a potential loss of access and accreditation and, for attorneys, possible disciplinary action from their state bar(s).

Furthermore, accredited representatives have an ethical obligation to supervise those working for them, whether accredited or unaccredited, and are responsible for protecting a client's privacy and security regardless of whether they are viewing the records electronically or in hard copy. *See, e.g.,* MRPC Rule 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."); Rule 1.6(e) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."); *see also* Model Guidelines for the Utilization of Paralegal Services, Guideline 1 ("A lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the jurisdiction in which the lawyer practices."); Guideline 6 ("A lawyer is responsible for taking reasonable measures to ensure that all client confidences are preserved by a paralegal.").

But by both eliminating the note to section 14.629 and only allowing for one individual to access the electronic record per the current *VA Form 21-22a*, VA does not guarantee any further protection of veterans' privacy and, in fact, recreates all the inefficiencies it claims electronic access was intended to reduce. First, it results in the absurdity that the one accredited representative in an entire firm, organization, or clinic that signed the *VA Form 21-22a* is relegated to a support staff role. That individual will now be tasked with downloading files into PDF form for distribution to other employees to whom the veteran has already granted access. But this process is not a one-time event. Rather, documents can be uploaded into the electronic file at any time. The only way to know if anything has been added to a file is to log onto VBMS, download new documents, and distribute those documents to authorized individuals. Likewise, every time a client calls to ask for information about the status of his or her case, that one individual will have to check the system to answer the question.

In addition, faced with the realization that multiple attorneys and staff members (some of whom may also be accredited with their own POA code) under his or her supervision are barred from reviewing the real-time electronic files of the firm's clients, the solo designee on the *VA Form 21-22a* will now resort to practices relied upon in the pre-electronic era. These include assigning his or her staff to file FOIA and Privacy Act requests for copies of files, call VA status lines, email VA staff, and write letters to VA regional offices and central office for information. The

result: overtaxed VA systems and employees and, more importantly, veterans whose earned benefits are delayed.

To appreciate what the return of such inefficiencies would mean to veterans and their statutory right to choose their representative, one need only look to two recent developments: (1) implementation of the AMA and (2) the COVID-19 pandemic. With implementation of the AMA, VA intended for veterans to have more "choice and control" over multiple options when faced with an adverse decision. As VA recently noted: "With the Higher-Level Review and Supplemental Claims, Veterans are afforded the ability to receive reconsideration of VA benefits decisions within shorter timeframes, along with the ability to leverage more than one avenue in addition to the formal appeal." VBA, *Information on Discontinuance of 48 Hour Review Policy for Certain Veterans Service Organizations.* Veterans need competent representation to make educated choices about the multiple new avenues available to them under the AMA. At the very moment VA seeks to become more agile under the AMA and reduce delays, it guarantees reduced success of its new system with this ill-conceived proposal: absent a workable way for other attorneys or agents in a firm, supervised paralegals, support staff, interns, and law students to monitor developments in VBMS and other databases, there will be an exponential increase in telephone, fax, email, and mail contacts to all levels of VA.

Likewise, VA's narrow proposal also creates unnecessary and unreasonable delays in any national emergency, including the current COVID-19 pandemic, that temporarily alters the way VA and representatives conduct their daily business. With VA employees and representatives teleworking in the current crisis, access is critical. To its credit, VA is deploying numerous innovations to keep its operations running as smoothly as possible – BVA virtual hearings and Skype DRO conferences as examples. NOVA members are grateful for these innovations and are participating in their successful deployment. Therefore, allowing for a firm, organization, or clinic to have access as described above can and should be accomplished as yet another tool to further ensure veterans' claims and appeals are not delayed any longer than absolutely necessary in the midst of a crisis.

In addition, members of the National Guard are being called up to assist in the COVID-19 pandemic. *See, e.g.,* National Conference of State Legislatures, *National Guard Assists Response to the COVID-19 Pandemic* (April 14, 2020) (https://www.ncsl.org/research/military-and-veterans-affairs/national-guard-activation-in-every-state-assisting-response-to-the-covid-19-pandemic.aspx). Many veterans' advocates themselves served our nation in uniform, and may continue to be deployed as a member of a Guard or Reserve unit. Without the ability for other employees in his or her firm, organization, or clinic to view electronic records during such deployments, these advocate-service members, as well as their clients, are distinctly disadvantaged.

Finally, VA recently stated: "VA must prioritize its information technology enhancements to favor the delivery of benefits, payments and service to Veterans, over those of creating access for VA-accredited individuals. VSOs have argued that VA should use its limited IT funding to build out an infrastructure that would allow all VA recognized organizations, VA-accredited individuals, and Veterans to have immediate access to VBMS and direct upload capabilities. VBA must continue to exercise prudence and ensure fiscal responsibility to taxpayers.

Unfortunately, IT resources are limited, and there are immediate priorities for Veterans benefits payments and healthcare that cannot be lessened in order to provide attorneys and other representatives with access to VBA systems." VBA, *Information on Discontinuance of 48 Hour Review Policy for Certain Veterans Service Organizations*. VA's failure to see the importance of making resources available and usable for VSOs and other advocates, as evidenced in this statement, is unfortunate. VA-accredited representatives, be it a VSO, agent, or attorney, are authorized by the veterans and family members they serve to advocate on their behalf to ensure receipt of all earned benefits. Downplaying the importance of reliable, reasonable access for all representatives is short sighted and will not "ensure fiscal responsibility to taxpayers." As discussed above, it will in fact waste VA resources as representatives seek information in non-electronic forms.

Due Process Requires Notice and An Opportunity To Be Heard When VA Proposes To Deny Or Revoke Access

Finally, given the critical and ever-growing importance of electronic access to advocates, VA's due process for a representative who has his or her access denied or revoked is virtually nonexistent. Section 1.603(b) and (c) permit VA to deny or revoke access without advance notice, opportunity to be heard, and to further declare it "a final decision." Thereafter, the representative would have the opportunity to file for reconsideration within 30 days. There are no specific standards for what factors are analyzed in the reconsideration process, how this process would work in practicality, and within what time frame VA would issue a "final" decision on reconsideration. Denial or revocation of access is a serious matter that greatly impacts the right of the representative to practice, and may potentially affect a veteran's claim or appeal already in progress. Due process requires more, and VA must provide notice and an opportunity to be heard **before** denying or revoking the access of a representative, as well as a more robust procedure for appealing an adverse decision.

NOVA appreciates the opportunity to comment on this proposed rule and thanks you for your consideration of our comments. Should you require additional information, please do not hesitate to contact me at 202.587.5708 or drauber@vetadvocates.org.

Sincerely,

/s/ Diane Boyd Rauber

Diane Boyd Rauber
Executive Director