

In the most recent terms of clearance for the information collection assigned control number 2900-0605, the Office of Management and Budget (OMB) directed the Department of Veterans Affairs (VA) to compare the questions on VA Form 21a to questions on Forms SF 85, SF 86, and OF 306. OMB directed VA to provide justification for why the requested information was needed for questions where VA required more information or information for a longer time period than required on the other forms. Additionally, OMB directed VA to provide justification for why “substance abuse” and “alcohol abuse” are more appropriate for VA Form 21a than the wording on forms SF 85, 86, and OF 306.

TERMS OF CLEARANCE: Approval is granted with the following terms of clearance. In the next revision or extension request for this collection, VA shall compare the questions on this form to questions on SF 85, SF 86, and OF 306. In any cases where VA requests more information or information for a longer time period than the federal government would require on these forms for adjudicating security clearances or public trust background investigations, VA shall provide justification for why this information is needed.

VA shall also provide justification of why "substance abuse" and "alcohol abuse" are more appropriate for this form than the way similar questions are worded on SF 85, 86, and OF 306.

Now pursuing a reinstatement of information collection 2900-0605, VA is providing the requested comparison and justification herein. The forms identified by OMB are not comparable to VA Form 21a. The VA Form 21a includes questions designed to enable VA’s Office of General Counsel (OGC) to determine whether the applicant is of good moral character and reputation, qualified to render claimants valuable service, and is otherwise competent to assist claimants in presenting claims before VA. See 38 U.S.C. § 5904. Applicants for accreditation as attorneys and claims agents are asked to provide information about their record of admission to practice before State or Federal agencies. These questions are similar in nature to those asked by other State or Federal licensing entities and are necessary to determine whether an applicant is capable of providing competent representation to claimants seeking VA benefits. See <https://www.ncbex.org/sites/default/files/2023-02/NCBE-Character-and-Fitness-Sample-Application-4.pdf>. Notably, VA collects less, not more, information than the information that is typically collected in conjunction with admission to a state bar to practice law. In other words, VA is already self-limiting the information it collects.

Moreover, the questions on the VA Form 21a about substance abuse and alcohol abuse are phrased in a way to match the questions that are asked of applicants to practice law before a state bar. VA Form 21a:

DO YOU HAVE ANY CONDITION OR IMPAIRMENT (SUCH AS SUBSTANCE ABUSE, ALCOHOL ABUSE, OR A MENTAL, EMOTIONAL, NERVOUS, OR BEHAVIORAL DISORDER OR CONDITION) THAT IN ANY WAY CURRENTLY AFFECTS, OR, IF UNTREATED OR NOT OTHERWISE ACTIVELY MANAGED, COULD AFFECT YOUR ABILITY TO REPRESENT CLAIMANTS IN A COMPETENT AND PROFESSIONAL MANNER?

NCBE Character and Fitness Application:

Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition)

that in any way affects your ability to practice law in a competent, ethical, and professional manner?

Historically, VA prioritized approving accreditation applications in order to give veterans more choices in who they could select as their representative. But, in recent years, an interest in the field of veteran “assistance” has gained popularity, and not always to the benefit of veterans. In 2013, the U.S. Government Accountability Office (GAO) reviewed VA’s procedures for ensuring that accredited representatives have good character and knowledge. GAO recommended that OGC improve its review of applications and monitoring of representatives. See GAO-13-643, “VA BENEFITS: Improvements Needed to Ensure Claimants Receive Appropriate Representation.” Part of the reason of the need for closer review by OGC is that there has been an increase in the level of interest in representing veterans by individuals looking to gain VA accreditation to target veterans based on veterans’ potential eligibility for VA’s pension benefit. Accordingly, the greater need now is to ensure that veterans are receiving quality representation—meaning that the practitioners continue to have the appropriate character and reputation and that they remain qualified and competent to provide representation. In response to this shift, the OGC accreditation program is focusing on reviewing more closely who VA accredits and monitoring accredited individuals for compliance with continuing requirements.

Turning to the forms identified by OMB, OF 306 is a cursory collection of the basic information used to determine whether an applicant is fit for federal employment; additional information is collected by either SF 85 or 86 upon a conditional offer of federal employment. While SF 85 does not ask directly about alcohol and substance abuse, those are areas that fall squarely within the scope of background investigations conducted by federal investigators to ensure character and fitness for federal employment. SF 86 is a much more extensive collection of information than VA Form 21a. SF 86 collects extensive information regarding alcohol and substance use, addiction, counseling, and treatment in greater detail than VA Form 21a. SF 86 also collects detailed, extensive information about an applicant’s psychological and emotional health, financial information, criminal background, and involvement in non-criminal court proceedings that far exceed VA Form 21a.

One of the key differences between SF 85 and 86, and VA Form 21a is that the VA has no comparable investigatory tools at its disposal to vet the information collected and to develop additional information. The collection of information on SF 85 and 86 includes an applicant’s social security number and is subject to background investigations conducted by trained, federal investigators to evaluate the accuracy and veracity of applicant responses, and to develop additional, relevant information necessary to conduct a comprehensive assessment of character and fitness for federal employment. VA is, to a large degree, reliant on self-reporting from applicants to develop information to assist in its determination of character and fitness. Therefore, it is necessary and prudent to include questions about conditions and impairments (e.g., alcohol and substance abuse, mental and emotional health) that could have a detrimental effect on the applicant’s ability to provide competent, reliable representation for veterans and their dependents.

Another important distinction between the SF 85 and 86 for federal employment and VA Form 21a is that the ongoing relationship with the federal government is much greater for individuals providing information on the SF 85 and 86. If an applicant using the SF 85 or 86 is ultimately employed by the federal government, federal employees are under the direct supervision of managers and supervisors, likely to be observed by federal employee colleagues. The nature of federal employment means that problematic behaviors can be much more readily observed and addressed, as opposed to claims agents and attorneys who work in the private sector and are not subject to ongoing observation and performance evaluation by the federal government. Problematic behaviors and disorders are much more likely to be discovered in the course of federal employment, even if missed during the application and background investigation process. Unlike federal employment, the primary interaction with claims agents and attorneys occurs during the application and accreditation process. Moreover, claims agents and attorneys often work independently as sole practitioners and do not have managerial layers above them who are incentivized to root out problematic conditions and impairments that negatively affect their work product and, by extension, veterans' benefits claims.

Finally, while licensed attorneys are bound by formal rules of professional conduct and subject to a degree of state and judicial oversight, claims agents are not generally subject to enforceable rules of professional conduct or oversight mechanisms. This places particular importance on gathering sufficient information about prospective claims agents on the front end during the application process.