

The Happiest ELF (Ethical Lawyers Forever)
Polk County Bar
2012

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I. INTRODUCTION

What are ethics?

1. Moral Action
2. Professionally Proper
3. Proper Conduct or Behavior
4. Rules of Conduct and Standards of responsibility for representatives –
20 C.F.R. § 404.1740

Who are you?

1. Lawyer - Bound by State Ethics - Directed by Regulations
2. Non-Attorney Representative - Directed by Regulations

Why do you do what you do? This will affect:

1. Intake - know your client; inform your client; know your case
2. Case preparation
3. Conduct at hearing
4. Post hearing actions (win or lose)
5. Advertising
6. Conflicts of Interest

II. A LAWYER'S RESPONSIBILITIES - RULES OF PROFESSIONAL CONDUCT AND
THE SOCIAL SECURITY REGULATIONS

A. Your Roles

Iowa Rules of Professional Conduct (IA RPC).

1. Preamble:

¹**Disclaimer:** This outline is designed to address general issues of ethics often faced by attorneys in private practice in the context of Social Security claims. This outline should not be substituted for legal advice or ethical advice. Social Security claims and ethical questions are often fact specific and legal advice should be sought for any legal or ethical question presented. The views expressed in this outline, and in the presentation at the CLE conference, are not necessarily the views of the Iowa State, or Polk County Bar Associations, this hotel, or any individual associated with the above organizations or corporation.

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” IA RPC Preamble [1].

2. Multiple Roles:

- a. advisor - “provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.” IA RPC Preamble [2].
- b. advocate - “zealously asserts the client’s position under the rules of the adversary system.” IA RPC Preamble [2].
- c. negotiator - “seeks a result advantageous to the client but consistent with requirements of honest dealings with others.” IA RPC Preamble [2].

E.g., amend onset date, and impacts number of months payable; PIA; auxiliary beneficiaries; and Medicare entitlement date.

- d. evaluator - “acts by examining a client’s legal affairs and reporting about them to the client or to others.” IA RPC Preamble [2].

B. Advertising - Communication Concerning a Lawyer’s Services

1. Do Not make “false or misleading communications” about yourself or your services. IA RPC 32.1

2. What’s false or misleading? IA RPC 32:7.1

“... A Communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

- Don’t use “unverifiable” statements.
- No emotional appeals.
- No statement or claim relating to the quality of the lawyer’s legal services.

•*Example* from the web following a simple Google® search: “We Win SSI/SSDI Claims - We Guarantee Our Services,” or

“America’s Most Successful Social Security Disability Advocates®. Nobody wins as many cases”

3. Also Iowa does not permit a lawyer in private practice to practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm. (i.e., Abe Lincoln Law Firm, better have an Abe Lincoln practicing). IA RPC 7.5(e).

4. Prohibition Relating to References to Social Security or Medicare - 42 U.S.C. § 1320b-10

(1) No person may use, in connection with any item constituting an advertisement, solicitation, circular, book, pamphlet, or other communication, or a play, motion picture, broadcast, telecast, or other production, alone or with other words, letters, symbols, or emblems--

(A) the words “Social Security”, “Social Security Account”, “Social Security System”, “Social Security Administration”, “Medicare”, “Centers for Medicare & Medicaid Services”, “Department of Health and Human Services”, “Health and Human Services”, “Supplemental Security Income Program”, “Medicaid”, “Death Benefits Update”, “Federal Benefit Information”, “Funeral Expenses”, or “Final Supplemental Plan”, the letters “SSA”, “CMS”, “DHHS”, “HHS”, or “SSI”, or any other combination or variation of such words or letters, or

(B) a symbol or emblem of the Social Security Administration, Centers for Medicare & Medicaid Services, or Department of Health and Human Services (including the design of, or a reasonable facsimile of the design of, the social security card issued pursuant to section 405(c)(2)(F) of this title or the Medicare card, the check used for payment of benefits under subchapter II of this chapter, or envelopes or other stationery used by the Social Security Administration, Centers for Medicare & Medicaid Services, or Department of Health and Human Services), or any other combination or variation of such symbols or emblems,

in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the Social Security Administration, the Centers for Medicare & Medicaid Services, or the Department of Health and Human Services or that such person has some connection with, or authorization from, the Social Security Administration, the Centers for Medicare & Medicaid Services, or the Department of Health and

Human Services. The preceding provisions of this subsection shall not apply with respect to the use by any agency or instrumentality of a State or political subdivision of a State of any words or letters which identify an agency or instrumentality of such State or of a political subdivision of such State or the use by any such agency or instrumentality of any symbol or emblem of an agency or instrumentality of such State or a political subdivision of such State.

•Subject to civil monetary penalties and assessments where you “misuse certain Social Security program words, letters, symbols, and emblems.” 20 C.F.R. § 498.100. See 42 U.S.C. § 1320b-10(b) (CMP not to exceed \$5,000.00, except in the case of broadcast or telecast, then the CMP can be up to \$25,000.00).

C. Attorney Fees

1. Don’t make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. IA RPC 32:1.5

2. IA RPC 32:1.5 - Comment - *Reasonableness and Legality of Fee and Expenses* Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer. A fee that is otherwise reasonable may be subject to legal limitations, of which the lawyer should be aware. For example, a lawyer must comply with restrictions imposed by statute or court rule on the timing and amount of fees in probate.

3. See SSA’s Regulations in context of Fee Petition: 20 C.F.R. § 404.1725(b).

4. *Example* - Scenario #1

When a Social Security disability claimant was previously represented by a non-attorney advocate and the advocate has withdrawn from the case, but still wants to be paid for her work, can the attorney, who has received his fee from the Social Security Administration, tell the client that he will pay the advocate for her services?

D. Advice to a client and to unrepresented person

1. IA RPC 32:2.1 and 32:4.3

2. IA RPC 32:2.1 In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. In the final analysis, the lawyer should always remember that the decision whether to pursue or forgo legally available objectives or methods because of nonlegal factors is ultimately for the client and not for the lawyer.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under rule 32:1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under rule 32:1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest. [Court Order April 20, 2005, effective July 1, 2005]

•Rule 32:4.3: DEALING WITH UNREPRESENTED PERSON In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

3. *Example Scenario #2 - When are you Representing a Person?*

Potential client calls on the last day of her appeal period at 4:00pm. Do you advise her to appeal via the internet?

4. *Example*

- Do you have an obligation to review the fully favorable decision?
- Do you have an obligation to review the Notice of Award?
(Ahh shucks - SSA usually gets it right at this point?)
Do they?

5. *Example - Scenario #3*

You are at the hearing for which you spent hours and hours going over 713 pages of VA records. You have presented a fantastically compelling case. Tears are welling up in the hearing assistant's eyes. The VE is reaching for the tissues. The ALJ says she will pay the case, if you will agree to amend the AOD to a much later date. Interestingly, your fee will not be affected; you will still receive the maximum amount provided for in the fee agreement.

What do you do? Beware of the pitfalls!

PIA
CDB/DAC
DLI
Medicare entitlement date (a big chunk of Medicare coverage may be at stake)

E. Disclosure of Confidential information - Destruction of Attorney/Client Privilege?

Whose privilege is it to waive?

1. IA RPC 32:1.6(a) and see 32:1.7

2. IA RPC 32:1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer 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) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the 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;
- (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

3. *Example* Whose responsibility is it to maintain?

- Working on your client’s disability claim on your laptop in the airport, or at the Polk County Bar Association CL conference?

- What about leaving the five files in the small conference room at ODAR while you are in hearing on the sixth client?

F. Conflict of Interest

1. IA RPC 32:1.7 - You cannot represent a client if the representation “involves a concurrent conflict of interest,” with some exceptions.

- IA RPC 32:1.8 states that the lawyer “shall not” enter into a “business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client” with some exceptions.

2. IA RPC 32:1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

(c) In no event shall a lawyer represent both parties in dissolution of marriage proceedings.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person, or from the lawyer’s own interests. . . .

3. *Examples*: two clients

-Mother/daughter

Mom calls about her daughter's claim, but it becomes evident she has a claim, (maybe a better claim, i.e., more money)

-Husband/wife

-Siblings - DAC claim; at what point will 1st claim hurt the subsequent claim(s)?

G. Sex with clients

1. American Bar Association Model Rules of Professional Conduct (ABA MRPC)

1.8(j) says don't have sex with a client unless "a consensual sexual relationship" was going on before the client became your client.

2. IA RPC 32:1.8(j) A lawyer shall not have sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the client-lawyer relationship. . .

Comment

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

•*Iowa Sup. Ct. Attorney Disciplinary Board v. Monroe*, 784 N.W.2d 784 (Iowa 2010) (sexual relationship with a dissolution client violated IA RPC. Dissolution clients are especially vulnerable).

•*Iowa Sup. Ct. Attorney Disciplinary Board v. Marzen*, 779 N.W.2d 757 (Iowa)

H. Handling your Trust account - what goes in must come out.

1. IA RPC 32:1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All client trust accounts shall be governed by chapter 45 of the Iowa Court Rules.

3. *Example:* EAJA - whose is it, and when?

I. Ending Representation

IA RPC 32:1.16

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Iowa Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

J. Pro Bono Obligation - IA RPC 32:6.1

“Every lawyer has a professional responsibility to provide legal services to those unable to pay[!!]”

- “aspire to render at least 50 hours of pro bono publico legal services per year”
- persons of limited means or charitable . . . organizations
- <http://www.iowalegalaid.org/> (for link to Volunteer Lawyers Project), and
- <http://pcbaonline.org/volunteer-lawyers-project/>

AND, AND

“a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”

- <http://www.iowalegalaid.org/donate>

III. CONCLUSION