Frivolous Claims
FRIVOLOUS CLAIMS

• Regulations governing behavior and accreditation of agents, attorneys, and service representatives (or service officers) -- quite possibly VA has created another “nice mess”

The Regulations

- **38 C.F.R. § 14.632 (b)(1)** - defines “competent representation”
  - knowledge, skill, thoroughness and preparation necessary for representation
  - Includes:
    - Understanding relevant issues of fact,
    - Understanding relevant issues of law,
    - Understanding title 38 USC
    - Understanding 38 C.F.R.

- **38 C.F.R. § 14.633(c) (4)** - knowingly submitting frivolous claim, issue, or argument is grounds for suspension from practice before VA
  - first time advocates have to deal with this type of rule
Frivolous Claims: VA Supplementary Information to Final Regulation

Frivolous defined

- Claim, issue, or argument is frivolous if the representative is unable to make a good faith argument on -
  - The merits of the position taken; or
  - Support the position with a good faith argument for extension, modification, or reversal of existing law
Frivolous Claims: Objection #1

Because vets entitled to representation, VSO policy is to present all claims for processing, even if no evidence supports grant.

- VA response – there is no right to representation for a frivolous claims

- Senate Committee on Vet Affairs recognized the adverse impact of frivolous claims filed by VSOs—could delay valid claims
Could representative be held responsible for claims/arguments submitted by claimants directly to VA (without knowledge of representative)?
Frivolous Claims: Objection #3

- Definition of “frivolous” doesn’t define “good faith argument”
- Comment 2 to Model Rule 3.1 - filing claim when all facts not known or evidence not fully developed frivolous?
  - Filing not frivolous merely because facts not fully substantiated or because lawyer expects to develop vital evidence
  - Lawyers--inform themselves about facts and law and determine good faith argument possible
  - Action not frivolous even though lawyer believes client ultimately will not win
  - Frivolous if lawyer unable either to make a good faith argument on the merits of the action or support action taken by a good faith argument for an extension, modification or reversal of existing law.
Frivolous Claims: Objection #3

- Definition of “frivolous,” cont’d

  - *Abbs v. Principi*, 237 F.3d 1342, 1345 (Fed. Cir. 2001), defined as arguments “that are beyond the reasonable contemplation of fair-minded people.”

  - *Abbs*—action is frivolous when representative “has significantly misrepresented the law or facts, or has abused the judicial process by repeatedly litigating the same issue in the same court.” *Abbs*, 237 F.3d at 1345.
Frivolous Claims

- The VA stated

  • “Like agents and attorneys, VSO representatives must inform themselves about the facts of each case and the applicable law, and before providing further representation, determine whether they can make a good faith argument in support of a claim.”
Frivolous Claims


- If good faith argument can’t be made, withdraw from representative or assume the risk of VA suspension.

- Can claim/argument shift from non-frivolous to frivolous?

- Tension between need to file claim to gain earliest possible effective date and need to determine whether claim, issue, or argument frivolous.
Competence

- Regulations seem to require VSOs take reasonable precautions so service officers won’t have to deal with more claims than can be properly handled

- County, state and national service organizations may have to reject some claims, not because frivolous, but because VSO does not have the advocates available to provide proper representation

- Some VSOs will have to choose between hiring more service officers or limiting # of claims assigned to representative
Examples of Frivolous Claims – Argument Determinations

- Appeal that is frivolous as filed is frivolous as argued, since any arguments made in support of it are, by definition, frivolous. *Constant v. United States*, 929 F.2d 654, 658 (Fed. Cir. 1991).

- Fact that appeal is without merit doesn’t mean appeal necessarily frivolous. *See Romala Corp. v. United States*, 927 F.2d 1219, 1224 (Fed. Cir. 1991).
Examples of Frivolous Claims – Argument Determinations

- Examples of actions deemed sanctionable include:
  - relitigating issues already finally adjudicated
  - failing to explain how the trial court erred or to present cogent or clear arguments for reversal
  - failing to cite authority & ignoring opponent's contrary cited authority, citing irrelevant or inapplicable authority
  - misrepresenting facts or law to court

© NVLSP 2014
Issues Facing Service Officers

- 3 main types of service officers (VSOs):
  - VSOs located outside of the regional offices (ROs)
  - VSOs located in the ROs
  - VSO located at the AMC or BVA
Advocates Located Outside of RO

Claimants filing claims and communicating with VA without the knowledge of their representative

- Can we withdraw if claimant communicates with VA without our knowing?

- If not – then how do we protect ourselves?
Advocates Located Outside of RO

➢ Workload tensions

- Reject claims because too much work?
- If yes – what process?

➢ Reopened claims

- Need to review file before attempt to reopen?
- Stricter standard of review for reopened claims?
Advocates Located in the RO

- Can a claim that is non-frivolous become frivolous
  - After development?
  - After a negative medical opinion?
  - After I cannot think of a good faith argument?
Advocates Located in the RO

What are frivolous arguments in VA disability benefits claims?

- Only negative evidence on one claim element?
- Claimant does not have basic eligibility?
- Previously rejected evidence?
- Advocate cites irrelevant statutes and regs?
- Advocate misleads the RO about facts?
- Advocate makes erroneous factual conclusions?
Regulations provide definitions of the following terms:

- Accreditation;
- Agency of Original Jurisdiction;
- Attorney;
- Benefit;
- Claim;
- Recognition;
- Representative;
- Representation; and
- Service.
Withdrawal of representation:

- May withdraw from representation provided before a VA agency of original jurisdiction if such withdrawal would not adversely impact the claimant's interests.

- Applicable until an agency of original jurisdiction certifies an appeal to the Board of Veterans' Appeals
  - Then 38 C.F.R. § 20.608 governs
38 C.F.R. § 14.631(c): Powers of attorney, disclosure of claimant information

Withdrawal also permissible if:

- reasonably believe fraudulent or criminal activity is furthered through representation
- claimant fails to uphold obligation
- other good cause for withdrawal exists.
38 C.F.R. § 14.631(c): Powers of attorney, disclosure of claimant information

- How to withdraw representation:
  - notify claimant
  - VA organization in possession of claims file and
  - Agency of Original Jurisdiction

  in writing prior to taking any action to withdraw

- Take steps to protect claimant interests:
  - give advance notice to claimant
  - allow time for appointment of alternative representation and
  - return documents provided by VA in course of representation
38 C.F.R. § 14.631: Powers of attorney, disclosure of claimant information

- All property must be returned to the claimant upon withdrawal
  - If claimant unavailable, all documents must be returned to the VA organization in possession of the claims file.

- Any other property of the claimant must be maintained according to applicable law.
38 C.F.R. § 14.631(f)(1)-(2): Powers of attorney, disclosure of claimant information

- **POA may be revoked at any time**
  - Receipt of new POA constitutes revocation of existing POA

- **An agent or attorney may be discharged at any time**

- **If agent or attorney limits scope of rep**
  - such specific authority constitutes revocation of existing general POA during the pendency of that particular claim.

- **Following final determination of such claim, general POA remains in effect as to any new or reopened claim.**
38 C.F.R. § 14.632: Standards of conduct for representation before VA

- Faithfully execute duties as individuals providing representation
- Be truthful in dealings with Claimants and the VA
- A representative shall:
  - Provide competent representation before the VA
    - This requires:
      - Knowledge
      - Skill
      - Thoroughness
      - Preparation necessary for representation
  - Act with reasonable diligence and promptness
Representative shall not:

- Violate standards of conduct
- Circumvent a rule of conduct through the actions of another
- Engage in conduct involving fraud, deceit, misrepresentation, or dishonesty
- Violate any provisions of title 38, United States Code, or title 38, Code of Federal Regulations;
- 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: Standards of conduct for representation before VA

- Solicit, receive, or enter into agreements for gifts related to representation
- Delay processing a claim without good cause
- Mislead, threaten, coerce, or deceive a claimant
- Engage in, or counsel or advise a claimant to engage in acts or behavior prejudicial to the fair and orderly conduct of administrative proceedings before VA
- Disclose, without the claimant's authorization, any information provided by VA for purposes of representation
- Engage in any other unlawful or unethical conduct.
Accreditation or authority to provide representation on a particular claim may be suspended or canceled at the request of an organization, individual providing representation under Sec. 14.630, representative, agent, or attorney.

When a suspension or cancellation is requested:

- The organization shall inform VA of reasoning and surrounding circumstances
  - When misconduct or lack of competence is the reason for the request
General Counsel cancels accreditation or authority to provide representation through a finding of clear and convincing evidence that:

- Violation 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 Sec. 14.632

or
Knowingly presenting to VA a frivolous claim, issue, or argument.

- Frivolous if:
  - unable to make a good faith argument on the merits of the position taken or to support the position taken by a good faith argument for an extension, modification, or reversal of existing law.

or

- Suspension or disbarment by any court, bar, or Federal or State agency to which such individual providing representation under Sec. 14.630 was previously admitted to practice, and lack of reinstatement.
38 C.F.R. § 14.633: Termination of accreditation/authority to provide representation under 14.630

- Charging excessive or unreasonable fees
  - As determined by the VA or any court hearing the case

- Any other unlawful or unethical practice adversely affecting an individual's fitness for practice before VA.
Questions Yet to be Resolved

- At BVA – why withdraw when case is going to BVA in any case?
- What about multiple issues/appeals?
- What about frivolous arguments submitted by appellant – not advocate?
Questions Yet to be Resolved

- Do the VSOs have to explain good cause to the BVA when it would only hurt the appellant? Or merely state further representation would be “impossible, impractical, or unethical” – see 38 C.F.R. § 20.608(b).

- “good faith argument” criteria rather vague.
  - Example – vet believes fall in service injured his back and now he suffers from DDD in low back. However, a VAE rejected linkage. There is no other medical linkage opinion of record. Assuming the VAE was adequate, then is the VSO obligated to drop out?

- No appealable issue as judgment below was so plainly correct and legal authority contrary to appellant's position so clear.
- Therefore, the very filing of appeal is frivolous and justifies the imposition of Rule 38 sanctions.
  - *In re Perry*, "When an appeal is a 'complete loser,' most of which is 'patently groundless,' sanctions should be imposed under Rule 38."
  - *Octocom Systems, Inc. v. Houston Computer Servs., Inc.*, "An appeal is frivolous where 'no basis for reversal in law or fact can be or is even arguably shown.'"
  - *Connell v. Sears*, briefs "not only ignore [controlling precedent] but fail to cite any authority whatsoever in support of the notion that the issue presented is a proper or reasonable basis for these petitions."
  - *Synan v. Merit Systems Protection Bd.*, appeal frivolous because no possible basis for reversing board's decision.

- Our precedent is similar to that of our sister circuits, which have adjudged frivolity where:
  - appeals “lacked any support in law or the record”
  - were “contrary to established law and unsupported by a reasoned, colorable argument for change in the law”
  - were “brought without the slightest chance of success”

- **Second type of frivolity:**
  - while genuinely appealable issues *may* exist, the appellant's contentions in prosecuting the appeal are frivolous

- **Frivolous Conduct Under Rule 38:**
  - submitting rambling briefs that make no attempt to address the elements requisite to obtaining reversal
    - *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985)
  - filing numerous documents containing irrelevant arguments and authority
    - *Limerick v. Greenwald*, 749 F.2d 97, 101 (1st Cir. 1984)

- frivolous as filed
  - no non-frivolous arguments could be made to support it

- logically this must also be frivolous as argued
  - any arguments made are, by definition, frivolous
  - pervasive pattern of misconduct on appeal clearly made appeal frivolous as argued

- Court discussed examples of arguments that are representative of the type of misconduct sanctionable.
Policy Issues

- HOW TO WITHDRAW?
- WHO AT PURPLE HEART DO I ASK FOR ADVICE?
- WHAT ABOUT MULTIPLE ISSUES (SOME OK SOME FRIVOLOUS)?
- WHAT IF PURPLE HEART APPEALS MANAGER AT BVA WITHDRAWS FROM AN APPEAL BECAUSE IT IS FRIVOLOUS – WHAT ARE MY OPTIONS?
Questions?