April 20, 2020

Director
Office of Regulation Policy and Management (00REG)
Department of Veterans Affairs
810 Vermont Ave. NW, Room 1064
Washington, DC 20420


Dear Director:

On behalf of the American Bar Association (“ABA”), which is the largest voluntary association of attorneys and legal professionals in the world, I write to express our concerns regarding the above-referenced proposed rule on Individuals Accredited by the Department of Veterans Affairs (VA) Using Veterans Benefits Administration Information Technology Systems to Access VBA Records Relevant to a Claim While Representing a Claimant Before the Agency.

The ABA works to improve the administration of justice, promotes programs that assist attorneys and judges in their work, develops model rules and policies relating to the ethical conduct and regulation of attorneys to ensure protection of the public, accredits American law schools, and works to build global understanding of the importance of the rule of law. Through entities such as our Standing Committee on Legal Assistance for Military Personnel, we also provide continuing education to the legal community, judges, and the public on the legal concerns of military personnel and veterans; promote the delivery of legal services to military personnel, veterans, and their families; and collaborate with other organizations and the government to enhance the scope, quality, and delivery of free or affordable legal services to eligible legal assistance clients.

The ABA has long supported access to justice for all veterans and their families, including timely access to earned benefits and assistance from the government. As such, we have concerns about the Proposed Rule, which would limit access to VA’s information technology systems, specifically those related to claims records currently maintained in VA’s Veterans Benefits Management System (VBMS). Under the Proposed Rule, attorneys’ support staff would not have access to VBMS. Instead, access would be limited to only those individuals accredited by VA such as an attorney, agent, or veteran service organization representative.¹

¹ Although some of the concerns raised in these comments may also be relevant to accredited agents or veteran service officer representatives, the ABA’s comments are limited to the Proposed Rule’s adverse effects on attorneys and lawyers, and we use these two terms interchangeably.
Although VA contends that the Proposed Rule is needed to protect veterans’ private information, we believe that such a limitation is unnecessary given the many other legal and ethical protections that exist to protect a client’s private information. In particular, the ABA believes that the Proposed Rule is unnecessary and would harm veterans for the following reasons.

**Existing authorities allow action to be taken against attorneys whose support staff violate client confidentiality.**

Restricting access to VBMS is unnecessary to ensure client confidentiality because other more effective mechanisms already exist to hold violators responsible for any misuse of either VBMS or the information contained in it.

Prohibiting paralegals or legal interns working directly for and under the supervision of a veteran claimant’s attorney from accessing VBMS is unnecessary to ensure client confidentiality. Current rules and regulations that require this information be held confidential provide adequate protection and present at most only nominal risk.

First, ABA Model Rule of Professional Conduct (“ABA Model Rule”) 1.6(a) mandates that an attorney keep confidential all information relating to the representation. ABA Model Rule 1.6(c) requires attorneys to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of client information. An attorney who works with support staff has an ethical duty to supervise and manage that staff, including but not limited to paralegals, administrative assistants, interns, and secretaries. See ABA Model Rule 5.3.

Attorneys who are managers must also have in place policies, procedures, training, audits, and remedial measures to ensure that their paralegals’ conduct conforms to applicable rules of professional conduct. This would include protecting information relating to the representation of a client, including information from the VA IT system. See Model Rule 5.3(a) and ABA Formal Ethics Opinion 467 (2014).

In the unlikely event that support staff members misuse VA IT systems or information, ABA Model Rule 5.3(c) ensures that the supervising attorney is responsible if she ordered the action, ratified the action (e.g. sees what is happening and turns a blind eye), or knows of the conduct in time to avoid the harm and does not correct it.

Second, the VA’s existing regulation provides for disciplinary action to be taken in circumstances of misuse including referral of the supervising attorney to that attorney’s disciplinary agency. This serves as a mechanism for ensuring accountability and creates a strong incentive for attorneys to actively supervise any non-attorneys on their staff.

**Although the Proposed Rule is predicated on the need to provide security for veterans’ information, no information is given indicating that a security risk currently exists.**

The Proposed Rule contends that its limitations on access to veterans’ information are needed to ensure the security and privacy of that information, but no information is provided to support that
claim. Therefore, the ABA questions whether the Proposed Rule is supported by credible evidence of legitimate privacy concerns, anecdotal or otherwise.

Under the current system, attorneys’ support staff do not have unlimited access to VA’s IT databases because anyone accessing VBMS may only view veterans’ information for which there is a representation agreement on file with VA. When hiring a law firm, clients routinely consent to support staff at the firm having access to their files. This is an important aspect of representation set forth in ABA Model Rule 1.4.²

Moreover, if any minimal security risks currently exist, they can be effectively mitigated through proper training. VA may mandate that all persons (including attorneys’ support staff) who will be accessing VA’s IT database undergo the same annual training that will be mandated by the amendments to 38 C.F.R. § 1.602 and require them also to agree to the VA Rules of Behavior now noted in 1.601(c). If these protections are adequate to ensure attorneys do not pose a security risk in accessing VBMS, then the same protections should also be adequate to ensure that support staff do not pose such a risk.

Veterans will suffer delays in accessing critical information if the Proposed Rule is adopted.

It is a generally accepted practice that attorneys may ethically delegate non-legal work to support staff. See ABA Model Rule 5.3, Comment 2. Therefore, if the Proposed Rule is adopted and only the attorney representing the veteran is permitted to access VBMS, veterans may experience unnecessary delay in receiving information and incur greater legal costs.

For example, if a veteran calls the attorney’s office to inquire when disability compensation funds will be released, but the attorney is engaged in other matters that are more properly classified as the practice of law instead of an administrative task, the veteran will likely have to wait an inordinate amount of time to receive an answer to a straightforward question. But if the attorney’s support staff personnel also have access to VBMS, those staff could provide the answer to the veteran more quickly and at lower cost.

Also, if an attorney must spend her time on administrative tasks such as these, her time spent performing the actual practice of law is thereby limited. This results in less available legal services for veterans if non-legal administrative tasks cannot be delegated to support staff. If a veteran is being represented on an hourly fee basis, the veteran will likely have to pay a higher hourly fee for the attorney’s time as opposed to a lower one for a support staff person’s time.

Conclusion

For all of these reasons, we believe that the Proposed Rule is unnecessary and would ultimately harm veterans. Therefore, we respectfully request that the VA either withdraw the Proposed Rule

²See ABA Model Rule of Professional Conduct 1.4: Communications, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/
or modify it to explicitly allow both attorneys and their support staff to access the VA’s IT systems after the staff undergo appropriate screening and training.

Thank you for considering our views. If you have any questions or need additional information, please contact Kenneth Goldsmith in the ABA Governmental Affairs Office at (202) 662-1789 or kenneth.goldsmith@americanbar.org.

Sincerely,

Judy Perry Martinez