

DATE: 08-15-91

CITATION: VAOPGCPREC 65-91
Vet. Aff.Op. Gen. Couns. Adv. 17-91

Vet. Aff. Op. Gen. Couns. Prec. 65-91

TEXT:

Electronic Claims and Facsimile Documents as Evidence

QUESTIONS PRESENTED:

- a. Could VA accept a claims form submitted by telefacsimile (fax) as a formal claim under 38 C.F.R. §§ 21.3030, 21.5030(c), 21.5730(a), and 21.7530(a)?
- b. Does VA have the legal authority to treat a faxed submission of additional evidence in support of claim (other than documentary evidence), such as a statement of mitigating circumstances for a withdrawal from school, etc., as though the statement contained the original signature?
- c. Does VA have the legal authority to accept documentary evidence in support of a claim such as a marriage certificate, birth certificate, divorce decree, etc., if these documents are faxed to VA?
- d. Would our acceptance of faxed claims and documents jeopardize (1) either the claimant's right to due process should the claim be appealed; (2) VA's ability to recover in court an overpayment resulting from an erroneous statement made on a faxed document; or (3) the Federal Government's ability to prosecute the claimant for fraud should a fraudulent claim be submitted by fax?
- e. If VA does not have the legal authority to accept any type of faxed claim or supporting document, or that to do so would jeopardize our areas of concern in paragraph d, which provisions of law or regulation would have to be amended in order for VA to accept faxed documents?
- f. Does VA have the legal authority to accept submission of an original or reopened claim submitted by an electronic means other than fax?
- g. Does VA have the legal authority to accept documentary evidence in support of a claim such as a marriage certificate, birth certificate, divorce decree, etc., if these documents are faxed to VA or submitted by an electronic means other than fax? Would such electronic documents meet the requirements of 38 C.F.R. § 3.204 if they were certified at the point of origin by a certified representative of a veterans service organization and this certification is also faxed?

h. Would an original claim received by electronic means other than by fax constitute a formal claim under 38 C.F.R. §§ 3.151 and 3.152? If not, can a claim submitted electronically be considered an informal claim under 38 C.F.R. § 3.155 protecting the date of claim but requiring follow-up by the original document?

i. What legal responsibility does the Department have in the event an individual alleges that a claim form or other evidence was sent but that a malfunction resulted in nonreceipt?

j. Would the fact that VA might be able to verify independently at a later date the information received either by fax or electronically have any bearing on VA's legal authority to accept the claim or supporting information?

k. Either the claimant, an accredited representative of a service organization, or another third party might submit the claim, supporting evidence, or other document. Would this have any bearing on VA's legal authority to accept this material?

COMMENTS:

1. The questions presented above are all directed to a data transfer system which is, in part at least, electronic in nature. This office has recently issued an opinion, O.G.C. Advisory 17-91, dated May 28, 1991 (copy attached), which broadly addresses various legal issues arising from use by VA of an Electronic Document Processing System (EDPST). The views expressed in that opinion are incorporated herein to the extent appropriate and applicable.

2. Neither of the inquiries which presented the questions above for our consideration defined the nature of the "fax" system assumed by the questions. As we understand the current technology, however, at least two variants exist. In the more traditional system a paper document is processed electronically by the sender and via electronic signal transmitted to the recipient whose equipment reconverts the electronic signal to a new paper document which is intended to mirror the original. In the more recently devised system, the data input at either end (or both) may be derived from or result in only an electronic image with no corresponding paper document. In any event, VA would receive no paper document under either system but would only receive an electronic data stream. For the purpose of answering the questions enumerated, it does not matter that VA could "create" a paper version of the material faxed to it since in both cases only an electronic signal is received, not the original document, nor even an original electronic record. Since the record received by VA is electronic, we would stress the need to comply with all of the requirements discussed in O.G.C. Advisory 17-91, which speaks generally to the legal implications arising from receipt, use, and storage of electronic records.

3. Each of the questions presented here requires us to consider whether VA has any basic legal authority to accept data obtained electronically as a substitute for data which has traditionally been submitted in printed or written form. The advisory opinion noted assumed general authority to do so exists and only addressed specific legal provisions which are for consideration in exercising or limiting that authority. We will attempt to address more particularly in this opinion the scope of VA's authority to permit submission of claims and evidentiary documents by electronic means and the legal implications flowing from use of such authority.

4. Under section 210, title 38, United States Code, the Secretary of Veterans Affairs "is responsible for the proper execution and administration of all laws administered" by VA. 38 U.S.C. § 210(b)(1). The Secretary also "has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department of Veterans Affairs ... including regulations with respect to the nature and extent of proofs and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws, and the forms of application by claimants under such laws...." 38 U.S.C. § 210(c)(1). (Emphasis added.)

5. These broad powers are subject to more particularized statutory mandates. For instance, section 3001(a) of title 38, United States Code, provides in pertinent part as follows:

A specific claim in the form prescribed by the Secretary ... must be filed in order for benefits to be paid or furnished.... (Emphasis added.)

Section 3002 of the same title further provides:

Upon request made in person or in writing by any person claiming or applying for benefits under the laws administered by the Department of Veterans Affairs, the Secretary shall furnish such person, free of all expense, all such printed instructions and forms as may be necessary in establishing such claim. (Emphasis added.)

6. The term "form," as used in the portions of sections 210(c) and 3001 quoted above, is not clear. It could mean either the format of the data to be recorded and submitted or the media by which the data is transmitted; e.g., printed, oral, electronic. The term "forms" in section 3002, taken in conjunction with the modifier "printed," indicates that some predetermined physical, paper-type documents are contemplated. However, the requirement to provide such forms is limited by the language "as may be necessary" which, again, places the matter within the Secretary's discretion. The legislative history of these provisions sheds no light upon the meaning intended by the drafters.

7. It may be noted that the above-referenced statutory terms were enacted and implemented long before hi-tech electronic data storage and transmission became generally accepted for ordinary business applications. This is reflected in the long-standing VA rules on informal claims, noted in your questions, which fix the date of claim as the date the person first contacts VA, whether in writing, by fax, by telephone, or in person, subject to submission of a formal application within 1 year thereafter. This reference to a formal application in such context strongly implies that VA and Congress have understood the terms "form" and "forms" as referring to printed or written documents.

8. Nevertheless, this de facto usage of such terms does not conclusively translate into a de jure restriction to such use. With the advent of today's advanced electronic telecommunications technology, we suspect that, if the issue now were specifically considered, Congress would raise no objections to VA's use of such technology according to its administrative discretion. More importantly, however, we find the statutory authority in section 210(c) sufficiently broad to allow VA to determine both the format and the media to be used in applying for benefits. In this regard, the "limitation" on such authority in section 3001(a) reflects only congressional concern with assuring that a claimant must knowingly communicate a specific intent to apply for a particular benefit; it does not, in our view, manifest an intent to intrude into the section 210 authority granted VA to decide the most appropriate manner and format for such communication.

9. Likewise, 38 U.S.C. § 210(c) plainly accords VA authority to determine both the "nature and extent of" and "method of taking and furnishing" proofs and evidence in support of claims for benefits. There, evidence or proof required to prove or perfect an application for benefits may be furnished by whatever method VA considers appropriate.

10. Consequently, if the Secretary determines as a matter of policy that original documents constituting proofs and evidence in support of a claim are not required for VA purposes and if such documents are not otherwise required by law, an electronically created image of the original, such as would be provided VA by fax transmission, may be authorized. VA could elect to retain and use the image electronically or print a copy from the electronic image, at its discretion.

11. However, in arriving at such a policy determination the Secretary must take into consideration the legal implications discussed in our previously mentioned advisory opinion. In particular, to the extent that fax transmission involves records which have been stored in a non-Federal Government electronic data base and which, once sent to VBA, will be stored in VBA's computers and used to electronically compare such transmission with VBA automated records for beneficiary eligibility purposes, such transmissions could well invoke application of the Computer Matching and Privacy Protection Act of 1988, Pub.L. No. 100-

503, 102 Stat. 2307 (1988) (the "Computer Matching Act"), which amended the Privacy Act, 5 U.S.C. § 552a. A matching program covered by the Act is defined in relevant part as:

A ny computerized comparison of—

(i) ... a system of records with non-Federal records for the purpose of--

(l) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefits programs.... 5 U.S.C.A. Section 552a(a)(8)(A) (West Supp.1990).

12. The phrase "non-Federal records" as used in the statutory definition refers to automated records of a State or local government. *Id.*, at §§ 552a(a)(10), 552a(o); OMB Final Guidance Interpreting the Provisions of Public Law 100-503 (OMB Guidance), 54 Fed.Reg. 25818, 25822 (1989). Thus, for example, the Computer Matching Act, though not applicable to submission of automated data by a private school, would apply to all faxed automated information received from a school operated as a component of State or local government if the data is stored on a VA computer and compared with VA computer data bases.

However, the Act would not apply to submission by such schools of paper-type documents (whether created manually or electronically), physically sent to VA for processing, even if VA converts the information to computer data that is then compared with other data bases. In such a case, no computerized Federal and non-Federal records comparison covered by the Act would have occurred. OMB Guidance, 54 Fed.Reg. 25822.

13. We also note, as a general matter, that a recent General Services Administration (GSA) pamphlet states that the "creation, maintenance, and disposition of all official records, regardless of media, is controlled by the provisions of 44 U.S.C. Chapters 21, 29, 31, and 35 and both the Federal Information Resources Management Regulation (FIRMR) (41 C.F.R. Chapter 201) and NARA National Archives and Records Administration regulations in 36 C.F.R. Chapter XII." Information Resources Management Service, General Services Administration, Electronic Forms and Authentication Practices, App. A, 14 (November 1990). Consistent with this statement, it is our view that statutory and regulatory provisions applicable to forms and records generally would apply to the electronically transmitted (faxed) forms or documents.

14. The Freedom of Information Act (FOIA), which governs release of agency records, does not exempt or otherwise distinguish agency records consisting of data received via fax. Accordingly, such records would be subject to release, if within the scope of a FOIA request, unless one of the FOIA exemptions from disclosure otherwise allowed VA to withhold the records. Moreover, subject to the

procedural requirements set forth in O.G.C. Advisory 23-91 (copy attached), a FOIA request for information submitted electronically by means of fax would be processed in the same manner as VA processes any FOIA request for paper records whether the faxed document is received and stored electronically by VA or received electronically and stored in printed form. (We note that, although there is little case law on the subject, VA has taken the legal position that information or data stored in a computer medium are agency records for FOIA purposes; that is, subject to disclosure under FOIA, only when the data may be retrieved by means of software in use in VA at the time of the FOIA request. In other words, FOIA does not compel VA to write software to retrieve data in order to respond to a FOIA request. Of course, this position may change as litigation arises in this area.)

15. Also, acceptance of faxed documents would necessitate having security procedures to prevent unauthorized invasion of the VA electronic systems required to receive, store, and retrieve the faxed data, as noted in our earlier-referenced advisory opinion. Obviously, the task of securing the data stored in electronic form is considerably different than securing data stored as a physical file. Appropriate measures to ensure the integrity of the electronic data storage system used in lieu of present printed data would be essential.

16. Documents, such as applications for benefits or enrollment certifications, which certify the data thereon by bearing the signature of the party presenting it could, if obtained by fax or other electronic means, be ruled unacceptable for evidentiary purposes in litigation before the Court of Veterans Appeals (COVA) or other judicial body. Thus, the dual risks of exposing the Government to payment of erroneous or fraudulent claims and of impairing its ability to prosecute the recovery thereof must be considered.

17. Further, our preliminary review discloses various VA regulations, title 38 provisions, and other statutes not herein discussed that specify that certain data shall be submitted "in writing." We interpret those references as barring submission of electronic records in lieu thereof. Consequently, conflicting regulations and laws would have to be amended before VA's conversion to an electronic or fax process. This Office would be pleased to assist you in locating any such references in title 38, United States Code. Your "word-search" system on regulations would enable you to locate such items in existing title 38, Code of Federal Regulations, provisions.

18. Finally, various factors exist that suggest great care should be exercised in considering the impact of implementing a policy of accepting faxed claims and supporting documents. Note, for example, that VA is not always the sole arbiter of the form of claim, as indicated by the provisions of sections 3001 and 3005 requiring that certain such applications be jointly approved by the Secretary of Health and Human Services. Further, the practicability of using two different systems to accommodate Computer Matching Act provisions, one for private

schools and another for public schools, could be a significant factor in any decision on permitting fax submission of required school certifications, as would the potential for fraud.

HELD:

a. The intent of Congress in according VA authority to determine the "form" of an application for benefits is not entirely clear from the statutory language or the legislative history. Nevertheless, we believe the language used in 38 U.S.C. § 210(c) is sufficiently broad as to empower the Secretary to prescribe, by regulation, both the format and media of transmission for benefit claims, as well as for the proofs and evidence needed to support them. Such media could include telefacsimile if use of that medium is reasonably related to the effective implementation of title 38 benefits law and not inconsistent therewith; will not unreasonably expose the Federal Treasury to erroneous or fraudulent claims; and complies with the requirements of relevant information and recordkeeping law and regulations.

(Questions a. and f.)

b. Submissions of any documentary evidence, other than an application for benefits, but including additional evidence in support of an original or reopened claim, such as a birth certificate or marriage license, or an enrollment certification not otherwise required by law to be in writing for Federal Government purposes may be accepted by VA in electronic or fax form (except to the extent that existing statutes and regulations otherwise specifically provide and are not amended to conform). Such documents could meet the requirements of 38 C.F.R. § 3.204 whether or not accompanied by a faxed certification if VA so provides. (Questions b., c., and g.)

c. VA has discretionary authority to prescribe that a claim submitted by fax or other electronic process will be accepted as a formal claim under 38 C.F.R. §§ 21.3030, 21.5030(a), 21.5730(a), 21.7030(a), 21.7530(a), 3.151 and 3.152.

(Questions a. and h.)

d. While acceptance of documents by fax or other electronic means is unlikely to jeopardize the claimant's right to due process, acceptance of documentary evidence in such form could adversely affect both VA's ability to recover an overpayment of benefits made in reliance upon such evidence and the Federal Government's ability to prosecute a claimant or third party for fraud for falsely certifying data. (Question d.)

e. Any provisions of law, including State law where relevant, which specifically mandate that a document shall be written or signed by a party thereto would have to be changed to allow VA to accept such documentation electronically or by fax; examples are certain insurance benefit requirements (see 38 U.S.C. §§

704(d) and 707) and deeds or mortgages for loan guaranty purposes which State law recognizes only in written or printed form. (Question e.)

f. If a document is sent to the VA electronically, but not received, responsibility for its nonreceipt only would fall upon VA if the failure to receive it was due to a malfunction as to which the VA had control, such as a defective fax receiving machine. However, even this risk should be eliminated by an appropriate legal requirement or agreement between the sender, such as a school, service organization, or claimant, and VA requiring the former to assume all responsibility. (Question i.)

g. The ability to independently verify documentary evidence transmitted by fax (other than an application document) has a bearing on the authority to use the data if subject to Computer Matching Act provisions. Otherwise, VA's legal authority to accept and use that form of evidence is limited by the degree to which the Secretary views the availability of such verification as being a factor in favor of accepting electronic or faxed transmission of the original's image for VA purposes. In other words, if a birth record is readily verifiable from official State records, a faxed copy may suffice for VA purposes, and VA may accept that form of evidence as a matter of policy. The decision is not a matter of legal authority but, rather, one of risk management. (Question j.)

h. The only apparent legal implications arising from the fact that the transmission of the documentary evidence may originate from either a veteran, accredited representative, or service organization are that (1) VA could only accept information from the source required by law and Department rules; and (2) the proper party submitting the evidence should be subject not only to the usual legal consequences of false and untimely submission but, also, to an agreement holding VA harmless from the consequences arising from use of electronic media in lieu of conventional media noted above. The fact that one category of submitting party or another is involved in no way absolves any such party from responsibility for its acts. (Question k.)

Attachments

05-28-91

From: General Counsel (024)

Subj: Electronic Document Processing System Technology

To: Chief Benefits Director (20)

QUESTION PRESENTED:

A. What legal issues may arise from the Veterans Benefits Administration's (VBA) plan to implement electronic document processing system technology (EDPST) in the entire claims processing system as the means to receive, store, transmit and otherwise process all records concerning veterans' claims?

B. What legal concerns may arise from a policy, if adopted, of no longer maintaining the original paper claims documents as backup to the electronic copies which will be in the system, including any specific concerns as to the admissibility and use of electronic documents or copies in court proceedings?

COMMENTS:

1. The move from a paper records environment to an electronic or "paperless" environment in the entire claims processing system involves many potential legal issues. These issues can be analyzed adequately only in the context of actual procedures and technologies VBA contemplates incorporating into its claims processing system. Consequently, what follows is a brief discussion of the general legal requirements which we have identified which would appear to be applicable to EDPST. We will address specific concerns later as they arise. (We are reviewing the VBA Circular on Electronic Education Certification Programs.)

2. The legal requirements which may apply to EDPST are dependent on at least five factors: (a) the medium used; (b) how the information is maintained and retrieved; (c) the nature of the information and records maintained; (d) whether information is gathered from sources outside the Federal government; and (e) the purposes for which the information is used by the Department.

3. Fundamental to the consideration of the application of all the factors is the fact that the materials gathered, maintained, and used in EDPST constitute agency records. 44 U.S.C. § 3301. All Federal agencies, including VA, must comply with the statutes governing the creation, maintenance and use, and disposition of records. 44 U.S.C. Chapters 29, 31, 33 and 35. All Federal agencies also must comply with government-wide standards, policies, guidelines and regulations promulgated under the authority of these statutes. E.g., 36 C.F.R. Subchapter B; 41 C.F.R. Chapter 201; GAO Policy and Procedures Manual for Guidance of Federal Agencies, Chapter 8. Criminal sanctions may be imposed on individuals, including Federal employees, who willfully and unlawfully destroy government records other than as authorized by these statutes and regulations. 18 U.S.C. § 2071; 36 C.F.R. § 1228.102.

4. As to the first factor mentioned in paragraph 2 above, the medium used, under authority of the statutes mentioned above, the National Archives and Records Administration (NARA) and the General Services Administration (GSA)

have promulgated regulations governing electronic records management. 36 C.F.R. Part 1234 and 41 C.F.R. Part 201-45, published at 55 Fed.Reg. 19216 (1990). These regulations address agency responsibilities as to electronic records, specifically: creation and use of the records, including backup copies; security; selection and maintenance of electronic records storage media; and retention, destruction, and judicial use of these records.

5. Under the Administrative Procedure Act (APA), Federal district courts shall hold unlawful and set aside agency actions, findings, and conclusions found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

Under this provision, while there are some exceptions, it is a well-established legal principle that agencies are bound by properly promulgated regulations; they generally must obey the applicable rules. Thus, where the failure to follow the applicable records rules contributed to the adverse result, VA's failure to comply with the regulations discussed in paragraphs 3 and 4 above or with any regulations applicable to these records could provide a basis for a person adversely affected by a VA determination based in whole or in part upon such records to either challenge the action administratively or preclude VA from getting the necessary electronic records supporting the determination admitted into evidence in judicial proceedings.

6. Further, EDPST technology would appear to be within the definition of automated data processing equipment (ADPE). 40 U.S.C. § 759(a)(2). As such, the procurement of EDPST, as well as its operation, is subject to various legal requirements. E.g., 41 C.F.R. Chapter 201, *supra*. Failure to comply with these requirements could result, upon challenge, in invalidation of an EDPST procurement, and in loss of the delegation of ADPE procurement authority to VA by GSA. E.g., 41 C.F.R. § individual identifiers, such as claim or social security numbers. Consequently, the records are subject to the Privacy Act of 1974 (PA), 5 U.S.C. § 552a. The PA imposes several duties on the agency. For example, VBA must:

establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained .

5 U.S.C. § 552a(e)(10).

10. An example of the application of the third factor, the nature of the information maintained, is the fact that information on VA beneficiaries would be protected by 38 U.S.C. § 3301, and where applicable, § 4132. For example, information protected by section 4132 in this electronic system would require significant security provisions, such as limitations on password access or menu assignment,

to ensure that this data could be accessed only by those VA officials needing the data to perform an agency task for which access to the data is required.

11. The fourth factor for consideration is whether this system will be used to gather information from non-Federal individuals and entities. If so, VA must abide by the provisions of the Paperwork Reduction Act (PRA), 44 U.S.C. Chapter 35, governing the collection of information. 44 U.S.C. § 3507; 5 C.F.R. Part 1320. For example, requiring educational institutions to submit information electronically on students' attendance would be subject to the PRA. If VBA fails to satisfy the PRA's requirements, no person asked to submit information may be penalized for failure to comply with VBA's information collection. 44 U.S.C. § 3512; 5 C.F.R. § 1320.5.

12. As to the final factor, that is, the purposes for which VA uses or will use the information, the determination of applicable legal provisions may be made only after VBA identifies those purposes. For example, if VBA engages in an automated data comparison which qualifies as a covered computer match, the Computer Matching and Privacy Protection Act of 1988, Pub.L.No. 100-503, would apply.

13. Turning to the question of admissibility of electronic records in Federal courts, it would appear that there are several legal provisions generally applicable in whole or in part to the admission of electronic records in Federal court proceedings. E.g., Federal Rules of Evidence 1001(1), (3), 1002, 803(6)-(10), 901(b)(7); 28 U.S.C. §§ 1732, 1733; and 36 C.F.R. § 1234.24. It would appear that electronic records generally would be admissible in court proceedings provided the requirements of these various statutes, court rules and regulations are met. United States v. Young Brothers, Inc., 728 F.2d 682, 693-94 (5th Cir.1984), cert. denied, 469 U.S. 881 (1984); accord, Systems Management Staff, Justice Management Division, United States Department of Justice, Admissibility of Electronically Filed Federal Records as Evidence: a Guideline for Federal Managers and Counsel, Draft (October 1990).

14. In essence, in order to meet these various legal requirements, VBA should document thoroughly in advance of implementation of an EDPST component or process, EDPST's standardized record creation, maintenance and retrieval procedures and the standardized recordkeeping procedures documenting the performance of these standardized record creation, maintenance and retrieval procedures. Procedures should include: (1) the procedures to ensure the accuracy (including authenticity) of the data and records being entered, or documents being scanned, into the system; (2) the security procedures preventing unauthorized addition to, or modification or deletion of, the records; and (3) the procedures to protect the system from such problems as power loss or storms. VBA also would have to demonstrate compliance with those procedures. 36 C.F.R. § 1234.24, see also, 36 C.F.R. § 1234.26. We would be pleased to advise you further on the applicable legal requirements if you desire.

15. There are three caveats to this general conclusion concerning the admissibility of electronic records in court proceedings, however. First, the Court of Veterans Appeals (COVA) has not indicated what position it would take on the admissibility of electronic records in proceedings before it. We would recommend that COVA's position be ascertained and any COVA concerns be addressed before any policies or procedures are established. If you wish, we would be pleased to approach COVA about this matter.

16. The second caveat concerns the fact that, under certain circumstances such as a challenge to the validity of a signature on an insurance beneficiary designation, it is necessary to establish the authenticity of a document by physical examination. Informal discussions with IG personnel indicates that, while document analysis can be performed on photocopies and electronic copies of documents, it is not as reliable as examination of the original document for several reasons, which reduces the reliability of an electronic copy of a document for authentication purposes, and hence, reduces its persuasiveness in either civil or criminal proceedings. Consequently, we would recommend that VBA keep certain original paper documents which are essential to the claims process and which historically have had their authenticity challenged on occasion, such as the designation of insurance beneficiary, after entry into electronic format. Such original documents then would be available later for authentication if necessary. We also recommend that you contact Laboratory Services (51B), in the Inspector General's Office of Investigations, to determine their requirements for authenticating suspect documents, prior to procurement of an Electronic Document Processing System and determining what key original documents to keep.

17. The third caveat concerns paper records which are transcribed to electronic storage media. In a draft document, the Department of Justice has stated that:

Special problems arise when dealing with records created by transcribing information from paper records to computer files, or that are the result of computer compilation or calculation such as a statistical report. In these circumstances, a systems analyst or programmer will likely be required to testify as to how the input data was manipulated to produce the record or report offered as evidence, and the original paper records (or listings of the input data) must be made available for inspection. If the process of converting data to matching readable form was not supervised by the testifying systems analyst or programmer, then someone who can attest to the validity of that process will be required. (Emphasis added.)

Systems Management Staff, Justice Management Division, United States Department of Justice, Admissibility of Electronically Filed Federal Records as Evidence: a Guideline for Federal Managers and Counsel, Draft 15-16 (October 1990). It would appear that the Department of Justice may have

reservations about the admissibility of paper printouts of the electronic copies of paper records absent the availability of the original paper records, and, hence, about the advisability of destroying those paper records.

19. Another significant legal matter arises in the consideration of a shift from paper records to electronic records in the claims process. There are specific statutory and regulatory provisions which state items are to be "written" or "in writing" or which use other terms which may imply a possible legal requirement that a paper instrument be used, such as the terms "sign," "signed," "certification," "certified," or "certify." These provisions generally are located in two categories of statutes and regulations: (a) provisions in title 38, United States Code, and implementing regulations; and (b) state laws governing documents, such as notes, mortgages and deeds or contracts conveying title of real estate, which are subject to state law because Federal law has not preempted the subject area. For example, section 707 requires VA to use a National Service Life Insurance policyholder's dividends to pay any unpaid premiums unless the policyholder has requested otherwise in writing. Also in title 38, subsection 111(g)(2)(C) mentions "certified in writing" while subsection 1810(g)(4)(A) speaks of certification "in such form as the Administrator shall prescribe."

20. While there has been some movement to amend the definition of the term "writing" to include electronic media specifically, e.g., Fed.R.Evid. 1001(1), the term "writing" generally has referred to "the expression of ideas by letters visible to the eye. The giving an (sic) outward and objective form to a contract, will, etc., by means of letters or marks placed upon paper, parchment, or other material substance." Black's Law Dictionary 1442 (5th ed. 1979). This definition would not appear to include information stored in computers in binary code requiring software to read on a computer screen since it is not in a tangible form of expression readable by the unaided human eye. See, e.g., Uniform Commercial Code, s 1-201(46); 1 Anderson on the Uniform Commercial Code, § 1-201:379, :380 (3rd ed. 1981) (unchanged as of the November 1990 supplement).

21. The use of these terms in VA statutes or regulations, where it is determined that they require paper records, would preclude the electronic creation of the records addressed in those statutes and regulations and may require the maintenance of the paper records until the VA statutes and regulations, where necessary, have been amended. These terms in the statutes and regulation apparently would not preclude VBA from making electronic copies of these records and using them administratively.

22. It would appear to be necessary to examine individually the many title 38 statutory and regulatory provisions using these or similar terms to determine whether use of electronic records or copies of records would satisfy the "writing" requirement, or paper records would be required. If requested, the Office of General Counsel would be pleased to conduct this review. (We might note

that the issue is not unique to VA. For example, we understand that the Office of Management and Budget currently is seeking a legislative amendment to 31 U.S.C. § 1501 which provides that Federal money may not be obligated pursuant to a contract unless supported by documentary evidence of a binding agreement that is in "writing" in order to allow electronically generated documents to satisfy this statute. Also, it is our understanding that the Internal Revenue Service has determined that the use of the term "signed" in 26 U.S.C. § 6061 requires that taxpayers sign a paper document in order to satisfy the statutory requirement that Federal income tax returns be signed. Hence, taxpayers who file their tax returns electronically also must file a paper form 8453 which is signed.)

23. State statutory requirements that documents be paper are another matter. Where applicable, it would appear that VBA will have to obtain or create and maintain the paper records necessary to comply with these requirements.

24. If you desire further legal assistance, such as discussed above, it would be helpful if VBA first identifies specifically the records which it wishes to create or store electronically when requesting such assistance. If there are legal questions concerning the matters discussed in this memorandum, please contact my staff.

HELD:

A. VBA may implement EDPST in accordance with applicable legal requirements.

In order to meet these legal requirements, VBA should document thoroughly in advance of implementation of an EDPST component or process, EDPST's standardized record creation, maintenance and retrieval procedures and the standardized recordkeeping procedures documenting compliance with these standardized record creation, maintenance and retrieval procedures. Procedures should include: (1) the procedures to ensure the accuracy (including authenticity) of the data or records being entered, or documents being scanned, into the system; (2) the security procedures preventing unauthorized addition to, or modification or deletion of, the records; and (3) the procedures to protect the system from such problems as power loss or storms. VBA also would have to be prepared to demonstrate compliance with those procedures as specific questions arose. Failure to comply with these legal requirements may: hinder VBA's ability to procure and operate EDPST; lay open the Department's claims decisions to challenge; expose VA to civil liability for damages, costs and attorneys' fees; and place individual employees at risk of criminal liability.

B. Upon compliance with those requirements, particularly as to the security, integrity and accuracy of the records, and with the requirements generally governing the admissibility of computer records, the electronic records or photocopies of those records generally should be admissible in Federal court proceedings.

C. Prior to implementation of EDPST, VBA should: determine COVA's position

on the admissibility of electronic records and resolve any concerns COVA may have; identify VA statutes and regulations in which the wording might require records be generated or maintained on paper; where appropriate, seek legislative amendment of the statutes and amend the regulations; and where state statutes would appear to require the use and maintenance of paper records, establish procedures to ensure that these records are not inadvertently destroyed if electronic copies are made for administrative use. Because of the need to address these concerns before implementation of EDPST and because of the need for access to the originals of the records to establish authenticity in certain cases, it would appear advisable to retain certain key paper originals, such as insurance beneficiary designations and documents concerning real estate transactions, e.g., notes, real estate contracts, at least for the near future.

VETERANS ADMINISTRATION GENERAL COUNSEL

Vet. Aff.Op. Gen. Couns. Adv. 17-91 Prec. 65-91