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VA Mailing Disputes: Overcoming the “Presumption of Regularity”

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In *Romero v. Tran* (33 Vet. App. 252 (2021)), argued by Chisholm Chisholm & Kilpatrick attorneys, the U.S. Court of Appeals for Veterans Claims (CAVC) issued one of its most detailed and consequential modern examinations of the presumption of regularity as applied to VA’s mailing obligations. Decided in January 2021, *Romero* clarified when the presumption attaches, what evidence is sufficient to rebut it, and what burden then shifts to VA once rebuttal occurs. Although framed as a procedural timeliness dispute, the case has had broader doctrinal implications for veterans law, particularly for claimants represented by counsel who rely on VA’s statutory duty to provide notice to both veterans and their representatives.

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This article examines *Romero*'s legal reasoning, its treatment of rebuttal evidence, and its practical impact. It then considers how a more recent memorandum decision, *Marion v. Collins* (No. 24-6964, slip op. at 1 (Vet. App. Dec. 23, 2025) (mem. dec.)) has refined—though not undermined—the principles articulated in *Romero*.

The Background for *Romero v. Tran*

Presumption of Regularity

The presumption of regularity is a long-standing administrative law doctrine under which courts assume that government officials have properly discharged their official duties, including complying with statutory and regulatory notice requirements, unless there is clear evidence to the contrary. In the VA context, this means that when the law requires VA to mail a decision or notice to a claimant or representative, adjudicators will generally presume that VA did so correctly, even if the claimant asserts nonreceipt.

Procedural Posture

The appellant in *Romero* was a Vietnam-era Army veteran pursuing multiple benefits claims, including an increased PTSD rating and entitlement to TDIU. After VA denied the claims, she timely filed a Notice of Disagreement and appointed counsel. VA later issued an August 2017 Statement of the Case (SOC), which triggered a sixty-day period to perfect the appeal under 38 U.S.C. § 7105(d)(3). The veteran's counsel did not receive the SOC by mail and discovered its existence only by reviewing the electronic claims file weeks later. Counsel promptly filed a VA Form 9 and argued that the appeal was timely because VA failed to mail the SOC to the representative as required by statute and regulation.

The Board of Veterans' Appeals rejected that argument, invoking the presumption of regularity to find that VA properly mailed the SOC to both the veteran and her representative. Although the Board acknowledged "substantial evidence" of widespread VA mailing problems, it concluded that the evidence was not "specific" to the appellant's case and therefore insufficient to rebut the presumption. The appeal to CAVC followed.

The *Romero v. Tran* Court's Framework: Attachment Versus Rebuttal

The Court's analysis in *Romero* is notable for its careful separation of two often-conflated questions: (1) when the presumption of regularity attaches, and (2) what is required to rebut it.

Attachment: Relatively Low Threshold

On attachment, the Court sided with the Secretary. Relying on Supreme Court and Federal Circuit precedent, the Court held that the presumption may be triggered by legal authority alone, not merely by evidence of an agency's internal procedures. Because VA is legally required by 38 U.S.C. § 7105(d)(3) and 38 C.F.R. § 19.30 to mail an SOC to both the claimant and the representative, that duty was sufficient to invoke the presumption that VA carried it out. The Court rejected the argument that VA must first affirmatively prove the reliability of its mailing system before the presumption applies.

This holding preserved a relatively low threshold for attachment, consistent with longstanding doctrine emphasizing administrative efficiency and separation-of-powers concerns.

Rebuttal: Generalized Evidence Can Be "Clear Evidence"

Where *Romero* broke new ground was in its rebuttal analysis. The Court emphasized that rebuttal is a question of law reviewed de novo and

that the presumption of regularity is not absolute. Once rebutted by “clear evidence,” the presumption falls away and VA must prove actual mailing or receipt by a preponderance of the evidence.

Critically, the Court rejected the Board’s conclusion that rebuttal evidence must be claimant-specific. The record included:

- A Government Accountability Office report documenting systemic deficiencies in VA’s outgoing mail operations;
- A sworn affidavit from counsel detailing hundreds of instances in which VA failed to mail decisional documents to representatives; and
- A sworn statement from the National Organization of Veterans’ Advocates describing similar widespread failures reported by accredited representatives.

The Board itself characterized this as “substantial evidence” of a widespread mailing problem, a factual finding favorable to the claimant. The Court held that such a finding could not be ignored or reweighed and that, when combined with counsel’s sworn statement of nonreceipt, it constituted clear evidence sufficient to rebut the presumption.

In doing so, the Court reaffirmed earlier precedent, such as *Ashley v. Derwinski* (2 Vet. App. 62 (1992)), recognizing that non-claimant-specific evidence may rebut the presumption where it directly undermines the assumption of regular agency practice.

Consequences of Rebuttal and the “Pointless Remand” Discussion

Once rebuttal occurred, the burden shifted to VA to prove actual mailing. At oral argument, the Secretary conceded that VA could not conclusively establish that the SOC was mailed to the representative. The Court therefore set aside the Board’s decision and remanded for a

new timeliness determination under the correct legal framework, noting that a remand to allow VA to “try again” to prove mailing would be pointless given the Secretary’s concession.

Importantly, the Court stressed that its holding did not amount to a categorical finding that VA’s mailing practices are generally irregular. Rather, the decision was grounded in the evidence presented and the Board’s own factual findings in that particular case.

2025: *Marion v. Collins* and the Potential Limits of *Romero*

In December 2025, CAVC issued a nonprecedential memorandum decision in *Marion v. Collins* that may illustrate the outer boundaries of *Romero*’s rebuttal framework. In *Marion*, the appellant argued that VA failed to mail a July 2021 higher-level review decision to his attorney, rendering a later Board appeal timely. The only rebuttal evidence consisted of an affidavit from counsel stating that a review of business records showed no receipt of the decision.

The Court affirmed the Board’s dismissal, holding that the affidavit amounted to no more than a generalized statement of nonreceipt. Unlike in *Romero*, there was no accompanying evidence of systemic VA mailing failures, no GAO report, and no corroborating statements from other practitioners or organizations. The Court emphasized that while an affidavit could, in theory, rebut the presumption, it must contain meaningful detail about office procedures or be supported by additional evidence. Standing alone, a bare assertion of nonreceipt was insufficient.

Read together, *Romero* and *Marion* draw an important doctrinal line. *Romero* confirms that generalized, systemic evidence—when credited by the Board—can rebut the presumption even if not tied to the individual claimant’s file. *Marion*, by contrast, demonstrates that

Romero does not lower the bar so far as to allow rebuttal based solely on conclusory affidavits.

Conclusion

Romero v. Tran remains a cornerstone case in veterans law concerning VA notice and the presumption of regularity. Its most enduring contribution is its clarification that rebuttal evidence need not be claimant-specific when it meaningfully calls into question the regularity of the agency practice at issue and is coupled with competent evidence of nonreceipt. Subsequent decisions like *Marion* underscore that *Romero* is not an invitation to speculation, but a carefully calibrated doctrine requiring real, probative evidence.

For practitioners and adjudicators alike, the lesson of *Romero* is both practical and principled: when the record demonstrates credible, systemic irregularities, the presumption of regularity cannot substitute for proof.

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