The Attorney-Client Relationship: A review of the rules and the cases

Iowa Real Property Law
September 16, 2022

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When studying Rule 32 of the Iowa Rules of Professional Conduct, the threshold question is whether an attorney-client relationship has been formed. Confidentiality and privilege, conflicts of interest, diligence, and all the other duties apply only when an attorney-client relationship has at least started to form.

Practically, we routinely find ourselves in conversations that may be seen by the other party as forming an attorney-client relationship. We want to be helpful to the friend in the grocery store parking lot or the one who e-mails us with a "quick question," but that conversation or e-mail exchange may trigger obligations the attorney does not intend. It is imperative for the protection of others that we are prudent in those conversations. Beyond the public, we take on liability exposure when we inadvertently form attorney-client relationships without the benefit of taking complete notes, having access to resources, and conducting the discussion in an environment conducive to confidential communication and analysis. Doctors should not give medical advice without properly gathering information in order to make an informed diagnosis; similarly, lawyers should be cautious in answering the "quick question" in the parking lot. In the future, memories may vary as to what that park lot conversation involved. The legal profession as a whole benefits from adherence to the rules regarding the attorney-client relationship.

This presentation addresses the following questions:

1. How is the attorney-client relationship defined?
2. What are the rules regarding prospective clients?
3. Can the attorney-client relationship be turned on and off?
4. Who is the client?
5. What rules govern the attorney-client relationship when the client has diminished capacity?
6. How is the attorney-client relationship ended?

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I. The definition of the attorney-client relationship

When is communication privileged? When is there attorney malpractice? When is there a violation of the prohibition against having sexual relations with clients? How should we think about our parking lot conversations? All of these questions turn on whether an attorney client relationship has formed. Curiously, the Rules of Professional Conduct *do not* provide a definition of the attorney-client relationship. What is the test for determining whether an attorney-client relationship has been formed in Iowa?

A. The three-prong test for establishing an attorney-client relationship

Iowa employs a three-prong test for determining whether there is an attorney-client relationship. In *Kurtenbach v. TeKippe*, the Iowa Supreme held an attorney-client relationship may be implied from the conduct of parties rather than from an express contract.[1] The following elements are needed to establish an attorney-client relationship:

> (1) a person has sought advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the attorney's professional competence; and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.[2]

This definition is consistent with the standard set forth in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2002), although the Restatement's version is expressed in two prongs. According to the Restatement, a relationship of lawyer and client arises when:

1. A person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and

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[1] *Kurtenbach v. TeKippe*, 260 N.W.2d 53 (Iowa 1977) (holding there was no attorney-client relationship as the conduct in question was outside of the scope of the attorney's representation of the client); *see also Healy v. Gray*, 168 N.W. 222, 224 (Iowa 1918) (holding that an attorney-client relationship "may be implied from the conduct of the parties"); *Anderson v. Lundt*, 206 N.W. 657, 659 (Iowa 1925) ("Formality is not essential in the employment of an attorney. It is enough that his advice and assistance be sought and received, in matters pertinent to his profession."); *Steinbach v. Meyer*, 412 N.W.2d 917 (Iowa Ct. App. 1987).

[2] *Id*. at 56.

> 2. the lawyer fails to manifest a lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the service.
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> Comments to the Restatement reveal the "client's intent may be manifest from surrounding facts and circumstances," but recognize "a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising." Restatement § 14 cmt. c. Likewise, "a lawyer may manifest consent to creating a client-lawyer relationship in many ways," including when a lawyer reasonably should know a person reasonably relies on the lawyer to provide services and "does not inform the person that the lawyer will not do so." *Id*. § 14 cmt. e.[3]

The standard for forming an attorney-client relationship does not require a written agreement or a retainer. It is simply the three elements. We must wait for cases in the future that will define the boundaries of the test. For now, we have only a few cases.

B. Important cases

1. *The third element of the test "may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it*." *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977) (emphasis added). In this case, an attorney formed two corporations for his client. The client sold multiple shares of stock to the companies and was obligated to report the sale of the stock to the commissioner of insurance. The corporations became financially troubled and the shareholders sued the client because of his failure to report the stock sales. The client brought an action against the attorney for failing to notify him of the obligation to report the sales. The Court found that it was beyond the scope of the attorney's representation and the attorney had no duty to investigate when the client never asked him to address this. This standard is later clarified in *Comm. on Professional Ethics & Conduct v. Wunschel*: "The point at which the attorney-client relationship begins and ends is further

[3] *State v. Parker*, 747 N.W.2d 196, 204 (Iowa 2008) (holding that an attorney did not exist in an analysis of whether communication was privileged).

defined by the rule that a lawyer bears responsibilty for *only those legal matters he or she is engaged to discharge*."[4]

Practice pointer. Stay within the scope of your representation. It is common for a client to ask for assistance in a manner outside of the initial scope of representation. In an effort to be helpful (or keep a client), there is a temptation to assist. The first question to consider: "Is this something that I can reasonably assist the client with or am I am dealing with matters that I am not competent to address?" If you believe that you can assist the client with the new matter, then create a new matter for the client and perhaps prepare or amend the first agreement to include the new matter. For example, if you are preparing a will for a client and the client asks you to also assist with the sale of real estate, clarify either (1) that is not a matter that you are able to assist with or (2) that you will consider this a new matter.

Practice pointer. There is a growing interest in limited scope representation (also referred to as unbundled legal services) where the attorney agrees to handle only parts of a client's matter. The American Bar Association has a website on the subject with numerous resources.[5] Rule 32:1.2(c) expressly permits limited representation and describes what need is needed for written consent from the client.

2. *Filing an appearance on behalf of a client creates a rebuttable presumption of an attorney-client relationship. Iowa Supreme Court Attorney Disciplinary Bd. v. Netti*, 797 N.W.2d 591, 599 (Iowa 2011). The attorney in this case settled a personal injury suit where there was a claim for reimbursement of medical subrogation by a hospital. Rather than pay the hospital from the settlement, the attorney provided the client his share and retained the attorney fees. The fee agreement with the client required the client to pay any subrogation claims from the recovery. With the

[4] *Comm. on Professional Ethics & Conduct v. Wunschel*, 461 N.W.2d 840, 845 (Iowa 1990) (emphasis added).

[5] www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/resources---information-on-key-atj-issues/limited_scope_unbundling/

subrogation claims unpaid, the hospital sued the insurance company, and the insurance company filed a third-party petition against the attorney and client. The attorney filed an appearance and answer for himself and the client. However, the client did not authorize this filing. In response to an assertion of a conflict of interest by opposing counsel, the attorney moved to withdraw the answer, filed a new answer only for himself, and cross-claimed against the client for indemnification. The Disciplinary Board analyzed whether there was a conflict of interest when the attorney filed the appearance and answer. The Court found there was a conflict of interest in violation of Rule 32:1.7(a)(2).[6]

3. *The Court will not tolerate efforts to distort the definition of the attorney-client relationship in order to have sexual relations with a client. Iowa Supreme Court Atty. Disciplinary Bd. v. Moothart*, 860 N.W.2d 598 (2015). In this case, the attorney was alleged to have engaged in sexual harassment under Rule 32:8.4(g) and sexual relations with clients under Rule 32:1.8(j). Five claimants came forward. The case is relevant to the question of the attorney-client relationship because Moothart offered a number of theories as to why there was no attorney-client relationship as a defense to the claim of sexual relations with clients. With one person, Moothart offered the rationale that because he created false files and documents, no actual attorney-client relationship existed and therefore he was not precluded ethically from having sexual relations with the person.[7] Moothart argued, in essence, if she's not a client in fact, the rules don't apply. The Court rejected this theory and found that the subjective belief by the client that Moothart was providing valid legal services was sufficient to establish an attorney-client relationship.[8] As provided in *Kurtenbach*, the client's reliance on the lawyer's advice must be reasonable.

Although tangential to the topic of whether an attorney-client relationship has formed, *Moothart* reminds us why the Rules of Professional Conduct prohibit sexual

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[6] *Netti*, 797 N.W.2d at 600.

[7] *Moothart*, 860 N.W.2d at 611.

[8] *Id*. *See also Iowa Supreme Court Atty. Disciplinary Bd. v. Blessum*, 861 N.W.2d 575, 588 (2015) (applying the three-prong test and holding that an attorney-client relationship had been formed in the context of having a will prepared and that a subsequent sexual relationship violated Rule 32:1.8(j)).

relations with clients. The best explanation comes in *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Morrison*, 727 N.W.2d 115 (Iowa 2007). Morrison had sexual relations with a female client while representing her during her dissolution of marriage. The Court provided the following explanation of why this is not a gray area of professional responsibility:

> First, "[t]he *unequal balance of power* in the attorney-client relationship, rooted in the attorney's special skill and knowledge on the one hand and *the client's potential vulnerability* on the other, may enable the lawyer to dominate and take unfair advantage." This is why the client's consent is irrelevant. We have previously stated "the professional relationship renders it impossible for the vulnerable layperson to be considered 'consenting.' "
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> Second, a sexual relationship between attorney and client may be *harmful to the client's interest*. This is true in any legal representation but "presents an even greater danger to the client seeking advice in times of personal crises such as divorce, death of a loved one, or when facing criminal charges."
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> Third, an attorney-client sexual relationship may prevent the attorney from *competently representing the client*. An attorney must be able to objectively evaluate the client's case. The American Bar Association stated "[t]he roles of lover and lawyer are potentially conflicting ones as the emotional involvement that is fostered by a sexual relationship has the potential to undercut the objective detachment that is often demanded for adequate representation."
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> Finally, an attorney initiating a sexual relationship with a client or attempting to do so may *undercut the client's trust and faith in the lawyer*. "Clients may rightfully expect that confidences vouchsafed to the lawyer will be solely used to advance the client's interest, and will not be used to advance the lawyer's interest, sexual or otherwise."[9]

Practice pointer. If you have a parking lot conversation with someone and you wonder, in hindsight, whether an attorney-client relationship might have been formed in the mind of the other person, as soon as practical (1) take notes on the meeting and (2) reach out to the individual to ask if you could have a follow up conference to review the facts and your advice, or, in the alternative, write to the individual to confirm that the conversation *did not* create an attorney-client relationship and that you advise the person to seek representation.

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[9] *Morrison*, 727 N.W.2d at 118 (citations omitted); *Iowa Supreme Court Attorney Disciplinary Bd. v. Johnson*, 884 N.W.2d 772 (Iowa 2016) (emphasis added).

C. Hypotheticals

1. Speaking at seminar. An attorney gives a presentation on estate planning to a group of people who will retire soon. The attorney provides incorrect information. One of the attendees follows the advice of the attorney and loses $50,000 as a result. The attendee brings a malpractice action against the attorney because of the incorrect statement, arguing that it was reasonable for attendees at the seminar to rely on the accuracy of the lawyer's recitals about the law. Is there an attorney-client relationship such that a malpractice suit can be brought? What might the attorney have done to reduce the risk of seminar attendees claiming an attorney-client relationship?

2. The pro se party. An attorney represents a commercial landlord in an action to remove a tenant who is $10,000 behind in rent of a building used for a restaurant. The tenant is pro se and calls the attorney and asks what he should do. The attorney tells the tenant that he cannot provide legal advice to the tenant but then goes on to explain the tenant's rights and obligations but neglects to say that under the lease, the tenant has the right to remove the commercial range hood and walk-in freezer that the tenant installed. The tenant thanks the attorney and says that he will certainly follow this advice. The tenant enters into a mutual full release of liability and walks away from the equipment (valued at $20,000). The tenant subsequently speaks with another attorney and learns of his forfeited rights to the equipment. The tenant then brings a malpractice action against the first attorney for the failure to explain his rights to the equipment. Is there an attorney-client relationship such that a malpractice suit can be brought?

3. An e-mail exchange and privilege. Jane Doe e-mails an attorney in town about a criminal matter she is facing. She includes a detailed account of what happened during the night in question. The attorney responds with an analysis of Jane's rights and obligations in the matter. The county attorney learns of the e-mail exchange between Jane and the attorney and seeks to obtain the e-mails. Jane asserts that the e-mails are privileged; the county attorney claims that an attorney-client relationship had

not been formed and therefore the e-mails are not privileged. What is the status of the e-mails?

II. Prospective clients

A. Rule 32:1.18

An important classification of clients are those where both the attorney and client are determining whether they will form an attorney-client relationship, hence the term "prospective" clients.[10] Rule 1.18 was not initially included in the model rules when first adopted and was added later in 2002.[11] The Rule was included when Iowa adopted the Iowa Rules of Professional Conduct, effective July 1, 2005. Rule 32:1.18 (Duties to Prospective Client) provides:

> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
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> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as rule 32:1.9 would permit with respect to information of a former client.
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> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
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> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

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[10] Scholars have created other categories of clients. "One author identifies five types of clients: (1) the prospective client, (2) the derivative or quasi client, (3) the nonclient with a special confidential relationship with a lawyer, (4) the secondary client, and (5) the primary client, who might also be called the traditional client." Richard A. Corwin, *Ethical Considerations: The Attorney-Client Relationship*, 75 TULANE L. REV. 1327 (2001) (citations omitted).

[11] Sisk. § 4-3.1(a) at 195.

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A 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. For example, a consultation is 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. See comment [4]. In contrast, a consultation does not occur if a 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 a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by rule 32:1.9, even if the client or lawyer decides not to proceed with the

representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under rule 32:1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See rule 32:1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this rule is imputed to other lawyers as provided in rule 32:1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See rule 32:1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see rule 32:1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see rule 32:1.15.

B. The prospective client

In order to qualify as a prospective client, a person "consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter."[12] Inherent in this definition is the "reasonable expectation" of possibly forming an attorney-client relationship. Conversely, the person who either (1) communicates unilaterally with the attorney or (2) communicates with the goal of disqualifying a lawyer or a law firm from future representation, does not qualify as a prospective client. Comment 2 to the Rule states:

> A 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. For example, a consultation is 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. See comment [4]. In contrast, a consultation does not occur if a 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 a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."*[13]

As to the unilateral communication, the Comment clarifies that a unilateral communication alone is insufficient to form an attorney-client relationship. There must be a "reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship." Thus, there will be a question of whether the public had a reasonable expectation that the firm or lawyer was willing to discuss the possibility of representation.[14] Did the law firm publish anything that communicated an attorney-

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[12] Rule 32:1.18(a).

[13] Emphasis added.

[14] Ethics Opinion 07-02 (The Iowa State Bar Association Committee on Ethics and Practice Guidelines), August 8, 2007 (addressing when a prospective client's communication with a lawyer disqualifies the lawyer in representing parties adverse to the prospective client).

client relationship could be formed merely by providing information? "In fashioning their public marketing strategy, counsel may well wish to consider some form of notice from which would … set the confidentiality expectation level of potential clients."[15]

Practice pointer. An initial meeting with a prospective client is ordinarily more limited until a determination of representation is made. Determine what information is needed to make this decision and limit information gathering to the more limited scope.

C. Duties owed to the prospective client

1. Confidentiality

It is important to limit the amount of information gathered from the prospective client. "[T]he lawyer may want to carefully control the prospective client's disclosure of information, so as to preserve greater flexibility in terms of representing other, especially existing, clients. The lawyer may wish to avoid learning about the client's assessment of the substance of the matter or other sensitive information until after conducting a preliminary conflicts-check."[16]

When the prospective client shares substantive information, the client is entitled to share that information with an expectation of confidentiality. However, Rule 32:1.18(b) prescribes that information learned from the prospective client is treated as that of a former client under Rule 32:1.9. According to Professor Sisk:

> Under Rule 1.9(c), a lawyer may not (1) use confidential information "to the disadvantage of the former client," unless the rules so permit or require as to a client (that is, one of the various exceptions to confidentiality apply) or "the information has become generally known;" or (2) disclose confidential information unless the rules so permit or require as to a client (that is, one of the exceptions to confidentiality applies).[17]

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[15] *Id*. at 4.

[16] GREGORY C. SISK ET AL. LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION, § 4-3.1(c) at 197 (2018).

[17] *Id*.

The duty of confidentiality owed to a prospective client is nearly the same as that owed to an established attorney client relationship.[18]

2. Limited degree of loyalty as to conflicts of interest

The duty of loyalty and conflicts of interest protection is limited with a prospective client. Note the qualification in Rule 1.18(c):

> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter *if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter*, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).[19]

Thus, the question in a conflicts context is whether the information received "could be significantly harmful to that person in the matter."

For example, a prospective client meets with an attorney to discuss a pending lawsuit. The client is being sued for breach of contract. The conversation is limited to the allegations in the petition without a discussion of the potential client's response to the allegations. Such a limited scope of discussion would not trigger disqualification from representation of an adverse party. "[T]he harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which the disqualification is sought, a determination that is exquisitely fact-sensitive and –specific."[20] If the lawyer *has had* a substantive discussion with the prospective client, the attorney would be disqualified from adverse representation.

Note that Rule 1.18(d)(2) permits lawyers in the firm of a disqualified lawyer to avoid an imputed conflict of interest where sufficient measure are

[18] The primary difference between the confidentiality of former client and a current client is that with the latter, confidentiality must be protected even where the confidential information is now generally known. *Id*.

[19] Emphasis added.

[20] *O Builders & Associates v. Yuna Corp.*, 19 A.3d 966, 977 (N.J. 2011).

taken to screen out the lawyer who received the information from the prospective client and where written notice is provided to the client.[21]

Practice pointer. Memorialize the limited scope of an interview with a prospective client. A letter to the prospective client which memorializes the limited scope of the interview puts the person on notice of the lawyer's effort to abide by Rule 1.18(c).

III. Whether the attorney-client relationship can be turned on and off

The Supreme Court addressed the constancy of the attorney-client relationship in *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Fay*.[22] In this case, an attorney (Fay) entered into a lease of a property with his client (Havlik). The Court analyzed the client's reliance on the attorney as follows:

> DR 5-104(A) applies only to transactions with clients. Yet, a client under the rule means not only an existing attorney-client relationship, but also a person "who regularly rel[ies] on an attorney for legal services . . . on an occasional and on-going basis." Thus, *an attorney-client relationship cannot be turned off and on to avoid the rule as Fay seems to suggest*. Havlik had relied on Fay for legal services on an on-going basis in the past and specifically consulted him about moving her business to a new location at the end of her existing business lease. Havlik was clearly a client under the rule at the time the lease was negotiated and executed.[23]

Although it would be convenient for the attorney to flip an attorney-client relationship switch on and off, the attorney must treat the client as a client until the representation is completed or ended.

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[21] *See State v. Smith*, 761 N.W.2d 63 (Iowa 2009). In *Smith*, a criminal defense attorney (Montgomery) learned that one of the approximately 100 witnesses named by the State was represented in a different criminal case by another attorney in his firm. The Court found that a number of factors weighed against an actual conflict of interest: the presence of non-conflicted co-counsel, the defendant's voluntary waiver on the record, Montgomery's careful avoidance of any information regarding the witness in question, and the purely speculative nature of the State's claim that Montgomery's representation will adversely affect his client. *Id*. at 72. This case serves as a valuable guide when facing a possible imputed conflict.

[22] 619 N.W.2d 321 (Iowa 2000).

[23] *Id*. at 325 (emphasis added) (citation omitted).

IV. Who is the client?

It is not uncommon to find oneself in a situation where it is challenging to determine who the client is. Sometimes this is due to the interference of others. For example, three people bring in their elderly father for an estate plan and explain what they believe their father wants for a plan. Who is the client? A college student is charged with possession of marijuana. The student's parents pay your retainer and ask for regular updates on your analysis of their child's case and offer recommendations on strategy. Who is the client? An attorney is asked to examine an abstract for a cash transaction and addresses the opinion to the real estate company. Does the buyer have a right to rely on the title opinion?[24] A group enters your office to ask for your assistance with the conveyance of a business. Both the sellers and the buyers want you to represent both sides as they have things worked out. Who is the client? The list could go on and on. Lawyers routinely have to sort out who the attorney-client relationship will be with.

The role of insurance defense counsel is beyond the scope of this outline. However, the Iowa State Bar Association Ethics and Practice Guidelines Committee issued Ethics Opinion 19-01, an important review of Iowa Ethics Opinion 88-14. Opinion 88-14 was based on the then governing Iowa Code of Professional Responsibility for Lawyers and addressed the insurance company in-house counsel's relationship between the insurer and the insured, such as how defenses are raised, the prosecution of rights of the insured, and how the insured's files are handed. Iowa Ethics Opinion 19-01 reinforces that staff counsel employed by an insurance carrier must comply with the Iowa Rules of

[24] Be sure to consider whether your client is a lender or the buyer when examining an abstract. *See* Ethics Opinion 01-07 (Iowa Supreme Ct. Bd. of Professional Ethics and Conduct) dated Mar. 7, 2002 (permitting an attorney to represent the seller in the sale of residential real estate and prepare the abstract). There *can* be different issues that influence title examination. For example, if you know the buyer has particular intentions for the property, this would create a duty to determine whether restrictive covenants precluded this activity. Such a restrictive covenant may be irrelevant for a lender's goal of a first-position mortgage, but of great importance to the buyer. *See generally Bazal v. Rhines*, 600 N.W.2d 327 (Iowa Ct. App. 1999) (holding that a real estate broker had a duty to disclose to buyers a restrictive covenant limiting the number of dogs a homeowner could keep).

Professional Conduct; it also addresses the unauthorized practice of law, conflicts of interest, confidentiality, command and control, and the use of a fictious law firm name.

A. Rule 32:1.13

The Rules of Professional Conduct do not address all the challenges that come with determining who the client is, but we do have Rule 1.13 (Organization as client):

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
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> (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
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> (c) Except as provided in paragraph (d), if
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> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
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> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not rule 32:1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
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> (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.
>
> (e) A lawyer who reasonably believes that the lawyer has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who

withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 32:1.7. If the organization's consent to the dual representation is required by rule 32:1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 32:1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 32:1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 32:1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be

substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in rule 32:1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by rule 32:1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under rule 32:1.8, 32:1.16, 32:3.3, or 32:4.1. Paragraph (c) of this rule supplements rule 32:1.6(b) by providing an additional basis upon which the lawyer may reveal information

relating to the representation, but does not modify, restrict, or limit the provisions of rule 32:1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, rules 32:1.6(b)(2) and 32:1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances rule 32:1.2(d) may also be applicable, in which event, withdrawal from the representation under rule 32:1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee, or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that the lawyer has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and ensuring that the wrongful act is prevented or

rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. For example, the provisions of Iowa Code sections 232.90 and 232.114 adequately accommodate the potentially conflicting roles of county attorneys in criminal prosecutions and child in need of assistance or termination of parental rights proceedings. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue.

Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's

relationship with the board. In those circumstances, rule 32:1.7 governs who should represent the directors and the organization.

B. Business organizations

1. Principles from Rule 1.13.

a. A lawyer represents the organization. Rule 1.13(a).

b. Comments 1 through 5 and 12 explain how an attorney represents the entity acting through its constituents.

2. *Analysis of whether an attorney had a conflict of interest in representing a limited liability company and its majority owner*. *Bottoms v. Stapleton*, 706 N.W.2d 411 (Iowa 2005). In *Bottoms*, the Court interpreted the new rules and found that an attorney's representation of a limited liability company and its majority owner was permissible because there was not yet a significant risk of material limitation to the attorney's representation of one client. The Court recites the standard as follows:

> The question to be answered under rule 32:1.7(a)(2) is whether there is "a significant risk" that counsel's representation of one client "will be materially limited by [his or her] responsibilities to another client." Although related to the old "appearance of impropriety" test, the modern approach focuses on the degree of risk that a lawyer will be unable to fulfill his or her duties to both clients.
>
> A comment to rule 32:1.7 sheds light on when a conflict of interest will materially limit an attorney in the performance of the attorney's responsibilities:
>
> > [A] conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities.... The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.
>
> Iowa R. of Prof'l Conduct 32:1.7 cmt. [8]; *see also id.* r. 32:1.7 cmt. [29] ("[R]epresentation of multiple clients is improper when it is unlikely that impartiality can be maintained."). The representation of codefendants will give rise to a conflict in situations involving a "substantial discrepancy in the [represented] parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of

settlement of the claims or liabilities in question." *Id.* r. 32:1.7 cmt. [23].[25]

Thus, under the Rules of Professional Conduct, the analysis is for an *actual* conflict of interest rather than a mere *potential* conflict.[26] However, the Court held open the possibility that a conflict could arise in the future.

Practice pointer. Be sensitive to situations where the interests diverge between the entity and the owners. There are situations where a separate attorney needs to represent the owners of the entity.

C. Estates and trusts

The question of whether an attorney owed a duty to a beneficiary of an estate was recently an issue in our appellate courts. The Iowa Court of Appeals held in *Sabin v. Ackerman*, that there was a duty owed to a beneficiary.[27] Judge Vogel offered a dissenting opinion that formed the basis of the Supreme Court's decision to vacate the decision of the Court of Appeals.[28] In *Sabin*, Ivan Ackerman was the attorney for the estate. The executor was Diean Sabin (daughter of the decedent, Elmer Gaede). Elmer had entered into a long-term lease with his son James. The lease included an option to buy the family farm. After the option was exercised, Diean filed an action against her brother James, claiming the option was invalid; the parties settled the dispute. Diean then brought a malpractice action against Ackerman under the theory that Ackerman owed a duty to advise on the adequacy of the option and that he failed to do so.[29] The Court held:

> Additionally, a duty for an estate attorney to protect the personal interest of the executor cannot arise from the duty of the attorney to administer the estate. Our cases reveal that lawyers only represent clients on matters they have been engaged to discharge. *An attorney does not have a duty to inquire into matters that do not pertain to the discharge of the duties undertaken by the attorney. Just like the*

[25] *Bottoms*, 706 N.W.2d at 416-17 (citations omitted).
[26] *See* Ethics Opinion 99-05 (Iowa Supreme Ct. Bd. of Professional Ethics and Conduct) dated Dec. 9, 1999 (permitting an attorney to represent a bank and its customers in unrelated matters, although not the same or potentially related matters). Note that this opinion was issued prior to the changes in 2005.
[27] 828 N.W.2d 325 (Iowa Ct. App. 2013).
[28] *Sabin v. Ackerman*, 846 N.W.2d 835 (Iowa 2014).
[29] *Id*. at 837-38.

duties of the executor, the duties of the designated attorney extend to estate administration. The personal interests of the executor are outside the scope of the services needed to administer the estate. The distinction between services related to the personal interests of the executor and services related to estate administration is borne out by the source of compensation for attorneys designated by personal representatives. The estate funds can only be used for services related to the administration of the estate.

Moreover, we observe no compelling reason to create a broader duty for an attorney for the executor, or to create a duty for the attorney to affirmatively advise a personal representative that the representation does not extend to the personal interests of the personal representative. The duty advocated by Diean is sought to protect executors who expect that their personal interests are protected by the designated attorney. Yet, personal representatives are protected by our law when they reasonably expect an attorney is representing their personal interests. The Restatement Governing Lawyers recognizes an attorney–client relationship is created when "a person manifests to a lawyer" an intent for the lawyer to provide legal services and "the lawyer fails to manifest lack of consent" and "knows or reasonably should know that the person reasonably relies on the lawyer to provide the services." This principle is consistent with our cases that recognize *an attorney can impliedly agree to provide legal assistance*.

In fact, the Restatement Governing Lawyers expressly addresses the situation involving a lawyer who represents a fiduciary. See Restatement Governing Lawyers § 14 cmt. f, at 130–31. It provides:

Under subsection (1)(b), *a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead the lawyer to have entered into client-lawyer representations not intended by the lawyer*. *Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity*....

In trusts and estates practice a lawyer may have to clarify with those involved whether a trust, a trustee, its beneficiaries or groupings of some or all of them are clients and similarly whether the client is an executor, an estate, or its beneficiaries. *In the absence of clarification the inference to be drawn may depend on the circumstances*.[30]

[30] *Id*. at 842-43 (citations omitted; emphasis added). *See Iowa Atty. Disciplinary Bd. v. Pedersen*, 887 N.W.2d 387, 392 (Iowa 2016) (holding a former attorney for an estate had a duty to the executor even after both removed from their roles and the attorney violated this duty by negotiating a loan from the executor before their removal). *See also* Mark A. Gray, *Minimizing Professional Risk in the Representation of Estates and Trusts: A*

Thus, the Court clarified that there is no presumption of a duty that the attorney owes to beneficiaries, but did leave open the door that an attorney could create an inference that an attorney-client relationship was formed as to the beneficiaries.

Practice pointer. Attorneys handling an estate need to clarify the scope of their representation in attorney-client representation agreements. Tasks beyond the scope of estate administration should be memorialized separately.

D. Government entities

Comment 9 of Rule 1.13 discusses some of the particulars of the duty to governmental organizations. It is beyond the scope of this outline to address this topic in detail. Privilege is a particularly important issue in this area. For further study in this area, I recommend Jeffrey L. Goodman and Jason Zabokrtsky's law review article, *The Attorney-Client Privilege and the Municipal Lawyer*.[31]

V. The attorney-client relationship when the client has diminished capacity

A. Rule 32:1.14

The Rules of Professional Conduct rightly create a separate category for how attorneys are to interact with those who have diminished capacity. An attorney should be generally familiar with this rule so that he or she will know how to respond as situations arise, often without much warning. Rule 32:1.14 (Client with Diminished Capacity) states:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Practical Guide for Iowa and Nebraska Lawyers, 50 CREIGHTON L. REV. 801 (2017) (an excellent treatment on the duties attorneys owe in the estate and trust settings).

[31] 48 DRAKE L. REV. 655 (2000) (discussing the challenges of defining the client for the municipal lawyer and how the attorney-client privilege has been treated in the government setting).

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by rule 32:1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under rule 32:1.6 to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

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

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents

as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See rule 32:1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator, or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by rule 32:1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

B. An important case

A violation of Rule 32:1.14 requires proof by a clear preponderance of the evidence that the client lacked the capacity to make "considered decisions" during the time represented by the attorney. Iowa Supreme Court Attorney Disciplinary Bd. v. Bowles, 794 N.W.2d 1 (Iowa 2011). In *Bowles*, the attorney represented a woman who had been recently released from a mental health institution for treatment for an attempted suicide. She had a history of cocaine and alcohol abuse and had been a prostitute. In their very first meeting they had sexual relations in Bowles' office.[32] Bowles was found to have violated Rule 32:1.8(j) (sexual relations with a client) on at least three occasions.[33] However, the Court did not presume that because the client had a very troubled recent past that she lacked the capacity to make "considered decisions." The rationale of the Court is noteworthy:

> The plain language of this rule addresses the obligation of lawyers to be attentive and responsive to circumstances in which a client's mental or legal capacity is impaired and to take "reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian." Id. r. 32:1.14(b). Noting the client was in a hospital for mental health treatment following a suicide attempt when she initially called Bowles to schedule a consultation, and noting further that the client had a history of drug and alcohol abuse, was in a depressed state, and was vulnerable when she first engaged in a sex act with Bowles, the commission found the client "suffered from diminished capacity at least at times during the relationship." *Although the record amply demonstrates the client had recent mental health difficulties, had a history of drug and alcohol abuse, and was vulnerable and under considerable stress as a consequence of the removal of her children during the time Bowles represented her, we do not believe a clear preponderance of the evidence supports a finding that her ability to make considered decisions was sufficiently impaired to support a conclusion that Bowles violated rule 32:1.14(a).*[34]

This is a hard, but instructive case. The Court noted that the board did not offer evidence that the client's capacity was, in fact, diminished.[35] We must stay within the four corners of this case and resist the temptation to speculate how the case might have been presented differently. What is not in dispute is that Bowles took advantage of a person who was

[32] *Bowles*, 794 N.W.2d at 4.
[33] *Id*. at 5.
[34] *Id*. (emphasis added).
[35] *Id*.

vulnerable (albeit not of diminished capacity). Such conduct harms vulnerable clients and brings disrepute to the Bar.

Practice pointer. As attorneys, we must never take advantage of vulnerable clients for our own ends. If you question your own character or the client's, have other attorneys or staff in meetings with the client. There is safety in accountability.

C. The posture of attorneys to clients with diminished capacity

If *Bowles* represents one ditch avoid, there is another ditch that is also unhealthy: that of assuming control over the client's affairs. Professor Sisk observes:

> That a client needing legal services has diminished capacity is not, however, a general invitation to the lawyer to paternalistically assume the power to determine what is in the client's best interests or to disregard client autonomy concerning the objectives of the representation. Most persons of diminished capacity are able to participate at some level and with some degree of effectiveness in making important decisions about their lives. These clients deserve respect, the necessary patience, and the sensitive counseling of their lawyers in doing so.[36]

Thus, the goal is to "maintain a normal client-lawyer relationship."[37]

In the event that protective action must be taken, the lawyer may only release information necessary for the assistance of the client.[38] All other information must remain confidential.

VI. Ending the attorney-client relationship

A. Rule 32:1.16

If it is important that we define when the attorney-client relationship begins, it follows that we must also clarify how the relationship ends. Although, as has been discussed, the Rules do not provide a definition of when the attorney-client relationship begins, they address the closure of the relationship. In short, the relationship ends because (1) the client ends the relationship (Rule 1.16(a)(3)), (2) the lawyer must

[36] SISK, § 4-3.5(a) at 223.
[37] Rule 1.14(a).
[38] Rule 1.14(c).

withdraw (Rule 1.16(a)), or (3) the lawyer may withdraw (Rule 1.16(b)). The lawyer's right to withdraw is subject to the order of a tribunal (Rule 1.16(c)). The lawyer must protect the client's interests upon termination (Rule 1.16(d)).

Rule 32:1.16 (Declining or Terminating Representation) states:

> (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.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See rules 32:1.2(c) and 32:6.5. See also rule 32:1.3, comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Iowa Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also rule 32:6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under rules 32:1.6 and 32:3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the

consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in rule 32:1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if the withdrawal can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee to the extent permitted by Iowa Code section 602.10116 or other law. See rule 32:1.15.

B. Important cases

Unfortunately, there are many cases in this area. The following examples are representative.

1. *A lawyer is obligated to withdraw from representation in which the lawyer's assistance will facilitate illegal conduct. Iowa Supreme Ct. Atty. Disciplinary Bd. v. Engelmann*, 840 N.W.2d 156, 162 (Iowa 2013). In this case, a real estate attorney assisted his clients in a scheme to misrepresent the price of real estate on settlement

statements, thereby deceiving lenders.[39] Once an attorney is aware of illegal conduct by the clients, Rule 1.16(a)(1) requires the attorney to end the attorney-client relationship.

2. *An attorney must withdraw from representation if the attorney's physical or mental health materially impairs the attorney's ability to represent the client. Iowa Supreme Ct. Atty. Disciplinary Bd. v. Kingery*, 871 N.W.2d 109, 119 (Iowa 2015). Here, the attorney suffered from a mental health condition that hampered and eventually paralyzed her ability to interact with her clients and the Court. The Court used the following standard for determining the sufficiency of impairment:

> To find a violation, a convincing preponderance of the evidence must show (1) the attorney was suffering from a physical or mental condition, (2) the condition materially impaired the attorney's ability to represent clients, and (3) the attorney failed to withdraw.[40]

The case is important because there are few cases which offer guidance in determining what constitutes a violation of the rule. The Court found sufficient evidence that Kingery's "own description of her dysfunction, the resulting delays in court proceedings, and the total absence of contact with clients over an extended period leads us to find by a convincing preponderance of the evidence that it was."[41]

3. *Upon termination of representation, a lawyer must take steps to protect the client's interest, including giving reasonable notice to the client and surrendering papers and property to the client. Iowa Supreme Ct. Atty. Disciplinary Bd. v. Sotak*, 706 N.W.2d 385 (Iowa 2005). In this case, Sotak ceased communicating with his clients and settled matters without client authorization or notice. In one instance, Sotak represented an insurance company in a subrogation claim and dismissed the case with prejudice without the client's knowledge. It was months after the fact that the client

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[39] *Engelmann*, 840 N.W.2d at 162-63 (Iowa 2013); *see also Iowa Supreme Ct. Atty. Disciplinary Bd. v. Bieber*, 824 N.W.2d 514 (Iowa 2012) (attorney facilitating a fraudulent real estate transaction by misrepresenting the sales price); *Iowa Supreme Ct. Atty. Disciplinary Bd. v. Springer*, 904 N.W.2d 589 (Iowa 2017) (attorney preparing fraudulent documents in real estate short sales).
[40] *Kingery*, 871 N.W.2d at 119 (citations omitted).
[41] *Id*. at 120.

became aware of this.[42] The Court sanctioned Sotak for not providing due notice to the client of the intent to withdraw and not providing all necessary papers and property to the client, thereby creating foreseeable prejudice to the rights of the clients.[43]

4. *The attorney and client may terminate the attorney-client relationship prior to the natural end of a matter. NuStar Farms, LLC v. Zylstra*, 880 N.W.2d 478, 483 (Iowa 2016). This is an important conflicts of interest case that turns on when one attorney-client relationship ended and when the next one began. The Court found that an e-mail sent by attorney Stoller to the clients (the Zyltras) was sufficient to terminate the attorney-client relationship.[44] However, Stoller's representation of an adverse began party two weeks prior to the e-mail. This created an adverse concurrent conflict of interest and (not surprisingly) Stoller did not obtain consent from the Zylstras to serve in that capacity.[45]

This presentation has sought to explore when an attorney-client relationship exists and some of the boundaries associated with the relationship. We must sharpen our understanding of these concepts so we can better apply the duties that follow the establishment of the attorney-client relationship.

[42] *Sotak*, 706 N.W.2d at 388.
[43] *Id*. at 391.
[44] *Id*.
[45] *Id*. at 484.