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June 8, 2007

Mr. Robert McFetridge, Director
Office of Regulations Management (00Reg1), Rm. 1068
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420

Re: Accreditation of Agents and Attorneys;
Agent and Attorney Fees (RIN 2900-AM62)

Dear Mr. McFetridge:

On behalf of the American Bar Association (ABA), I am pleased to provide these comments in response to the Department of Veterans Affairs' (VA) proposed rulemaking concerning implementation of the Veterans Benefits, Health Care and Information Technology Act of 2006 (P.L.109-461). This legislation partially lifts a 150-year prohibition on veterans being able to hire a lawyer to pursue claims for benefits. While we continue to support the repeal of the remaining restrictions on lawyer representation so that claimants can have representation at the initial hearing stage as well, we support certain of the proposed changes as a positive step in the right direction. Not all cases will require the services of a lawyer, but we maintain that the option to hire one in matters involving life, liberty and property should not be restricted.

More immediately, we look forward to working collaboratively with other stakeholders, such as the VA, bar associations, veteran service organizations, and others, to ensure successful implementation of the new law and to develop lawyer training programs to promote excellence in service to our veterans.

This letter comments only on those proposed regulations concerning lawyers and is submitted on behalf of the ABA. One ABA entity, the Section of Administrative Law and Regulatory Practice which has particular expertise and interest in these matters, is transmitting under separate cover additional comments not covered in this letter. While the Section's views should not be construed as the policy of the ABA as a whole, we nevertheless commend them to your attention.

Preliminarily, we would like to bring to your attention a potential legal issue that should be resolved prior to implementation of the law. The proposed regulations seek

to change to the definition of “attorney” to impose an additional requirement beyond the lawyer being a member in good standing of a state or territorial bar, including Washington, D.C. We note that there is case law suggesting that absent express authority, the definition of “attorney” under the Agency Practice Act (5 U.S.C. 500(b) is controlling and attempts by agencies to regulate lawyers have not always been successful, e.g. 534 F. Supp. 367 (D.C. Va. 1982) (holding that regulation-imposed requirements not necessary to the efficient administration of the agency are rendered void when in conflict with the Agency Protection Act). While there is some regulation of representatives within the Patent Trademark Office, this might be distinguished. These comments should not be construed as our taking a formal position on this aspect of the proposed regulations. We simply wish to bring this potential problem to your attention and respectfully suggest that this question be resolved prior to implementation of the regulations.

With regard to provisions establishing the rules of conduct before the VA, we appreciate the fact that the proposed regulations so closely track the language and requirements of the ABA Model Rules of Professional Conduct (MPC). The MPC has a considerable history and many of its provisions have been the subject of Formal Opinions that may be of use to the VA. We do have comments or suggested changes with regard to several of the proposed provisions, which are presented below, seriatim.

Definition of “Professional” Conduct

We oppose §14.632(c)(11), which includes a prohibition against “unprofessional” conduct, distinguishing it from “unlawful” or “unethical” conduct. Given that there is no universal definition regarding what is or is not “professional” conduct, we respectfully request that this prohibition be removed, particularly as grounds for removal or disqualification. If that is unacceptable, we recommend that the VA provide precise guidance regarding what conduct is intended to be covered by this subsection.

Cancellation of Accreditation and Reporting

On another provision we would like to see the VA go farther than proposed. Section 14.629(b)(4) provides that a lawyer seeking accreditation must submit annually to the VA a listing of state and federal courts and agencies where the lawyer is admitted to practice, along with proof of good standing for each. Further, §14.633(h) provides that where an accreditation of a lawyer has been cancelled, the General Counsel *may* notify all courts, bars and agencies to which the lawyer is admitted of that discipline.

We respectfully suggest that in the event of cancellation of accreditation, the General Counsel ***should be required*** to make such notification for purposes of public protection and to afford those agencies, courts and bars the opportunity to promptly initiate reciprocal disciplinary proceedings where appropriate. To facilitate this, and in promoting the interest by the VA in the membership and status of each lawyer, we further recommend that the VA, through its General Counsel, participate in the ABA National Lawyer Regulatory Data Bank (NLRDB). (*See* Rule 16 (I), ABA Model Rules for Lawyer Disciplinary Enforcement.)

The ABA Standing Committee on Professional Discipline is responsible for the ABA's National Lawyer Regulatory Data Bank (NLRDB), the only national repository of information concerning public regulatory actions imposed against lawyers from all states and the District of Columbia, many federal courts and some federal agencies. The NLRDB was established to serve as a national clearinghouse of reports of public disciplinary sanctions so that all jurisdictions where a practitioner is admitted may be informed and take appropriate reciprocal disciplinary action.

Participating courts and agencies are able to submit reports of public regulatory actions to the NLRDB and to access information that has been approved in it for reciprocal discipline purposes. The submission and accessing of this information can be done electronically. Additional information about the Data Bank is available on-line at <http://www.abanet.org/cpr/regulation/databank.html>. Questions concerning participation can be directed to ABA Association Counsel Ellyn S. Rosen at rosene@staff.abanet.org.

Competence

We appreciate the VA's rationale for the proposed adoption of a written exam for accreditation candidates to demonstrate competence because attendance at a particular training session or experience in a related practice setting does not, itself, ensure competence. We do encourage the VA, however, to also consider the appropriate role of ongoing education or related opportunities for those accredited under its system. Consistent with the VA's interests, Rule 1.1 of the MRPC provides that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Accordingly, even if the VA does not require continuing education, lawyers who will appear before the VA will still have an ongoing obligation of to be competent and seek appropriate training. Nevertheless, we hope that the VA encourages organizations committed to veterans' interests to develop education programs for attorneys that will promote the best representation possible.

Removing Potential Obstacles to Pro Bono Legal Representation

Perhaps the greatest concern to the ABA under the proposed changes is the extent to which they would create an unfortunate obstacle to pro bono legal assistance. Under the proposed regulations on accreditation, for example, pro bono attorneys would need to sit for the VA competence exam. This may deter someone otherwise willing to volunteer to take veteran cases, particularly if held at a regional VA office a great distance from the lawyer. This requirement also is objectionable because it treats lawyers differently than non-lawyer service organization representatives who are apparently exempt from the exam requirement under §14.629, even though both groups offer their services on a pro bono basis. If pro bono attorneys were exempt from the accreditation requirement, they would still be accountable to the jurisdictions in which they are licensed and to maintain their professional competence. Furthermore, even without formal VA accreditation, they would be accountable to the VA rules under §14.630(c) and (d). For these reasons, we urge you to exempt pro bono attorneys from the VA competency exam requirement.

Related to this, §14.630(a) would limit pro bono attorneys who were not otherwise accredited by the VA to appear on only a single claim. We strongly urge the VA to reconsider this

requirement and permit pro bono lawyers to represent veterans in need of representation on an ongoing basis. We see no justification for this limitation as it relates to lawyers and believe that it is more productive to focus on ways to encourage, not impede, laudable pro bono service.

Withdrawal from Representation

Under proposed §14.631, a lawyer may withdraw from representation if the withdrawal will not harm the material interests of the client. Subsection C of this section is much like Model Rule 1.16 -- Declining or Terminating Representation, in that it provides circumstances under which an attorney may terminate representation, including when the lawyer reasonably believes continued representation may advance a fraud or crime. However, subject to the material interests of the client, and having received appropriate permissions for withdrawal, Model Rule 1.16 further provides that when the representation will result in a “violation of the rules of professional conduct or other law,” the lawyer must withdraw. We respectfully request that the VA acknowledge this additional professional requirement on lawyers.

Cancellation of Accreditation and Notice

Section 14.633 concerns the cancellation of accreditation. For over forty years, the ABA has been the national leader in seeking improvements to make lawyer discipline fair and effective.¹ The ABA has conducted two major national studies² and almost 50 individual studies of state and other tribunals’ lawyer discipline systems. The policies recommended in one study, the Clark and McKay Reports, were adopted by the ABA House of Delegates and are embodied in the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE) available at <http://www.abanet.org/cpr/disenf/home.html>. We commend these to your attention.

The MRLDE are a comprehensive policy document of the Association’s recommendations for disciplinary procedural rules. We recognize that certain of the VA procedures for investigating and prosecuting allegations of misconduct or incompetence are consistent with ABA policy as set forth in the MRLDE. For example, §14.633(e) provides that the Assistant General Counsel shall initiate an inquiry into allegations of misconduct from any source. This is consistent with Rule 11 (A) of the MRLDE.

However, the proposed regulations do not require that the lawyer subject to the allegations of misconduct be notified of the initiation of such an inquiry or be provided with an opportunity to be heard at this stage, as is required under Rule 11 (B) (2) of the MRLDE. It is not until the

¹Mary M. Devlin, The Development of Lawyer Disciplinary Procedures in the United States, 7 Geo. J. Legal Ethics 911 (1994).

² In 1968, the ABA established the Clark Committee (chaired by former U.S. Supreme Court Justice Tom Clark). The Clark Committee Report, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Clark Report), 1 (1970), can be found at http://www.abanet.org/cpr/reports/Clark_Report.pdf. In 1989, the ABA established the McKay Commission (chaired by former N.Y.U. Law School Dean Robert B. McKay) to examine the effects of the Clark Report and to study additional reforms. The McKay Commission’s Report, LAWYER REGULATION FOR A NEW CENTURY, (1992) can be found at http://www.abanet.org/cpr/reports/mckay_report.html.

Assistant General Counsel decides, without review and approval by another, to initiate adverse proceedings to cancel accreditation that the lawyer is provided with notice and an opportunity to be heard. These cancellation proceedings appear to be analogous to formal discipline proceedings under the ABA Model Rules for Lawyer Disciplinary Enforcement, where a finding of probable cause has been made and formal disciplinary charges are filed. We urge that the respondent lawyer be informed of the existence of the inquiry at an earlier stage. Pursuant to Rule 11 (B) (2) of the MRLDE, a lawyer should be notified of the allegations and provided an opportunity to respond before the investigation is concluded and any adverse disposition is formulated.

We further recommend that the regulations require that complainants be kept apprised of the status of the proceedings, at all of its stages. We also urge that complainants be given an opportunity to respond to a respondent lawyer's statements before an investigation is dismissed without the initiation of formal disciplinary proceedings, and that the complainant be notified of the reasons underlying that decision. We further support providing the complainant an opportunity to appear and testify at the relevant hearing. Rule 11 (D) (4), MRLDE.

Prosecutorial and Adjudicative Functions in Cancellation Determinations

We have an additional concern over the apparent lack of adequate separation between the prosecutorial and adjudicative roles of VA employees in cancellation proceedings. (See Rule 4 MRLDE) Under the proposed regulations, the Assistant General Counsel, who presumably works for the General Counsel, acts in the capacity of investigator, prosecutor and adjudicator. The General Counsel is responsible for making the finding of disciplinary violation and revocation of accreditation after a hearing. The fact that the Assistant General Counsel reports to and is presumably supervised by the General Counsel raises, at the very least, a perception of unfairness or conflict of interest in cancellation proceedings. Recommendation 6 of the McKay Report and Rule 4 of the MRLDE speak to the importance of the independence of disciplinary counsel and the separation of the prosecutorial and adjudicative functions. The VA should consider amending the rules to provide for a more independent disciplinary counsel for cancellation proceedings.

The Hearing Officer

We note that §14-633(f) provides that a hearing officer for hearings to be held at the VA Central Office is to be appointed by the Director of Compensation and Benefits Service, and the Assistant General Counsel acts as prosecutor. We strongly urge that the regulations explicitly provide that the hearing officer not directly or indirectly report to, or be employed under, the Office of General Counsel or others designated to decide disciplinary matters. We also recommend that the hearing officer not be a VA employee.

A hearing officer is supposed to be the neutral trier of fact. However, it appears from the proposed regulations that the Assistant General Counsel reviews the record along with the hearing officer's recommended findings and that *the Assistant General Counsel* then makes the recommendation to the General Counsel for final decision. The proposed regulations should be amended to eliminate this adjudicative role for the Assistant General Counsel. The hearing

officer as the trier of fact, or a hearing panel as recommended below, should forward his/her report to the General Counsel for consideration.

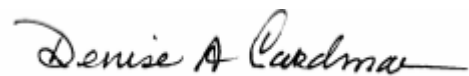
One suggested alternative for conducting hearings in cancellation proceedings would be for the final regulations to provide for the appointment of a hearing panel composed of two lawyer practitioners who are not VA employees and one non-lawyer. Panels should not exceed three members. The inclusion of a non-lawyer would increase the credibility of the disciplinary process. (See Comment, Rule 2, MRLDE.)

Application of the Federal Rules of Evidence

Section 14.633(f) also provides that court rules of evidence do not apply in these VA disciplinary proceedings. The Federal Rules of Evidence should apply, especially if any adjudication by the General Counsel or the VA Board of Appeals can be appealed to the U.S. District Court for the District of Columbia. Rule 18 (B) of the ABA MRLDE provides for the applicability of state rules of evidence in disciplinary proceedings, except as otherwise provided in the rules.

We thank you for your consideration of the ABA's views on this very important matter. We look forward to working together on the successful implementation of the new law, in furtherance of VA's mission and in service to our veterans.

Respectfully submitted,

A handwritten signature in cursive script that reads "Denise A. Cardman". The signature is written in black ink and is positioned above the typed name and title.

Denise A. Cardman
Acting Director, Governmental Affairs