FULFILLING OUR PROMISES
TO THE MEN AND WOMEN WHO SERVED

NONPROFIT ADVISOR

For DAV Departments and Chapters

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VETERANS BEWARE: AVOIDING PITFALLS OF ATTORNEY/AGENT FEE AGREEMENTS

"It is not the intent of Congress that these mercenary [attorney] leeches should sap the blood of any financial benefit from the Government by putting up these false claims and establishing their right to this 10 per cent commission for doing nothing, and doing what the Government itself intends to do in every individual case."

The above quotation is from the *Congressional Record* in 1918 and is part of a discussion of the issue of lawyers representing veterans in benefit claims. For a significant part of our Nation's history, Congress has discouraged attorney/agent representation of VA claimants because of reports of predatory practices. For more than a century, Congress addressed this concern by making it a federal crime (punishable by two years hard labor) to charge more than $10 to represent a veteran-claimant.

The advent of the Veterans' Judicial Review Act in 1988 dramatically changed the landscape for attorneys, providing for judicial review of Board of Veterans' Appeals (BVA) decisions and creating the US Court of Appeals for Veterans Claims (CAVC). The Veterans Benefits, Health Care, and Information Technology Act of 2006 granted permission to attorneys/agents to charge a "reasonable" fee for representation before a regional office and BVA after the filing of a notice of disagreement (NOD) on or after June 20, 2007.

Veterans are nearly always better off with DAV representation in VA and BVA proceedings. There may be rare occasions where a veteran is wise to hire an attorney at VA. This most typically would be in unusual remand cases where outside experts are needed. Most reputable attorneys will "upfront" the cost of these services. While the overwhelming majority of attorneys representing VA claimants are honest and veteran-friendly, the sophisticated claimant should still proceed with great care before executing a fee agreement. Below are some red flags and items to notice and/or remember.

Except as indicated, the following warnings need not be heeded when dealing with DAV (representation always free) or with the select group of law firms involved in DAV's CAVC and supplemental claims programs. You can be sure you are dealing with a DAV- approved law firm ONLY if you receive a referral letter directly from DAV naming the recommended firm.

Beware of executing a fee agreement before a decision on an initial claim. As referenced above, an attorney/agent may not charge a fee to file an initial claim on behalf of a veteran. Fees are permissible only after an adverse decision on an initial claim. As such – and we hate to say this – one has to wonder whether some attorneys who file initial claims are actually hoping for a denial, so they can start getting paid**.**

Beware of the "consultation" fee. A questionable opinion of the VA General Counsel permits attorneys to charge for consultations on claims BEFORE an initial filing is made.

DAV believes that this opinion is misguided and inconsistent with the spirit of governing law. DAV always offers pre-filing consultations for free. Take advantage!

Beware of excessive fees for representation before the VA. Fees charged for representation "may be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases." 38 C.F.R. § 14.636(e). However, in practice, charging a percentage of past-due benefits is the norm in fee agreements for representation before the VA. Further, a fee of 20 percent in past-due benefits is presumed reasonable by the VA. A fee higher than 30% is at least a reason to ask questions.

Beware of responsibility for expenses. The fee agreement should also address reimbursement for expenses. Examples of expenses include, but not limited to, cost of traveling to attend a hearing, cost of copies of medical records, and the cost of obtaining an expert opinion. Fee agreements may allow for reimbursement of expenses, but we recommend that the payback be limited to cases in which the retroactive benefits exceed the amount of expenses. If an attorney requires a veteran to pay expenses regardless of the outcome of the case, the veteran should find another attorney.

Beware of fee agreements that provide for both CAVC/VA representation. When a veteran hires an attorney/agent to represent him or her at the CAVC, a veteran should avoid entering into a fee agreement that covers representation before the CAVC and VA in the event the veteran receives a remand. Instead, the fee agreement should be limited to representation before the CAVC and to the recovery of EAJA fees. The veteran should then reevaluate whether he or she wants to continue with representation of the attorney/agent before the VA after the CAVC issues a decision remanding the case.

A final note. In instances where a veteran is initially represented at VA by an attorney/agent for a fee and switches to DAV, and thereafter is granted an award of benefits, the attorney/agent may still be entitled to recover the amount outlined in the fee agreement or a portion of the fee. This is only fair, depending on the amount of work the attorney has done. You certainly never NEED to hire an attorney for VA proceedings, but if you do, you should expect that the attorney *will* get paid (if you win). This is true even if you choose to hire one of DAV's carefully selected firms to represent you at VA.

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