

NEW YORK
CITY BAR

COMMITTEE ON
MILITARY AFFAIRS AND JUSTICE

June 6, 2007

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Submitted via internet: www.Regulations.gov
Director
Regulations Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue, NW
Room 1068
Washington, DC 20420

Re: Comments in Response to:
RIN 2900-AM62 Accreditation of Agents and Attorneys;
Agent and Attorney Fees

Dear Sirs:

This letter is submitted on behalf of the Standing Committee on Military Affairs and Justice (the "Committee") of the New York City Bar Association (the "Association") in response to the request of the Department of Veterans Affairs (the "VA") for comments on Proposed Rules for Accreditation of Agents and Attorneys; Agent and Attorney Fees (the "Proposed Rules").¹ The Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors and government officials, principally from New York City, but also from around the United States and from 50 other countries. Founded in 1870, the Association has a long history of engagement in issues of legal policy of concern to the profession and has been a continuous advocate of the rule of law at home and around the world. The Committee has a long history of interest in and contribution to matters of law and policy affecting the United States Armed Forces. Fairness and efficiency in the provision of legal assistance to veterans seeking VA benefits is in the best interest of all veterans, the Department

¹ 72 Fed. Reg. 25, 930 (May 7, 2007)

and the nation. The Committee thanks the Department for the opportunity to comment on the Proposed Rules. We limit our comments to those provisions which affect attorneys and their accreditation to practice before the VA.

I. COMMENTS

A. Character and Fitness

The Proposed Rules authorize the VA to make determinations of character and fitness of attorneys to practice before the VA. See Proposed 38 C.F.R. § 14.629(b)(2)-(4). In a departure from prior practice, the new rule would permit the VA to decline to accredit an attorney who was in good standing before every state bar in which that attorney is admitted, based only on the VA's independent assessment of the attorney's "good character." The Committee opposes this provision. Although we understand that the statute now provides the VA with broad authority to impose requirements upon attorneys to practice before it, we fail to see how this provision marks an improvement over the current system. The current rules define an "attorney" as a member in good standing of a state bar. Membership in a state bar comes with its own set of requirements which, we respectfully submit, are more than adequate to ensure that qualified, ethical counsel are permitted to practice before the VA.²

B. Examination Requirement

Section 14.629 also would impose upon attorneys the condition that they pass a written examination in order to be accredited by the VA. Respectfully, the Committee believes that the examination requirement is inappropriate under the statutory mandate, nearly unprecedented, and probably in violation of the Agency Practice Act.

First, the statute that empowers the VA to prescribe standards to accredit attorneys to practice before it (38 U.S.C. § 5904(a)(2)) requires that any regulations prescribed should be consistent with the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). The Model Rules confirm that the profession is largely self-governed and, as a fundamental precept, require counsel to provide competent representation of their clients. See ABA Model Rule 1.1. Attorneys, having entered the profession by passing one or more state bar exams and by submitting to individual state character and fitness evaluations, should not be required to pass an additional examination in order to practice before the VA.

Second, with the exception of the U.S. Patent and Trademark Office (which is the subject of specific statutory exemption), no other agency of the United States government imposes an examination requirement upon counsel in order to practice before it.

Third, the Agency Practice Act forbids this proposed examination. The statute provides:

(b) An individual who is a member of good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as

² While the particular requirements for both attaining and maintaining "good standing" before the bar may vary from state to state, the requirements are largely consistent with one another in at least one significant regard, namely, they all require that the practicing attorney at all times comply with applicable ethical rules of conduct.

provided by this subsection, and is authorized to represent the particular person in whose behalf he acts.

- 5 U.S.C. § 500(b)

Requiring the proposed examination for attorneys appears to directly violate this provision of the Agency Practice Act.


Finally, it should be emphasized that requiring attorneys to take and pass an examination may have the effect of discouraging *pro bono* representation of veterans.³ For all of the foregoing reasons, we believe the imposition of an examination requirement upon attorneys admitted in good standing is inadvisable and inappropriate.

C. Termination of Accreditation

Section 14.633, which sets forth the basis for the termination of accreditation, under proposed (c)(4) provides that an attorney "shall" lose his accreditation for "Presenting to VA a frivolous claim . . ." We suggest that the presenting of a frivolous claim should be "knowing" in order to result in the loss of accreditation. Such a requirement would draw the standard closer to Rule 3.1 of the Model Rules ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."). This approach would also retain the standard contained in the analogous current rule, which provides for the loss of accreditation if a representative participated in "[K]nowingly presenting or prosecuting a fraudulent claim".

We thank you again for the opportunity to be heard and remain available to provide further information and advice if necessary.

Very truly yours,


Michael J. Mernin
Chair

³ In that regard, we respectfully refer you to the separate comments submitted by our sister organization, the City Bar Justice Center, addressing in depth the Association's views on these Proposed Rules with respect to their impact on *pro bono* representation