



## Tips on Fee Agreements for Veterans Claims

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**1. Don't charge a fee too early.** An attorney or a claims agent may never charge a claimant or receive a fee or a gift from a claimant for assistance with preparing and filing an initial VA benefits claim. 38 U.S.C. 5904(c)(1) (“[A] fee may not be charged, allowed, or paid for services of agents and attorneys . . . provided before the date on which a claimant is provided notice of [VA]’s initial decision . . . with respect to the case.”). Charging a fee or accepting a gift on an initial claim—including charging for assistance with gathering necessary documents and filling out forms—is a violation of the VA Standards of Conduct, 38 C.F.R. § 14.632(c)(5) and (6), and grounds for cancellation of VA accreditation. But, once a claimant receives an initial decision on a claim or claims, an attorney or a claims agent may charge a fee for assisting a claimant in seeking review of those claims. 38 C.F.R. § 14.636(c).

**2. Ensure your fee is reasonable.** A fee for representation on a veteran’s benefits claims must be reasonable at all times. 38 C.F.R. § 14.636(e) (“[f]ees permitted for services of an agent or attorney admitted to practice before VA must be reasonable”). Pursuant to VA’s standards of conduct for accredited individuals, it is a VA-accredited attorney or agent’s responsibility to ensure that he or she does not “enter into an agreement for, charge, solicit, or receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation.” 38 C.F.R. § 14.632(c)(5). It is important to remember that in most instances the onus is on the attorney or the claims agent to assess whether the fee is reasonable.

When an attorney or claims agent has a contingency fee agreement that does not exceed 20-percent and provides continuous representation from the date of the agreement through the date of the decision awarding benefits, the fee called for in the fee agreement is presumed to be reasonable in the absence of clear and convincing evidence to the contrary. 38 U.S.C. § 5904(a)(5); 38 C.F.R. § 14.636(f); *see also Scates v. Principi*, 282 F.3d 1362, 1365 (Fed. Cir. 2002) (explaining that even if a fee agreement provides for a fee of 20 percent of past-due benefits awarded, implicit in that arrangement is the understanding that the attorney or agent’s right to receive the full 20-percent fee only arises if the attorney or agent continues as the veteran’s representative until the case is successfully completed). In contrast, an attorney or agent with a 20-percent contingency fee agreement whose representation of the claimant ends before the case is completed, may still be eligible for a fee, but the full amount of the fee stated in the agreement generally would not represent a reasonable fee for that attorney or agent. Rather a reasonable fee for a discharged agent or attorney would be limited to the amount of the “fee that fairly and accurately reflects [the attorney or agent’s] contribution to and responsibility for the benefits awarded.” *Scates*, 282 F.3d at 1366.

**3. Choose your fee payment arrangement wisely.** Two different types of fee payment arrangements are permitted on VA benefits claims. The parties may choose either, but not both. Most fee agreements filed with VA are direct-payment fee agreements, under which the claimant and the attorney or claims agent agree that the fee is to be paid to the agent or attorney by VA directly from any past-due benefits awarded to the claimant. In these types of arrangements, the total fee may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim and the fee must be entirely contingent on the claimant receiving a favorable result on the claim. 38 C.F.R. § 14.636(h).

With the other type of fee arrangement, commonly referred to as a non-direct payment fee arrangement, the attorney or claims agent is responsible for collecting any fees for representation from the claimant without assistance from VA. Under this type of arrangement an attorney may charge reasonable fees based on a fixed fee, an hourly rate, a percentage of benefits recovered, or a combination of such bases. While there is not an absolute cap on the amount of fees that may be charged under these arrangements, if the fee charged

exceeds 33 1/3 percent of past-due benefits awarded, the attorney or agent must provide VA with clear and convincing evidence that such a fee is reasonable before receiving payment.

**4. Mixed-type fee agreements and the direct payment of fees, don't mix.** Fees 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). But, in order to receive direct payment of a fee by VA, the fee must be wholly contingent on favorable resolution of the claim. 38 C.F.R. § 14.636(h)(1)(ii). VA will not provide direct payment for any fee agreements that mixes a contingent fee with a fixed or hourly rate. Moreover, if an attorney or claims agent were to receive a direct payment fee of 20 percent in addition to another fee, that individual would be in violation of 38 C.F.R. § 14.632(c)(5) and could potentially risk losing his or her VA-accreditation.

**5. Make sure that your fee agreement is clear.** Any ambiguity in a written fee agreement will be resolved against the lawyer. *Beatty v. NP Corp.*, 581 N.E.2d 1311, 1315 (Mass. App. Ct. 1991).

**6. Know what to include and not to include in your fee agreement.** It is not proper for a fee agreement to purport to restrict VA from contacting a veteran. A fee agreement is between a client and attorney or claims agent; it does not bind VA and cannot restrict VA from contacting a veteran. *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."). Please make sure that you are using the fee agreement for its intended purpose. In addition, a fee agreement should never purport to eliminate a claimant's right to terminate the attorney-client relationship or dispute a fee. Veterans have a *legal right* to terminate an attorney at any time and to dispute an attorney's eligibility to a fee or question the reasonableness of a fee. See 38 C.F.R. §§ 14.631(f)(1) ("A power of attorney may be revoked at any time, and an agent or attorney may be discharged at any time); 14.636(i) ("[T]he Office of the General Counsel may review a fee agreement . . . upon its own motion or the claimant or appellant."). Finally, with regard to termination clauses in contingent fee agreements specifically, a contingent fee agreement that penalizes the client for discharging the lawyer is impermissible. See, e.g., *Guy Bennett Rubin PA v. Guettler*, 73 So. 3d 809 (Fla. Dist. Ct. App. 2011) (finding a termination clause in contingent-fee contract requiring client to pay hourly rate for work done before discharge chills client's right to switch lawyers or to abandon case); *In re Lansky*, 678 N.E.2d 1114 (Ind. 1997) (finding an agreement guaranteeing a lawyer 40 percent of the client's gross recovery if the lawyer is discharged before the resolution of case to be unreasonable); *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006) (finding a retainer provision that entitles an attorney to the full value of a contingent fee if the attorney is discharged before the contingency occurs violates public policy and is unenforceable); Va. Ethics Op. 1812 (2005) (determining it to be impermissible to include a provision stating that if client terminates agreement, "reasonable value of Attorney's services shall be valued at \$200 per hour," or alternative provision that lawyer may, "where permitted by law, elect compensation based on the agreed contingent fee for any settlement offer made to Client prior to termination").

**7. Explain the scope of your representation and any limitations.** Sometimes an attorney's or claim agent's representation of a claimant is limited in the scope of representation to a specific claim on appeal, or to a particular stage of the adjudicatory process (e.g., an attorney may limit representation of the claimant only before the Court of Appeals for Veterans Claims). An attorney or agent may limit the scope of engagement, but the limitation must be reasonable under the circumstances and the claimant should consent to the limited scope. See 38 C.F.R. § 14.632(c)(9) (an attorney or agent shall not engage in acts or behavior prejudicial to the fair and orderly conduct of administrative proceedings before VA); MRPR, 1.2(c). For the attorney and agent's protection, it is best to memorialize the limitations and consent in writing. See *Wong v.*

Michael Kennedy, P.C., 853 F. Supp. 73, 80 (E.D.N.Y. 1994) (explaining that an attorney who drafts a fee agreement stands in a fiduciary relationship to the client and has the burden of showing that the agreement is fair, reasonable, and fully understood by the client). Remember that on the VA Form 21-22a, Appointment of Individual as Claimant's Representative, Item 23 allows an attorney or agent to list any limitations on representation.

**8. Beware of making mid-representation changes to the fee agreement.** Attorneys face additional scrutiny when they change fee arrangements mid-representation. Having assumed representation of the client, the lawyer now owes fiduciary duties to his or her client. Courts and regulators are often concerned that a lawyer may take advantage of a vulnerable client. Therefore, particularly if the lawyer receives a larger fee under the new arrangement, the lawyer may face disciplinary charges or invalidation of the new fee arrangement.

The American Bar Association, Model Rule 1.8(a) as well as the rules of most States provide that a lawyer shall not enter into a business transaction with a client unless: (1) the transaction is objectively fair and reasonable; (2) fully disclosed in writing and in terms that are understandable to the client; and (3) the client is provided an opportunity to have the transaction reviewed by outside counsel and agrees to the transaction in writing. MODEL RULES OF PROF'L CONDUCT (MPRC) r. 1.8(a) (AM. BAR ASS'N 1983). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 (2000) (showing the protections in MRPC Rule 1.8 are consistent with the common law governing the attorney-client relationship); RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006) (showing that the protections are also consistent with the law of agency). Although this particular rule would not generally apply to an ordinary fee agreement between an attorney and a client, States have applied it to situations in which the attorney modifies an existing fee agreement during the course of representation to tip the scale in the attorney's favor. *See e.g., In re Corcella*, 994 N.E.2d 1127 (Ind. 2013) (lawyer switched fee type from an hourly rate to a contingency fee without complying with Indiana Professional Conduct Rule 1.8(a)); *In re Curry*, 16 So. 3d 1139 (La. 2009) (revising a fee agreement to more favorable terms for the attorney violated Louisiana Rules of Professional Conduct 1.8(a)). To avoid such problems, if an attorney or agent must change their fee arrangement mid-representation, he or she ensure that the new arrangement is fair to the client, inform the client of the new agreement in writing, and recommend that the client seek independent counsel on the fee agreement and provide the client an opportunity to do so.

**9. Know where to file your fee agreement.** Fee agreements should be filed with VA in only one location—that location is determined by whether the fee agreement calls for VA to directly pay the attorney fees from the claimant's award of past-due benefits. A direct-payment fee agreement must be filed with the Veteran Benefits Administration at the Evidence Intake Center within 30 days of its execution. In contrast, a non-direct payment fee agreement must be filed with OGC within 30 days of its execution.

**10. Provide competent, diligent representation.** A contract providing for the direct payment of fees from the claimant's past-due benefits could be perceived as creating a perverse incentive for attorneys and claims agents to provide subpar representation—effectively encouraging attorney and agents to try to provide the least amount of representation as they can and still collect fees, if past-due benefits are awarded to the claimant. However, under 38 C.F.R. § 14.632(b)(1), attorneys and claims agents are required to provide competent representation before VA. Competent representation requires the knowledge, skill, thoroughness, and preparation necessary for the representation. Competent representation also requires the attorney and claims agent to know and understand the issues of fact as well as the law. Section 14.632(b)(2) requires an attorney and a claims agent to act with reasonable diligence and promptness in representing claimants. This means promptly responding to VA's requests for information as well as returning your client's phone calls and emails. Accordingly, it is wise to make sure that you do not spread yourself too thin when handling veterans

claims so you can ensure that each of your clients is receiving the competent and diligent representation that is required by VA's standards of conduct.

**11. Communication is key.** We recommend that at the onset of representation that you discuss with the claimant how you will communicate about the claim and how often. One of the biggest complaints that claimants have in challenging the reasonableness of a fee is that they were unable to reach their attorney or agent and were not provided regular updates on their claim.

**12. Document your work and record your time, it may be helpful later.** The best time to document your work is when you are doing it. Even if you typically work for a contingency fee, having a record of the work you completed and the time you spent on a case may come in handy if there is a dispute over your fee.

**13. Do not rely on OGC to review your fee for reasonableness.** VA's Office of General Counsel does not review every fee for reasonableness, and simply because you were determined eligible for a fee does not mean you should accept or keep the funds dispersed to you. Pursuant to VA's standards of conduct for accredited individuals, it is a VA-accredited attorney or agent's responsibility to ensure that he or she does not "receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation." 38 C.F.R. § 14.632(c)(5). It is important to remember that in the majority of VA claims, just like in many other areas of the law, the onus is primarily on the attorney or the claims agent to assess whether the fee is reasonable.

The only time that OGC always reviews a fee for reasonableness is when more than one attorney or agent is involved in a case, and the fee agreements call for the direct-payment of fees to be made by VA from the claimant's past-due benefits. When a claimant retains more than one attorney or agent through a direct payment fee agreement during the course of the case, the total amount of the funds that VA can direct to the attorneys and agents collectively under 38 U.S.C. § 5904(d) is capped at 20 percent of the claimant's past-due benefits awarded. *Scates*, 282 F.3d at 1365-66. Thus, VA is unable to disperse the withheld funds based on an attorney or agent's eligibility for the direct-payment of fees alone. See 38 C.F.R. § 14.636(c), (g)-(h). In order to effectuate payment, OGC, on its own motion, exercises its authority to review the fees to determine the reasonable share to be issued to each attorney and/or agent.

**14. Waiving fees may be the right thing to do.** Generally, it is your responsibility to waive your right to fees if you did no work, or an insignificant amount of work, that contributed to the Claimant's award. See 38 C.F.R. § 14.632(c)(5); see also, e.g., *In re Cleaver-Bascombe*, 892 A.2d 396 (D.C. 2006) (explaining that it is by definition "unreasonable" to charge for work that was not done); *In re Powell*, 953 N.E.2d 1060 (Ind. 2011) (explaining that terms of a contingent fee agreement may have been reasonable at outset, but because the matter quickly resolved, the lawyer should have realized that his fee had become unreasonable); *In re Sinnott*, 845 A.2d 373 (Vt. 2004) (holding that it was unreasonable for a lawyer to charge a client for negotiations that the client ended up doing herself). To waive entitlement to the fee called for in your fee agreement with the claimant, please submit a written response indicating that you have elected to do so to the regional office and the Office of General Counsel.

**15. If a matter is with OGC for the review of the reasonableness of a fee, settlement may be an option.** VA encourages the informal resolution of fee matters. In our experience, attorneys, agents, and claimants, have been able to settle these matters in a fair and timely manner. Accordingly, we encourage attorney and

agents to consider the applicable law and communicate with the other parties—whether it be with the claimant, another agent or attorney, or both—regarding the possibility of proposing a settlement agreement.

If you were the only attorney or agent of record, you should advise the claimant, in writing, to seek independent advice and counsel prior to reaching an agreement. Under ABA Model Rule 1.8(h)(2), “[a] lawyer shall not . . . settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.” In Comment 15 to Model Rule 1.8(h)(2), the ABA states that “[a]greements settling a claim or a potential claim for malpractice are not prohibited by this Rule” but, “in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement.” Additionally, the attorney must “give the client or former client a reasonable opportunity to find and consult independent counsel.” *Id.* The failure of an attorney to properly advise a client to seek independent advice in such matters may subject the attorney to bar discipline. See, e.g., *Kentucky Bar Ass’n v. Keating*, 405 S.W.3d 462, 464 (Ky. 2013) (accepting board of governors 18-month suspension recommendation for attorney who settled a potential malpractice claim “without advising [the client] in writing of the desirability of seeking, and giving her a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith”); *Attorney Grievance Comm’n of Maryland v. Butler*, 44 A.3d 1022, 1030 (Md. 2012) (affirming 60-day suspension of attorney who “plainly limited his liability for his mismanagement” of a case without presenting evidence that he “advised the clients to seek independent counsel”).

If there is more than one attorney or agent of record, you and the other eligible attorney or agent should submit a written response to our office, indicating that you are proposing that this matter be resolved through agreement by the representatives, and attach the signed agreement. The consent of the claimant may be necessary depending on your state rules of professional conduct and the situation at hand. Your response should include all pertinent details concerning the terms of the proposed settlement agreement, such as an explanation as to the portion of the fees that should be paid to each representative and, if appropriate, the Claimant. Upon receipt of the settlement agreement, OGC may opt to withdraw this motion to review the fee matter and instruct that fees be paid in accordance with the terms of the settlement agreement. A settlement agreement that does not secure the consent of the claimant would not preclude the claimant from filing, or OGC from acting upon, a motion from the claimant requesting a review of the reasonableness of the fees pursuant to section 14.636(i)(1) within the regulatory time period.

**16. Think, before accepting a big fee.** Before you celebrate over a windfall of fees coming your way, you should first pause and consider whether the fee is reasonable, from both your perspective and the claimant’s perspective. It is important to be aware of the consequences an attorney or agent may face for accepting an unreasonable fee. The reasonableness review process under 38 C.F.R. § 14.636(i) can lead to the suspension or cancellation of accreditation under 38 C.F.R. § 14.633(c)(6), which specifically refers to “[c]harging excessive or unreasonable fees for representation as determined by VA.” However, equally important, outside of the reasonableness review process, violation of the standard of conduct at 38 C.F.R. § 14.632(c)(5)—providing that an attorney shall not “enter into an agreement for, charge, solicit, or receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation”—could lead to the suspension or cancellation of accreditation under 38 C.F.R. § 14.633(c)(1), which specifically refers to “[v]iolation of or refusal to comply with the laws administered by VA or with the regulations governing practice before VA including the standards of conduct in § 14.632.” The bottom line is that you should never accept a fee that is not reasonable.