

September 17, 2007

VHA MEDICAL ADVISORY OPINION REQUESTS BY REGIONAL COUNSEL

1. PURPOSE: This Veterans Health Administration (VHA) Directive establishes policy requiring all Veterans Integrated Service Networks (VISNs) and all health care practitioners, including part-time and contract personnel, when requested by Regional Counsel, through the Office of Medical-Legal Affairs, to provide medical advisory opinions regarding the care provided to VHA patients for whom a tort claim alleging medical malpractice has been filed.

2. BACKGROUND

a. Annually, over 1,000 tort claims alleging medical malpractice by VHA health care providers are submitted under the Federal Tort Claims Act. A medical advisory opinion is an essential component of the Department of Veterans Affairs (VA) Regional Counsel's decision to settle or deny the claim. VA regulations, at Title 38 Code of Federal Regulations (CFR) § 14.602(b), provide that Regional Counsels are guided by the views of the Under Secretary for Health as to the standard of medical care and treatment, the nature and extent of the injuries, the degree of temporary or permanent disability, the prognosis, the necessity for future treatment or physical rehabilitation, and any other pertinent medical aspects of a claim.

b. Medical advisory opinions are generally protected from discovery in litigation, and are exempt from disclosure under the Freedom of Information Act exemption 5 (Title 5 United States Code (U.S.C.) § 552(b)(5)), by the attorney work-product doctrine codified in Rule 26(b)(3), Federal Rules of Civil Procedure. They are not, however, considered confidential and privileged quality assurance records under 38 U.S.C. § 5705. No disclosure should be made of such opinions without the approval of the Regional Counsel or General Counsel (021B). The opinions are qualitatively different from a peer review. The medical advisory opinion should address in detail all of the questions raised by the Regional Counsel attorney. Medical issues not identified by the Regional Counsel, but which the reviewer believes may be relevant to a decision on the claim should also be addressed.

3. POLICY: It is VHA policy that all VISNs and VHA practitioners assist and cooperate in the performance of medical advisory reviews requested by Regional Counsels through the Office of Medical-Legal Affairs.

4. ACTION

a. **Office of Medical-Legal Affairs and VISN Chief Medical Officers (CMOs).** The Office of Medical-Legal Affairs and VISN CMOs are responsible for coordinating the equitable distribution of requests for medical advisory opinions across VISNs in a manner that minimizes unnecessary delay or repeated transmission of protected health information.

b. **Regional Counsel.** The Regional Counsel is responsible for:

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(1) Initiating requests for medical advisory opinions by the Office of Medical-Legal Affairs by providing the veteran's name, last four social security numbers, involved VISN(s), and required specialty.

(2) Providing, upon notification by the Office of Medical-Legal Affairs, to the assigned facility's Chief of Staff (COS), the veteran's name and last four social security numbers, as well as clearly and concisely-stated medical questions pertinent to the review.

(3) Clarifying questions. The Regional Counsel must be available to the assigned facility COS, VISN CMO, and reviewer(s) to clarify questions.

(4) Notifying the VISN CMO of any issues affecting a timely completion of the assigned review. The VISN CMO coordinates with facility COS to ensure completion, or reassignment, of the requested review.

(5) Notifying the Office of Medical-Legal Affairs of the date of receipt of the completed review(s) and providing a copy of the medical advisory opinion(s) and the questions that were submitted by the Regional Counsel.

c. **Office of Medical-Legal Affairs.** The Office of Medical-Legal Affairs (11ML) is responsible for:

(1) Receiving and coordinating the assignment of Regional Councils' requests for medical advisory opinions.

(2) Providing to VISN CMOs data concerning the number and specialty distribution of expected opinion requests based upon prior years' experience.

(3) Assigning requests, on a rotating basis, to facility COSs by means of the distribution list provided by the CMOs.

(a) The distribution of assignments is divided among VISNs by means of the distribution list provided by the CMOs.

(b) When the Office of Medical-Legal Affairs assigns a medical advisory opinion request to a facility COS by means of the distribution list provided by the CMOs, that request automatically becomes the responsibility of that VISN's CMO, or designee.

(c) A VISN associated with the episode of care which led to the claim is ineligible for assignment. The preceding sentence applies only to medical advisory opinions requested through the Office of Medical-Legal Affairs, and does not prohibit reviews by the VA medical center associated with the episode of care which led to the claim when requested by the Regional Counsel, VA medical center management, or the VISN.

(4) Providing notification of the assignment to the requesting Regional Counsel and the assigned facility's COS.

(5) Tracking the completion of the advisory opinions for timeliness.

(6) Providing, when requested, a VISN-level report to the VISN CMO, the Office of the Deputy Under Secretary for Health for Operations and Management, the Office of Patient Care Services, and the Office of the General Counsel.

d. **VISN CMO**

(1) The VISN CMO is responsible for:

(a) Providing to the Office of Medical-Legal Affairs an annual listing of assigned volume and specialty capability by facility for medical advisory opinions. This listing is used by the Office of Medical-Legal Affairs in the assignment of requested reviews.

(b) Assuming overall responsibility for the request, when the Office of Medical-Legal Affairs assigns a medical advisory opinion request to a facility COS by means of the distribution list provided by the CMOs.

(2) The facility COS and VISN CMO are responsible for ensuring that the review is provided to the requesting Regional Counsel within 30 days of the assignment to the reviewer, or otherwise in a timely manner consistent with the complexity of the review.

e. **Facility COS.** The facility COS is responsible for:

(1) Receiving Office of Medical-Legal Affairs' notification of an assignment and the name of the requesting attorney.

(2) Receiving from the requesting Regional Counsel:

(a) The involved veteran's name and the last four of the social security number.

(b) Clearly and concisely stated medical questions pertinent to the review.

(3) Contacting the requesting Regional Counsel for clarification of medical questions pertinent to the review.

(4) Assigning the case to the appropriate specialty or subspecialty reviewer and providing the attorney contact information to reviewer to permit further clarification of medical questions pertinent to the review.

(5) Providing the Regional Counsel and the VHA Health Information Access Program with the assigned reviewer contact information.

(6) Contacting the VISN CMO, if unable to assign a case for review. The CMO then contacts other facility COSs within the VISN, or other VISN CMOs to arrange for reassignment

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of the requested review, and then notifying Regional Counsel and the VHA Health Information Access Program of the change in assignment.

(7) Arranging for the reviewer(s) to have access to the electronic medical records of the involved veteran in accordance with processes established by the VHA Privacy Officer, VHA Office of Information.

5. REFERENCES: None.

6. FOLLOW-UP RESPONSIBILITY: The Office of Medical-Legal Affairs, Office of Safety and Enterprise Risk Management (10E2E) is responsible for the contents of this Directive.

7. RECISSIONS: None. This VHA Directive expires September 30, 2012.

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