BE IT RESOLVED, that the American Bar Association urges the United States Department of Veterans' Affairs (hereafter "DVA") to administer its debt collection and forfeiture proceedings in a manner that allows veterans to hire attorneys without regard to the attorney fee limitations set forth in 38 U.S.C. §§ 3404 and 3405 that are applicable to benefit claims cases. In furtherance of this resolution, the American Bar Association:

1) Urges the DVA to issue a public statement to the effect (1) that the attorneys' fee provisions of 38 U.S.C. §§ 3404 and 3405 do not apply in administrative proceedings respecting debt collection or forfeiture, and (2) that previous pronouncements to the contrary are superseded.

2) Urges the DVA to provide notice to all veterans who become subject to debt collections or forfeiture proceedings that they are entitled to hire an attorney or nonlawyer representative of their own choosing to represent them before the agency, and that the attorneys' fee limitations of 38 U.S.C. §§ 3404 and 3405 do not apply in such proceedings. Such notice shall be provided immediately upon commencement of such proceedings against the veteran; and

3) Urges Congress to enact legislation clarifying that the attorneys' fee limitations set forth in 38 U.S.C. §§ 3404, 3405 do not apply in administrative debt collection or forfeiture proceedings initiated against veterans by the DVA.
The U.S. Department of Veterans' Affairs ("DVA") operates the largest public assistance program in the United States, dispensing benefits to veterans and their families in the form of disability compensation, educational benefits, home loan guarantees, health care and other services. Periodically, the DVA determines that a veteran has been "overpaid," or has otherwise incurred indebtedness to the U.S. Government in connection with receipt of benefits. When the DVA determines that a debt is allegedly owed to it by a veteran, it initiates collection action through administrative, and if necessary, through judicial proceedings.1/

Veterans charged with owing money to the DVA are entitled to dispute the existence of the debt before the DVA. They are also entitled to contend that in any event collection would be against equity and good conscience, and that repayment should be waived. 38 C.F.R. §§ 1.911a, 1.955, 1.962, 1.963, 1.964 (1987). The veteran's contentions are initially adjudicated before a DVA Regional Office Committee on Waivers and Compromises. If the veteran's arguments are rejected at the DVA Regional Office level, they are entitled to appeal the matter to the Board of Veterans Appeals ("BVA").

1/ Similarly, if the DVA determines that a veteran has engaged in the perpetration of a fraud against the DVA for the purpose of receiving DVA benefits, it will commence "forfeiture" of benefits proceedings against the veteran pursuant to 38 U.S.C. § 3503, 38 C.F.R. § 3.900 et seq. In such cases, the veteran is notified of the DVA's findings, and is given an opportunity to present a defense, including the right to submit evidence and to have a hearing.
Once the DVA determines that a debt is allegedly owed to it, and before the veteran has exhausted his or her appellate rights before the agency, a full range of administrative sanctions may be used against the veteran. These activities include reporting the alleged debt to consumer reporting agencies, referral to the Internal Revenue Service for diversion of the veteran's income tax refund, garnishing the veteran's wages if he or she is a federal employee, offsetting existing benefits the veteran may be receiving, or referring the case to the U.S. Department of Justice for prosecution in the name of the United States.

As of September 1988, there were over 470,000 outstanding debt collection proceedings pending against veterans throughout the United States. The issues involved in these proceedings initiated by the DVA are often complex, and frequently involve matters of state law. However, due to the DVA's erroneous interpretation of a civil war-era statute, veterans are denied the assistance of counsel in such proceedings, and counsel may be sanctioned with criminal penalties for accepting fees in such cases.

In 1862, Congress passed a law limiting to $5 the amount a veteran could pay an attorney to assist in applying for a pension. The law was designed to prevent attorneys and "pension agents" from taking advantage of unwary veterans by charging excessive fees for relatively simple services, i.e., the filling out of simple claims forms. In the following years, Congress amended the original fee limit many times, and in 1936, enacted the "$10 limit" which remained on the books until 1988. Codified at 38 U.S.C. § 3404, the limit provided, in relevant part, that attorneys' fees in "allowed claims for monetary benefits . . . shall not exceed $10 with respect to any one claim." (emphasis added.) The attorneys' fee limit was accompanied by another statute establishing criminal sanctions in the form of fines and imprisonment for violation of the fee limitation. 38 U.S.C. § 3405.

For at least 12 years, from 1974 to 1986, the DVA properly recognized the obvious difference between a "claim" for benefits

2/ For example, a substantial number of debt collection proceedings initiated by the DVA involve home loan foreclosures, where state laws respecting notice and other foreclosure procedures are applicable.

3/ 12 Stat. 566, 568 (1862).
in the first instance, and an administrative debt collection proceeding initiated by the DVA. In its Adjudication Procedures Manual M21-1, which sets adjudication policy for all DVA offices nationwide, the DVA stated clearly that:

The fee limitation is not applicable in a case in which an attorney is representing a claimant in defending charges of forfeiture of rights or proceedings regarding waiver of recovery of overpayment. The amount of such fee is not determined by the VA and payment is to be made by the claimant.4/

This policy was consistent with the plain meaning of the fee statutes, as well as the extensive legislative history. It was also consistent with "unofficial" DVA General Counsel advisory opinions previously rendered with respect to individual claims cases.

Abruptly, on May 5, 1986, the DVA General Counsel issued a formal, binding precedent opinion in the form of a memorandum, stating that henceforth, the fee statutes would apply to all DVA administrative proceedings, including proceedings involving debt collection and forfeiture.5/ In the memo, the General Counsel reasoned that "consistent application" of the fee statutes was appropriate, given that "both waiver and forfeiture proceedings are adjudicatory in nature, and are conducted in the same informal setting as other BVA benefits adjudications."

The DVA's reversal of policy is erroneous for several reasons. First, the plain language of the fee limiting statutes repeatedly referred to affirmative "claims" for benefits, not debt collection proceedings initiated by the DVA.6/ Second, the


5/ Veterans' Administration Memorandum from General Counsel to Chief Benefits Director re: "Scope of Statutory Limitation on Attorneys' Fees in Claims Involving Benefits Administered by the Veterans' Administration, 38 U.S.C. §§ 3404(c), 3405" (May 5, 1986).

6/ As amended by the Veterans' Judicial Review Act, 38 U.S.C. § 3404(c) now imposes fee restrictions "in connection with a
extensive legislative history of these statutes confirms the result reached under the "plain language" test. 7/

Third, 38 U.S.C. § 3405 establishes criminal sanctions for violation of the fee limits. It is well established that any ambiguity in a criminal statute must be construed against the governmental entity. United States v. Enmons, 410 U.S. 396, 93 S. Ct. 1047, 1048 (1973). Thus, even if the fee statutes were ambiguous on this issue, absent a specific statutory reference to debt collection and forfeiture proceedings, the DVA's interpretation must be rejected.

Finally, the DVA's interpretation of the fee statutes is prima facie unreasonable. To suggest, as the DVA does, that debt collection proceedings are essentially similar to affirmative claims proceedings due to the fact that both involve the use of "informal" procedures is to ignore the obvious. Debt collection proceedings, by their very nature, are extremely adversarial. It is one thing to apply for education benefits, or a DVA guaranteed mortgage, and be denied. It is quite another to be subject to aggressive debt collection by the federal government, where one's credit may be ruined, reputation injured, wages garnished, etc. 8/

[footnote continued from previous page]

proceeding before the Veterans' Administration with respect to benefits under laws administered by the Veterans' Administration . . ." P.L. 100-687, Section 104. While the language of the fee statute as amended is arguably broader than the former version of the statute, which consistently referenced "claims for benefits," there is no indication in the legislative history of P.L. 100-687 that Congress affirmatively decided to broaden the coverage of the fee restrictions to include either debt collection proceedings or forfeiture proceedings.

7/ On June 30, 1987, the House Committee on Veterans' Affairs published a legislative history of the fee limitation prepared at the Committee's request by the non-partisan American Law Division of the Library of Congress. This exhaustive history analyzes approximately thirty statutes either amending or affecting the fee limitation, and quotes numerous passages of Congressional floor and committee debate. Nowhere in this impartial survey is there anything supporting the DVA's application of the fee limits to debt collection and forfeiture proceedings. See House Committee Print No. 8, 100th Cong., 1st Sess. (June 30, 1987).

8/ The validity of the DVA's statutory interpretation as reflected in the May 5, 1986 General Counsel opinion is currently [footnote continued next page]
Recently, the $10 fee limitation was amended by the Veterans' Judicial Review Act, P.L. 100-687. As amended, veterans are prohibited from paying any fees to an attorney until the BVA has rendered a "first, final decision." Only after that "first, final decision" has been rendered may a veteran pay an attorney "reasonable" fees for services rendered. Thus, if the DVA persists in its current view that the fee limitations apply to debt collection and forfeiture proceedings, the practical effect is that before a veteran may hire an attorney in a debt collection or forfeiture proceeding, he or she must:

1. Dispute the existence of the debt, or request a waiver before the DVA's Regional Office Committee;
2. Lose the case before the Regional Office Committee;
3. Appeal the case to the BVA; and
4. Lose the appeal to the BVA. Only then is the veteran entitled to retain a lawyer in an attempt to reopen the case. Meanwhile, the veteran is exposed to the full range of administrative sanctions, and must attempt to negotiate often complex legal issues without the assistance of counsel.

United States Veterans have sacrificed greatly to preserve the fundamental rights of all Americans to due process. If Congress had intended to deprive these veterans of the fundamental right to counsel when accused of owing money to the federal government, it would have said so. It did not. Finally, the fee statutes were enacted to protect veterans, not harm them. The DVA's current interpretation, however, is extremely harmful under federal court challenge (Eastern District of Virginia, Alexandria Division) in the matter of Bahnmiiller et al. v. Turnage, Civil Action No. 88-732 A.

9/ P.L. 100-687 was formally enacted on November 18, 1988.

10/ We note that in 1977, the ABA adopted a resolution recommending that Congress repeal the $10 fee limit set forth at 38 U.S.C. § 3404(c). This resolution is fully consistent with the ABA's prior resolution.

11/ Of course, if the case is referred to the Justice Department for prosecution, and suit is filed against the veteran in the name of the United States, the fee restrictions do not apply. However, the vast majority of debt collection cases initiated by the DVA are in the administrative, rather than the judicial arena.
to veterans. Accordingly, we urge the adoption of the proposed resolution.

Respectfully submitted,

Sally Katzen
Chair, Section of Administrative Law and Regulatory Practice

August, 1989
1. **Summary of Recommendation(s).** The Recommendation urges the U.S. Department of Veterans' Affairs ('DVA) to issue a public statement to the effect that the attorneys' fee limitations set forth in 38 U.S.C. §§ 3404 and 3405 do not apply in debt collection and forfeiture proceedings initiated against veterans by the DVA.

2. **Approval by Submitting Entity.** The Report and Recommendation were approved by the Section Council on February 5, 1989, at a regularly scheduled meeting.

3. **Previous submission to the House or relevant Association position.** Not applicable.

4. **Need for Action at This Meeting.** The Association's views on this issue should be made known as soon as possible, particularly since there is a new Department of Veterans' Affairs.

5. **Status of Legislation.** (If applicable.) Not applicable.

6. **Cost to the Association.** (Both direct and indirect costs.) None.

7. **Disclosure of Interest.** (If applicable.) The Recommendation and Report were submitted to the Section Council by the Section's Committee on Veterans' Benefits, one of whose members is Bruce S. Deming, plaintiffs' counsel in *Bahnmliller et al. v. Turnage*, Civil Action No. 88-0732-A, U.S. District Court for the Eastern District of Virginia (Alexandria Division). Mr. Deming represents plaintiffs in a challenge to the DVA's application of the fee limitations set forth in 38 U.S.C. §§ 3404 and 3405 to administrative debt collection and forfeiture proceedings initiated against veterans by the DVA. Disclosure of Mr. Deming's interest was made to the Council at the time of submission.

8. **Referrals.** A copy of the Report and Recommendation was sent to all Section and Division Chairs in June, 1989.
9. **Contact Person.** (Prior to meeting.)

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10. **Contact Person.** (Who will present the report to the House.)

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