



**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM

# Ethics for Veterans Advocates: Expect the Unexpected

Presented by: Helen Chong

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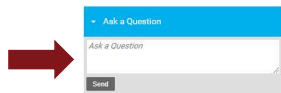
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## Intro Notes: Questions

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## Helen Chong



- Former Magistrate of the Supreme Court of Virginia
- NVLSP Webinar Manager
- An author of the *Veterans Benefits Manual*

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## Objective



Continuity of representing your veterans during a disaster

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## Topics

- 7 Ethical Duties
- Disaster Planning
- Personal or Family Emergency
- National Crisis
- Data Breaches
- Extreme weather

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## Ethical Rules and Laws



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## Ethical Rules & Laws

- American Bar Association (ABA) Model & Virginia State Bar (VSB) Rules of Professional Conduct
- ABA Formal Opinions
- Code of Federal Regulations Ethical Requirements

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 **ABA & VSB Rules**

Rule 1.1: Thoroughness & preparation

Rule 1.3: Contingency planning

Rule 1.4: Keeping clients informed & continuity of representation

Rule 1.6: Safekeeping of confidential information

Rule 1.16: Termination of representation

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 **ABA & VSB Comments**

Rule 1.1: Comment [5]

Rule 1.4: Comment [20]

Rule 1.6: Comment [20] (Virginia)

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 **ABA Formal Opinions**

ABA Formal Op. 482: Ethical Obligations Related to Disasters

ABA Formal Op. 483: Obligations After a Data Breach

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# Code of Federal Regulations



38 C.F.R. § 14.632 - Standards of conduct for persons providing representation before the Department [of Veterans Affairs]

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# General Disaster Planning



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# General Disaster Planning



Advance preparation vs. winging it

- Ethical duty of competent representation
- Simple contingency plan
- Alternative methods of communication

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# Ethical Duty 1

*Thoroughness and Preparation*

**Rule 1.1:**  
 “Competent representation\* requires the legal knowledge, skill, ***thoroughness and preparation*** reasonably necessary for the representation.”

\* This duty also includes competent computer and technology skills, further discussion in Ethical Duty 5 Section

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# Ethical Duty 1

*Thoroughness and Preparation*

**38 C.F.R. § 14.632(b):** An individual providing representation on a particular claim under § 14.630, **representative, agent, or attorney 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.

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# Ethical Duty 1

*Thoroughness and Preparation*



- Awareness of relevant changes in the law, policy, and current events that can impact your ability to represent

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## Resources to Stay Informed

- NVLSP
- [Google Alerts](#)
- VA's and CAVC's Social Media & Email Subscribe

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## Examples

- <https://www.instagram.com/deptvetaffairs/?hl=en>
- <https://www.instagram.com/vabenefits/?hl=en>

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## Survey # 1

Which of the following things should you know about if you represent veterans?

- A. Blue Water Navy Vietnam Veterans Act of 2019
- B. Service members' exposure to toxic chemicals known as PFAS
- C. VA's telehealth programs
- D. A and C
- E. All the above

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## Survey 1 Answer & Discussion



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## Rule 1.1 Comment 5

### Thoroughness & Preparation

"[I]nquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes ***adequate preparation. The required attention and preparation are determined in part by what is at stake.***"

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## Rule 1.1 Comment [5]



What is at stake?

- In the shoes of the veteran
  - Age
  - Health condition
  - Support system
  - Outcome

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## Ethical Duty 2

*Diligence and Promptness*

Rule 1.3

"A lawyer shall act with reasonable ***diligence*** and ***promptness*** in representing a client."

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## Ethical Duty 2

*Diligence and Promptness*

Rule 1.3\*

To carry this duty out during a disaster, you need a plan in advance

\*ABA Formal Opinion 482

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## Contingency Plan

Purpose:

Prevent or minimize the disruption of prompt advocacy for Veterans during a disaster

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## Contingency Plan

A written document :

- Continue critical business processes
- Call tree, e.g., call list or text chain
- Safeguarding confidential information

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## Contingency Plan

Circumstances have changed but ethical duties remain the same

- Providing diligent professional services
- Daily operations running smoothly
- Meeting filings and court deadlines
- You are accessible to your Vets

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## Contingency Plan

- Create a general organization/office disaster plan
- Create your own professional individual plan
- Review and possibly add or omit steps
- Reassess & update from time-to-time

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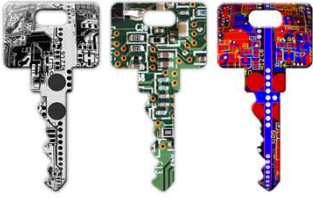
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## Contingency Plan: 3 Keys



Continued  
Representation

Communication

Competency

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## Continued Representation

*ABA Formal Op. 482: Ethical Obligations Related to Disasters*

### STEP 1: Ask yourself

What action to take **before, during, and after** a disaster to continue representing my veteran?

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## Continued Representation

*ABA Formal Op. 482: Ethical Obligations Related to Disasters*

### Action before a disaster:

Obtain several ways to communicate with

- client
- key office personnel
- *vice versa*

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## Continued Representation

*ABA Formal Op. 482: Ethical Obligations Related to Disasters*

**Action before a disaster:**

Determine how to access and protect Vets' information

- Physical office v. remote access
- Hard copies v. electronic copies

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## American Bar Association

*Surviving a Disaster: A Lawyer's Guide to Disaster Planning*

**• 10 pieces to a disaster plan:**

1. Essential Functions and Processes	6. Vital Records Management
2. Order of Succession	7. Human Capital
3. Delegation of Authority	8. Devolution of Control
4. Alternate Facilities	9. Test, Training & Exercise
5. Continuity Communications	10. Reconstitution

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## American Bar Association

*Surviving a Disaster: A Lawyer's Guide to Disaster Planning*

**Ch 1.4 Preparedness Checklist: Questions 1-4**

1. Are you familiar with your office evacuation plan?
2. Do you know where your office exit routes, stairways, fire extinguishers, and medical kits are located?
3. Do you have a muster point identified for personnel to meet after an emergency event?
4. Do you have a list of important phone numbers identified for reaching your employees, clients, and vendors after a disruption?

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## American Bar Association

*Surviving a Disaster: A Lawyer's Guide to Disaster Planning*

### Ch 1.4 Preparedness Checklist: Questions 5-8

- 5. Do you have a list of important emergency numbers quickly accessible in printed and electronic format?
- 6. Do you have a general strategy in place for notifying the media and stakeholders about an ongoing event and its implications?
- 7. Do you have the ability to access critical client records remotely?**
- 8. Have you prioritized your firm's functions by criticality?

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## American Bar Association

*Surviving a Disaster: A Lawyer's Guide to Disaster Planning*

### Ch 1.4 Preparedness Checklist: Questions 9-12

- 9. Do you have a "go kit" of office items you would need if you were unable to access your primary office?
- 10. Have you pre-positioned technology equipment offsite to ensure adequate processing capability?
- 11. Are you confident in your redundancies and controls to protect/recover client data in the event of critical technology failures?
- 12. Have you tested mechanisms to access critical records remotely and to work remotely after disruptions?**

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## Resources for Disaster Planning

<https://www.americanbar.org/groups/committees/disaster/>

<https://www.vsb.org/site/members/disaster-resources/>

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## Ethical Duty 3

*Communication*

Rule 1:4

(3) keep the client reasonably informed about the status of the matter;  
 (4) promptly comply with reasonable requests for information

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## Ethical Duty 3

*Communication*

Key element b/c

- Vet needs to make an informed decision regarding representation
- Vet decides continuity of representation and needs information you possess

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## Communication

Contingency plan should include:

- List of phone numbers to reach key personnel at your office, clients, VARO, BVA, court
- List of emergency numbers
- Contact lists easy to access in print and electronic form
- Contact lists are in a safe location

Organizational level:

- Strategy to notify media and stakeholders about an ongoing event and its impact

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## Communication

*Surviving a Disaster: A Lawyer's Guide to Disaster Planning*

**Communications Checklist**

- Plan details procedures for notifying personnel, points of contact, clients, stakeholders and other relevant parties of the organization's continuity plan activation and status.
- Plan describes procedures to communicate with, update and instruct essential and support personnel throughout each phase of the continuity situation.
- Alternate paths and backups for all communication lines exist, including those at alternate sites.

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## Communication

*Surviving a Disaster: A Lawyer's Guide to Disaster Planning*

**Communications Checklist Cont'd**

- Plan addresses the need to sustain interoperable communications that facilitate communications with other inside and outside the organization.
- Communication lines between the primary site, alternate facilities, and any IT data center is maintained.

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## Survey # 2

Which of the following communication methods could you include in your disaster plan?

- A. Vet's family member or friend
- B. Certified mail
- C. Internet phone calls
- D. Other (please type in chatbox)

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## Survey 2 Answer & Discussion



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## Delayed Communication

# CAUTION!

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## Communication

Rule 1.4 Comment [20]

In some circumstances, [you] **may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.** Thus, [you] might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. [You] **may not withhold information to serve [your] own interest or convenience or the interests or convenience of another person.** Rules or court orders governing litigation may provide that information supplied to [you] may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

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## Ethical Duty 3 Recap

### Rule 1.4:

- Keep the Vet reasonably informed
- Comply with reasonable requests for information
- Comment [20] may v. may not

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## Recap

What are the 3 key C's to a contingency plan?

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_



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## Personal Emergency



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## Ethical Duty 4

*Physical and Mental Health*

- Physical and mental health of advocates

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## Ethical Duty 4

*Physical and Mental Health*

Rule 1.16:

Withdraw representation if continuing will violate a professional conduct rule or law or **your physical or mental condition materially impairs your ability to represent.**

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## Contingency Plan Examples

<p>VSOs</p> <ul style="list-style-type: none"> <li>• Transferring file to colleague</li> <li>• Notifying supervisor</li> </ul>	<p>Attorneys</p> <ul style="list-style-type: none"> <li>• Transferring file to another attorney within the firm</li> <li>• If solo, have contact info for other lawyer or VSO to whom you can refer Vet</li> </ul>
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## Ethical Duty 4

*Physical and Mental Health*

Rule 1.16:

“[G]iving reasonable notice to the client...surrendering papers and property to which the client is entitled.”

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## Survey # 3

**Fact Pattern**

- You are a VSO with 5 years of experience
- 3 years ago you were diagnosed with anxiety and depression
- Initial treatment included weekly therapy and medication
- Over time, you developed tools to manage your symptoms and eventually worked with your doctor to stop medication
- 6 months ago, your divorce from your spouse was finalized (not amicably)

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## Survey # 3

**Fact Pattern Con't:**

- You have sole custody of your 5-year-old son
- 3 months ago, you moved to a new town to get a fresh start and work with a new organization
- Recently, the symptoms of anxiety and depression you experienced 3 years ago that caused you to withdraw from serving as a veterans advocate resurfaced

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## Survey # 3

Question: Do you need to withdraw from serving as an advocate for veterans?

- A. Probably yes
- B. Probably no

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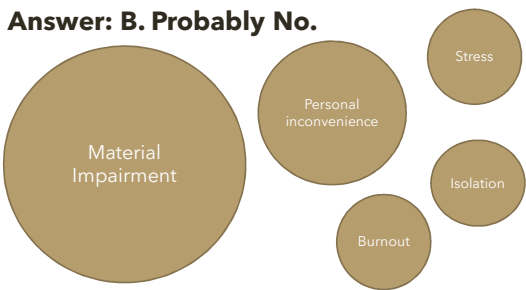
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## Survey 3 Answer & Discussion

**Answer: B. Probably No.**



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## Advocate's Health

*Physical and Mental Health*

- **Individual assessment and self-screening tools**
- **Accountability and check-ins**
- **Risk level of developing a mental health disorder**



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## Advocate's Health

*Physical and Mental Health*

### Individual risk assessment and self-screening tools

Alcohol use	<a href="https://auditscreen.org/">https://auditscreen.org/</a>
Burn out	<a href="https://www.mindgarden.com/117-maslach-burnout-inventory-mbi">https://www.mindgarden.com/117-maslach-burnout-inventory-mbi</a>

Resource: ABA Well-Being Toolkit for Lawyers and Legal Employers

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## Advocate's Health

*Physical and Mental Health*

### Accountability and check-ins

- Personal network
- Trusted colleagues, professional mentors, etc.
- Regular scheduled check-ins

Resource: ABA Well-Being Toolkit for Lawyers and Legal Employers

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## Advocate's Health

*Physical and Mental Health*

### Tips and Resources for team leaders

13 Factor Workplace Wellbeing	<a href="https://www.tjmf.org.au/wp-content/uploads/TJMF-workplace-wellbeing-guidelines-.pdf">https://www.tjmf.org.au/wp-content/uploads/TJMF-workplace-wellbeing-guidelines-.pdf</a>
Evaluation and Intervention	<a href="https://www.cdc.gov/workplacehealthpromotion/health-strategies/depression/interventions/index.html">https://www.cdc.gov/workplacehealthpromotion/health-strategies/depression/interventions/index.html</a>

Resource: ABA Well-Being Toolkit for Lawyers and Legal Employers

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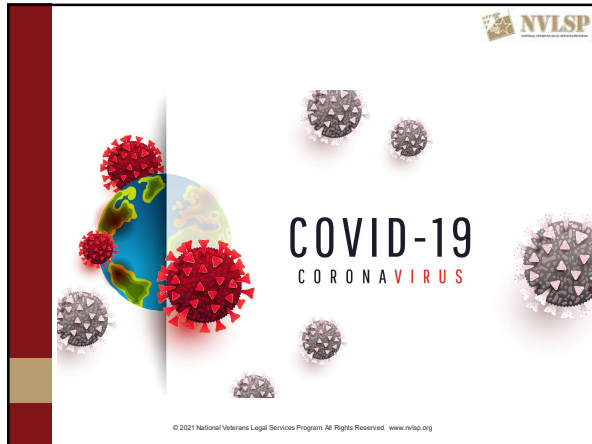
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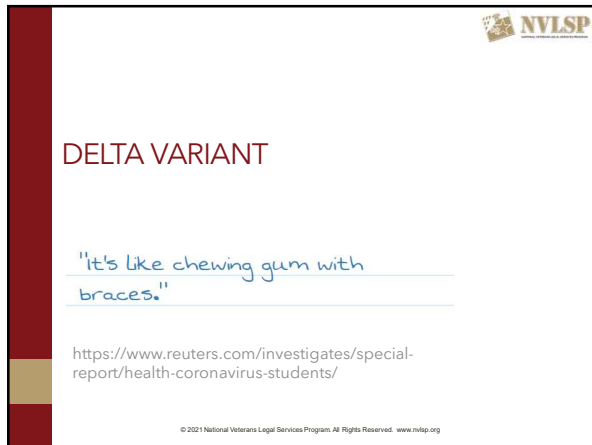
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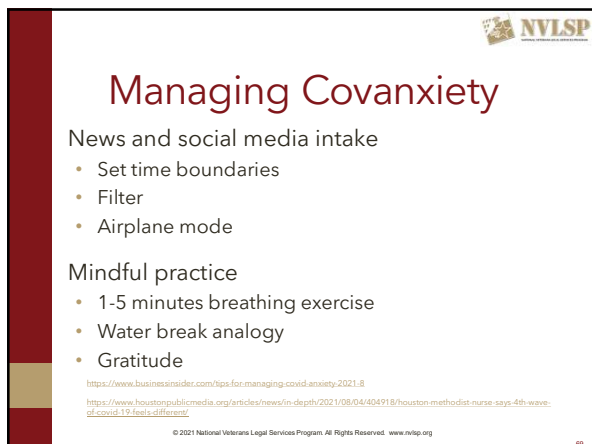
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## Survey # 4

**Fact Pattern**

- Facts from Survey 3
- Diagnosed with the Delta variant
- On your 11<sup>th</sup> day of self-quarantine since your diagnosis
- Your elderly mother is watching over your 5-year-old son
- Have not had time to develop social circles since you moved
- Started new job during the pandemic
- Symptoms of anxiety and depression are worsening
- The quality of your work and relationships have declined

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## Survey # 4

Question: Do you need to withdraw from serving as an advocate for veterans?

A. Probably yes

B. Probably no

C. It depends

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## Survey 4 Answer & Discussion



- Answer: Probably Yes
- Runner up: It depends
- Prioritize your mental health

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## What's a data breach?

**A cyber event** where:

- A. material client confidential information is misappropriated, destroyed, or compromised

or

- B. your ability to perform services is significantly impaired by the data event

*ABA Formal Opinion 483*



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## Data Breach

*ABA Formal Opinion 483*

- Not all cyber events rise to the level of a data breach
- Involves actual compromise of material confidential information

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## Data Breach Examples

*ABA Formal Opinion 483*

- Theft of client's information
- Ransomware, i.e. no client information is accessed or lost, but it is blocked or inaccessible until you pay)
- Destroying organization's infrastructure where the information is stored and preventing you from using it to perform your duties

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## Ethical Duties & Technology

**Rule 1.1:** having competent technological skills

**Rule 1.6:** protecting confidential information

**Rule 1.4:** explaining a data breach

**38 C.F.R. § 14.632(a)(2):** being truthful in dealings with claimants

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## Ethical Duty 5

*Competency*

- Technology = a tool to deliver services to clients
- You need to understand the tool you are using
- Benefits and risks of this tool
- Competent ≠ expert

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## Rule 1.1 Comment [8]

“To maintain the requisite knowledge and skill, [you] should keep abreast of changes in the law and its practice, including ***the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which [you are] subject.”

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## Ethical Duty 6

*Reasonable Care*

Act with reasonable care when using technology to access and store confidential information of veterans and other VA claimants

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## Rule 1.6(c)

“[M]ake **reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information** relating to the representation of a client.”

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## Rule 1.6(c)

Reminder:

- You are a custodian of confidential information
- Therefore, you are a target for hackers

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## Reasonable Care

*Rule 1.6*

Where are you working from?

- Home
- Coffee shop

Expectation of privacy

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## Reasonable Care

*Rule 1.6*

Where are you storing your electronics and files?

- Home office
- Backseat of car
- Gym locker

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## Reasonable Care

*Rule 1.6*

Who else has access?

- Family
- Roommates
- Guests
- Public

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NVLSP

## Where's the Beef?



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NVLSP

## 2 Factor Authentication

Example: Symantic VIP

- Security code generator
- Anti-cloning
- <https://vip.symantec.com/>

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## Takeaway

Single password

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## Virginia Rule 1.6 Comment [20]

“What is ‘reasonable’ will be determined in part by the size of the firm [or organization]”

“[T]hey have acted reasonably to safeguard client information by **employing appropriate data protection measures for any devices used to communicate or store client confidential information.**”

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## Virginia Rule 1.6 Comment [20]

Cont.:

- ***Do not*** need “to have all the required technology competencies.”
- But “***must turn to the expertise of staff or an outside technology professional.***”
- “[S]hould periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.”

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## Virginia Rule 1.6 Comment [21]

**Recommend practices:**

- a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security
- b) Policies to address departing employee’s future access to confidential firm / organization data and return of electronically stored confidential data

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## Virginia Rule 1.6 Comment [21]

**Recommend practices:**

- c) Procedures addressing security measures for access of third parties to stored information
- d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused

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## Virginia Rule 1.6 Comment [21]

**Recommend practices:**

- e) **The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures**
- f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity

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You've  
GOT  
Mail

Hacked

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## What should you do?

- A. Pay the ransom
- B. Troubleshoot the matter yourself since you're working from home
- C. Refer to the hard copy of your contingency plan, since you can't access the e-version from your computer
- D. Other

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## Ethical Duty 7

### *Data Breach Disclosure*

- ABA Model Rules
- Code of Federal Regulations Ethical Requirements

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## Rule 1.4

### *Data Breach Disclosure*

Keep the client reasonably informed about the status of the matter

- Notify clients of data breach that involves their confidential information

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## 38 C.F.R. § 14.632(a)

*Data Breach Disclosure*

- 1) All persons acting on behalf of a claimant shall faithfully execute their duties as . . . representatives, agents, or attorneys.
  
- 2) All individuals providing representation are **required to be truthful in their dealings with claimants and VA**

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## Extreme Weather



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## Extreme Weather

*Levels of disruption\**

Level 1	Level 2	Level 3
Minor Emergency	Major Emergency	Disaster
Short term electrical failures, blackouts, air conditioning failures	Flooding, tornado, fire in one part of the office	Widespread natural disaster, e.g. massive flooding or hurricane
Temporary adverse impact to one department or a portion of your organization	Primary worksite uninhabitable; operational impact, but staff is able to maintain some key operating areas	Prevents or potential to prevent organization from continuing its operation from the original office
Generally no more than 8 hours	Between 8-48 hours	This event will most likely result in the triggering your disaster plan, which may include relocation

*ABA Formal Opinion 482*

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## Extreme Weather

Reminder:

- Rule 1.1 Thoroughness and Preparation
- If unable to access paper files, electronic files, e.g. cloud service
- 3 Keys, e.g. communication

*ABA Formal Opinion 482*  
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## Extreme Weather

- Each state or local community may have varying abilities to immediately respond and recover from a disaster
- When your office can begin reconstitution may be dependent on your specific geographical area affected by the disaster

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## Extreme Weather

*Reconstitution Phase: Returning to normal business operations*

Organizational level checklist

- Alternate site operations
- Returning or moving personnel, records, and equipment to main or new location
- Procedures to notify personnel and clients of changes

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## Rule 1.15

- Hold onto veteran's property in connection with representation
- Property includes material client information (ABA Opinion 483)
- Preserve for 5 years after termination of representation

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## Takeaway

After a natural disaster reach out to veteran as soon as reasonably possible

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## QUESTIONS



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## UPCOMING WEBINARS

**SEPTEMBER:** Recent Court Decisions Veterans Advocates Need to Know About (February 2021-September 2021)

**OCTOBER:** Ensuring the VA Properly Evaluates Joint Disabilities

[To learn more, click here](#)

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## ON DEMAND WEBINARS

Previous NVLSP webinars are available

- Webinars are available for 72 hours after purchase
- Topics include:
  - The New VA Appeals System (Appeals Modernization)
  - 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

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## NVLSP VA 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](#)

 Download on the **App Store**
 **Google play**

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## NVLSP TRAINING OPPORTUNITIES



NVLSP offers private in-person and webinar training tailored to the needs of your organization

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)

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