

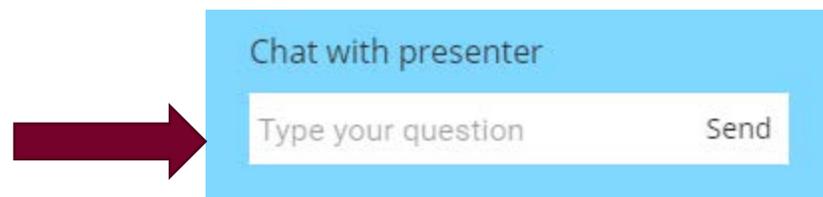


# Ethical Duties of a VSO & How to Navigate Common Ethical Dilemmas

VSO Webinar

# Intro Notes

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# Tech Tips

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# Intro Notes



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# Rick Spataro

Presenter

## Bio

- Director of Training and Publications
- Has practiced Veterans Law since 2004 at CAVC, Federal Circuit, and BVA
- Former Managing Attorney of NVLSP's Nehmer Lawsuit Division



# Helen Chong

Presenter

## Bio

- Former Magistrate of the Supreme Court of Virginia
- Trained in mental health matters through the Virginia judicial system
- Authored the healthcare chapter of the *Veterans Benefits Manual* and Online Basic Training Course

## VSO's Guiding Principles to Ethical Duties

- 38 C.F.R. § 14.632, Standards of conduct for persons providing representation before the Department
- Your Organization's Policies
- American Bar Associations Model Rules of Professional Conduct

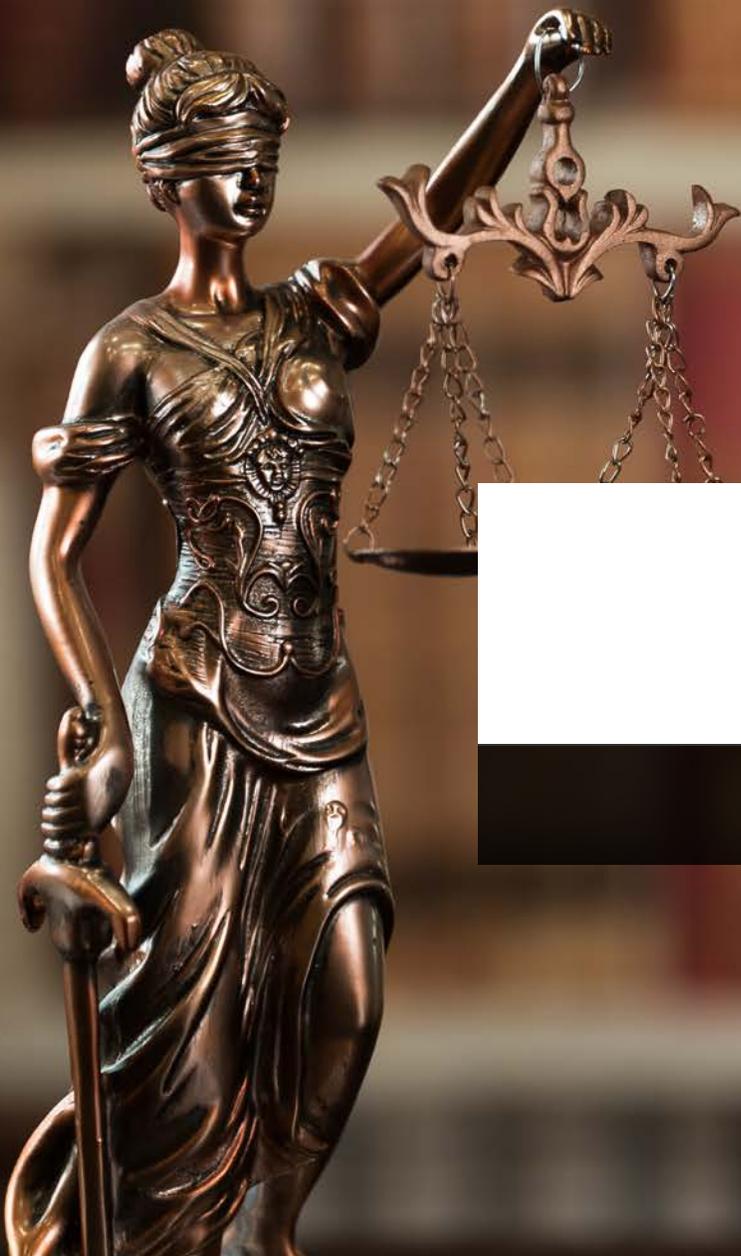
# Code of Federal Regulations

38 C.F.R. § 14.632 Standards of conduct for persons providing representation before the Department



# Your Organization's Policies

Supervisor, Guidelines, etc.



# American Bar Association

Model Rules of Professional Conduct

# How to interpret the Model Rules

- Not binding on VSOs, but can provide helpful guidance.
- “Virtually all difficult ethical problems arise from conflict between [an advocate’s] responsibilities to clients, to the legal system and to the [advocates] own interest in remaining an upright person while earning a satisfactory living.”
  - ABA Model Rules Preamble [9]

# How to interpret the Model Rules

- “[S]ensitive professional and moral judgment guided by the basic principles underlying the Rules.” (ABA Model Rules Preamble [9])
- “The Rules of Professional Conduct are ***rules of reason***. They should be interpreted with ***reference to the purposes of legal representation*** and of the law itself.” (ABA Model Rules Scope)

In a Nutshell: Common sense & your role



# Presentation Topics

## Practical Guide to Ethical Dilemmas

- **Going all out v. Minimum Acceptable Standard for a VSO**
  - Zealous and Diligent Advocacy
- **Competence**
- **Diminished Capacity**
- **Duty of Confidentiality**
- **Gifts**

# Going All Out v. Minimum Acceptable Standard



## Standards

## Going All Out v. Minimum Acceptable Standard

Do you, as a VSO, have a choice in how hard you work for a particular claimant?

# Standards

What is the minimum acceptable standard for a VSO?

Minimum includes, but is not limited to:

- Interview Vet
- Review file to see if other claims should be filed
  - Vet relies on you, the expert, to help identify potential benefits
- Submit an ITF / Supplemental Claim to protect effective date
- Review c-file / STRs
- After review of file & interview with Vet, tell Vet what evidence is needed for VA to grant claim(s)

# Standards

What is going all out for a VSO?

## Going all out:

- Do all of the above, plus...
  - Identify medical experts and write to them for favorable opinions
  - Write letter to medical expert that includes:
    - Summarizing facts,
    - Explaining VA rules, and
    - Standard of proof that applies to medical opinion
  - Help Vet prepare lay statement
  - Interview family / buddies and help prepare lay statements for them to sign

# Going all out: Zealous v. Diligent Advocacy



## Zealous

Merriam-Webster Dictionary:

- Zealous: marked by fervent partisanship for a cause : characterized by zeal
- Zeal: eagerness and ardent interest in pursuit of something: FERVOR

Dictionary.com:

- Zealous: having or showing zeal
- Zeal: fervor for a cause; eager desire or endeavor; ***enthusiastic diligence***; ardor

## Diligent

Merriam-Webster Dictionary:

- characterized by steady, earnest, and energetic effort

Dictionary.com:

- Having or showing care and conscientiousness in one's work or duties

# Hypo: Zealous Advocacy



You're a VSO helping a Vet file a claim for service-connected compensation for a mental disorder. You advise him to get a medical opinion to support his claim.



Vet provides three letters. Letter 1 is written by a general practitioner. Letter 2 is written by a psychiatrist with special training and experience working with Vets. Letter 3 is written by a nurse whom he's known for years as a family friend.



Letter 2 written by the psychiatrist provides a favorable nexus opinion. Letter 3 written by the nurse neither supports nor hurts the claim. Letter 1 includes a negative nexus opinion.

# Hypo: Zealous Advocacy cont'd



You submit the application, but forget to attach any medical opinion.



The application you submitted references medical opinions obtained by the Vet.



VA sends a letter requesting you to provide the medical opinions.



Vet provided you all three letters under during a communication that the Vet asked you to keep confidential.



You call and email the Vet and get an automated message that he is out of the country.

# Poll Question

Zealous Advocacy

**What should you do in response to the VA's request?**

Give all three letters

Give two letters

Give one letter

Acknowledge request and state you will respond after consulting with Vet when he returns to country

Do nothing

# RULES

- 1 Code of Federal Regulations
- 2 Your Organization's Policies
- 3 ABA : Zealous and Diligent



## 38 C.F.R. § 14.632

# Standards of conduct for persons providing representation before the Department



## Diligent Advocacy

**38 C.F.R. § 14.632(b):** An individual providing representation on a particular claim shall

**(2)** Act with reasonable diligence and promptness in representing claimants. This includes responding promptly to VA requests for information or assisting a claimant in responding promptly to VA requests for information.

## Diligent Advocacy

**Definition:** characterized by steady, earnest, and energetic effort; showing care and conscientiousness in one's work or duties





# Diligent Advocacy



**“A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when [an advocate] overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the [advocate’s] trustworthiness.”**

- ABA Model Rule 1.3 Comment [3]



# Diligent Advocacy

## Topic

- Caseload: Too many cases? Overworked? Not enough time? What do you do?



## Diligent Advocacy

**38 C.F.R. § 14.632(b):** An individual providing representation on a particular claim shall:

(1) Provide claimants with competent representation before VA. Competent representation requires the knowledge, skill, thoroughness, and preparation necessary for the representation. This includes understanding the issues of fact and law relevant to the claim as well as the applicable provisions of title 38, United States Code, and title 38, Code of Federal Regulations;

(2) Act with reasonable diligence and promptness in representing claimants. This includes responding promptly to VA requests for information or assisting a claimant in responding promptly to VA requests for information.

# Diligent Advocacy



“[An advocate’s] work load must be controlled so that each matter can be handled competently.”

- ABA Model Rule 1.3 Comment [2]
- ABA Model Rule 1.1 Competence

## Hypo: Diligent Advocacy - VSO Workload

- You are able to provide diligent advocacy to each of your Vets by performing a few extra hours of work each week.
- Your supervisor is impressed with the quality of your work and increases your caseload.
- You find yourself needing to work a few extra hours each day and even on weekends. You start to lose sleep and, for the first time ever, miss a deadline for filing a completed claim post ITF.



# Poll Question

## Diligent Advocacy: VSO Workload

**What should you do about your current workload?**

Tell yourself it was a one-time mistake and keep grinding because you want a promotion

Let your supervisor know what happened and ask her to reduce your workload

## Hypo: Diligent Advocacy - VSO Workload cont'd

### NEW FACT:

Despite expressing your concerns to your supervisor, she does not reduce your caseload. You are still worried about the quality of your work for your clients.



# Poll Question

## Diligent Advocacy: VSO Workload

### What do you do?

Inform your clients about your workload and the quality of representation so they can make an informed decision.

Tell your supervisor you must inform your clients about your workload and the quality of your representation unless your caseload is reduced

See if any colleagues can take some of your cases and ask your supervisor if that's okay

# Diminished Capacity

## Topics:

- Mental impairment
- Substantial physical harm, e.g. veteran suicide
- Duty of Confidentiality v. Duty to Disclose



# Diminished Capacity

## General Rule:

When a client’s capacity to make an adequate decision is diminished because of “minority, mental impairment, or some other reason” an advocate “shall as reasonably possible maintain a normal client-advocate relationship with the client.”

- ABA Model Rule 1.14 (a)

# Diminished Capacity

## Keep in Mind:

Clients properly advised by their advocate are capable of making decisions about important matters, including clients with “diminished mental capacity.”

- ABA Model Rule 1.14 Comment [1]

# Diminished Capacity

## **ABA Model Rule of PC Comment [1]:**

“[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”

## **ABA Model Rule of PC Comment [2]:**

“The fact that a client suffers a disability does not diminish the [advocate’s] obligation to treat the client with attention and respect. Even if the person has a legal representative, the [advocate] should as far as possible accord the represented person the status of client, particularly in maintaining communication.”

# Diminished Capacity



## EXCEPTION:

“When [an advocate] reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the [advocate] may take reasonably necessary protection action, including consulting with individuals or entities that have the ability to take action to protect the client and, and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”

- ABA Model Rule 1.14(b)

# Diminished Capacity



## **HYPOTHESIS: Victor a Vietnam Veteran with Dementia and Depression**

Victor is a 72-year-old Vet who served in the Vietnam War. He wants you to represent him in an appeal of a denial of a service-connected disability claim. At your first meeting, he brings his adult daughter Amy. Victor indicates Amy will help him because of his dementia and depression.

# Poll Question

Diminished Capacity

**Can you represent  
Victor?**

Yes

No

# Diminished Capacity



**Practical Tips:** Direct communication with your client & how to maintain dignity and respect with a client with diminished capacity

In Victor and Amy hypo, during meetings with both:

- Eye contact and speak directly with Victor
- Make it clear that Victor is the client and in control of his case; Victor can change his mind and choose to stop having Amy help
  - This also helps empower the client and reinforces that he is in control of his case, not you or his family
- Avoid speaking about Victor to Amy b/c it can make him feel like a child and Amy the parent

# Diminished Capacity



## HYPO Cont'd: Vietnam Veteran Victor

### Additional Facts:

- During a later meeting with Victor, he expresses frustration with the VA and doesn't understand why VA denied his claim.
- He needed money to help pay for his medical bills that are overdue.
- He feels that his service to his country was invalidated when the VA rejected his claims.
- He tells you, ***“I should just kill myself today, because I’ll be dead before the VA decides my appeal! It’s going too slow!”***

# Warnings Sign of Direct Harm



**Suicide or death statements**

**Direct statement to another person,  
social media, self**

***“I want to kill myself”***

***“I have no reason to live”***

[https://www.mirecc.va.gov/visn19/docs/A\\_Guide\\_for\\_Military\\_Veteran\\_Families.pdf](https://www.mirecc.va.gov/visn19/docs/A_Guide_for_Military_Veteran_Families.pdf)

# Poll Question

Diminished Capacity

**After Victor made that statement,  
what should you do?**

Nothing

Stay calm and continue the conversation

Call 911

Continue the conversation and send an  
instant messenger message to your  
secretary to call 911

Call Amy

# Diminished Capacity

## What can you do?

- Determine if he is at “risk of substantial physical harm”
  - Continuing the conversation
  - Being mindful of his surroundings (sharp objects near him)
- Consult individuals/entities
  - Call the police
  - Call Amy
  - Call a mental health expert
  - Welfare checks and/or emergency custody orders

# Diminished Capacity

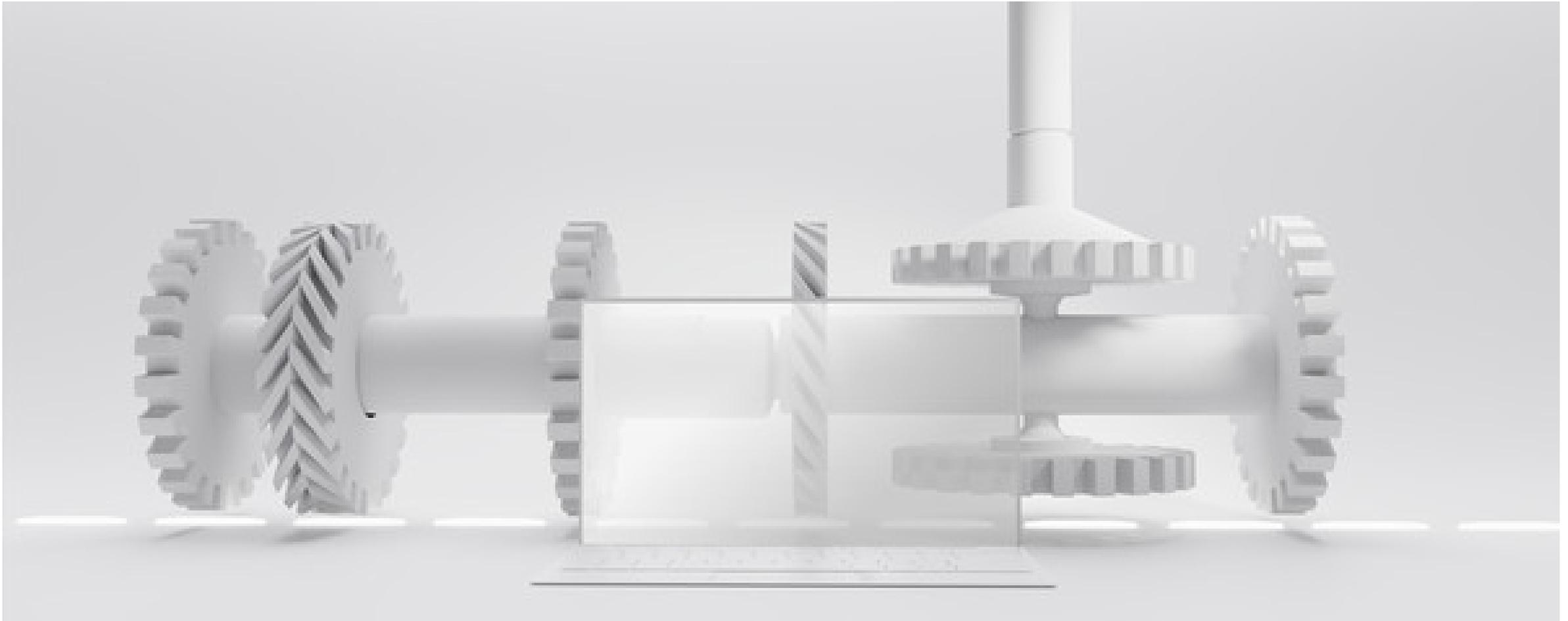


## What else can you do?

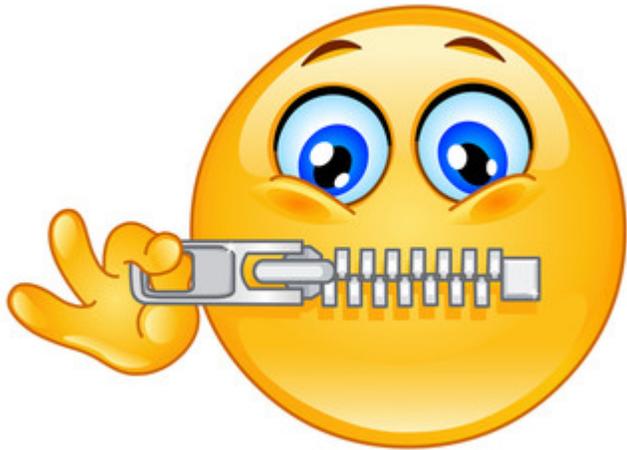
- Show the light at the end of the tunnel
  - How you present facts, legal strategy options, and letting him know he's in the driver seat can empower the client
  - Motion to Advance on BVA Docket?
  - Communicate the progress of his case
  - Team effort mentality

# Diminished Capacity

Interplay btwn Diminished Capacity, Rule 1.14 and Duty of Confidentiality, Rule 1.6



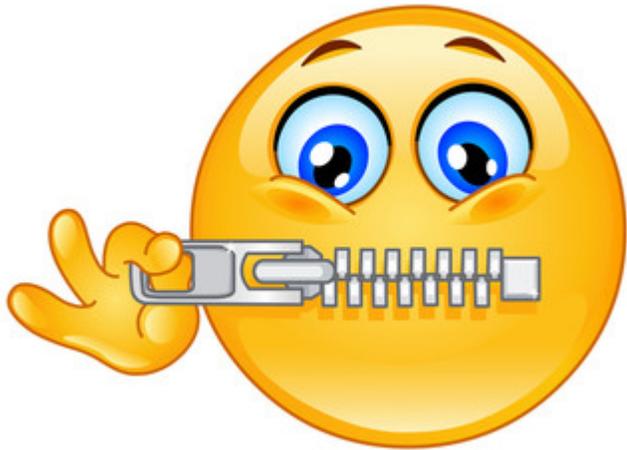
# Confidentiality of Information



## General Rule: ABA Model Rule 1.6(a)

“An [advocate] shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”

# Confidentiality of Information



## Exception: ABA Model Rule 1.6(a)

“[An advocate] shall not reveal information relating to the representation of a client **unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**”

# Confidentiality of Information



## Exceptions cont'd: ABA Model Rule 1.6(b)

An advocate **may** reveal information relating to the representation of a client to the extent the advocate reasonably believes necessary:

- to prevent reasonably certain death or substantial bodily harm
- **to prevent client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services**
- to secure legal advice about [the advocates ethical duties]
- **to comply with other law or a court order**



# Fraud, Deceit, Misrepresentation, or Dishonesty



## 38 C.F.R. § 14.632(c)(3)

- An individual providing representation on a particular claim **shall not . . .**
- “Engage in conduct involving fraud, deceit, misrepresentation, or dishonesty”

# Fraud, Deceit, Misrepresentation, or Dishonesty



Would failure to submit the following to VA violate § 14.682(c)(3)?

- Negative medical nexus opinions?
- Information / evidence definitively establishing that entitlement to benefit is NOT warranted?

# Client Gets Arrested

## Vietnam Veteran Victor Hypo cont'd

Victor tells you he got a DUI b/c his debt from unpaid medical bills and his VA disability claim is overwhelming him.

He told you that one night he drank several beers and drove to a gas station to get more beer, but crashed into light post.

Victor was arrested at the scene of the accident.



# Poll Question

Diminished Capacity and Duty of Confidentiality

Do you have to disclose Victor's DUI Arrest?

- Yes, tell Amy
- Yes, tell the VA
- No, it's not relevant to your representation
- No, there is no risk of substantial physical harm
- It depends

# Warnings Sign of Indirect Harm



**Substance abuse**

**E.g. Excessive use of alcohol or drugs**

[https://www.mirecc.va.gov/visn19/docs/A\\_Guide\\_for\\_Military\\_Veteran\\_Families.pdf](https://www.mirecc.va.gov/visn19/docs/A_Guide_for_Military_Veteran_Families.pdf)

## Responding Promptly

**38 C.F.R. § 14.632(b):** An individual providing representation on a particular claim shall

(2) Act with reasonable diligence and promptness in representing claimants. This includes responding promptly to VA requests for information or assisting a claimant in responding promptly to VA requests for information.

## 38 C.F.R. § 14.632(b)(2)

Why does responding promptly matter?

- Zealous advocacy
- Diligent advocacy
- Competence
- Confidentiality



## 38 C.F.R. § 14.632(b)(2)

“Responding promptly to VA requests for information”

How to interpret?

- Harmonious interpretation
- Disclose interpretation
- Middle ground interpretation



# Harmonious Interpretation

Responding promptly interpreted as sending a response in a prompt manner, which may not be providing the substantive information to the VA

- C.F.R. and ABA Rules
- Why did the Vet hire you?
- Duty to client or VA?



# Harmonious Interpretation

## “Harmonious”

- Confidentiality
- Competence
- Zealous Advocacy
- Diligent Advocacy



# Harmonious Interpretation

## Confidentiality

- The purpose of this rule
- What this rule protects



# Harmonious Interpretation

## Competence

- **shall** provide competent representation, which includes **thoroughness and preparation**
  - Client consultation
  - Weigh pros and cons with client



# Harmonious Interpretation

## Zealous or Diligent Advocacy

- Your duty is to the client
- Reasonable diligence and promptness when representing client
- Does this include disclosing information that hurts your client's interest?



## Disclosure Interpretation

Responding promptly and not engaging in conduct involving deceit, misrepresentation, etc. may be interpreted as needing to send even adverse evidence to VA in a prompt manner if you remain representative

- View held by some attorneys
  - Caveat: withdrawal consideration
- Unintended Consequences
- Ethical duties to your client come into conflict under this interpretation

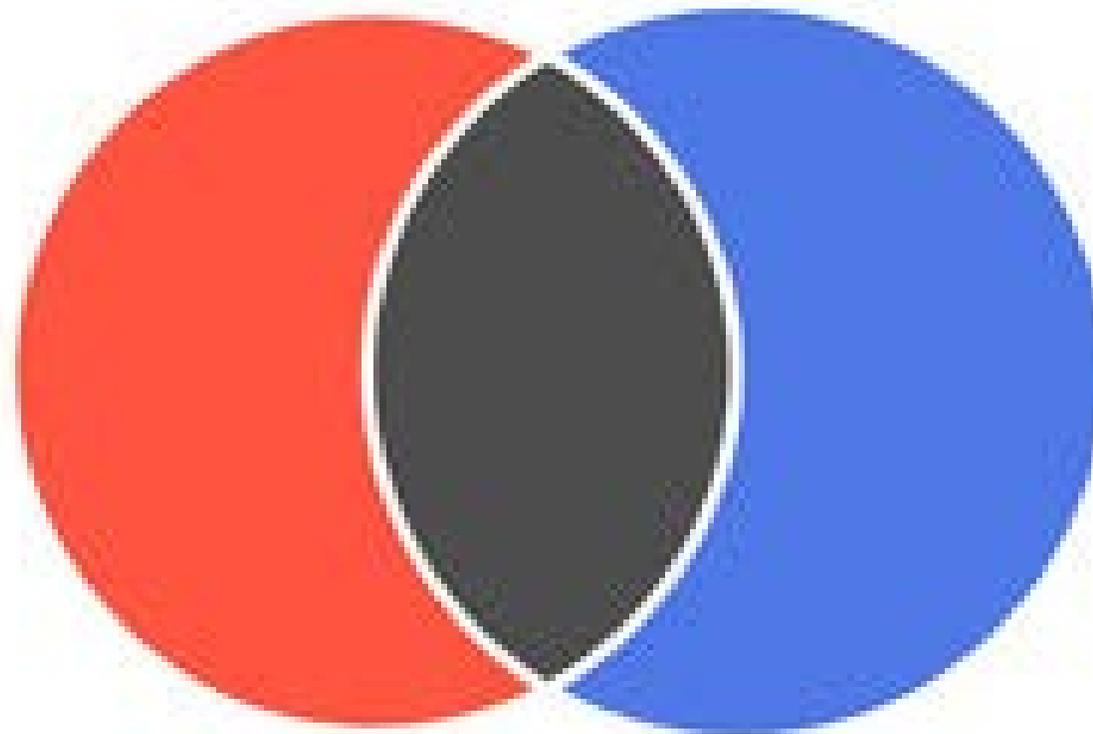


**Disclose  
Everything**

## Middle Ground Interpretation

Unless VA specifically requests evidence, you do not have an obligation to provide the VA with negative evidence.

Remember your obligation is to your client, not to VA.



# Middle Ground Interpretation



Likely similar result as the Harmonious Interpretation because it factors in:

- ABA rules
- Why did Vet give you POA?
- Your duty to the client, not the VA

But remember

- Duty of confidentiality
- Client consent to waive confidentiality if applicable

# Hypo: Interpreting 38 C.F.R. §§ 14.632(b)(2) and (c)(3)



- You represent Vet seeking SC for knee disability
- Vet got medical opinions from 2 doctors who treated his knee – one favorable and one negative
- RO asked Vet to provide release form for or records from all doctors who have treated his knee disability
- VA would not know about doctor who provided negative opinion unless Vet provides this info

# Hypo cont'd: What should you do?



- A. Advise Vet not to inform RO about doctor who provided negative opinion
- B. Advise Vet he must inform VA about both doctors
- C. Advise Vet you could no longer represent him if he decided not to inform VA about doctor who provided negative opinion, but you would not divulge this information to anyone
- D. Tell Vet to submit treatment records, but not negative nexus opinion

# Hypo cont'd: Answer

**Answer: It depends on your interpretation**

Disclose everything interpretation answer: **B**

Rationale: You disclose everything, even if it might harm your client's interests

Harmonious interpretation answer: **D**

Rationale: VA didn't specifically request opinion, and negative opinion is just that – an opinion, not a certainty

Middle ground interpretation answer: **B**

Rationale: Once VA asks for specific info, Vet must respond honestly and completely to VA's request.

# Hypo cont'd: Answer

**Answer: It depends on your interpretation**

Middle ground interpretation answer: **Answers B and C**

Rationale: Once VA asks for specific info, Vet has to respond honestly and completely to VA's request. However, depending on the timing, it's possible you had a conversation with your client, who waived confidentiality and agreed to the disclosure of this adverse evidence.

Extra-cautious: **C**

Rationale: You can't harm your client's interests nor violate confidentiality, but you think withholding opinion while remaining as his rep would be inconsistent with § 14.632(c)(2)



## Why should I care?

Consequences if you violate an ethical duty

- Harming Vet's claim(s)
- Damaged reputation
- Disciplinary action by your organization
- VA may suspend or cancel your accreditation
  - [www.va.gov/ogc/accreditation.asp](http://www.va.gov/ogc/accreditation.asp)



## Gifts from clients

A VSO shall not

“[s]olicit, receive, or enter into agreements for gifts related to services for which a fee could not lawfully be charged”

- 38 C.F.R. § 14.632(c)(6)



**Putting all the Pieces  
Together:**

**Common Ethical  
Dilemmas**



# Hypo: Monetary Gifts



- You help a Vet prepare his initial claim pro bono
- You spend 20 hours reviewing his service treatment records, helping him obtain supporting medical evidence, and working with him, his family, and buddies preparing lay statements
- VA grants all of the requested benefits and awards a high disability rating
- To show his appreciation, the Vet mails you a thank you card with a \$20 dollar bill
- If he had given you a large sum of money, such as \$500 or more, you would have returned it to him without even thinking about it, but \$20 seems like an inconsequential amount

# Question

What should you do?

- A. Keep the money because \$20 is a very small amount
- B. Keep the money, but only because you put so much time into the Vet's case
- C. Inform the Vet that you appreciate the gesture, but that you cannot keep the money



# Answer

Answer is C

- You should not accept a monetary gift from a VA claimant, even if it is a relatively small amount and even if you worked really hard on the case
- Let the Vet know that you really appreciate the kind gesture, but you are prohibited by law from accepting money for the work you did



# Hypo: Non-Monetary Gifts

Same facts as the previous hypo, except instead of including \$20 with the thank you note, the Vet (who lives in Las Vegas) sends you a refrigerator magnet of the Las Vegas Strip to thank you for your hard work.



# Question



Are you allowed to keep the refrigerator magnet?

- Yes
- No

# Answer



Yes, you can ***probably*** keep the magnet in this scenario

- A token of appreciation with such minimal value does not seem to violate the intent of § 14.632(c)(6)
- Check your organizations rules!
- Obviously, if you receive a nice watch, jewelry, or other significant gift, you would have to return it.

# Hypo: Case Strategy



- Vet filed an ITF 11 months ago
- She wants to file a claim for an increased evaluation and you determine she may also be entitled to TDIU
- You think it would be better for Vet to first obtain an increased rating for the SC condition and then file TDIU claim
- While this might result a loss of some months of TDIU benefits, you this strategy gives the Vet a better chance to eventually obtain the most SC benefits

# Question



What should you do?

- A. Promptly file the claim for increase w/o mentioning the TDIU issue
- B. Promptly file the claim for increase and explicitly raise the TDIU claim
- C. Discuss options with Vet and accept her decision – if she rejects your advice about waiting to file the TDIU claim, file the TDIU claim along with the claim for increase
- D. Discuss options with Vet and then tell her that you will not file the TDIU claim, even if she wants to

# Answer



Answer is C

- You should present all options to client and try to convince the Vet to follow the course of action you suggest, but if the Vet insists, file the TDIU claim
- It is the Vet's decision – not yours
- In this situation (where a strategy decision might result in the loss of several months of TDIU benefits), you are obligated to communicate with client before embarking on a course of action

# Hypo: Caseload



- You have a full caseload and are already feeling very pressed for time
- You do not think you can take on any more cases and still adequately represent all of your clients
- Your supervisor assigns you a new case that has over 700 documents in VBMS, involves several complicated issues that will require you to do lots of research, and has an important deadline fast approaching

# Question



What should you do?

- A. This Vet needs assistance and you have an obligation to help him, so you take on the case and do the best you can
- B. Meet with your supervisor and let her know that you have serious doubts that you have the time to adequately represent the Vet
- C. Do not take on the case, but provide the Vet with advice on where else he can get help with his claim
- D. Both B and C

# Answer



The best answer is D

- You should meet with your supervisor and let her know that you have too heavy a workload and you do not think you will be able to adequately represent the Vet. You should also give advice to the Vet on where else he can get help with the claim
- If you do not think you can provide a claimant with adequate representation, you should not take on that case, but do not leave the claimant completely empty-handed. Point the claimant in the direction of where he or she can get assistance.

## Hypo: VA Error in Client's Favor

- You represent a Vet in a claim who has filed a claims for an increased evaluation for her SC knee disability and NSC pension with A&A
- Prior to its promulgation, you review the rating decision and see that the RO has erroneously granted her SMC(I) based on the need for A&A, rather than NSC pension at the A&A rate
- She is definitely not entitled to SMC(I)
- Your organization does not have a rule / policy covering this situation

# Question



What should you do?

- A. Say/do nothing
- B. Bring the error to the attention of the VA without consulting Vet
- C. Inform Vet about the error, request her permission to inform VA, but if she doesn't give it to you, you must inform the VA
- D. Inform Vet about error, request her permission to inform VA, but if she doesn't give it to you, an overpayment may be created (which could be subject to a waiver claim b/c of administrative error)
- E. Inform Vet about the error, request her permission to inform VA, but if she doesn't give it to you, you must withdraw your representation

# Answer



Answer is E

- You should not take action that would harm your client, but remaining her representative and knowingly allowing VA to pay benefits to which she is not entitled could be considered a violation of multiple provisions of § 14.632
  - (a)(2) – must be truthful in dealings with claimants and VA
  - (c)(3) – shall not engage in conduct involving fraud, deceit, misrepresentation, or dishonesty
  - (c)(9) – shall not engage in, or counsel or advise a claimant to engage in acts or behavior prejudicial to the fair and orderly conduct of administrative proceedings before VA

## Hypo: Duty to Client



- You represent a Vet receiving NSC pension
- Based on info you received from a member of your Post, you suspect, but have no direct proof, that the Vet has withheld info about income – namely, money he earns in a consulting business
- You now believe that the Vet should not be receiving NSC pension

# Question



What should you do?

- A. Nothing
- B. Notify VA about the Vet's consulting business
- C. Advise Vet he must tell VA that he is earning income as a consultant, and if he does not report this income, you will be forced to tell VA
- D. Advise Vet that if he is in receipt of income or if he is working, because he is in receipt of NSC pension, he is obligated to inform the VA
- E. Advise Vet that if he is in receipt of income not reported to VA, VA may find out about the income and create an overpayment
- F. D & E

# Answer

Answer is F

- If you suspect, but you are not certain, that a Vet you represent who is receiving NSC pension is receiving a salary from work, the most you should do is advise the Vet to report all income and changes in work status, and warn the Vet that an overpayment could be created.
- You are not obligated to investigate your client.



## Hypo: Competence

- You represent Vet seeking SC for back condition
- Vet served from 2005 to 2009, with a tour in Afghanistan
- Vet has current back disability and alleges in-service back injury, but STRs show nothing related to back
- Back disability not treated or diagnosed until 6 years after discharge
- You do not know how or when Vet hurt back in service
- You know that if Vet suffered back injury during combat, it is much easier to establish the “in-service injury” element of SC

# Question



What should you do (in attempt to prove in-service back injury)

- A. Ask Vet where and how he hurt his back
- B. Ask Vet if he hurt his back during combat with the enemy
- C. Before you ask him how and when he hurt his back in service, explain all the ways Vet might be able to prove that he injured his back in service
- D. Before you ask if he injured his back during combat, explain that it would be much easier to convince VA that he injured his back in service if he states the injury occurred during combat with enemy
- E. C then D

# Answer

Answer is E.

You should explain the rules and the impact of certain responses before the claimant commits to a factual response. An informed claimant is much better off.



# Hypo: Frivolous Claims

- Vet served on active duty from 1980 to 1985
- Vet comes to you wanting you to help her file a claim for NSC pension
- Since Vet did not serve during a period of war, you know her appeal has ZERO chance of success



# Question



What should you do?

- A. Advise Vet of the law and that she is not eligible for NSC pension, but if she still wants to pursue the claim, you will help represent her.
- B. Inform Vet that because her claim has no merit, you cannot represent her on that claim
- C. Ask Vet if she has any current disabilities that she thinks may be related to service
- D. B and C

# Answer



Answer is E

- Inform Vet that you will not file a claim for pension because it has no merit
- But, it would be a good idea to ask if she has any disabilities that might be service-connected and consider filing a claim for comp
- This way you show that you want to help the Vet

# Frivolous Claims



- VA can cancel accreditation or authority to provide representation on a particular claim if OGC finds by clear and convincing evidence that you knowingly presented a frivolous claim, issue, or argument
- “A claim, issue, or argument is frivolous if the individual providing representation ... is unable to make a good faith argument on the merits of the position taken or to support the position taken by a good faith argument for an extension, modification, or reversal of existing law.”
  - 38 C.F.R. § 14.633(c)(4)
- In practice, a claim, issue, or argument has to be egregious to be considered frivolous, but the foregoing fact pattern could meet the criteria

# Hypothetical: Hearing



- Vet appeals SC claim for a back condition that was denied by the RO and appeals to the BVA
- You have met with the Vet multiple times and while you think he is a honest person, he is forgetful and you are concerned that he may not be a good witness at a BVA hearing. You also think his testimony would not be able to provide the evidence needed to grant the claim, so a hearing would only cause needless delay.
- The Vet insists that he wants a BVA hearing

# Question



What should you do?

- A. Tell the Vet what he wants to hear—that a BVA hearing is a great idea—and elect to have a hearing.
- B. Advise the Vet that you do not think a hearing will be helpful to his case, but if he really wants to have a hearing, you will request a BVA hearing
- C. Advise the Vet that having a hearing would not be helpful to his claim, and if he insists on having a hearing, tell him that you will withdraw from representing him

# Answer



## Answer is B

- Advise the Vet that you do not think a hearing will be helpful to his case, but if he really wants to have a hearing, you will request that the BVA schedule a hearing
- If the Vet really wants a hearing, he or she has that right
- This disagreement in strategy does not warrant withdrawal of representation

# Stolen Valor Act of 2013



- Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described in section (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both.
  - 8 U.S.C. § 704(b)
- Medals include:
  - Medal of Honor
  - Silver Star
  - Purple Heart
  - Combat Infantryman's Badge
  - Combat Action Badge

# Hypo: Stolen Valor Act of 2013



- Vet served from 1966-1969; his service records do not indicate that he was ever in Vietnam, but are incomplete
- Prior to becoming your client, Vet filed a SC claim for PTSD and alleged that he received a Purple Heart for an injury he sustained during combat in Vietnam. There is no record of this injury or of the Vet receiving a Purple Heart. His claim was denied by the RO and he is appealing to the BVA.
- You call the Vet while preparing for the BVA hearing and ask him about the Purple Heart
- The Vet admits to you that he lied about that and he plans to lie about it during his BVA hearing

# Hypo Stolen Valor Act of 2013 : Question



What should you do?

- A. Advise the Vet not to lie, but continue representing him
- B. Withdraw your representation
- C. Inform your supervisor of the situation
- D. Report the Vet to the proper authorities
- E. B and C

# Hypo Stolen Valor Act of 2013 : Answer is E



- Withdraw from representing the Vet and talk with your supervisor about how to proceed
  - 38 C.F.R. § 20.6(a)(2): After appeal to BVA has been filed, a VSO can withdraw as representative upon a showing of good cause, including if further representation would be impossible, impractical, or unethical. Must file motion with BVA
- File motion to withdraw informing BVA that your further representation would be impossible, impractical, or unethical
- While it might be tempting to report the Vet to the authorities, we advise against it due to fiduciary duty to (former) client, but confer with your supervisor



# Recent Court Cases You Can Use to Help Veterans, Part 2

Upcoming VSO Webinars: Mon, Oct. 28 & Tues, Oct. 29

Presented by: Caitlin Milo



# Library of Recorded Webinars

Webinars are available for only 72 hours after purchase

**Recorded Webinars are available here:**

<https://productsbynvls.org/webinars/>

**Recorded Webinar topics include:**

- The New VA Appeals System (Appeals Modernization)
- Modernized Claims and Appeals: Supplemental Claims and Recent Developments
- New Changes to VA's Non-Service Connected Disability Pension Program
- VA Benefits for Disabilities Caused by VA Health Care (§ 1151 Claims): The Basics and Important New Developments

# NVLSP Benefit Identifier



**Questionnaire/App:** Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to.

**3 WAYS to Access:**

[NVLSP Website](#)



## Training Opportunities

NVLSP offers private in-person and webinar training tailored to the needs of individual groups.

If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro at [richard@nvlsp.org](mailto:richard@nvlsp.org)