

Selected Ethics Issues for Iowa Lawyers

The Federal Practice Committee of the
United States District Court for the Northern District of Iowa
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I. Background

- A. Between 1971 and 2005, Iowa followed the Iowa Code of Professional Responsibility (“ICPR”). The ICPR were developed by the American Bar Association (“ABA”) in 1969. They were structured with foundational canons, mandatory disciplinary rules and aspirational ethical considerations.
- B. The ABA adopted the Model Rules of Professional Conduct (“Model Rules”) in 1983.
- C. The Model Rules have been adopted by most states.
- D. The Iowa Supreme Court by order dated April 20, 2005 established the new Iowa Rules of Professional Conduct (“IRPC” or “Rules”) effective July 1, 2005. The IRPC are based on the Model Rules with some modifications.
- E. By order dated September 12, 2012, Rule 31.16 (Registration of House Counsel) was rescinded in its entirety and replaced by a new Rule 31.16.
- F. Rules relating to lawyer advertising were amended by order dated August 29, 2012. Amendments became effective for all communications to the public about a lawyer or lawyer’s services placed or communicated to the public after December 31, 2012.
- G. Rule 31.14 addresses admission pro hac vice before Iowa courts and administrative agencies. ISBA Ethics Opinion 13-02 provides that an Iowa lawyer who sponsors pro hac vice admission of an out of state attorney may not turn over so much authority in the case to the attorney that it would reduce the Iowa lawyer’s role to little more than a “local counsel.”
- H. The IRPC are located at:
http://www.judicial.state.ia.us/Professional_Regulation/Rules_of_Professional_Conduct/

II. Iowa Rules of Professional Conduct - Overview

A. Scope and Organization of IRPC

1. The IRPC contain rules that are imperatives, cast in the terms “shall” or “shall not” and other rules that are permissive and cast in the term of “may.”
2. IRPC contain both rules and comments. Comments do not add obligations but provide guidance for practicing in compliance with IRPC.
3. Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.

B. Terminology

1. Rule 32:1.0(e): Informed Consent.
 - a. Denotes agreement by person to proposed course of conduct after lawyer has communicated adequate information and explanation about material risks of and reasonably available alternatives to proposed course of conduct.
 - b. Comments to Rule 32:1.0
 - i. Communication necessary to obtain informed consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent.
 - ii. Lawyer must make reasonable efforts to ensure that client or other person possesses information reasonably adequate to make informed decision. Ordinarily, this includes:
 - Disclosure of the facts and circumstances giving rise to the situation;
 - Any explanation reasonably necessary to inform client or other person of material advantages and disadvantages of proposed course of conduct; and
 - Discussion of client’s or other person’s options and alternatives.
 - In some circumstances, it may be appropriate for lawyer to advise client or other person to seek the advice of other counsel.

iii. Obtaining informed consent usually requires affirmative response by client or other person.

- Lawyer may not assume consent from client's or other person's silence.
- Consent may be inferred from conduct of client or other person who has reasonably adequate information about matter.

2. Rule 32:1.0(b): Confirmed in Writing.

a. Denotes informed consent that is either:

i. Given in writing by person; or

ii. Writing that lawyer promptly transmits to person confirming an oral informed consent.

b. If it is not feasible to obtain or transmit writing at time person gives informed consent, then lawyer must obtain or transmit it within a reasonable time thereafter.

i. Lawyer may reasonably rely on informed consent after it is obtained but prior to it being transcribed or transmitted, so long as transmission occurs within a reasonable time.

3. Rule 32:1.0(n): Writing or Written.

a. Tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and email.

b. A "signed" writing includes electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

4. Enforcement of and Interpretation of Rules.

a. Rule 35.2 of the Iowa Court Rules establishes the Attorney Disciplinary Board of the Supreme Court of Iowa.

b. Rule 35.1 of the Iowa Court Rules establishes the Grievance Commission of the Supreme Court of Iowa.

c. Iowa State Bar Association Committee on Ethics and Practice Guidelines.

III. Selected Issues for Iowa Lawyers

A. Confidentiality of Client Information

1. Rule 32:1.6: Confidentiality of Information.
 - a. Lawyer shall not reveal information relating to representation of client unless client gives informed consent, disclosure is impliedly authorized in order to carry out the representation, or disclosure is permitted or required by Rule.
 - i. Not limited to confidences and secrets.
 - ii. Source of information not relevant.
 - b. Permitted Disclosures under Rule 32:1.6:
 - i. To prevent reasonably certain death or substantial bodily harm.
 - “Reasonably certain” includes situations where lawyer knows or reasonably believes harm will occur, but there is still time for independent discovery and prevention of the harm without lawyer’s disclosure.
 - ii. To prevent client from committing crime or fraud reasonably certain to result in substantial injury to financial interests or property of another and in furtherance of which client has used or is using lawyer’s services.
 - iii. 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 client’s commission of crime or fraud in furtherance of which client has used or is using lawyer’s services.
 - Iowa Drafting Committee objected to the inclusion of the above two provisions because of concern that they would inadvertently subordinate the preeminent responsibility of lawyer in protecting the confidential information of client. Committee also expressed concern potential conflict with attorney client privilege under Iowa Code section 622.10.

- iv. To secure legal advice about lawyer's compliance with the IRPC.
- v. To establish claim or defense on behalf of lawyer in a controversy between lawyer and client.
- vi. To establish defense to criminal charge or civil claim against lawyer based upon conduct in which client was involved.
- vii. To respond to allegations in any proceeding concerning lawyer's representation of client.
- viii. To comply with other law or court order.
- c. ISBA Ethics Opinion 10-02 addresses release of client information in the event lawyer has reasonable belief that certain or imminent death or substantial bodily harm to another will occur.
- d. ISBA Ethics Opinion 11-01 addresses whether a law firm may utilize cloud computing to store client information.
- e. ISBA Ethics Opinion 13-04 addresses four possible approaches for structuring a mentor-mentee relationship in which lawyers who are not in the same firm may discuss actual client cases without violating the duty of confidentiality. These include: (i) employer-employee relationships; (ii) co-counsel relationships; (iii) contracted-retained lawyer relationships; and (iv) of counsel relationship.
- f. ISBA Ethics Opinion 14-01 addresses a lawyer's obligation to keep information confidential in the context of the Windows XP operating system.

B. Lawyer Representing Multiple Parties

- 1. IRPC 32:1.7: Conflict of Interest: Current Clients.
 - a. Key Concepts: "Duty of Loyalty," "Independent Judgment," and "Materially Limited."
 - b. General Rule: A lawyer shall not represent client if representation involves concurrent conflict of interest.
 - c. Concurrent Conflict of Interest exists if:
 - i. Representation of one client will be directly adverse to another client.

- Lawyer may not act as advocate in one matter against person lawyer represents in some other matter, even when matters are wholly unrelated.
 - Simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest.
 - If lawyer is asked to represent seller of business in negotiations with buyer also represented by lawyer, not in the same transaction but in another unrelated matter, lawyer could not undertake the representation without the informed consent of each client.
- ii. There is significant risk that representation of one or more clients will be materially limited by lawyer's responsibilities to another client, former client, or third person or by personal interest of the lawyer.
- Lawyer asked to represent several individuals seeking to form joint venture is likely to be materially limited in lawyer's ability to recommend or advocate all possible positions that each might take because of lawyer's duty of loyalty to the others.
 - Critical questions are likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.
- d. Analysis. Resolution of conflict of interest problem under IRPC require the following analysis:
- i. Identifying client or clients;
 - ii. Determining whether conflict exists;
 - iii. Deciding whether representation may be undertaken despite existence of conflict (i.e., whether conflict is consentable); and

- iv. If so, consult affected clients and obtain informed consent in writing.
- e. Multiple Representation Exception. Lawyer may represent multiple parties if all of following apply:
 - i. Lawyer reasonably believes that lawyer will be able to provide competent and diligent representation to each affected client;
 - ii. Representation is not prohibited by law;
 - iii. Representation does not involve the assertion of a claim by one client against another client represented by lawyer in the same litigation or other proceeding before a tribunal; and
 - iv. Each affected client gives informed consent, confirmed in writing.

2. Organization of Entities.

- a. Multiple representation might occur in various situations including the following:
 - i. When the lawyer represents multiple clients with common objectives such as in the organization of an entity.
 - Comment 29 provides that in considering whether to represent multiple clients in the same matter, a lawyer needs to be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can result in additional cost, embarrassment, and recrimination. It also provides that because a lawyer is required to be impartial between commonly represented clients, multiple client representation is improper when it is unlikely that impartiality can be maintained. Relevant factors are: the existence of an antagonist relationship between the parties, whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.
 - Comment 30 provides that an important factor in determining the appropriateness of multiple

representation is the effect on client-lawyer confidentiality and the attorney-client relationship. As between the parties, the prevailing rule is that the attorney-client privilege does not attach.

- Comment 31 provides that with regard to the duty of confidentiality, continued multiple representation will not be adequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. As a result, the lawyer, at the outset of the representation, should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.
 - Comment 32 provides that when seeking to establish or adjust the relationship in a multiple representation situation, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and that, as a result, clients may be required to assume greater responsibility for decisions than when each client is separately represented.
- ii. When the lawyer intends to represent only one of the parties in the organization of an entity, but the other parties believe the lawyer is representing them. Claims could be made that the lawyer was the "lawyer for the deal" and violated Rule 1.7 because the lawyer did not withdraw from representation when a conflict arose between the clients.
- b. ABA Formal Opinion 91-361 (July 12, 1991) states that a lawyer for a general partnership is not the lawyer for the partners. But see Rice v. Strunk, 679 N.E.2d 1280 (Ind. 1996) (rejected ABA Opinion and held that lawyer was representing each of the partners).
- c. In Jesse v. Danforth, 485 N.W.2d 63 (Wis. 1992), the Wisconsin Supreme Court held in the situation where the lawyer was involved in the organization of a corporation, the lawyer represented the corporate entity and not the shareholders and the entity representation was "retroactive." See also Manion v. Nagin, 2004 WL 234402 (D. Minn. Feb. 5, 2004), aff'd on other grounds, 294 F.3d 1062 (8th Cir. 2005).

- d. Possible Options:
 - i. Representing one of the organizers
 - ii. Representing more than one of the organizers
 - iii. Representing the newly created entity
- e. In any of these situations, important to communicate in writing with client/non-clients the following information:
 - i. Identifying the client of the lawyer and obtaining any necessary conflict waivers.
 - ii. Consequences of representation/non-representation. If representation of multiple organizers and conflict arises, lawyer may have to withdraw from representation.
 - iii. If multiple representation – address treatment of confidential information

C. Representing Adverse Parties in Commercial Matters.

1. In the commercial negotiations context, such as where a lawyer represents a client in the sale of a business of another client (represented by separate counsel), the lawyer’s representation may be “directly adverse” to another client within the meaning of Rule 32:1.7.
2. In addition to be directly adverse, there is also a concern that a lawyer might “pull punches” in the representation.
3. Among the relevant factors are the existence of hostility between the parties may impact whether the conflict is consentable.
4. Ability of Law Firm to Terminate Representation to Avoid Conflict
 - a. A law firm might try to avoid a conflict by terminating representation of one of the adverse parties.
 - b. The majority view is that a firm may not drop a client like a “hot potato” especially in order “to keep a more lucrative client.” Picker International, Inc. v. Varian Associates, Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), aff’d, 869 F.2d 578 (Fed. Cir. 1989). But see District of Columbia Bar Opinion 272 (May 22, 1997 (rejected “hot potato” rule in determining that a law firm could withdraw from representation of a current client for whom no active matters are pending to represent long-standing client adverse to the inactive client.)).

D. Lawyer's Personal Interest in a Business Transaction

1. Rule 32:1.8: Conflict of Interest: Current Clients: Specific Rules.
 - a. Lawyer's Personal Interest in Business Transaction. Lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to client, unless:
 - i. Transaction and terms on which lawyer acquires interest are fair and reasonable to client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by client;
 - ii. Client advised in writing of desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on transaction; and
 - iii. Client gives informed consent, in a writing signed by client, to essential terms of transaction and lawyer's role in the transaction, including whether lawyer is representing the client in transaction.
 - b. Comments to Rule 32:1.8.
 - i. Lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when lawyer participates in a business, property, or financial transaction with a client.
 - ii. Requirements of this Rule must be met even when the transaction is not closely related to the subject matter of the representation.
 - iii. Rule generally does not apply to ordinary fee arrangements between client and lawyer.
 - iv. Rule does not apply to standard commercial transactions between lawyer and client for products or services that client generally markets to others.

E. Representation of a Party That is Adverse to a Subsidiary or Affiliate of a Corporate Client

1. Rule 32:1.7: Conflict of Interest: Current Clients.
2. Comment 35 provides that lawyer who represents a corporation or other organization does not necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. As a result, lawyer is not barred from accepting representation adverse to such parent or subsidiary in an unrelated matter unless:
 - a. The circumstances are such that the affiliate should also be considered a client,
 - b. There is an understanding between organizational client and lawyer that lawyer will avoid representation adverse to client's interests, or
 - c. Lawyer's obligations to either organizational client or new client are likely to limit materially lawyer's representation of other client.
3. ABA Formal Opinion 95-390
 - a. Law firms must carefully identify and analyze potential corporate family issues at the outset of representation.
 - b. It is permissible to have an agreement between a firm and a corporate client as to which members of the corporate family are considered "clients" of the firm.
 - c. A lawsuit against a corporate affiliate does not necessarily constitute direct adversity under Rule 32:1.7.
 - d. Even if there is no direct adversity, a suit against an affiliated corporation may constitute "indirect" adversity that violates Rule 32:1.7(b), by tempting the firm to pull its punches or otherwise materially limit its representation.
4. Some states have adopted bright-line test that prohibits representation of parties adverse to an affiliate of a corporate client. See, e.g., Gen-Cor, LLC v. Buckeye Corrugated, Inc., 111 F. Supp. 2d 1049 (S.D. Ind. 2000); Stratagem Development Corp. v. Heron International N.V., 756 F. Supp. 789 (S.D.N.Y. 1991).
5. Factors considered:
 - a. Unity of interest/alter ego.

- b. Likelihood that lawyer has received confidential information that would be detrimental to affiliate.

See, e.g., Teradyne, Inc. v. Hewlett-Packard Co., 20 U.S.P.Q.2d 1143 (N.D. Cal. 1991); Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC, 663 N.Y.S.2d 499 (N.Y. Sup. Ct. 1997).

F. Lawyer's Representation of Both an Entity and One or More Employees of the Entity

1. Rule 32:1.13: Organization as Client.

- a. Lawyer employed or retained by organization represents organization acting through its duly authorized constituents.

- b. Lawyer representing organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 32:1.7 (Conflicts of Interest With Current Clients).

- If organization's consent to dual representation is required by Rule 32:1.7, consent shall be given by appropriate official of organization other than individual who is to be represented, or by the shareholders.

- c. Comments to Rule 32:1.13.

- i. When constituents of organizational client communicates with organization's lawyer in that person's organizational capacity, communication is protected by the duty of confidentiality.

- ii. This does not mean, however, that constituents of organizational client are clients of lawyer. Lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by organizational client in order to carry out representation or as otherwise permitted by Rule 32:1.6 (Confidentiality of Information).

- iii. There are times when organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances, lawyer should advise any constituent, whose interest lawyer finds adverse to that of organization, of the conflict or potential conflict of interest:

- That lawyer cannot represent such constituent, and

- That such person may wish to obtain independent representation.

iv. Care must be taken to ensure that individual understands that, when there is such adversity of interest, lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between lawyer for the organization and the individual may not be privileged.

- See also Rule 32:4.3 (Dealing with an Unrepresented Person).

G. Duty if Lawyer Determines a Client Entity Has Violated the Law or Is Violating a Law

1. Rule 32:1.13: Organization as Client.

a. Lawyer's Knowledge of Legal Obligation Violation or Law Violation. If lawyer for organization knows that officer, employee, or other person associated with organization is engaged in action, intends to act, or refuses to act in matter related to representation that is violation of legal obligation to the organization, or violation of law that reasonably might be imputed to organization, and that is likely to result in substantial injury to organization, then lawyer shall proceed as is reasonably necessary in best interest of the organization.

i. Unless lawyer reasonably believes that it is not necessary in the best interest of organization to do so, lawyer shall refer the matter to higher authority in organization, including, if warranted by the circumstances to highest authority that can act on behalf of organization as determined by applicable law.

ii. Comments to Rule 32:1.13.

- In determining how to proceed under this Rule, lawyer should give due consideration to:
 - Seriousness of violation and its consequences,
 - Responsibility in organization and apparent motivation of person involved,
 - Policies of organization concerning such matters, and

- Any other relevant considerations.
 - In some circumstances it may be appropriate for lawyer to ask constituent to reconsider the matter; for example, if circumstances involve constituent's innocent misunderstanding of law and subsequent acceptance of lawyer's advice, lawyer may reasonably conclude that best interest of organization does not require that matter be referred to higher authority.
 - If constituent persists in conduct contrary to lawyer's advice, it will be necessary for lawyer to take steps to have matter reviewed by higher authority in organization. If the matter is of sufficient seriousness and importance or urgency to organization, referral to higher authority in organization may be necessary even if lawyer has not communicated with constituent.
 - Any measures taken should, to extent practicable, minimize risk of revealing information relating to representation to persons outside the organization.
 - Even in circumstances where lawyer is not obligated by Rule 32:1.13 to proceed, lawyer may bring to the attention of organizational client, including its highest authority, matters that lawyer reasonably believes to be of sufficient importance to warrant doing so in best interest of organization.
 - Organization's highest authority to whom matter may be referred ordinarily will be board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, for example, in independent directors of corporation.
- b. Lawyer's Disclosure of Information Outside of Organization. Paragraph (c) of Rule 32:1.13 provides that except as provided in paragraph (d), if:
- i. Despite lawyer's efforts in accordance with paragraph (b) highest authority that can act on behalf of organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly violation of law, and

- ii. Lawyer reasonably believes that violation is reasonably certain to result in substantial injury to the organization,
- iii. Lawyer may reveal information relating to representation whether or not Rule 32:1.6 permits such disclosure, but only if and to the extent lawyer reasonably believes necessary to prevent substantial injury to organization.
- iv. Comments to Rule 32:1.13.
 - It is not necessary that lawyer's services be used in furtherance of the violation, but it is required that matter be related to lawyer's representation of the organization.
 - If lawyer's services are being used by organization to further a crime or fraud by the organization, Rules 32:1.6(b)(2) and 32:1.6(b)(3) may permit lawyer to disclose confidential information.
 - Sarbanes-Oxley Act imposes reporting duties on attorneys. See, e.g., 17 C.F.R. section 205.
- c. Exception to Disclosure. Paragraph (d) of Rule 32:1.13 provides that paragraph (c) shall not apply with respect to information relating to:
 - i. Lawyer's representation of an organization to investigate an alleged violation of law, or
 - ii. To defend organization or an officer, employee, or other constituent associated with organization against claim arising out of an alleged violation of law.
- d. Lawyer's Notification of Lawyer's Discharge or Withdrawal. Lawyer who reasonably believes that lawyer has been discharged because of lawyer's actions taken pursuant to paragraphs (b) or (c) of Rule 32:1.13, or who withdraws under circumstances that require or permit lawyer to take action under either of those paragraphs, shall proceed as lawyer reasonably believes necessary to ensure that organization's highest authority is informed of lawyer's discharge or withdrawal.
- e. Lawyer's Identification of Client. In dealing with organization's directors, officers, employees, members, shareholders, or other constituents, lawyer shall explain identity of client when the lawyer knows or reasonably should know that organization's interests are adverse to those of constituents with whom lawyer is dealing.

2. Rule 32:1.6: Confidentiality of Information.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to, among other things:

- a. 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 been used or is using the lawyer's services. Rule 32:1.6(b)(2).
- b. 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. Rule 32:1.6(b)(3).

H. Duty to Prospective Clients

1. Rule 32:1.18: Duties to Prospective Client.

- a. Person who consults with lawyer about the possibility of forming client-lawyer relationship with respect to matter is prospective client.
 - i. Person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances.
 - ii. Consultation likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations and a person provides information in response.
 - iii. In contrast, a consultation does not occur if person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such person communicates unilaterally to a lawyer without reasonable expectation that lawyer is willing to discuss possibility of forming client-lawyer relationship is not "prospective client."

- b. Even if client-lawyer relationship does not ensue, lawyer who has learned information from a prospective client shall not use or reveal that information except as IRPC 32:1.9 (Duties to Former Clients) would permit.
 - i. As a result, it is important that lawyers limit initial interview to only such information as appears necessary to determine whether there is a conflict.
- c. Lawyer shall not represent client with interests materially adverse to those of prospective client in same or substantially related matter if lawyer received information from prospective client that could be significantly harmful to that person in the matter (except as provided in the Rule).
- d. If lawyer received disqualifying information, representation is permissible if:
 - i. Affected client and prospective client have given informed consent confirmed in writing; or
 - ii. Lawyer takes reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to represent client and disqualified lawyer is timely screened from any participation in matter and not apportioned any part of fee and written notice is promptly given to prospective client.

I. Duty to Former Client

- 1. Rule 32:1.9: Duties to Former Clients.
 - a. Lawyer who has formerly represented client in matter shall not thereafter represent another person in same or substantially related matter in which that person's interests are materially adverse to interests of former client unless former client gives informed consent, confirmed in writing.
 - i. "Matter":
 - A. When lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction is prohibited.
 - B. On other hand, lawyer who recurrently handles a type of problem for former client is not precluded from later representing another client in a factually

distinct problem of that type even though subsequent representation involves a position adverse to prior client.

- C. Underlying question is whether lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

ii. “Substantially related”:

- A. Matters involve same transaction or legal dispute; or
- B. If there otherwise is substantial risk that confidential factual information as would normally have been obtained in prior representation would materially advance client’s position in subsequent matter.
- C. Information that has been disclosed to public or to other parties adverse to former client ordinarily will not be disqualifying.
- D. Information acquired in prior representation may have been rendered obsolete by the passage of time.
- E. In case of an organizational client, general knowledge of client’s policies and practices ordinarily do not preclude subsequent representation; on other hand, knowledge of specific facts gained in prior representation that are relevant to matter in question ordinarily will preclude such a representation.

- b. Lawyer shall not knowingly represent a person in same or substantially related matter in which a firm with which lawyer formerly was associated had previously represented client:

- i. Whose interests are materially adverse to that person; and
- ii. About whom lawyer had acquired information protected by the duty of confidentiality or by 32:1.9(c) that is material to the matter, unless former client gives informed consent, confirmed in writing.

- c. Lawyer who formerly represented client in matter or whose present or former firm has formerly represented client in matter shall not thereafter:
 - i. Use information relating to representation to disadvantage of former client except as the Rules would permit or require with respect to client, or when the information has become generally known; or
 - ii. Reveal information relating to the representation except as the Rules would permit or require with respect to a client.

J. Conflict Waiver From Client for Future Conflicts

- 1. Rule 32:1.7: Conflict of Interest: Current Clients.
- 2. Comment 22 provides that the effectiveness of future consent waivers is generally determined by the extent to which client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of types of future representations that might arise and actual and foreseeable adverse consequences of those representations, the greater the likelihood that client will have the requisite understanding. If consent is general and open-ended, consent ordinarily will be ineffective, because it is not reasonably likely that client will have understood the material risks involved.
- 3. ABA Formal Opinion 05-436 provides that where a sophisticated user of legal services agrees to an open-ended waiver, the consent should be deemed valid. The Opinion further provides that where the consent is limited to matters “not substantially related” to the prior representation, there should not be any misuse of confidential information. It also rejected view that for consent to be “informed,” the consenting client needed to know the details of the future conflict. See also Galderma Labs v. Actavis Mid Atlantic, 927 F. Supp.2d 390 (N.D. Tex. 2013); but see Worldspan, L.P. v. The Sabre Group Holding, Inc., 5 F. Supp. 2d 1356 (N.D. Ga. 1998) (court invalidated advance waiver on grounds that it was too old.)

K. Truthfulness in Negotiations

- 1. Rule 32:4.1: Truthfulness in Statements to Others.
 - a. A lawyer may not knowingly make false statements of material fact or law to a third person.
 - b. A lawyer may not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 32:1.6 (Confidentiality of Information).

2. Rule 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 otherwise permitted under Rule 32:1.6.
 - b. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes it is necessary, among other things, to:
 - i. Prevent a 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.
 - ii. 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.
3. Rule 32:1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer.

A lawyer may not assist the client in committing a fraud or crime. See also Rule 32:8.4 (Misconduct).
4. Rule 32:1.13: Organization as Client.

See above discussion regarding refer the matter to higher authority in organization.
5. ABA Formal Opinion 06-439 (Lawyer's Obligation of Truthfulness When Representing Client in Negotiation: Application to Caucused Mediation).

Opinion recognizes that a lawyer may be expected to "puff" as to certain issues. It also recognizes, however, that a lawyer may not lie.

L. Lawyer's Receipt of Third Party E-mail Communications with Counsel

1. Situation can arise when an employer's lawyer receives copies of an employee's private communication with counsel, which the employer located in the employee's business e-mail file or on the employee's workplace computer or other device.

2. Model Rule 4.4(b) (Respect of Rights of Third Persons).

A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

3. Rule 4.4(b) likely not applicable because emails between an employee and his or her counsel are not "inadvertently sent."

4. ABA Formal Opinion 11-460 (Duty When Lawyer Receives Copies of a Third Party's E-mail Communication with Counsel).

a. Neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of receipt of the communications.

b. Still, court decisions, civil procedure rules, or other law may impose such a notification duty.

c. To extent law is unclear, Rule 1.6(b)(6) allows employer's lawyer to disclose that the employer has retrieved attorney-client emails to the extent lawyer reasonably believes it is necessary to do so to comply with relevant law.

d. If no law can reasonably be read as establishing a notification obligation, the decision whether to give notice must be made by the employer-client and the employer's lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

5. ABA Formal Opinion 11-459 (Duty to Protect the Confidentiality of E-mail Communications with One's Client).

Opinion provides that a lawyer sending communications to a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account where there is a significant risk that a third party may gain access.

6. ABA Formal Opinion 99-413 (Protecting the Confidentiality of Unencrypted E-mail).

Opinion provides that a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the internet without violating Rule 1.6(a) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The opinion also provides, however, that lawyers should consult with their clients and follow their clients' instructions as to the mode of transmitting highly sensitive information relating to the clients'

representation. In addition, particularly strong protected measures are warranted to guard against the disclosure of highly sensitive matters.

7. Washington State Bar Association Rules of Professional Conduct Committee, Informal Op. 2216.

Lawyers may review readily accessible metadata that an opposing counsel unwittingly transmits in an electronic document but may not use sophisticated forensic software to extract such metadata from a “scrubbed document.”

ABA Formal Opinion 06-442 and 05-437 address metadata. Provides that recipient may review or mine metadata.

ABA maintains website containing metadata ethics opinions around the United States.

http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadachart.html

M. Obligations of Supervising Lawyers

1. Rule 32:5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers.
 - a. Partner in a law firm, and lawyer who individually or together with other lawyers possesses comparable managerial authority in law firm, shall make reasonable efforts to ensure that firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to Rules. Rule 32:5.1(a).
 - b. Comments to Rule 32:5.1(a):
 - i. Rule applies to lawyers who have managerial authority in a legal services organization or a law department of an enterprise or government agency.
 - ii. Requires managers to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Model Rules.
 - c. Lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that other lawyer conforms to the Rules. Rule 32:5.1(b).
 - d. Lawyer shall be responsible for another lawyer’s violation of the Rules if:
 - i. Lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

- ii. Lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. Rule 32:1.5(c).
- e. Comments to Rule 32:5.1(c):

Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter.
- 2. Note: Essentially the same rule is established at Rule 32:5.3 (Responsibility Regarding Nonlawyer Assistants) with regard to managerial attorney responsibility over nonlawyer assistants.
- 3. Rule 32:5.1: Responsibilities of a Subordinate Lawyer
 - i. Lawyer is bound by the Model Rules notwithstanding lawyer acted at direction of another person.
 - ii. Subordinate lawyer does not violate IRPC if lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.
- 4. ISBA Ethics Opinion 13-03 addresses the use of contracted lawyers and identifies five issues relating to the scope and use of contracted lawyers: competency, consent, control, compensation and conflicts. The opinion states that both parties – the contracted lawyer and the retained lawyer and law firm – must exercise due care to ensure that the scope and nature of the contracted services are well-defined and that the potential for conflicts of interest and imputed conflicts of interest are identified.

N. Outsourcing Legal Work

- 1. Rules 32:5.1 and 32:5.3. See above.
- 2. Rule 32:1.1 (Competence)

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- 3. Rule 32:5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law). See below.

4. ABA Formal Opinion No. 08-451 (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services).
 - a. A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1.
 - b. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3.
 - c. Lawyer should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with lawyer's own professional obligations as a lawyer with "direct supervisory authority" over them.
 - d. Appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6.
 - e. The fees charged must be reasonable and otherwise in compliance with Rule 1.5 (Fees), and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.
5. Various states have issued opinions on the outsourcing of work. See, e.g., Florida Bar Ethics Advisory Opinion 07-02 (January 8, 2008); Bar of the City of New York Formal Ethics Opinion 2006-03 (August 2006); Los Angeles County Bar Ethics Opinion No. 518 (June 19, 2006); and San Diego County Bar Association Ethics Opinion 2007-01. Each opinion concluded that outsourcing to persons not admitted to practice in the United States does not constitute assisting the unauthorized practice of law as long as a lawyer admitted to the relevant jurisdiction supervises and takes responsibility for the work of the contractors.
6. ABA Commission on Ethics 20/20 recommendations on outsourcing provide amendments to the comments to the Model Rules.
 - a. Model Rule 1.1 includes comment that provides that before lawyer retains other lawyers outside of lawyer's own law firm to provide or assist in provision of legal services to a client, the lawyer should "ordinarily" obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. Factors to be considered regarding "reasonableness" of use of other lawyers include: education, experience, reputation of outside lawyers, and the legal and ethical environment in which the services will be performed. In addition, where the client has chose or suggested

lawyers from other firms to assist in the provision of legal services on a particular matter, the law firms that will be assisting the client on that matter should consult with each other and the client about the allocation of responsibility for monitoring and supervision of any nonlawyers who will be working on the client matter.

- b. Model Rule 5.3 includes a comment that notes the lawyers' duty to ensure the quality of outsourced legal support services.

O. Fees

1. IRPC 32:1.5 (Fees).

- a. Under IRPC, fees must be reasonable with reasonableness dependent on eight factors.
 - i. Time and labor required, novelty and difficulty of questions involved, and skill requisite to perform the legal service properly.
 - ii. Likelihood, if apparent to client, that acceptance of particular employment will preclude other employment by lawyer.
 - iii. Fee customarily charged in locality for similar legal services.
 - iv. Amount involved and results obtained.
 - v. Time limitations imposed by client or by the circumstances.
 - vi. Nature and length of professional relationship with client.
 - vii. Experience, reputation, and ability of lawyer or lawyers performing services; and
 - viii. Whether fee is fixed or contingent.
- b. Scope of representation and basis or rate of fee and expenses for which client is responsible are to be communicated to client, preferably in writing, before or within a reasonable time after commencing the representation, except when lawyer will charge a regularly represented client on the same basis.
- c. Required written fee agreements:
 - i. Contingent Fee: Contingent fee agreement must be in a writing signed by the client and are to state the method by which the fee is to be determined.

- ii. Non-Contingent Fee: Non-contingency fee agreements need not be in writing, although written communication is preferable.
- d. Rule 32:1.5 is relevant to all fee arrangements and important in the determination of whether such arrangements are permissible under the IRPC. Rules 32:1.7 (Conflict of Interest: Current Clients), 1.8 (Conflict of Interest: Current Clients: Specific Rules), and 2.1 (Advisor) also relevant.
- e. Rule 1.5 is discussed in three ABA Formal Ethics Opinions addressing alternative billing arrangements. See, e.g., ABA Formal Ethics Opinion 94-389 (Contingent Fees); 93-373 (Reverse Contingent Fees); and 00-418 (Acquiring Ownership in a Client in Connection with Performing Legal Services).
- f. ISBA Ethics Opinion 13-05 addresses co-counsel relationships. It provides that when contemplating a co-counsel relationship, Iowa lawyers are advised to reduce the terms of the relationship to writing and obtain the client's informed consent. In those situations where a division of fee is contemplated, the fee division must be based either upon the services performed or assumption of responsibility and the client must consent in writing to the agreement, including the share each lawyer will receive.

P. Multi-Jurisdictional Practice

- 1. Rule 32:5.5: Multi-Jurisdictional Practice.
 - a. Lawyer shall not practice law in jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
 - i. Comment: Rule does not prohibit a lawyer from:
 - Providing professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies.
 - Assisting independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services.
 - Counseling nonlawyers who wish to proceed pro se.

- b. Lawyer not admitted to practice in Iowa shall not:
 - i. Except as authorized by the IRPC or other law, establish office or other systematic and continuous presence in Iowa for practice of law; or
 - Comment: Presence may be systematic and continuous even if the lawyer is not physically present here.
 - ii. Hold out to public or otherwise represent that the lawyer is admitted to practice law in Iowa.
- c. Lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on temporary basis in Iowa that:
 - i. Are undertaken in association with a lawyer admitted to practice in Iowa and who actively participates in the matter;
 - ii. Are in or reasonably related to pending or potential proceeding before tribunal in Iowa or another jurisdiction, if lawyer, or person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - Comment: Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents.
 - iii. Are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Iowa or another jurisdiction, if services arise out of or are reasonably related to lawyer's practice in jurisdiction in which lawyer is admitted to practice and are not services for which forum requires pro hac vice admission; or
 - iv. Are not within paragraphs described above and arise out of or are reasonably related to lawyer's practice in jurisdiction in which the lawyer is admitted to practice.
 - Comment: Services may be "temporary" even though lawyer provides services in Iowa on recurring basis, or for extended period of time, as when lawyer is representing client in a single lengthy negotiation or litigation.

- Comment: Reasonably related includes:
 - Lawyer's client may have been previously represented by lawyer, or may be resident in or have substantial contacts with jurisdiction in which the lawyer is admitted.
 - The matter, although involving other jurisdictions, may have significant connection with that jurisdiction.
 - Significant aspects of lawyer's work might be conducted in that jurisdiction or significant aspect of matter may involve the law of that jurisdiction.
 - Client's activities or legal issues involve multiple jurisdictions, such as when officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each.
 - Services may draw on lawyer's recognized expertise developed through regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

- d. Lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in Iowa that:
 - i. Are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
 - ii. Are services that the lawyer is authorized to provide by federal law or other Iowa law.
 - iii. Comment: The first part of this Rule does not authorize the provision of personal legal services to the employer's officers or employees; it only applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer.

- e. Iowa Supreme Court Attorney Disciplinary Board v. Carpenter, 781 N.W. 2d 263 (Iowa 2010) (Court held that it had jurisdiction to

discipline a lawyer licensed in another jurisdiction and to fashion equitable practice restrictions).

- f. Iowa Ethics Opinion 13-01 addresses of-counsel relationships. Among other things, it provides the one seeking to meet the requirement of a close, regular, and continuous relationship with an Iowa lawyer or law firm so as to offer legal services to the firm's clients needs to be admitted to the practice of law in Iowa. Of-counsel relationships should not be used as an alternative to bar admission by non-Iowa lawyers.

Q. Use of Social Media

1. Attorney Client Relationship.
 - a. Social media, such as LinkedIn, can give rise to attorney-client relationship issues.
 - b. To the extent lawyers are responding to specific legal issues, such responses may be characterized as providing legal advice, thereby creating the potential for an attorney-client relationship. See ABA Formal Opinion 10-457 (August 5, 2010) (A lawyer who answers fact-specific legal questions may be characterized as offering legal advice while the lawyer posing and answering a hypothetical question usually will not be characterized as offering legal advice).

2. Confidentiality.

- a. Rule 32:1.6 (Confidentiality of Information).

Lawyers shall not reveal any information relating to representation of a client unless client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is otherwise permitted under the Rules.

- b. Potential Issues.
 - i. Disclosing too much information on a blog (Illinois lawyer suspended for sixty days after disclosing names or other identities of clients).
 - ii. Seeking advice on listserves (Oregon Ethics Opinion No. 2011-184 required lawyer to obtain consent of client before posting hypothetical question that includes facts that would permit third party to determine client's identify).
 - iii. Client disclosure of information on social networks can be deemed waiver of attorney-client privilege.

5. Conflict of Interest.
 - a. Communicating with parties with adverse interests to those of clients (including prospective clients). See Model Rule 1.18 (Duties to Prospective Clients).
 - b. Stating a position that is contrary to interests of a firm client – creation of an issue conflict.

6. Unauthorized Practice of Law.
 - a. Rule 32:5.5: Unauthorized practice of law: multi-jurisdictional practice of law.

Lawyer shall not practice in jurisdiction in violation of the regulation of the legal profession of that jurisdiction.
 - b. Potential Issues.

Providing specific legal advice to a social networking participant located in a different jurisdiction.

7. Discovery.

A lawyer may not send a “friend request” to a user in order to gain access to evidence on the applicable social networking site. If to do so, the lawyer is engaged in “trickery” or “deceptive behavior.” See Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02; New York City Bar Formal Opinion No. 2010-2; San Diego County Bar Legal Ethics Commission Opinion 2011-2.

R. Advertising/Solicitation of Legal Services

1. Rule 32:7.1: Communications Concerning a Lawyer’s Service (effective January 1, 2013).
 - a. Lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.
 - b. 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.
 - i. Comment: Truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading or if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer

or lawyer's services for which there is no reasonable foundation.

- ii. Unsubstantiated comparison of lawyer's services or fees or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. Inclusion of appropriate disclaimer or qualifying language may preclude finding that statement is likely to create unjustified expectations or otherwise mislead the public.
- c. Note: Old Rule prohibited lawyer from communicating with public using statements that are unverifiable or using advertising that relied on emotional appeal or containing any statement or claim relating to the quality of the lawyer's services.

2. Rule 32:7.2: Advertising.

- a. Subject to Rules 32:7.1 and 32:7.3, lawyer may advertise services through written, recorded, or electronic communication, including public media.
- b. Lawyer shall not give anything of value to a person for recommending lawyer's services except lawyer may:
 - i. Pay reasonable costs of advertisements and communications.
 - ii. Pay usual charges of legal service plan or nonprofit or qualified lawyer referral service.
 - iii. Pay for a law practice in accordance with Rule 32:1.17.
 - iv. Refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under the Rules that provides for the other person to refer clients or customers to lawyer if: (1) the reciprocal referral agreement is not exclusive; and (2) client is informed of the existence and nature of the agreement.
 - Comment: Except as provided in Rule 32:1.5(e), lawyer who receives referrals from lawyer or nonlawyer professional must not pay anything solely for the referral, but lawyer does not violate Rule by agreeing to refer clients to other lawyer or nonlawyer professional.
 - Comment: Reciprocal referral arrangements should not be of indefinite duration and should be reviewed

periodically to determine whether they comply with Rules.

- c. Any communication made pursuant to Rule shall include the name and office address of at least one lawyer or law firm responsible for content.
- d. Note: Old Rule provided extensive requirements relating to advertising that are not part of New Rule.

3. Rule 32:7.3: Solicitation of Clients.

- a. Lawyer shall not by in-person, live telephone or real time electronic contact solicit professional employment when significant motive for lawyer's doing so is the lawyer's pecuniary gain, unless person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with lawyer.
 - i. Solicitation is a targeted communication directed to a specific person that offers to provide or can reasonably be understood as offering to provide legal services.
 - ii. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, internet banner advertisement, website or television commercial, or if it is in response to a request for information or is automatically generated in response to internet searches.
- b. Lawyer shall not solicit professional employment by written, recorded, or electronic communication or by in-person, telephone, or real time electronic contact even when not otherwise prohibited by Rule if: (1) target of solicitation has made known to lawyer a desire not be solicited by lawyer; or (2) solicitation involves coercion, duress, or harassment.
- c. Every written, recorded or electronic communication from lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded electronic communication, unless the recipient of the communication is the person specified in paragraph (a)(1) or (2) above.
- d. Notwithstanding prohibitions in paragraph (a) above, lawyer may participate with prepaid or group legal services plan operated by organization not owned or directed by lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the

plan from persons who are not known to need legal services in a particular matter covered by the plan.

- e. Note: Old Rule did not include exceptions identified in paragraph (a) above.

4. Rule 32:7.4: Communication of Fields of Practice Specialization.

- a. Lawyer may communicate fact that lawyer does or does not practice in particular fields of law.
- b. Lawyer admitted to engage in patent practice before U.S. Patent and Trademark Office may use designation “Patent Attorney” or a substantially similar designation.
- c. Lawyer engaged in admiralty practice may use designation.
- d. Lawyer shall not state or imply that lawyer is certified as a specialist in particular field of law, unless: (1) lawyer has been certified as specialist by organization or state authority that lawyer can demonstrate is qualified to grant certifications to lawyers; (2) name of certifying organization is clearly identified in communication; (3) reference to certification must be truthful and verifiable and not misleading in violation of Rule 32:7.1; and (3) representation by lawyer that lawyer is certified as specialist states that Iowa Supreme Court does not certify lawyers as specialists in practice of law and certification is not requirement to practice in Iowa.
- e. Old Rule provided for list of specific fields of practice and requirements for being able to identify or describe lawyer’s practice by reference. Rule also provided requirements for use of the terms “practice limited to . . .” and “practicing primarily in . . .” Such requirements are not in new Rule.

5. Rule 32:7.5: Firm Names and Letterheads.

- a. A lawyer may not use a firm name, letterhead, or other professional designation that violates Rule 32:7.1.
- b. A trade name or uniform resource locator (URL) may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 32:7.1.
- c. Every letterhead, sign, advertisement, card or other place where a trade name or URL is communicated to the public, where the trade name or URL is more than a minor variation of the official name of the lawyer, firm, or organization, shall display the name and

address of one or more of its principally responsible lawyers licensed in Iowa.

S. Lawyer Serving on Board of Directors of a Client Organization

1. Lawyer who serves as a director of organization may find the lawyer/director's responsibilities conflict. As a director, a lawyer is bound by the duties of care and loyalty to reasonably exercise an unbiased judgment on an informed basis and in good faith to further the best interests of the corporation. Such duties may conflict with the duty to represent the organization.
2. Rule 32:1.7: Conflict of Interest: Current Clients.

Comment 35 provides that the lawyer for corporation or other organization who is also member of its board should determine whether responsibilities of two roles may conflict. Considerations should be given to frequencies of situations in which lawyer may be called on to advise corporation on matters involving directors' actions, the potential intensity of such conflict, effect of lawyer's resignation from board, and possibility of corporation obtaining legal representation from another lawyer in such situations. If there is material risk that the dual role will compromise lawyer's independence of professional judgment, the lawyer should not serve as director or should cease to act as the corporation's lawyer when conflicts of interest arise. In addition, lawyers should advise other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require lawyer's recusal as director or might require lawyer and lawyer's law firm to decline representation of the corporation in the matter.

3. Situations where such conflicts arise include:
 - a. ABA Formal Opinion 98-410 (Lawyer Serving as Director of Client Corporation) addresses potential conflict situations:
 - i. Pursuing client objectives that the lawyer, as director, opposed.
 - ii. Opining on board actions in which the lawyer-director participated.
 - iii. Corporate actions affecting the lawyer's law firm.
 - iv. Representation of the corporation in litigation.
 - b. Treadway Companies v. Care Corp., 490 F. Supp. 660 (S.D.N.Y.), aff'd in part, rev'd in part, 638 F. 2d 357(2d Cir. 1980) (Court

recognized that director-lawyer bound by business judgment rule to reasonably exercise an unbiased judgment on an informed basis and in good faith in the best interests of the organization).

c. Lawyer serving as a director of a nonprofit corporation where other lawyers in the lawyer/director's law firm represent client that is adverse to the nonprofit. In such situations, law firms have been disqualified from representing adverse parties. See, e.g., Berry v. Saline Memorial Hospital, 907 S.W.2d 736 (Ark. 1995) (court affirmed disqualification of law firm adverse to organization where lawyer from law firm served on organization's board); Allen v. Academic Games Leagues of America, 831 F. Supp. 785 (C.D. Cal. 1993) (law firm disqualified when lawyer acted in advisory role to organization); Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296 (Ariz. 1981); Iowa Supreme Court Board of Professional Ethics and Conduct, Op. Nos. 94-04 ("[I]t is improper for a lawyer who is a director of a corporation, public or private, to represent a client in business dealings with that corporation if the client has interests that are or may become different from those of that corporation, and, what the lawyer cannot do, no partner or associate of the lawyer, or the lawyer's law firm can do."); 03-01; 92-32; 80-17. The basis for such disqualification appears to be the determination that a director's fiduciary responsibility carries with it the same duty of loyalty as a legal representation.

4. In conflict situations, the lawyer may be required to not participate in the voting of a board matter. See Iowa Code sections 490.832 and 504.833; ABA Formal Opinion 98-410.

5. Lawyer/Directors May Be Held to a Higher Standard of Care.

a. In the for-profit/securities context, a lawyer/director's dual role as a legal advisor and corporate manager renders a lawyer/director more likely to be named as defendants in corporate litigation. See, e.g., Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 575-76, 578 (E.D.N.Y. 1971) (court held that lawyers/directors may be so deeply involved in a company that they are required to undertake the strict investigatory duties of an "inside" director whose standard of care approaches that of a "guarantor of accuracy"); Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 690 (S.D.N.Y. 1968) (court held that a lawyer who acted as an outside director, by virtue of his status as a lawyer, faced a heightened standard of director due diligence when preparing and investigating a corporate registration statement).

b. In Blakely v. Lisac, 357 F. Supp. 255 (D. Or. 1972), the lawyer/director was held liable both as a lawyer and as a director

for his failure to detect or investigate misrepresentations which appeared in the company's investment prospectus.

- c. The Task Force on the Independent Lawyer of the ABA Litigation Section issued a report in which it states that a lawyer for an organization who is also a director is expected to have more extensive knowledge and conduct more extensive investigations into the facts than other outside directors, and in general is held to a higher standard of care than either a director who is not a lawyer or a lawyer for the organization who is not a director). ABA Section of Litigation Report of the Task Force on the Independent Lawyer, "The Lawyer-Director: Implications and Independence," March 1998.

6. Vicarious Law Firm Liability.

There is a risk that when a lawyer/director is found to have violated a fiduciary duty, the lawyer's law firm can be held vicariously liable on the theory that the lawyer's service was authorized by, or was on behalf of, the firm. See, e.g., Deutsch v. Cogan, 580 A.2d 100 (Del. Ch. 1990) (court held that a firm, whose partner served on a client board, had same fiduciary obligation to client's shareholders as the lawyer/director).

7. Attorney-Client Privilege Waiver Risks.

- a. The lawyer/director's dual role can make it difficult to insure that communications between the lawyer and the nonprofit will be protected by the attorney-client privilege. See, e.g., Committee on Professional Conduct, et al, "The Attorney-Client Privilege and Work-Product in the Post-Enron Era," American Bar Association, Section of Business Law, Annual Meeting, 2004. In the corporate world, a basic element of the privilege is that the lawyer must be acting as legal counsel rather than a business advisor in order for communications to be protected from disclosure in litigation.
- b. In the for-profit context, claims have been asserted that the communications from a lawyer/director involved business issues (as opposed to legal advice) and were therefore not protected by the attorney-client privilege. See, e.g., SEC v. Gulf & Western Industries, Inc., 518 F. Supp. 675 (D.D.C. 1981); United States v. International Business Machines Corporation, 66 F.R.D. 206, 212 (S.D.N.Y. 1974).
- c. ABA Standing Committee on Ethics and Professional Responsibility has taken the position that a lawyer must warn a corporate client of the potential loss of the attorney-client privilege where a lawyer is also a board member. ABA Formal Opinion 98-410.

8. ABA Section on Business Law Committee on Lawyer Business Ethics, in its report, "The Lawyer as Director of a Client," 57 Bus. Law. 387 (November 2001) recommends the following steps for a lawyer to take when serving on a client board:
 - a. Takes steps so that management and the board understand the different responsibilities of the lawyer and director, that the lawyer represents the entity, and that ethical rules may require the lawyer to recommend engagement of other counsel on specific matters.
 - b. Take steps to assure management and the board understand that the attorney-client privilege does not extend to business matters discussed at board meetings or between directors.
 - c. Safeguard the attorney-client privilege to the extent possible, by among other things, making it clear when communications to or from the lawyer/director are made in his or capacity as lawyer.
 - d. Review the minutes of the board meetings to assure they identify when attorney-client communications occurred.
 - e. Refrain from voting on matters relating to the lawyer's representation of the client.
 - f. Identify any potential gaps in D&O and professional liability coverage.
 - g. When rendering legal advice, advise against action that is not legal or likely to harm client even when favored by management or other directors.
 - h. Diligently and zealously, within the limits of applicable law and ethical rules, perform the duties of counsel once a decision has been reached by management or the board.
 - i. Law Firms should:
 - i. Set forth standards for notifying and approving lawyers' service on client boards.
 - ii. Consider the inherent risks related to the applicable client.
 - iii. Consider the indemnification, exculpation and immunity protections that may be available to a director.
 - iv. Consider potential gaps in coverage.
 - v. Consider how director fees and other compensation are to be handled.

- vi. Consider lawyer/director's relationship to the client, in terms of whether such lawyer should be primary contact.
- vii. Review all client directorships on regular basis.

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