April 20, 2020

Re: Syracuse University College of Law’s Veterans Legal Clinic
Comment to RIN 2900-AQ81

Introduction

This comment is provided on behalf of the Betty and Michael D. Wohl Veterans Legal Clinic¹, Syracuse University College of Law’s distinguished legal advocacy clinic in support of veterans and their families. In particular, the Clinic addresses the proposed rule from the U.S. Department of Veterans Affairs (hereinafter “VA”) titled “Individuals Accredited by the Department of Veterans Affairs Using Veterans Benefits Administration Information Technology Systems To Access VBA Records Relevant to a Claim While Representing a Claimant Before the Agency,” dated February 18, 2020 [FR Doc, 2020-02196] [RIN 2900-AQ81]². The VA offers this proposed rule “to amend its regulations addressing when VA will allow individuals and organizations who are assisting claimants in the preparation, presentation, and

¹ This Clinic primarily provides representation to veterans and their families who are seeking benefits from the VA or upgrading a military discharge through the various military branches. The clinic provides a fantastic experiential learning for our students, who have the opportunity to advocate for clients in these matters anywhere from introductory fact investigation to client advocacy before the VA and its various administrative levels. For more information on the Betty and Michael D. Wohl Veterans Legal Clinic, visit http://law.syr.edu/academics/clinical-experiential/clinical-legal-education/veterans-legal-clinic/.
prosecution of their claims before VA to use Veterans Benefits Administration’s (VBA) information technology (IT) systems to access VA records relevant to a claim,” and, in particular, “who is permitted, and under what circumstances, to directly access VA’s claim records through those IT systems during representation of a VA claimant in a claim for VA benefits”\(^3\) (emphasis added).

The primary scope of this comment touches upon one component of the proposed rule, in particular, the VA’s intention to remove the current note to 38 C.F.R. § 14.629. The removal of this note would substantially impair the ability for our staff attorneys, student attorneys, and general staff members to help coordinate sound and efficient advocacy for our clients. This impact would not only be felt in-office, it would reverberate to our clients as our ability to efficiently allocate time and resources would be restricted by only the attorney of record having access to the Veterans Benefits Management System (VBMS). Moreover, this amendment would assuredly also impact the ability for other clinics, law firms, and legal services entities to provide sound and efficient legal advocacy for veterans and their families in matters before the VA. We strongly urge the VA to reconsider amending the rule in this fashion. Rather, the VA should continue with the current note to 38 C.F.R. § 14.629 in place, or, in the alternative, consider another amendment which would continue to allow student attorneys participating in a veterans legal clinic\(^4\) the

\(^3\) *Id.* at 9435.

\(^4\) There are a number of other legal organizations and law school clinics that provide advocacy for claimants before the VA. For more information on these entities, see https://www.va.gov/ogc/docs/LegalServices.pdf
opportunity to “qualify for read-only access to pertinent Veterans Benefits Administration automated claims records[.]”

The Note

The current regulation reads, in pertinent part, that:

A legal intern, law student, or certified paralegal may assist in the preparation, presentation, or prosecution of a claim, under the direct supervision of an attorney of record designated under § 14.631(a), if the claimant's written consent is furnished to VA. Such consent must specifically state that participation in all aspects of the claim by a legal intern, law student, or paralegal furnishing written authorization from the attorney of record is authorized. In addition, suitable authorization for access to the claimant's records must be provided in order for such an individual to participate. The supervising attorney must be present at any hearing in which a legal intern, law student, or paralegal participates. The written consent must include the name of the veteran, or the name of the appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable VA file number; the name of the attorney-at-law; the consent of the appellant for the use of the services of legal interns, law students, or paralegals and for such individuals to have access to applicable VA records; and the names of the legal interns, law students, or paralegals who will be assisting in the case. The signed consent must be submitted to the agency of original jurisdiction and maintained in the claimant's file. In the case of appeals before the Board in Washington, DC, the signed consent must be submitted to: Director, Office of Management, Planning and Analysis (014), Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. In the case of hearings before a Member or Members of the Board at VA field facilities, the consent must be presented to the presiding Member of the hearing.

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5 38 C.F.R. § 14.629.
6 Id.
The proposed rule “does not propose any substantive changes” to this subsection. Rather, the proposed rule would touch upon the following Note to 38 C.F.R. § 14.629:

Note to § 14.629: A legal intern, law student, paralegal, or veterans service organization support-staff person, working under the supervision of an individual designated under § 14.631(a) as the claimant’s representative, attorney, or agent, may qualify for read-only access to pertinent Veterans Benefits Administration automated claims records as described in §§ 1.600 through 1.603 in part 1 of this chapter.

The proposed rule would remove this note entirely, revoking the opportunity for these individuals to access client records electronically through the VBMS. The VA offers this amendment description and justification:

VA added this note in a 2003 final rule stating only that it was intended to “promote consistency with regulations and practice” at the time, specifically with respect to individuals working under the supervision of the claimant’s designated representative.” 68 FR 8541, 8543. It is notable that VA IT systems did not include electronic copies of evidence at the time of the 2003 Federal Register notice. This note has never meant that VA would always provide support staff at a service organization or legal interns, law students, or paralegals with access to VBA IT systems. Nevertheless, the note may have caused confusion and contributed to inconsistent application of current § 1.600 through 1.603 as VA has transitioned to primarily keeping claimant records in electronic form rather than paper. Accordingly, VA proposes to remove this note, consistent with the clarification of its policy under this proposed rule. Indeed, VA’s proposed regulations and current practice of limiting systems access to claimants’ accredited attorneys, agents, or representatives of a VA-recognized service organization, would be inconsistent with allowing support staff at service organizations or legal interns, law students, or paralegals to electronically access VA records. Under this proposed rule, VA would ensure
that only accredited attorneys, agents, or representatives of a VA-recognized service organization have privileges to access VBA's IT systems. Furthermore, a VA-accredited attorney or agent would have access to records only if the claimant appointed that individual as the attorney of record or agent of record for his or her claim. In the case of a service organization, VA would provide access only to the representatives of that service organization. VA would only grant access to the attorney of record, the agent of record, or the representatives of the service organization of record regardless of whether any other individuals are assisting the attorney of record in the representation of the claimant's case, or are serving on the support staff of the attorney, agent, or veterans service organization.7

The limitation of this capability, according to the VA, “is reasonable given [the] VA’s overarching responsibility to protect Veterans’ privacy, maintain IT security according to Federal requirements, and control administrative burden and costs.”8 We do not refute that the VA has these important responsibilities. However, the proposed rule provides little justification for how this Note limits the VA's ability to successfully adhere to these responsibilities. Primarily, the VA points to an argument regarding confidentiality:

Under § 14.632 VA requires that accredited attorneys, agents and representatives maintain a claimant's privacy by not disclosing, without the claimant’s authorization, any information provided by VA for purposes of representation. This, in addition to the requirements for continuing education and/or training on a regular basis, character and fitness assessments, and other certifications found in § 14.629, gives VA the assurance that these individuals will maintain the claimants’ privacy while also minimizing the risk to the security of VA's IT systems.

Limiting access to this group of individuals also gives VA a means to remediate any mishandling of claimant information or misuse of the systems access

7 2020 WL 777881 at *9438-9439.
8 Id. at 9439.
through termination of accreditation, which may include notifying all agencies, courts, and bars to which an agent or attorney is admitted to practice pursuant to § 14.633.⁹

The maintenance of confidentiality and privacy is vital in administering access to electronic records for VA claimants. However, this argument fails to realize the very nature of legal clinics like ours. At our clinic, student attorneys are tasked with advocating for numerous clients for academic credit, under the supervision of a Staff Attorney, a Managing Director, and an Executive Director – all licensed attorneys. The students and attorneys act hand-in-hand to provide sound legal advocacy for our clients. Crucial to this advocacy is the ability to access our clients’ records electronically through the VBMS. Our student attorneys act under the same confidentiality guidelines as our attorneys do. Ultimately, these individuals are training to be licensed attorneys, and there is no reason why the same justification to limit the access cannot be used in the alternative. These student attorneys, acting under the bounds of client confidentiality, can also be subject to disciplinary measures for any breach thereof.

Limiting the access to simply the attorney of record will make clinic operations much more strenuous, as any time one of our several student attorneys, or, one of the staff attorneys not currently in accordance with the new requirements which would be required under this proposed rule, would need to access a vital client record through VBMS, would be unable to do so without the express consent of the attorney of record within the clinic, which will assuredly bog down the operational efficiency

⁹ *Id.* at 9437.
of our clinic and limit the student academic experience. Moreover, it would negatively impact our ability to represent clients efficiently and soundly. Our clients already permit this inter-office access to their own records, so why should the VA refute that capability when the clients themselves do not. Our staff attorneys would subsequently have to go through the lengthy process of achieving VBMS access in order to access records and provide them to our students, so why add the burdensome extra step, where confidentiality and responsibility is already maintained by our staff attorneys and students. The proposed rule itself acknowledges that this Note was included in the original rule to “promote consistency with regulations and practice’ at the time, specifically with respect to individuals working under the supervision of the claimant’s designated representative.”10 It strains logic to not continue to permit this accessibility for student attorneys like those of veterans legal clinics around the country like ours.11

Arbitrariness and Capriciousness Present in the Proposed Rule

The proposed rule, in particular, this amendment rescinding the Note to § 14.629, appears arbitrary and capricious. This proposed rule is, according to the VA, statutorily authorized by 38 U.S.C. §§ 5721-5728.12 However, The VA should consider the implication of APA § 706(2)(A) in this respect.13 The VA correctly indicates that:

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10 Id. at 9438-9439 (quoting 68 FR 8541, 8543).
11 This area of experiential learning is expanding at law schools around the country, where schools are instituting veterans legal clinics to support claimants before the VA. Therefore, it is difficult to say that permitting electronic access through student attorneys at legal clinics similar to ours is not “consistent with [current] practice[s].” Id.; See https://www.va.gov/ogc/docs/LegalServices.pdf.
12 2020 WL 777881 at *9435.
In establishing its Department-wide information security program, Congress has entrusted to the VA information owners that oversee the system or systems to “determin[e] who has access to the system or systems containing sensitive personal information, including types of privileges and access rights.”

However, the VA has neither realized the implications this will have on our clients nor provided sufficient reasons to restrict the access it had previously granted to law students, legal interns, paralegals, and service organization support staff, under the supervision of the claimant’s representative, attorney, or agent. In terms of student attorneys in a legal clinic like ours, the students advocate for veterans under the supervision of a managing attorney and/or professors who are licensed attorneys. These supervising attorneys are still responsible for the actions of these students and work hand-in-hand with students daily to assure that they are complying with the requisite clinic, VA, and professional responsibility guidelines. The supervising attorneys must still abide by the rules of professional conduct in their respective jurisdictions. Model Rule 5.3(2), for example, states, in pertinent part, that:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.

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14 2020 WL 777881 at *9435 (quoting 38 U.S.C. § 5723 (d)(2)).
15 ABA Model Rules of Prof'l Conduct R. 5.3(b).
Therefore, the professional requirements associated with supervising nonlawyers, especially considering that these individuals are student attorneys tasked with advocating for – and taking a great deal of responsibility of day-to-day client affairs – our veterans, should represent a sufficient protection for the VA to reconsider revoking the current Note to § 14.629(c). The VA does not point to any particular support for how, in terms of restricting student attorneys in clinics like ours from VBMS access, revocation is necessary to protect veterans’ personal information. These students are – while nonlawyers – training to be legal professionals, and are made aware of the responsibility to protect client information from the beginning. Therefore, with sufficient safeguards in place, the VA’s proposed rule appears arbitrary and capricious, and would represent a major barrier in providing sound and efficient advocacy for our veterans.

**The Veterans’ Canon**

While not the subject of litigation, it is important to note the Veterans’ Canon. In their justification for removing this Note, the VA stated that “never meant that VA would always provide support staff at a service organization or legal interns, law students, or paralegals with access to VBA IT systems.” However, this has become the reality. By making that statement, the VA is inherently interpreting its own regulation to its benefit. In doing so, the VA should consider the Veterans Canon,

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16 At Syracuse University, our students must either have already taken, or be currently enrolled in, a course on professional responsibility. Regardless of their status as to that requirement, the students are reminded at the beginning and throughout their time with our clinic that the protection of client information is of utmost concern.  
17 Something that courts have given deference to in the controversial Auer doctrine. See Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding that courts should defer to an agency's interpretation of its own regulation unless it is plainly erroneous or inconsistent with the regulation); see also Chadwick
proffered in *Brown v. Gardner*, 513 U.S. 115 (1994). There, the Court established a doctrine that court deference to ambiguity mandates “that interpretive doubt is to be resolved in the veteran's favor.”\(^\text{18}\) Of course, there is no litigation requiring judicial resolution of ambiguity, but there is an explicit attempt by the VA to resolve ambiguity, in its favor, where clinics like ours have relied upon the availability of this Note to provide sound and efficient legal advocacy for a number of years through this accessibility to the VBMS. The interpretation that the VA provided through this proposed rule is *ad hoc* in nature, and does not provide any circumstances through which its proposed justifications have come to fruition in the past. However, the limitation that the proposed rule would provide, through removing this Note, would directly impact attorneys, student attorneys, and clients at clinics like ours. Interpreting this apparent ambiguity in favor of the veteran – for our very own veterans permit usage of the VBMS by *not exclusively* the attorney of record – would justify the continuing existence of this Note.

**Conclusion**

Therefore, we urge the VA to reconsider removal of this Note to 38 C.F.R. § 14.629. Its removal would substantially impair the ability for veterans legal clinics like ours to provide sound and efficient legal advocacy to our clients before the VA. In

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the alternative, we would urge the VA to consider amending the proposed rule to, at least, permit veterans legal clinics like ours to have the opportunity to continue to have extended access to veterans records through the VBMS. Our student and staff attorneys are under the same requirements of confidentiality that the VA considers in its justification for the amendment to remove the Note. Perhaps the VA had not considered its impact on veterans legal clinics, but the impact is profound. This Comment is thus offered to urge the VA to reconsider removal of this Note which would have detrimental impacts to the efficiency and advocacy offered by our clinic, and, more importantly, to our clients, those who have “borne the battle” and those whom the VA has affirmed an obligation to care for. We appreciate the opportunity to comment on this proposed rule and thank you for your consideration of our comments.

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In coordination with
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