



## NATIONAL VETERANS LEGAL SERVICES PROGRAM

December 2, 2024

*Submitted via federalregister.gov*

### **RE: Proposed Addition of Part 81 to 38 CFR Chapter I**

The National Veterans Legal Services Program (“NVLSP”) thanks the Department of Veterans Affairs (“VA”) for the proposal of 38 CFR 81, titled Legal Services for Veterans – Legal Assistance for Access to VA Programs Grant Program, which implements the Legal Services for Veterans—Legal Assistance for Access to VA Programs Grant Program (“Grant Program”) to “award grants to eligible entities to establish new legal assistance clinics or enhance existing legal assistance clinics or other pro bono efforts providing legal assistance to eligible individuals.”<sup>1</sup> We also appreciate the opportunity to provide comments on the proposed rule. We look forward to continuing to work with the VA on these critical issues.

NVLSP is a national nonprofit organization that has worked since 1981 to ensure that our nation’s 18 million veterans and active-duty personnel receive the government benefits they have earned through their military service to our country.<sup>2</sup> A critical component of NVLSP’s work is assisting veterans who are seeking to improve the status of their military discharge or characterization of service through a discharge review board (“DRB”) or board of correction for military or naval records (“BCMR”). We passionately believe that the availability of effective, efficient and competent legal assistance critically impacts the overall success of a veteran obtaining a discharge upgrade.

We applaud the VA’s decision to implement the Grant Program. The proposed rule will provide eligible entities with the resources necessary to assist many veterans to achieve access to their well-deserved and hard-earned benefits. Nevertheless, we wish to propose changes that will

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<sup>1</sup> See Legal Services for Veterans – Legal Assistance to Access to VA Programs Grant Program, 89 Fed. Reg. 80,186 (Oct. 2, 2024).

<sup>2</sup> Additional information on NVLSP can be found at: <https://www.nvlsp.org/what-we-do/>.

clarify and improve the rule’s important components. We believe these proposed amendments will benefit the Grant Program. As an organization with deep ties to the military community and given our profound understanding of the challenges veterans face when seeking a discharge upgrade before a DRB or BCMR, we appreciate the opportunity to address the proposed changes to 38 CFR 81. NVLSP is pleased to offer these comments on the proposed rule, specifically addressing the proposed sections 81.10, 81.20, 81.25, 81.35, 81.45, 81.55, and 81.85.

**A. Proposed Amendments to § 81.10**

The stated purpose of the proposed regulations is to “award grants to *eligible entities* to establish new legal assistance clinics or enhance existing legal assistance clinics or other pro bono efforts providing legal assistance to eligible individuals.”<sup>3</sup> Proposed 38 CFR 81.10 governs the criteria of an entity that would be considered eligible for the Grant Program. The section will (i) be consistent with section 548(b)(2) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (the “Act”) and (ii) provide eligibility criteria for entities seeking to receive grant assistance under the Grant Program.<sup>4</sup> As drafted, in order to receive assistance under the Grant Program, proposed § 81.10(a) requires that an applicant (i) must operate in a nonprofit status and (ii) fall into one of the categories listed in § 81.10(a)(1) through (a)(5), as consistent with section 548(b)(2) of the Act.<sup>5</sup>

Sections (a)(1) through (a)(5) rightfully open eligibility to a wide-array of organizations committed to providing focused assistance to veterans. However, current § 81.10 does not specifically discuss or contemplate programs or organizations which operate by utilizing pro bono volunteers from law firms and/or corporations to expand their reach and offer increased assistance to veterans (“Pro Bono Programs”). In doing so, we believe the proposed rule may unintentionally disregard a sizable number of programs which offer valuable services to veterans. We recommend the following change to the regulations:

To be an eligible entity under this part, the entity must be a nonprofit or public entity that meets the following requirements and serves veterans through direct representation and/or pro bono volunteers.

*i. Proposed § 81.10(a) should explicitly note that entities serving veterans through*

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<sup>3</sup> 89 Fed. Reg. 80,186 (emphasis added).

<sup>4</sup> *See id.* at 80,172.

<sup>5</sup> *See id.* at 80,174-175.

*pro bono volunteers are eligible for the Grant Program, in part because Pro Bono Programs provide an invaluable service at no cost to veterans.*

As of January 1, 2023, there were 1,331,290 active lawyers in the United States.<sup>6</sup> The American Bar Association’s (“ABA”) Model Rules suggest that each of these lawyers “has a professional responsibility to provide legal services to those unable to pay” and that each “should aspire to render at least (50) hours of pro bono public legal services per year.”<sup>7</sup> Many states have adopted similar aspirational language, with some mirroring the ABA’s goal of 50 hours of pro bono service per year. New York, the state with the largest concentration of lawyers in the country, requires new applicants to provide 50 hours of pro bono service.<sup>8</sup> According to the ABA, in 2018, over 50% of attorneys surveyed provided pro bono service, with the average lawyer volunteering 37 hours.<sup>9</sup> That same year, the ABA found that nearly 14% of all pro bono was directed at assisting veterans as a group.<sup>10</sup> Taking these averages from 2018 and applying them to 2023, over 49 million hours of pro bono would have been provided in 2023, with nearly 3.5 million hours directed toward veterans. Pro Bono Programs, which utilize the nation’s 1.3 million attorneys providing pro bono services, often act as a force-multiplier for traditional organizations advocating for veterans and provide an invaluable service to veterans across the nation.

Pro bono legal services from law firms and corporations exponentially increase the assistance available to veterans and allows nonprofits to provide legal services to more veterans than otherwise possible, and at a reduced cost. For example, in 2023, NVLSP pro bono volunteers from law firms and corporations provided approximately 84,000 pro bono hours, equating to over 68 million dollars of work performed, at no cost to the veterans.<sup>11</sup> NVLSP utilizes the outstanding services of pro bono volunteers from law firms and corporations to provide full representation to approximately 500 veterans per year. Therefore, we respectfully recommend that the suggested amendment be adopted, to ensure these programs are considered eligible entities and that veterans can benefit from their services.

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<sup>6</sup> See *Profile of the Legal Profession 2023 / Demographics*, AMERICAN BAR ASSOC., (last visited Nov. 12, 2024).

<sup>7</sup> MODEL RULES OF PROF’L CONDUCT R. 6.1 (2024), [ABA Model Rule 6.1](#).

<sup>8</sup> See *Bar Admission Requirements*, NEW YORK STATE UNIFIED COURT SYSTEM, <https://ww2.nycourts.gov/attorneys/probono/baradmissionreqs.shtml>, (last visited Nov. 12, 2024).

<sup>9</sup> See *Profile of the Legal Profession 2023 / Pro Bono*, AMERICAN BAR ASSOC., (last visited Nov. 12, 2024).

<sup>10</sup> See *id.*

<sup>11</sup> See NATIONAL VETERANS LEGAL SERVICES PROGRAM PRO BONO PROGRAM, LAWYERS SERVING LAWYERS (2023).

## **B. Proposed Amendments to § 81.20**

Proposed 38 CFR § 81.20 sets forth the types of legal assistance eligible individuals could be provided under the Grant Program. Specifically, § 81.20(a) explains that a grantee may provide legal assistance regarding “any VA program administered by the Secretary.”<sup>12</sup> Further, proposed § 81.20(b) permits legal assistance aimed at improving “the status of a military discharge or characterization of service in the Armed Forces” either through a DRB or BCMR.<sup>13</sup> While current § 81.20 permits a wide-array of eligible legal assistance, we believe the regulations would benefit from additional clarity regarding services provided to veterans in conjunction with discharge upgrades and other services covered by the Grant Program. Therefore, we respectfully recommend the VA’s consideration of making the following amendments to § 81.20:

1. (1) Improving the status of a military discharge or characterization of service in the Armed Forces, to include representation to achieve “Honorable” status, or to amend the narrative reason for separation, including through a discharge review board; or
2. (a) Legal Assistance with any VA program solely or jointly administered by the Secretary.
  - i. *The regulations should be amended to specify that they include legal services to upgrade a veteran’s discharge status to “Honorable.”*

The stated purpose of the Grant Program is “to provide certain legal assistance to former service members to assist them in gaining access to VA benefits.”<sup>14</sup> To facilitate this purpose, current § 81.20(b)(1) permits a grantee to provide legal assistance aimed at “[i]mproving the status of a military discharge or characterization of service.”<sup>15</sup> However, veterans’ benefits, like discharge upgrade services, exist on a continuum. For example, although a veteran may be granted a discharge upgrade from “Other than Honorable” to “General (Under Honorable Conditions),” which would improve their discharge status and qualify them for some VA benefits, in these circumstances, additional legal representation is needed to obtain an upgrade to “Honorable.” Fully Honorable status would entitle a veteran to all VA, Department of Defense (“DOD”), and other veterans’ benefits,

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<sup>12</sup> 89 Fed. Reg. 80,186.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 80,172.

<sup>15</sup> *Id.* at 80,186.

including the GI Bill, and the potential for meeting further requirements needed for receipt of a medical retirement or Combat-Related Special Compensation. Therefore, we strongly recommend that § 81.20(b)(1) be amended to clarify that “improving the status of a military discharge” includes representation to obtain a fully Honorable discharge, not just access to VA benefits that only require a “General (Under Honorable Conditions)” characterization.

- ii. *The regulations should be amended to specify that they include legal services to change a veteran’s narrative reason for separation.*

Proposed rule § 81.20(b)(1), permits legal assistance aimed at improving “the status of a military discharge or characterization of service in the Armed Forces.”<sup>16</sup> We believe the regulations would benefit from additional clarification that such legal assistance includes seeking an amendment to a veteran’s narrative reason for separation.

In many instances, veterans will seek to amend a derogatory or stigmatizing narrative reason for separation. Veterans with “Honorable” or “General (Under Honorable Conditions)” discharges may still be unable to obtain desired employment if their DD-214 has stigmatizing language such as “drug abuse,” “misconduct” or “personality disorder.” Additionally, these narrative reasons for separation may preclude employment with a police force or prevent a veteran from obtaining a security clearance. Moreover, this requested assistance can often be accomplished at the same time as seeking a change in the discharge characterization, making it complementary and cost-effective. For these reasons, we strongly suggest that § 81.20(b)(1) expressly include legal assistance to change the narrative reason for separation, even for veterans with a discharge characterization of Honorable or General (Under Honorable Conditions).

- iii. *The regulations should clarify whether § 81.20(a) includes jointly administered programs.*

Current § 81.20(a) states that “legal assistance with any VA program administered by the Secretary” may be provided under the Grant Program.<sup>17</sup> The Servicemembers’ Group Life Insurance Traumatic Injury Protection (“TSGLI”) is administered jointly by the VA and the DOD. We request clarification whether “VA program[s] administered by the Secretary” includes those programs that

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

are jointly administered between the Secretary and another entity, such as the DOD.<sup>18</sup> We believe that such jointly administered programs provide crucial services to veterans and strongly recommend such a clarification to ensure that veterans are provided access to all VA benefits, not just those wholly administered by the Secretary.

### **C. Proposed Amendments to § 81.25**

Proposed 38 CFR § 81.25 outlines the process for eligible entities to apply for the Grant Program. As stated in the proposed rule, the section will be consistent with section 548(b)(6) of the Act.<sup>19</sup> Section 81.25 levies several vital requirements: (1) applicants must describe their capacity to provide legal assistance to eligible individuals in § 81.25(a)(2), (2) applicants must explain the legal assistance they would provide and the identified need for that assistance among eligible individuals via § 81.25(a)(3), and (3) applicants must describe how they will ensure that legal assistance is provided to eligible individuals via § 81.25(a)(7).<sup>20</sup> We recommend 38 CFR § 81.25 specifically address the applicant's screening and mentoring procedures for those programs utilizing pro bono services of law firms and corporations.

- i. The regulations should be amended to require applicants utilizing law firms and corporate volunteers to describe their program's process.*

As addressed above in the section addressing § 81.10, Pro Bono Programs that work with law firms and corporations provide valuable assistance to veterans seeking an upgrade to their discharge characterization. The regulations should request a description of the program's screening and mentoring process for these programs to ensure the eligible veteran is given high-quality services. For example, screening and mentoring may include identifying meritorious cases for pro bono placement, providing extensive support to pro bono volunteers, supervising the preparation of the application materials and the filing process, and evaluating decisions received for potential appeal or further relief, which are all indicators of a high-quality Pro Bono Program.

We recommend amending § 81.25(a) to require pro bono applicants who partner with law firms and corporations to describe their program's screening and mentoring processes. With this new

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<sup>18</sup> *See id.*

<sup>19</sup> *See id.* at 80,176.

<sup>20</sup> *See id.* at 80,177.

requirement, the VA would have visibility on the policies and processes drafted and implemented by applicants, increasing the quality and effectiveness of the services provided to veterans working through their upgrade process. For these reasons, we strongly recommend the following amendment to add a new numbered subsection to § 81.25(a):

A description of the applicant's processes for screening and mentoring potential cases and the support an applicant provides to potential pro bono volunteers.

**D. Proposed Amendments to § 81.35**

Proposed 38 CFR § 81.35 outlines the process for eligible entities to apply for the Grant Program. As stated in the proposed rule, the section will be consistent with Section 548(b) of the Act.<sup>21</sup> Proposed paragraph (b) would outline the VA's award point system based on the applicant's program concept and legal assistance plan. Section 81.35(b)(4) would set up a point system based on timelines.<sup>22</sup> The goal would be to ensure eligible individuals would be provided legal assistance as quickly as possible.

Efficiency of service is an important objective when assisting eligible individuals. Nevertheless, efficiency is not the only impactful objective. The quickest way to apply for a discharge upgrade is for the veteran to fill out the required form and submit it without supporting documents. There are only two opportunities to apply to the DRB, and the BCMR has more stringent requirements for petitions following the initial application. Thus, chasing the fastest possible lane may use up the veteran's limited opportunities for their case to be heard. NVLSP is contacted by numerous veterans every year who have squandered their chances by filling out the necessary form and submitting it with minimal supporting documents. NVLSP's process is to always have a detailed brief with thorough arguments submitted in support of the application. We also always include helpful documents from the veteran's military personnel records, military medical records, and VA files and frequently include a new statement from the veteran. As appropriate to an individual case, we further facilitate the gathering of supporting character references as well as explore a possible independent medical opinion paid for by pro bono partners. In our experience, the brief and supporting evidence are crucial to success for the veteran. The DOD has no duty to assist the veteran. Instead, it is incumbent on the advocate to assist the veteran in submitting a brief with supporting

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<sup>21</sup> *See id.*

<sup>22</sup> *See* 89 Fed. Reg. 80,178.

documents.

The VA's core values of integrity, commitment, advocacy, respect, and excellence support the VA's goal of fulfilling its sacred obligation to care for veterans, their families, caregivers, and survivors. The term "excellence" demands the VA "[s]trive for the highest quality and continuous improvement."<sup>23</sup>

- i. *The regulations should be amended to focus on the quality of the organization's service.*

Focusing on the "highest quality" goal, the VA should not score programs based solely on speed. Instead, the VA should award additional consideration based on the quality of the services provided. The regulations should empower programs to take the necessary time to gather sufficient evidence to support an application, including military and medical records, independent medical opinions, statements in support of the application, and character references, by carefully considering this quality of representation in scoring a grant application.

Further, the speed at which programs can provide assistance is dependent on factors outside the Grant Program's control, including the length of time it takes for the agencies involved in the application process to schedule hearings, respond to requests for records, issue advisory opinions, and issue final decisional documents. Finally, programs should be encouraged to work with veterans who may have communication difficulties (for example, because of homelessness or mental health conditions) that delay the completion of the application for relief rather than solely prioritizing the speed at which legal representation is concluded.

- ii. *The regulations should be amended to recognize the benefits of remote programs to eligible veterans.*

Another way to increase service quality is working with eligible individuals remotely rather than requiring veterans to travel to meet with a representative. Subsections (b)(1), (b)(2), and (b)(5) award an applicant points based on need within the community where the program is established, outreach and referral plans, and coordinating services with local VA facilities.<sup>24</sup> Although the Grant

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<sup>23</sup> *Our VA Mission and Core Values*, U.S. DEPT. OF VETERANS AFFAIRS, <https://department.va.gov/icare/> (last visited Nov. 12, 2024).

<sup>24</sup> *See* 89 Fed. Reg. 80,178.



Program allows programs to operate remotely, these criteria award additional points for programs that are locally based in a community. We strongly believe that remote access to quality legal assistance is critical. Granting brick-and-mortar organizations higher ratings than their remote counterparts would serve to prejudice remote programs and discriminate against veterans across the country who may not have access to a local physical organization. Moreover, prioritizing physical organizations stands in opposition to previous VA guidance.

The VA has historically acknowledged the benefits of providing remote access to care for veterans.<sup>25</sup> For example, when working to ensure veterans receive efficient and effective health care, the VA has highlighted that remote telehealth has played a crucial role in overcoming barriers veterans face when seeking medical care.<sup>26</sup> Remote health programs have become a significant avenue for the VA to meet its goal of connecting veterans and VA providers regardless of distance. Significantly, one in three veterans who receive VA care access part of that care through telehealth, demonstrating the important role remote programs play in assisting veterans.<sup>27</sup>

Similar to the VA remote telehealth program, remote organizations seeking to provide assistance through the Grant Program will be well suited to reach potentially eligible and hard-to-reach veterans through online outreach, such as social media. For example, veterans with “Other than Honorable” discharges, who are less likely to interact with the VA or other veteran communities because of their exclusion from benefits, would likely find remote programs beneficial alternatives to traditional physical organizations. Many veterans may also live in areas that do not have a robust veteran community or access to these kinds of communities, which again uniquely positions remote programs to provide assistance that otherwise may be unavailable to these veterans. We find that these veterans are often unable to travel to seek assistance at a traditional local program. For these reasons, we strongly recommend the following amendment to add new numbered subsections to § 81.35(b):

1. (8) *Quality of representation.* Applicant has demonstrated that their program is committed to providing quality service and that they devote sufficient time to gather relevant evidence to support an application, including military and medical

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<sup>25</sup> See *Expanding Veterans Access to Care Through Virtual Technologies*, U.S. Dept. of Veterans Affairs [Home | Connected Care](#) (last visited Nov. 14, 2024).

<sup>26</sup> *Telehealth expands access to quality care for Veterans*, U.S. Dept. of Veterans Affairs, [Telehealth expands access to quality care for Veterans - VA News](#) (last visited Nov. 14, 2024).

<sup>27</sup> *Id.*

records, independent medical opinions, statements supporting the application, and character references. Additionally, examples of quality service could be shown by a program's ability to work with veterans who may have communication difficulties, including veterans who are homeless and veterans with mental health issues.

2. (9) *Online outreach*. Applicant has the ability to reach potentially eligible individuals through online outreach programs which operate remotely.

#### **E. Proposed Amendments to § 81.45**

Like § 81.35, proposed 38 CFR § 81.45 delineates the process for eligible entities to apply for renewal of a legal assistance grant. Proposed paragraph (a) of this section allows the VA to award points under its scoring criteria for organizations applying for renewal of a previously awarded grant based on the success of the grantee's program. The proposed rule defines success as being determined by the overall satisfaction of program participants and the timeliness of legal assistance provided.

Focusing on the term "timeliness" could prejudice renewal applicants affected by the VA's delays in providing necessary records required for adequate provision of services. Instead, we recommend the section be amended to more clearly define "success" in this context, for example, to include the number of applicants requesting assistance from an organization, examples of favorable decisions, etc., in addition to the current definition.

#### **F. Proposed Amendments to § 81.55**

Proposed 38 CFR § 81.55 sets forth requirements for the operation of legal assistance programs supporting the Grant Program.<sup>28</sup> The goal of these requirements would be to ensure the program is administered to support the effective administration of the program while the legal needs of eligible individuals are adequately achieved.<sup>29</sup> However, the proposed rule requires grantees to continue providing legal assistance once it has begun for as long as the participant remains eligible and has a need for legal assistance.<sup>30</sup> Legal representation is generally provided for a specific legal task, not for continuous assistance. The VA should amend this requirement to allow grantees to conclude legal assistance when the matter is completed, and further appeal is not merited.

#### **G. Proposed Amendments to § 81.85**

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<sup>28</sup> See 89 Fed. Reg. 80,180.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

Proposed 38 CFR § 81.85(a) sets forth the VA's right to conduct visits for the purpose of inspecting a grantee's program and to "review grantee accomplishments and management control systems and to provide such technical assistance as may be required."<sup>31</sup> The section does not clarify how VA would conduct this oversight for programs that operate remotely. Additionally, many legal services programs no longer store records physically, instead using a cloud-based storage system or other digital storage method. This section's requirement to inspect records should specifically include the ability to review digitally-stored records or reports to reflect modern data storage practices.

Since comprehensive inspection is crucial to the Grant Program's ultimate success, we respectfully and strongly recommend that § 81.85(a) be amended to address inspection of programs that operate remotely as well as digital or cloud-based files.

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NVLSP appreciates the opportunity to comment on the proposed creation of 38 CFR part 81. We strongly believe our proposed amendments will significantly benefit the nation's veterans and their ability to obtain VA benefits.

Sincerely,



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<sup>31</sup> *Id.* at 80,190.