

To: Dan Troy, Chair
Kim Knight, Director
Section on Administrative Law and Regulatory Practice

From: Ken Goldsmith, Legislative Counsel, ABA Governmental Affairs

Date: February 6, 2007

Re: Veterans Choice in Representation; 109th & 110th Congress

I look forward to providing the members of the Section Council with a brief presentation on the Veterans Choice Act at your Midyear meeting. I wanted to provide you with a written report to supplement my comments and provide additional background for those interested. Should you or others have any questions, please do not hesitate to call on me. (202) 662-1789.

Veterans Choice and the ABA Position

The American Bar Association supports full repeal of an historic prohibition on veterans' ability to compensate a lawyer for representing them in the assistance in pursuit of their due benefits. I am pleased to report that on December 8, 2006, under expedited consideration, both the House and Senate approved S. 3421, which partly repeals this restriction on lawyer compensation. (P.L. 109-461). The law becomes effective 180 days after enactment and requires the Secretary for Veterans Affairs to promulgate rules and regulations guiding its implementation.

This new, historic law represents a hybrid between two distinct approaches in the leading bills of the 109th Congress -- H.R. 4914 and S.2694, or so-called "Veterans Choice" legislation. As proposed in H.R. 4914, the new law allows veterans to hire an attorney but only starting from the filing of a Notice of Disagreement (N.O.D.) following an adverse ruling at the local level. Similar to the proposal in S. 2694, the law grants, among other things, special powers to Secretary over who may appear before the Board of Veterans Appeals (suggesting it should be consistent with the ABA Model Rules of Professional Conduct), and over the reasonability of fees charged to veterans (20% contingency fee is presumptively reasonable). It also authorizes the Department to collect a contingency fee based on how much the agent collects, not to exceed \$100. Finally, the law includes a requirement that the Secretary report back to Congress in three and a half years on the effect the law has had on the successful administration of veterans' cases.

Current Status and Effort at Repeal

I had looked to the Midyear meeting as a time to speak with interested ABA entities to address the significant steps to come determining training and education requirements for lawyers interested in developing a committed practice with veterans' cases. These are specialized cases and not generally appropriate for the rank and file general practice lawyer. Accordingly, we had talked about the possibility of forming a roundtable, including veterans service organizations who had opposed the bill, and representation from the Veterans Administration. Among other things, it could work with the Secretary during the necessary rulemaking process for implementing the new law.

However, even as we began early conversations over the ABA's role, we learned that groups that had opposed the legislation, namely the Disabled American Veterans and the Veterans of Foreign Wars, had succeeded in securing a deal from a Democratic Senator to place a hold on a larger package of veterans benefits, and would release it only upon agreement by the then Senate Veterans Committee Chair to promptly introduce legislation in the 110th Congress to repeal Veterans Choice. That effort is ongoing, although not yet introduced as originally planned. Groups who oppose the legislation cite, among other things, that the process is historically non-adversarial, that lawyers would only complicate an already backlogged system, that veterans would soon believe they needed legal representation when that is not the case, and that less-competent lawyers would unduly take an unfair percentage of veterans benefit checks. The ABA believes our efforts around, for example, Social Security demonstrate that lawyers can greatly assist government in reducing backlog and streamlining the process. We also believe that the complexity of medical cases particularly since Viet Nam, combined with an adverse ruling at the local level, tend to make the process adversarial for the veteran whose claim is denied. And of course, we know that the bar is committed to serving our veterans, not "contingency fees," and would work with government to strengthen the training and experience of all lawyers who would take such cases.

What Can Be Done

Among other things, our message to Congress has included mention of the wealth that the lawyers, judges and academicians of the Administrative Law and Regulatory Practice Section can bring to the table, if the law were passed. While efforts to repeal the law are underway, it is still important that the ABA be prepared to take a role in supporting the implementation and administration of the new law, and consideration of the responsibilities for the bar to ensure its success. One way to do this might include joining with the Judicial Division, the Standing Committee on Legal Assistance for Military Personnel, the Commission on Law and Aging, and other concerned groups, to consider the tasks before the Secretary.

I welcome your and the Section's assistance in both implementation of the new law and in opposing its premature repeal. 202-662-1789 or goldsmithk@staff.abanet.org.

(P.L. 109-461)

TITLE I--ATTORNEY REPRESENTATION MATTERS

SEC. 101. AGENT OR ATTORNEY REPRESENTATION IN VETERANS BENEFITS CASES BEFORE THE DEPARTMENT OF VETERANS AFFAIRS.

(a) Qualifications and Standards of Conduct for Individuals Recognized as Agents or Attorneys-

(1) ADDITIONAL QUALIFICATIONS AND STANDARDS FOR AGENTS AND ATTORNEYS GENERALLY- Subsection (a) of section 5904 is amended--

(A) by inserting 'Recognition- (1)' after '(a)';

(B) by striking 'The Secretary may recognize' and inserting 'Except as provided in paragraph (4), the Secretary may recognize';

(C) by striking the second sentence; and

(D) by adding at the end the following new paragraphs:

(2) The Secretary shall prescribe in regulations (consistent with the Model Rules of Professional Conduct of the American Bar Association) qualifications and standards of conduct for individuals recognized under this section, including a requirement that, as a condition of being so recognized, an individual must--

(A) show that such individual is of good moral character and in good repute, is qualified to render claimants valuable service, and is otherwise competent to assist claimants in presenting claims;

(B) have such level of experience or specialized training as the Secretary shall specify; and

(C) certify to the Secretary that the individual has satisfied any qualifications and standards prescribed by the Secretary under this section.

(3) The Secretary shall prescribe in regulations requirements that each agent or attorney recognized under this section provide annually to the Secretary information about any court, bar, or Federal or State agency to which such agent or attorney is admitted to practice or otherwise authorized to appear, any relevant identification number or numbers, and a certification by such agent or attorney that such agent or attorney is in good standing in every jurisdiction where the agent or attorney is admitted to practice or otherwise authorized to appear.

(4) The Secretary may not recognize an individual as an agent or attorney under paragraph (1) if such individual has been suspended or disbarred by any court, bar, or Federal or State agency to which the

individual was previously admitted to practice and has not been subsequently reinstated.

` (5) The Secretary may prescribe in regulations reasonable restrictions on the amount of fees that an agent or attorney may charge a claimant for services rendered in the preparation, presentation, and prosecution of a claim before the Department. A fee that does not exceed 20 percent of the past due amount of benefits awarded on a claim shall be presumed to be reasonable.

` (6)(A) The Secretary may charge and collect an assessment from an individual recognized as an agent or attorney under this section in any case in which the Secretary pays to the agent or attorney, from past-due benefits owed to a claimant represented by the agent or attorney, an amount as a fee in accordance with a fee arrangement between the claimant and the agent or attorney.

` (B) The amount of an assessment under subparagraph (A) shall be equal to five percent of the amount of the fee required to be paid to the agent or attorney, except that the amount of such an assessment may not exceed \$100.

` (C) The Secretary may collect an assessment under subparagraph (A) by offsetting the amount of the fee otherwise required to be paid to the agent or attorney from the past-due benefits owed to the claimant represented by the agent or attorney.

` (D) An agent or attorney who is charged an assessment under subparagraph (A) may not, directly or indirectly, request, receive, or obtain reimbursement for such assessment from the claimant represented by the agent or attorney.

` (E) Amounts collected under this paragraph shall be deposited in the account available for administrative expenses for veterans' benefits programs. Amounts so deposited shall be merged with amounts in such account and shall be available for the same purpose, and subject to the same conditions and limitations, as amounts otherwise in such account.'

(2) SUSPENSION OF RECOGNIZED REPRESENTATIVES OF VETERANS SERVICE ORGANIZATIONS- Section 5902(b) is amended--

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively;

(B) by inserting `(1)' after `(b)'; and

(C) by adding at the end the following new paragraph:

` (2) An individual recognized under this section shall be subject to the provisions of section 5904(b) of this title on the same basis as an individual recognized under section 5904(a) of this title.'

(3) SUSPENSION OF INDIVIDUALS RECOGNIZED FOR PARTICULAR CLAIMS- Section 5903 is amended--

(A) by inserting ` (a) In General- ' before ` The Secretary';
and

(B) by adding at the end the following new subsection:

` (b) Suspension- An individual recognized under this section shall be subject to the provisions of section 5904(b) of this title on the same basis as an individual recognized under section 5904(a) of this title.'.

(b) Additional Bases for Suspension of Individuals- Subsection (b) of section 5904 is amended--

(1) by inserting ` Suspension of Agents and Attorneys- ' after ` (b)';

(2) in paragraph (4), by striking ` or' at the end;

(3) in paragraph (5), by striking the period and inserting a semicolon; and

(4) by adding at the end the following new paragraphs:

` (6) has presented to the Secretary a frivolous claim, issue, or argument, involving conduct inconsistent with ethical standards for the practice of law;

` (7) has been suspended or disbarred by any court or bar to which such agent or attorney was previously admitted to practice, or has been disqualified from participating in or appearing before any Federal agency, and has not been subsequently reinstated;

` (8) has charged excessive or unreasonable fees, as determined by the Secretary in accordance with subsection (c)(3)(A); or

` (9) has failed to comply with any other condition specified in regulations prescribed by the Secretary for purposes of this subsection.'.

(c) Modification of Date for Commencement of Services Subject to Fees-

(1) MODIFICATION- Effective as provided in subsection (h), paragraph (1) of subsection (c) of such section is amended--

(A) by striking ` the Board of Veterans' Appeals first makes a final decision in' and inserting ` a notice of disagreement is filed with respect to';

(B) by striking the second sentence; and

(C) in the third sentence, by inserting ` fees charged, allowed, or paid for' before ` services provided'.

(2) REPORT- Not later than 42 months after the date of the enactment of this Act, the Secretary of Veterans Affairs shall submit to Congress a report that sets forth an assessment of the effects of allowing agents and attorneys recognized under section 5904 of title 38, United States Code, to charge a fee to a claimant for services rendered in the preparation, presentation, and prosecution of a claim before the Department of Veterans

Affairs after a notice of disagreement has been filed. Such report shall include the recommendations of the Secretary with respect to agent and attorney representation.

(d) Modification of Requirements To File Attorney Fee Agreements- Effective as provided in subsection (h), paragraph (2) of subsection (c) of such section is amended--

(1) by striking ` after the Board first makes a final decision in the case' and inserting ` after a notice of disagreement is filed with respect to the case';

(2) by striking ` with the Board at such time as may be specified by the Board' and inserting ` with the Secretary pursuant to regulations prescribed by the Secretary'; and

(3) by striking the second and third sentences.

(e) Attorney Fees- Subsection (c) of such section is further amended--

(1) in paragraph (1), by striking ` paragraph (3)' and inserting ` paragraph (4)'; and

(2) by redesignating paragraph (3) as paragraph (4);

(3) by inserting after paragraph (2) the following new paragraph (3):

` (3)(A) The Secretary may, upon the Secretary's own motion or at the request of the claimant, review a fee agreement filed pursuant to paragraph (2) and may order a reduction in the fee called for in the agreement if the Secretary finds that the fee is excessive or unreasonable.

` (B) A finding or order of the Secretary under subparagraph (A) may be reviewed by the Board of Veterans' Appeals under section 7104 of this title.

` (C) If the Secretary under subsection (b) suspends or excludes from further practice before the Department any agent or attorney who collects or receives a fee in excess of the amount authorized under this section, the suspension shall continue until the agent or attorney makes full restitution to each claimant from whom the agent or attorney collected or received an excessive fee. If the agent or attorney makes such restitution, the Secretary may reinstate such agent or attorney under such rules as the Secretary may prescribe.'.

(f) Technical and Conforming Amendments- Subsection (d) of such section is amended--

(1) by inserting ` Payment of Fees Out of Past-Due Benefits- ' after ` (d)';

(2) by inserting ` agent or' before ` attorney' each place it appears;

(3) in paragraph (1), by striking ` of this subsection' after ` paragraph (2)';

(4) in paragraph (2)(B), by striking ` of this paragraph' after ` subparagraph (A)'; and

(5) in paragraph (3)--

(A) by striking ` attorneys' fee' and inserting ` fee to an agent or attorney'; and

(B) by striking ` of this subsection' after ` paragraph (1)'.

(g) Repeal of Penalty for Certain Acts- Section 5905 is amended by striking ` (1)' and all that follows through ` (2)'.

(h) Effective Date- The amendments made by subsections (c)(1) and (d) shall take effect on the date that is 180 days after the date of the enactment of this Act and shall apply with respect to services of agents and attorneys that are provided with respect to cases in which notices of disagreement are filed on or after that date.

(i) Limitation on Collection of Fee Assessment- No assessments on fees may be collected under paragraph (6) of section 5904(a) of title 38, United States Code (as added by subsection (a)(1)(D) of this section), until the date on which the Secretary of Veterans Affairs prescribes the regulations required by the amendments made by this section.

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