

Department of Veterans Affairs

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binding on Department officials and employees merely because of their being contained within a written legal opinion. Written legal opinions will be maintained in the Office of the General Counsel. Written legal opinions involving veterans' benefits under laws administered by the Department of Veterans Affairs, which pertain to a particular benefit matter, in addition to being maintained in the Office of the General Counsel, will be filed in the individual claim folder.

(b) A written legal opinion of the General Counsel involving veterans' benefits under laws administered by the Department of Veterans Affairs which, in the judgment of the General Counsel or the Deputy General Counsel acting as or for the General Counsel, necessitates regulatory change, interprets a statute or regulation as a matter of first impression, clarifies or modifies a prior opinion, or is otherwise of significance beyond the matter at issue, may be designated a "precedent opinion" for purposes of such benefits. Written legal opinions designated as precedent opinions under this section shall be considered by Department of Veterans Affairs to be subject to the provisions of 5 U.S.C. 552(a)(1). An opinion designated as a precedent opinion is binding on Department officials and employees in subsequent matters involving a legal issue decided in the precedent opinion, unless there has been a material change in a controlling statute or regulation or the opinion has been overruled or modified by a subsequent precedent opinion or judicial decision.

(c) For purposes of this section, the term *written legal opinion of the General Counsel* means a typed or printed memorandum or letter signed by the General Counsel or by the Deputy General Counsel acting as or for the General Counsel, addressed to an official or officials of the Department of Veterans Affairs stating a conclusion on a legal issue pertaining to Department of Veterans Affairs activities.

(Authority: 38 U.S.C. 501)

[54 FR 5613, Feb. 6, 1989, as amended at 61 FR 68666, Dec. 30, 1996]

LITIGATION (OTHER THAN UNDER THE FEDERAL TORT CLAIMS ACT); INDEMNIFICATION

§ 14.514 Suits by or against United States or Department of Veterans Affairs officials; indemnification of Department of Veterans Affairs employees.

(a) *Suits against United States or Department of Veterans Affairs officials.* When a suit involving any activities of the Department of Veterans Affairs is filed against the United States or the Secretary or a suit is filed against any employee of the Department of Veterans Affairs in which is involved any official action of the employee, not covered by the provisions of §§14.600 through 14.617, a copy of the petition will be forwarded to the General Counsel who will take necessary action to obtain the pertinent facts, cooperate with or receive the cooperation of the Department of Justice and, where indicated, advise the Regional Counsel of any further action required.

(b) *Counsel and representation of employees.* The Department of Justice may afford counsel and representation to Government employees who are sued individually as a result of the performance of their official duties. A civil action commenced in a State court against an employee, as the result of an action under color of his or her office, may be removed to the applicable Federal District Court. If a suit is filed against an employee as the result of the performance of his or her official duties, where the provisions of either 28 U.S.C. 2679 or 38 U.S.C. 7316 are not applicable (see §14.610), and the employee desires to be represented by the U.S. Attorney, the Regional Counsel will obtain a written request to this effect from the employee and will also obtain an affidavit of the facility Director describing the incident in sufficient detail to enable a determination to be made as to whether the employee was in the scope of his or her employment at the time. These statements, together with a copy of the petition and two copies of a summary of pertinent facts, will be sent to the General Counsel, who will transmit copies thereof to the Department of Justice for appropriate action.

(c) *Indemnification.* (1) The Department of Veterans Affairs may indemnify a Department of Veterans Affairs employee, who is personally named as a defendant in any civil suit in state or Federal court or an arbitration proceeding or other proceeding seeking damages against the employee personally, where either 28 U.S.C. 2679 or 38 U.S.C. 7316 is not applicable, for any verdict, judgment, or other monetary award which is rendered against such employee; provided that: the alleged conduct giving rise to the verdict, judgment, or award was taken within the scope of his or her employment and that such indemnification is in the interest of the Department of Veterans Affairs, as determined by the Secretary or his designee.

(2) The Department of Veterans Affairs may settle or compromise a personal damage claim against a Department of Veterans Affairs employee, in cases where the provisions of either 28 U.S.C. 2679 or 38 U.S.C. 7316 are not applicable, by the payment of available funds, at any time; provided that: the alleged conduct giving rise to the personal damage claim was taken within the employee's scope of employment and that such settlement or compromise is in the interest of the Department of Veterans Affairs, as determined by the Secretary or his designee.

(3) Absent exceptional circumstances as determined by the Secretary or his designee, the Agency will not entertain a request either to agree to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment, or award.

(4) A Department of Veterans Affairs employee may request indemnification to satisfy a verdict, judgment, or award entered against that employee. The employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal, in a timely manner to the Department of Veterans Affairs General Counsel, who shall make a recommended disposition of the request. Where the Department of Veterans Affairs determines it appropriate, the Agency shall seek the view of the Department of Justice. The General Counsel shall forward the employee re-

quest for indemnification, and the accompanying documentation, with the General Counsel's recommendation to the Secretary for decision.

(5) Any payment under this section either to indemnify a Department of Veterans Affairs employee or to settle or compromise a personal damage claim shall be contingent upon the availability of appropriated funds of the Department of Veterans Affairs.

(d) *Attorney-client privilege.* Attorneys employed by the Department of Veterans Affairs who participate in any process utilized for the purpose of determining whether the Agency should request the Department of Justice to provide representation to a Department employee sued, subpoenaed or charged in his individual capacity, or whether attorneys employed by the Department of Veterans Affairs should provide assistance in the representation of such a Department employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Department of Veterans Affairs attorneys who assist in the representation of an employee also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department of Veterans Affairs, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee.

(e) *Suits by the United States.* In any instance wherein direct submission to a U.S. Attorney for institution of civil action has been authorized by the Department of Justice, the Regional Counsel will furnish the U.S. Attorney a complete report of the facts and applicable law, documentary evidence, names and addresses of witnesses and, in cases wherein Department of Veterans Affairs action has been taken, a copy of any pertinent decision rendered. The Regional Counsel will forward two copies of such report and of any proposed pleading to the General

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Counsel, and will render any practicable assistance requested by the U.S. Attorney.

[42 FR 41411, Aug. 17, 1977, as amended at 54 FR 5614, Feb. 6, 1989]

§ 14.515 Suits involving loan guaranty matters.

(a) In actions for debt, possession or actions similar in substance (including title actions) in which §36.4282 or §36.4319 of this chapter has been complied with, the Regional Counsel is authorized to enter the appearance of and represent the Secretary of Veterans Affairs as the attorney of record and to file claims for debt in probate proceedings without prior reference to the General Counsel. Any such action will normally be taken within the time prescribed by law as though there had been valid service of process. In all other types of cases, the Regional Counsel will not enter an appearance or file any pleading on behalf of the Secretary except in imperative emergency until authorization is received from the General Counsel after submission of all relevant facts. In doubtful cases, the Regional Counsel will request instructions from the General Counsel, submitting copy of so much of the pleadings or other papers, together with a sufficient recital of the facts as will make clear the background, the issues, and the relief sought. The submission also will include names and addresses of adverse parties and attorneys so that immediate action may be taken if injunctive relief seems proper. Where necessary in any case to preserve rights which might be lost by default if there had been proper service of process, appropriate action will be taken by a special appearance, or, in jurisdictions where a special appearance does not serve the purpose or under State statute or decisions will constitute a general appearance for a later date, by an appearance through *amicus curiae*, to obtain an extension of time, preferably 30 days or more, in which to appear and plead without prejudice. If not feasible to obtain an extension, the Regional Counsel will explain to adverse counsel by letter, and personally, if desirable, the necessity of deferring all action and will see that the proper judge receives a signed

copy of the letter before default day. The letter will point out that there is no valid service of process on the Secretary of Veterans Affairs but will not base the delay on that alone.

(b) The General Counsel or each Regional Counsel representing the General Counsel is the attorney of the Secretary of Veterans Affairs for all purposes of 38 U.S.C. 3720 and, as such, is authorized to represent the Secretary in any court action or other legal matter arising under said statutory provisions. Said authorization is subject to any applicable statutes and Executive orders concerning claims of the United States. A Regional Counsel may enter appearance in such cases, subject to the provisions of §§36.4282 and 36.4319 of this chapter and paragraph (a) of this section. Each Regional Counsel is authorized to contract for the employment of attorneys on a fee basis for conducting any action arising under guaranty or insurance of loans or direct loans by the Department of Veterans Affairs; or for examination and other proper services with respect to title to and liens on real and personal property, material incident to such activities of the Department of Veterans Affairs, when, such employment is deemed by the Regional Counsel to be appropriate. The authority delegated to the Regional Counsel may be redelegated with the approval of the General Counsel.

(c) The General Counsel and each Regional Counsel, in carrying out their duties as authorized in paragraph (a) or (b) of this section, are authorized: (1) To contract for and execute, for and on behalf of the Secretary, any bond (and appropriate contract or application therefor) which is required in or preliminary to or in connection with any judicial proceeding in which the Regional Counsel is attorney for the Secretary, and to incur obligations for premiums for such bonds and (2) to do all other acts and incur all costs and expenses which are necessary or appropriate to further or protect the interests of the Secretary in or in connection with prosecuting or defending any cause in any court or tribunal within the United States, which cause arises out of or incident to the guaranty or