Ex Parte Communications with Litigants, Judges, Jurors, & Third Parties and Disqualification of Counsel for Ex Parte Communications

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Iowa R. of Prof'l Conduct 32:1.0 Terminology

Iowa R. of Professional Conduct 32:1.0 provides, in part:

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. . . . .

Iowa R. of Prof'l Conduct 32:2.4
Lawyer serving as third-party neutral

Iowa R. of Prof'l Conduct 32:2.4 provides, in part:

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment [3] to Iowa R. of Prof'l Conduct 32:2.4 provides:

Unlike nonlawyers who serve as third-party neutrals, lawyer serving in this rule may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particular parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

Professor Gregory Sisk comments on the lawyer serving as an arbitrator:

> When a lawyer is serving as an arbitrator, thus having the ultimate authority to resolve the dispute between the parties, either by acting alone or as a member of a panel, the lawyer assumes responsibilities similar to that of a judge, such as maintaining impartiality (unless selected as a partisan of a party on a multimember arbitration panel), avoiding ex parte communications with the parties, etc.

16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 6.4(b) pp. 590-91 (2013).

With regard to the lawyer serving as a mediator, **Sisk** writes: "[T]he Iowa Rules of Professional Conduct provides very limited guidance on the duties and ethical constraints upon mediators." *Id.* at 592.

With regard to the lawyer representing a client in binding arbitration, **Sisk** writes: "[T]hose provisions in the Iowa Rules of Professional Conduct establishing the responsibilities of lawyers when representing a client in adjudication apply not only to the traditional litigation process in the court system but also to that formal if private means of adjudication known as binding arbitration." *Id.* at 591.

With regard to the lawyer representing a client in mediation, **Sisk** writes: "[T]he ethical constraints on lawyers in adjudication do not apply as readily to a mediation proceeding. (footnote omitted)." *Id.* at 592.

Iowa R. of Prof'l Conduct 32:4.3
Dealing with unrepresented person

Iowa R. of Prof'l Conduct **32:4.3** provides:

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

Comment [1] to Iowa R. of Prof'l Conduct 32:4.3 provides, in part:

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority of the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. . . . .

Comment [2] to Iowa R. of Prof'l Conduct 32:4.3 provides:

> The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of the transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

In the context of the lawyer representing an entity, **Professor Sisk** writes: "[T]he lawyer regularly should remind directors, officers, employees, members, and shareholders that the lawyer is counsel for the entity and does not represent any of these persons in their individual capacities (unless the lawyer is engaged in dual representation of both the organization and the constituent). (footnote omitted)." 16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 8.3(b) p. 800 (2013).

When the lawyer participates in an internal entity investigation, **Sisk** cautions the lawyer "to issue a 'corporate Miranda warning' to those that they interview, advising employees that they represent the corporation, that the interview is for the purpose of providing legal advice to the corporation, and that, while the communication may be covered by the attorney-client privilege, the privilege belongs to and may be surrendered by the company. (footnote omitted)." *Id.* at 801.

Iowa R. of Prof'l Conduct 32:1.13
Organization as a client

Iowa R. of Prof'l Conduct 32:1.13 provides, in part:

> (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.

Comment [10] to Iowa R. of Prof'l Conduct 32:1.13 provides:

> 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.

Comment [11] to Iowa R. of Prof'l Conduct 32:1.13 provides:

> 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.

Professor Sisk recognizes the importance of regularly clarifying the role of the entity's lawyer:

> In carrying out the representation, and being responsive to such "duly authorized constituents" as directors, officers, employees, members, and shareholders, the lawyer regularly should remind those persons that the lawyer is counsel for the entity and does not represent any of these persons in their individual capacities (unless the lawyer is engaged in dual representation of both the organization and the constituent). (footnote omitted).

16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 5.13(d) p. 469 (2013).

Iowa R. of Prof'l Conduct 32:4.2
Communication with person represented by counsel

Iowa R. of Prof'l Conduct 32:4.2 provides:

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with rule 32:1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited-representation lawyer as to the subject matter within the limited scope of representation.

Comment [1] to Iowa R. of Prof'l Conduct 32:4.2 provides:

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

Comment [3] to Iowa R. of Prof'l Conduct 32:4.2 provides:

The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with the person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

Comment [4] to Iowa R. of Prof'l Conduct 32:4.2 provides, in part:

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. . . . . Nor does this rule preclude communication with a represented party who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. *See* rule 32:8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or

legal authorization for communicating with the represented person is entitled to do so.

Comment [5] to Iowa R. of Prof'l Conduct 32:4.2 provides:

> Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

Comment [6] to Iowa R. of Prof'l Conduct 32:4.2 provides, in part:

> A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule . . . .

Comment [7] to Iowa R. of Prof'l Conduct 32:4.2 provides, in part:

> In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. . . . . In communicating with the current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. . . . .

Comment [8] to Iowa R. of Prof'l Conduct 32:4.2 provides, in part:

> The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. . . . . [T]he lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

Comment [9] to Iowa R. of Prof'l Conduct 32:4.2 provides:

> In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to rule 32:4.3.

In **February 1987**, the Board issued its opinion **86-14** addressing the question whether an assistant county attorney may speak with a criminal defendant who is represented by counsel without the permission of the defendant's counsel concerning an unrelated matter. The Board cited DR 7-104(A)[1] as the applicable rule. Concluding "that it is improper for a member of the County Attorney's office to talk on any subject with a criminal-defendant represented by counsel without the knowledge and consent of such counsel[,]" the Board wrote:

> The [Board] is of the opinion that the rationale on which [DR 7-104(A)] is based is violated by an interview by one authority, such as a member of the County Attorney's office, "talking with" a defendant-prisoner without even the knowledge of such defendant's counsel. The opportunities for impropriety are innumerable and the inducement to discuss improper matters almost overwhelming. . . . .

In ***Comm. on Prof'l Ethics & Conduct v. Hoffman,*** 402 N.W.2d 449 **(Iowa 1987)**, the Court agreed with the Grievance Commission's conclusion that Hoffman violated, *inter alia,* DR 7-104(A)(1) when he wrote letters, which the Court described as having "a certain outlandish quality both in content and style[,]" to the mayor and city administrator of LeMars while litigation about the proposed construction of a city sidewalk was pending. *Id.* at 450-51. Hoffman violated this Rule because "[e]ach of these letters was admittedly written by [Hoffman] without the prior knowledge or consent of the attorneys representing the city in the sidewalk litigation." *Id.* at 450.

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[1] DR 7-104(A)(1) provided that during the course of representing a client a lawyer shall not communicate on the subject of the representation with a party known to be represented by a lawyer in that matter except with the prior consent of the lawyer representing such other party or as authorized by law.
DR 7-104(A)(2) provided that during the course of representing a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

In **May 1988**, the Board issued its opinion **87-29** addressing the question whether a lawyer can "approach" individual city council members, without the knowledge or permission of the city attorney, "for the purpose of influencing their votes on the question of whether to bring" suit against the lawyer's client. Recognizing this question as one falling under the "authorized by law" exception to the general no-contact rule, the Board concluded:

> [I]n a matter concerning proposed action by a governmental body, the city council in this case, right of access by the constituency to an elected official should be an exception to the provisions of DR 7-104(A)(1) and that it would not be improper for representatives of that constituency, in person or through counsel, to consult with individual members of the city council without the knowledge or consent of the attorney for the city council itself.

Professor Sisk adds this admonition to the "authorized by law" exception:

> The "authorized by law" exception to Rule 4.2, which allows a lawyer to speak on behalf of a client directly with a governmental official, should be limited to circumstances where that official is being approached as a decision-maker in a position to take action on the matter being presented by the lawyer (even if that matter is the subject of litigation). . . . . Moreover, a lawyer who is representing a party to a contested administrative proceeding being adjudicated by an agency tribunal (footnote omitted) is generally prohibited under Rule 3.5 from engaging in any ex parte communication with the agency adjudicators. (footnote omitted).

16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 8.2(e) p. 795 (2013).

In ***Cram v. Lamson & Sessions Co., Carlon Division,*** 148 F.R.D. 259 (**S.D. Iowa 1993**), magistrate judge Bennett, in an employment discrimination/sexual harassment case, addressed the issue whether Cram's "counsel may engage in *ex parte* communications with former employees of [Lamson & Sessions] without violating [DR 7-104(A)(1)]." *Id.* at 259-60. Bennett concluded that DR 7-104(A)(1) and Rule 4.2 were "substantially identical". *Id.* at 259 n. 1.

Bennett identified four policy considerations that supported the ban on counsel communicating with a represented party directly: 1) prevented exploitation of the lay person by a skilled attorney. *Id.* at 260. 2) prevented attorney from "coming between" the opposing counsel and the client. *Id.* 3) prevented the inadvertent disclosure of privileged information. *Id.* and 4) advanced dispute settlements. *Id.*

Bennett acknowledged that these policy considerations had minimal relevance when applied to communications between a lawyer and a former-employee of the opposing party. *Id.* at 260-61. "[T]he inadvertent disclosure of privileged information by the former employee" remained a policy concern. *Id.*

Bennett cited a number of cases that held that DR 7-104(A)(1) did "not generally prohibit *ex parte* communications with former employees of an opposing party. (citations omitted)." *Id.* at 261. Bennett found good reasons for this approach because it had "the potential to reduce costly and expensive formal discovery. Moreover, it also [had] the potential of screening non-meritorious cases. Finally, allowing *ex parte* communications with former employees facilitate[d] earlier settlement by expediting the flow of important factual information." *Id.* at 261-62.

Bennett's research led him to conclude that courts came to same conclusion when interpreting Rule 4.2. *Id.* at 262. This Rule did "not prohibit *ex parte* communications with former employees." *Id.* at 263.

Notwithstanding his conclusion that either Rule permitted *ex parte* communication with a former employee, Bennett emphasized that the attorney "may not inquire into privileged attorney-client communications" between the former employee and former employer. *Id.* at 266.

In ***Comm. on Prof'l Ethics & Conduct v. Shepler,*** 519 N.W.2d 92 (**Iowa 1994**), the Court agreed with the Grievance Commission that Shepler violated, *inter alia*, DR 7-104(A)(1) when he negotiated three subordination agreements directly with his 78 year old real estate contract seller, Opal Truby, after Truby's daughter told him that Truby would not subordinate her contract interest to any other financial institution and to not contact Truby "directly on any business matters." *Id.* at 93.

In ***Comm. on Prof'l Ethics & Conduct v. Zimmermann,*** 522 N.W.2d 619 (**Iowa 1994**), Zimmermann agreed with the Grievance Commission that he violated DR 7-104(A)(1) when he contacted directly two represented parties in a CINA proceeding, the child and the child's guardian, without their lawyers' knowledge or consent. *Id.* at 620.

In ***Bd. of Prof'l Ethics & Conduct v. Sullins***, 556 N.W.2d 456 (**Iowa 1996**), the Board charged Sullins, *inter alia*, with communicating "with a child witness without consent of her attorney . . . ." *Id.* at 456. This interview occurred after a client, facing an imminent sex abuse charge, hired Sullins. *Id.* Sullins anticipated that the county attorney would file a CINA case too. *Id.* Sullins contacted the client's wife and asked her to question her daughter about the allegations. *Id.* at 457. She stated she was not up to the task, but she invited Sullins to interview the girl at the family residence. *Id.* Sullins agreed to visit that evening, but he first went to the courthouse to speak with a county attorney and check the clerk's records. *Id.* He learned that the county attorney had filed a CINA case, but as of the

close of business, the juvenile court had not yet appointed an attorney to represent the child. *Id.* Sullins knew that it was just a matter of time before the court appointed counsel for the girl, but nonetheless, he interviewed the girl that night and gained "valuable defense evidence". *Id.* The Court concluded that Sullins violated DR 7-104. *Id.*

In ***Terra Int'l, Inc. v. Mississippi Chem. Corp.,*** 913 F.Supp. 1306 (**N.D. Iowa 1996**), Bennett, now a district judge, faced the issue of *ex parte* communications by Mississippi Chemical's lawyers with current and former employees of Terra International. *Id.* at 1309. In its motion for discovery guidance, Mississippi Chemical sought permission to communication *ex parte* with all former Terra International employees and all current employees of Terra International "except those who are (1) corporate parties whose acts or omissions in the matter are binding on the corporation; (2) parties who may impute liability to the corporation; or (3) employees who act at the instruction or advice of corporate counsel (citation omitted)." *Id.*

With regard to former employees, Bennett agreed with the decision he made in his 1993 *Cram* decision.

With regard to current employees, Bennett ruled that those represented by Terra's counsel or their own independent counsel could not be communicated with *ex parte* by Mississippi Chemical's counsel. *Id.* at 1317. But Terra's counsel did not automatically represent all of Terra's employees. *Id.* Bennett "conclude[d] that *ex parte* contacts should not be permitted with managerial level employees . . . ." *Id.* at 1321. The second class of current employees that Bennett excluded from *ex parte* contact were those "employees who could impute liability directly to Terra for their own wrongful acts . . . ." *Id.* at 1322.

In ***U.S. v. Plumley,*** 207 F.3d 1086 (**8th Cir. 2000**), the Court of Appeals for the Eighth Circuit rejected Jeremy Kaune's argument that FBI agent Bricko's meeting with him in June 1998 on behalf of the U.S. Attorney Office for the Northern District of Iowa, when Kaune had a lawyer, constituted an improper *ex parte* communication in violation of DR 7-104(A)(1) and in violation of the Board's February 1987 opinion, **86-14**, that concluded "it is improper for a member of the County Attorney's office to talk on any subject with a criminal-defendant represented by counsel without the knowledge and consent of such counsel." *Id.* at 1094-95. The Court concluded "that the interpretation of state disciplinary rules as they apply to federal criminal law practice 'should be and is a matter of federal law.' (citations omitted)." *Id.* at 1095.

Further, the Court disregarded the potential impact of 28 U.S.C. § 530B, Ethical standards for attorneys for the Government, because this Code section did not become effective until April 1999, ten months after the meeting with Bricko. *Id.*

Citing its own precedent, the Court agreed with Judge Bennett's decision to deny Kaune's motion to suppress the statements he made to Bricko during this meeting. *Id.* DR

7-104 does not prohibit law enforcement agents from communicating with criminal suspects even though they have retained counsel. *Id.*

Title 28 U.S.C. § 530B, Ethical standards for attorneys for the Government, enacted in 1998, provides, in part:

> **(a)** An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 C.F.R. § 77.5, No private remedies, provides, with regard to § 530B :

> The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, including criminal defendants, targets or subjects of criminal investigations, witnesses in criminal or civil cases (including civil law enforcement proceedings), or plaintiffs or defendants in civil investigations or litigation; or any other person, whether or not a party to litigation with the United States, or their counsel; and shall not be a basis for dismissing criminal or civil charges or proceedings or for excluding relevant evidence in any judicial or administrative proceeding. Nor are any limitations placed on otherwise lawful litigative prerogatives of the Department of Justice as a result of this part.

Professor Sisk summarized the "authorized by law" exception in Rule 32:4.2:

> [A] government lawyer conducting an otherwise legitimate law enforcement investigation may directly, or through persons acting at the lawyer's direction or under the lawyer's supervision . . . communicate with a suspected law-breaker who is known to be represented by a lawyer, provided that this communication occurs before that person has been taken into custody . . . criminally charged . . . or named as a defendant in civil litigation brought by the government to enforce the law. In this way, the public interest is served in assuring that legitimate law enforcement investigations are conducted under appropriate legal supervision, while the right of the individual to counsel is protected by rigorously restricting communications with represented persons after arrest, criminal charge, or service or filing of a civil complaint. The "authorized by law" exception for government investigation applies, not only to criminal investigations, but also to civil law enforcement, in which the

> government lawyers investigate allegedly unlawful conduct that may be penalized under federal regulatory powers or through civil litigation.

16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 8.2(d) pp. 790-91 (2013).

In ***Bd. of Prof'l Ethics & Conduct v. Herrera***, 626 N.W.2d 107 (**Iowa 2001**), the Grievance Commission and the Court both found that Herrera did not violate DR 7-104(A)(1) in his communications with two represented criminal co-defendants. *Id.* at 111, 114-15.

In mid-November 1998, a federal grand jury indicted four persons, including Lopez and Santos, on drug charges; the district court appointed counsel for the defendants. *Id.* at 110. On December 2, at a third person's request, Herrera met with Lopez; thereafter, Herrera advised Lopez's attorney and the U.S. Attorney that he would be representing Lopez. *Id.* At a December 5 meeting, Lopez told Herrera that Santos wanted to meet with him, and Herrera did so. *Id.* at 111. While both Lopez and Santos wanted to hire him, neither did so, and Herrera never entered an appearance in the criminal case. *Id.*

In analyzing Herrera's conduct the Court focused on two elements of DR 7-104(A)(1): 1) communications "during the course of representing a client: and 2) communications "on the subject of the representation with a party known to be represented by a lawyer in that matter". *Id.* at 114.

The Court concluded that the Rule did "not exist to prohibit a lawyer from consulting with a prospective client concurrently represented by another lawyer to discuss complaints or concerns. (citations omitted)." *Id.* Rather, "the language of the rule reveals that the prohibition is limited to efforts by lawyers in their representation of their clients to drive a wedge between other lawyers and their clients. (citations omitted)." *Id.*

Although Herrera argued that he was not representing Lopez when he met with Santos, the Court concluded he "was in the course of representing Lopez under DR 7-104(A)(1) at the time he met with Santos." *Id.*

Herrera did not violate this Rule, however, because his communications with Santos were not about "the subject of the representation between Santos and his existing lawyer, but to the subject of new representation. The discussion between Herrera and Santos was confined to inquiries to determine if Herrera would represent the defendants in the criminal case and the fee which would be necessary to secure the representation." *Id.* The Board's evidence did not show "the communications between Herrera and Santos extended to any matters covered within the subject of the representation between Santos and his existing counsel." *Id.*

In analyzing the first element of the Rule, when a lawyer is representing a client, **Professor Sisk** writes: "[T]he limitation of the no-contact rule to circumstances in which the lawyer is representing a client enables a person who may be dissatisfied with a lawyer or with a lawyer's advice to interview and secure a new lawyer or to seek a second opinion from another lawyer, without either the person or the lawyer having to obtain permission from the person's present lawyer." 16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 8.2(b)(3) pp. 771-72 (2013).

Commenting on the *Herrera* decision, **Sisk** writes: "[W]hile a person represented by a lawyer may not be restricted by the no-contact rule in shopping for new counsel, a lawyer ought to be somewhat constrained in shopping for an additional client, at least when that lawyer is already representing one party to a matter and the targeted new client is another party represented by a different lawyer on the same matter." *Id.* at p. 772.

In analyzing the second element of the Rule, when a lawyer is communicating on the subject of the representation, **Sisk** writes: "That a person is represented on one matter does not prevent a lawyer representing a client on another matter from communicating with that person." *Id.* at § 8.2(b)(4) p. 773.

In ***Dietrich v. Liberty Square, L.L.C.***, 230 F.R.D. 574 (**N.D. Iowa 2005**), magistrate judge Jarvey granted Dietrich's motion to compel discovery in a class action Fair Labor Standards Act case. *Id.* at 581. Dietrich served an interrogatory asking Liberty Square to identify "every hourly employee" who had worked at a particular health facility since a particular date. *Id.* at 580. Later, Dietrich asked the same question regarding "non-hourly, salaried employees." *Id.*

In granting Dietrich's motion to compel answers to her interrogatories, Jarvey ordered Liberty Square to

> identify by position those salaried managerial employees for whom the defendants claim representation of in this matter, so as to provide notice to the plaintiffs of those employees for whom contact from plaintiffs' counsel would implicate Rule 32:4.2 of the Iowa Rules of Professional Conduct. In doing so, the defendants are cautioned against any wholesale assertions that somehow every salaried employee is a managerial employee for whom the defendants are providing representation in this matter.

Id. at 581.

In ***Attorney Disciplinary Bd. v. Box***, 715 N.W.2d 758 (**Iowa 2006**), the Court agreed with the Grievance Commission that Box violated DR 7-104(A)(1) in meeting in October 2001 with a brother (John) and sister (Martha) and their great nephew (Todd). *Id.* at 765.

In June 2001, Martha, age 80 and a childless widow, met with a Burlington attorney and prepared a will that gave her niece, Shirley, a life estate in her 315 acres of farmland and gave her four great nephews and nieces, including Todd, the remainder interest in this land. *Id.* at 760.

In August 2001, Martha met with a Cedar Rapids attorney and prepared a living trust and pour-over will that gave Shirley all of Martha's estate outright. *Id.*

When John and Todd learned of Martha's actions they scheduled a meeting for Martha with Box, who had previously represented both of them. *Id.* Martha arranged to have the Burlington attorney deliver a copy of her June will to Box. *Id.* Shirley delivered the August trust to Box. *Id.* On September 7, John, his wife, Todd, and Shirley met with Box; Martha did not attend. According to the Court, "[t]here was at once an acrimonious discourse between Shirley and the others concerning Martha's affairs." *Id.*

Soon thereafter, Martha joined the group. *Id.* Box, having reviewed both instruments, "advised all persons present, including Martha, concerning the contrasting disposition of Martha's assets under the two instruments. He advised all persons concerning Shirley's status as a successor trustee and what her powers would be." *Id.* at 760-61.

On September 10, Shirley and Martha met with lawyer Bloethe. *Id.* at 761. He prepared

> an amendment to the trust instrument, which provided that upon her death Shirley would have a life interest in the trust assets with the remainder gifted to Shirley's four children in equal shares. This amendment also provided that if one of Shirley's children was farming the agricultural property at the time of Shirley's death that person would have an option to purchase the farm at fair market value.

Id.

Since Martha "appeared frightened and told [Bloethe] she was being pressured", on September 11 Bloethe wrote this to Box:

> Martha M. Hillard has visited with me concerning her Last Will & Testament and her Revocable Trust, together with other personal matters.
>
> In the event you would want to communicate with Martha, you should contact me instead inasmuch as I will be representing Martha.

Id.

In early October, Todd and his wife "prepared a written five-year lease of the farmland in Martha's trust with John and Todd as tenants. The lease agreement also contained an option for Todd to purchase approximately two-thirds of the trust farm property at a price substantially below its market value." *Id.* On October 10, while Shirley was out of state, John took Martha to a nearby courthouse to sign up for an agricultural tax exemption. *Id.* The Court continued, "Todd joined them later in the morning. While the three were together, Martha was presented with the proposed lease and option-to-purchase agreement, which she signed. According to the testimony of John and Todd, Martha then stated that perhaps she should give the farm property to Todd." *Id.*

According to John and Todd, the three then negotiated a contract sale of all of Martha's farmland and eventually arrived at Box's office to finalize the deal. *Id.* at 761-62.

> [Box] was told the reason the group was there was Martha's intention to sell the trust farm property to Todd on terms to which the parties had agreed. Box then spoke with Martha concerning Bloethe's letter and expressed the view that he should not be talking to her. According to Box and the others present, Martha responded testily that she could speak to whatever lawyer she chose. (footnote omitted).

Id. at 762.

Box prepared the contract, advised the parties about setting the lowest acceptable interest rate, and described the pro-ration of real estate taxes when selling Iowa land. *Id.* Although the contract price was below market value, Martha signed the contract. *Id.*

Martha had seller's remorse, and on October 18, Bloethe's associate wrote to Box to state "that Martha was rescinding the contract of sale. This was followed up by two subsequent letters to Box concerning Martha's intention to rescind the transaction." *Id.* Todd refused to agree to the rescission, but "[l]itigation followed in which the district court ultimately rescinded the contract of sale." *Id.*

On appeal, Box presented three arguments against the Commission's conclusion that he violated DR 7-104(A)(1):

1) the Rule only applied "to formal adversary proceedings such as litigation. (citations omitted)." *Id.* at 763. The Court rejected this narrow reading of the Rule and concluded that it applied "to any transaction in which the contacted party is represented by a lawyer." *Id.*

2) Bloethe's representation of Martha concluded on September 10 when their meeting ended; Box argued that Bloethe's representation did not involve the sale of real estate and was not "continuing in nature." *Id.* The Court rejected this argument after

reading Bloethe's letter to Box that it described "as broadly inclusive" and as a letter that indicated Bloethe would "be representing Martha in any matter for which Box might need to communicate with her in Box's professional capacity." *Id.* at 763-64.

3) "Martha waived representation by counsel by presenting herself at his office and responding to his reference to Bloethe's letter by stating that she could talk to whatever lawyer she chose." *Id.* at 764. The Court rejected this argument because the Rule required the lawyer's consent, not the client's. *Id.* at 765. While the Court recognized the right of the client to discharge his or her lawyer, it was "satisfied that DR 7-104(A)(1) required Box to recognize the vulnerability of Martha, as an unrepresented party at the meeting, and, at the very least, to verify the status of Bloethe's representation by a simple telephone call." *Id.*

Addressing the third element of this Rule, when a lawyer knows the person is represented by counsel, and summarizing the *Box* decision, **Professor Sisk** writes: "In sum, when the lawyer knows that a person has been represented by a lawyer, and circumstances do not clearly indicate that the representation has been terminated, the lawyer is obliged to verify the status of the matter 'by a simple telephone call.' (footnote omitted)." 16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 8.2(b)(5) p. 776 (2013).

In ***Attorney Disciplinary Bd. v. Wengert***, 790 N.W.2d 94 (**Iowa 2010**), Wengert, the Grievance Commission, and the Court agreed that she violated Rule 32:4.2 when she had contact with her client's daughter, Linda Wilson, after the district court "found a concurrent conflict of interest, disqualified Wengert from representing Wilson [in a criminal case], and ordered Wengert not to discuss the case with Wilson." *Id.* at 98. Wengert represented Wilson's mother, Mary Stenlund, in an involuntary guardianship and conservatorship proceeding. *Id.* The county attorney had charged Wilson with neglecting her mother; nonetheless, Wengert had filed an appearance as Wilson's lawyer in the criminal case. *Id.* After the district court disqualified Wengert, Wilson obtained a new attorney, but Wengert continued to be in communication with Wilson about the case without her lawyer's knowledge or consent. *Id.*

In ***Attorney Disciplinary Bd. v. Gailey***, 790 N.W.2d 801 (**Iowa 2010**), the Court decided that it should interpret Rule 32:4.2 "in the same manner[]" as former DR 7-104(A)(1). *Id.* at 806. Citing its *Box* decision, the Court wrote: "We have interpreted our prior rule to prohibit an attorney from communicating with an adverse party represented by counsel concerning litigation or a transactional matter unless the attorney for the adverse party gives the opposing attorney permission to talk to the adverse party. (citation omitted)." *Id.*

Based on the parties' stipulation, the Court found that Gailey, while attorney of record for his son, Denis, in his dissolution of marriage case with Dawn, met with Dawn, who was represented in the dissolution case, to discuss her testimony in Denis' kidnapping

case and the division of marital assets. *Id.* at 804-05. Dawn's counsel did not know of or consent to this communication. *Id.* at 804.

Based on the record in this case, the Court concluded: "Gailey communicated with Dawn about a financial settlement in the dissolution matter at a time when she was represented by counsel. The record also reveals that Gailey did not have the permission of Dawn's attorney when they had that conversation. Therefore, we find Gailey's conduct in communicating with Dawn violated rule 32:4.2(a)." *Id.* at 806.

In ***Attorney Disciplinary Bd. v. Schmidt***, 796 N.W.2d 33 (**Iowa 2011**), the Court concluded that Schmidt violated Rule 32:4.2 by making an end-run around the husband's counsel in a dissolution of marriage case. *Id.* at 40. Schmidt represented the woman in this case. *Id.* at 37. The parties had a no-contact order in place. *Id.* Schmidt had drafted a consent decree and delivered it to her husband's lawyer, only to learn that the husband rejected it. *Id.*

Later, the husband advised his lawyer that he and his wife had reached an agreement and that Schmidt would be sending a revised consent decree. *Id.* The wife contacted Schmidt; she asked him to prepare the same consent decree and told him that her husband would probably discharge his lawyer. *Id.* Schmidt revised the consent decree to indicate that the husband represented himself and deleted any reference to the husband's lawyer. *Id.* The wife picked up the revised decree, she and her husband signed it before a notary public, and she returned it to Schmidt. *Id.* After Schmidt signed the decree, he faxed it to the husband's lawyer. *Id.* The husband's lawyer contacted Schmidt and told him "he found the situation unusual". *Id.*

The husband's lawyer contacted his client, reviewed the decree with him, and told his client that he objected to the "unfair" settlement terms. *Id.* The husband told his lawyer that he wanted to finalize this settlement, and the lawyer moved to withdraw as his attorney. *Id.* The district court granted this motion and filed the consent decree. *Id.*

The Court concluded that Schmidt violated Rule 32:4.2. *Id.* at 40. The Court continued: "Moreover, Schmidt cannot circumvent rule 32:4.2(a) by having his client do what he cannot do, especially when a no-contact order exists prohibiting the parties from contacting each other." *Id.*

Citing its *Herrera* decision, the Court stated the purposes of this Rule: 1) it "protects the represented party from the imbalance of legal skill and acumen between the lawyer and that party. (citation omitted)[]" and 2) it " 'promotes the integrity of the attorney-client relationship and serves to prevent a variety of overreaching.' (citation omitted)." *Id.*

Professor Sisk makes a practical observation about adversaries who have a close relationship: "The no-contact rule does not prohibit or directly constrain exchanges

between represented persons, that is, between the clients when unaccompanied by their lawyers. In some circumstances, such as when the represented persons have ongoing family or business relationships, continued contacts outside the presence of their lawyers may be unavoidable." 16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 8.2(b)(2) pp. 768-69 (2013).

Specifically commenting on the *Schmidt* decision, **Sisk** writes: "While not providing specific guidance on the appropriate scope and depth of lawyer advice to a client who will meet with another party, the *Schmidt* decision suggests that a lawyer should avoid turning the client into a direct emissary of the lawyer and not use a client to secure another party's signature on a document as an end-run around the other party's lawyer." *Id.* at pp. 770-71.

In ***Attorney Disciplinary Bd. v. Olson***, 807 N.W.2d 268 (**Iowa 2011**), the Court rejected the Grievance Commission's conclusion that Olson violated Rule 32: 4.2(a). *Id.* at 278. Based on conflicting testimony, the Court concluded that the Board had not met its burden of proof: a convincing preponderance of the evidence. *Id.*

The *Olson* case focused on the fourth element of the Rule: consent by the client's attorney.

Summarizing a maze of communications among attorney Olson, Steven Whitehead, president of DNA Today, LLC, and several attorneys representing Whitehead/ DNA Today, over a 13-month period, from July 2005 to August 2006, the Court focused on communications occurring on August 10, 2006, one day before the face to face meeting at DNA Today's office between Olson's law partner, J.R., and Whitehead, which formed the basis of the Board's prosecution of Olson. *Id.* at 270-74. Did lawyer Stone, representing Whitehead/DNA Today, give permission to Olson to communicate directly with Whitehead? *Id.* at 278.

As of August 9, 2006, here was the state of affairs:

1. Olson and J.R. represented the Sac & Fox Tribe of the Mississippi (the Tribe). *Id.* at 270.

2. In July 2005, the Tribe had loaned DNA Today $1,000,000 and had a security interest in all of DNA's assets and Whitehead's personal guaranty. *Id.* at 271.

3. Olson and Whitehead negotiated this loan, and they "continued to deal directly with each other after that." *Id.* at 271.

4. By the fall of 2005, DNA Today had breached its contract with the Tribe, but the parties were negotiating the terms of an additional loan by the Tribe to DNA Today. *Id.* at 271-72.

5. In July 2006, two meetings occurred between the Tribe and DNA Today with no attorneys present. *Id.* at 272.

6. In July 2006, Whitehead and Olson communicated directly in writing and by telephone. *Id.* at 272.

7. In July 2006, Frank Carroll, representing Whitehead/DNA Today, first contacted Olson to discuss the negotiations for a new financing agreement. *Id.* at 272-73.

8. On August 2, 2006, Olson filed a UCC financing statement with the Secretary of State. *Id.* at 272.

9. On August 8, 2006, Olson obtained a temporary restraining order from the tribal court prohibiting DNA Today and Whitehead "from disposing of or interfering with any efforts by the Tribe to take possession of the Tribe's collateral." *Id.* at 272.

10. In Carroll's absence in August 2006, attorney Jason Stone communicated with Olson about the ongoing new financing agreement. *Id.* at 273.

On August 10, 2006, at 12:20 p.m., Olson had a one minute telephone call with Stone. *Id.* at 273. "Olson claim[ed] that Stone authorized him in that call to communicate directly with DNA Today. Stone did not recall such a conversation but testified that, if it had occurred, he thinks he would have remembered it. Stone also did not think that, under the circumstances, he would have given Olson permission to talk directly to his client." *Id.*

Later in the afternoon of August 10, 2006, Olson spoke directly with Whitehead. *Id.* at 273. In that conversation, Olson asked Whitehead whether Tribe representatives could "visit DNA Today's offices the next morning to verify the software was there." *Id.*

After this call, Whitehead and Stone exchanged emails. *Id.* at 273-74. In his email, Whitehead told Stone: "We won[]" and "A big victory for our team." *Id.* Stone was more measured in his response to Whitehead: "Just make sure that you secure the source code tomorrow and take steps to ensure that the Tribe cannot easily obtain a copy of it while they are there. Also, you should make sure that you have a copy. I have no reason to believe that there will be any issues associated with their trip, but it will not hurt to be a bit cautious." *Id.* at 274. Whitehead assured Stone that he would be cautious. *Id.*

Stone's guarded optimism was well placed; during the August 11, 2006, meeting, J.R., Olson's law partner, located DNA Today's server, executed self-help repossession, and left the office with the server. *Id. A*fter the self-help repossession occurred, the Tribe served the temporary restraining order on Whitehead. *Id.*

The Grievance Commission found that Olson violated Rule 32:4.2(a). *Id.* at 278. In rejecting this conclusion, the Court noted that Stone, upon learning from Whitehead that he had agreed to a meeting with tribal representatives the next day, did not act surprised; instead, he provided Whitehead "with various advice about the next day's meeting". *Id.*

Further, the Court gleaned this evidence from the record:

> [W]hile Carroll and Stone had no recollection of giving Olson permission to communicate directly with Whitehead, Whitehead *did* have a recollection that such permission had been given, at least on some subjects. Even after the Davis Brown law firm became involved in July 2006, Olson and Whitehead continued to e-mail each other directly, except with respect to the text of the proposed Collateral Agreement. After consulting with his attorneys regarding the events of August 11, Whitehead again wrote Olson directly on August 16, while only sending an informational copy to Carroll. Against this backdrop, it is understandable that Olson would not have sent a confirming email to Stone on the 10th.

Id.

In ***Attorney Disciplinary Bd. v. Stowers***, 823 N.W.2d 1 (**Iowa 2012**), reh'g denied (November 28, 2012), the Court concluded that Stowers violated Rule 32:4.2(a). *Id.* at 12. Following the November 2007 settlement of his wife's, Reis', employment discrimination lawsuit against Care Initiatives, Stowers sent several emails to represented parties. *Id.* at 5-7.

During the Reis litigation, Stowers, Reis, and their counsel had signed a protective order with regard to certain confidential Care Initiatives documents produced in discovery that limited their use to this lawsuit only. *Id.* at 4. The parties' settlement agreement provided that the confidential documents be returned to Care Initiatives. *Id.* at 5. After the settlement, Stowers took possession of Reis' entire case file, including the confidential Care Initiatives' documents. *Id.*

In February 2008, Stowers sent an email to M.M., a senior vice president and chief financial officer, for his wife's former employer, Care Initiatives. *Id.* at 5. Stowers asked for M.M.'s resignation. *Id.*

The next day, Stowers sent an email to R.T., a lawyer and a member of the Care Initiatives board of directors. *Id.* To avoid disbarment and potential fraud charges, Stowers invited R.T. to make a substantial charitable contribution, in Stowers' wife's name, and to resign from the Care Initiatives' Board. *Id.* at 5-6.

The next day, Care Initiatives' lawyer wrote to Stowers demanding that the confidential documents be returned. *Id.* at 6. Stowers replied by disputing that he had any obligation under the protective order and by stating that he was not a party to the settlement agreement. *Id.* Stowers stated that he needed "to retain the documents to preserve evidence for federal investigations and until 'Care Initiatives had cleaned house.' " *Id.*

In charging Stowers with violating Rule 4.2(a), the Board argued that M.M. and R.T. were constituents of Care Initiatives and that Stowers knew they were represented by counsel. *Id.* at 9-10.

Stowers countered that they were not constituents and that the Board "failed to establish his emails were done while "representing a client" or related to any ongoing "matter" because his wife's lawsuit had been concluded." *Id.* at 10.

The Grievance Commission agreed with Stowers. *Id.* "It rejected the Board's contention that the 'matter' at issue was the return of the confidential documents and that Stowers had an attorney-client relationship with his wife in that matter. The commission also found the Board failed to establish M.M. and R.T. were constituents of Care Initiatives . . . ." *Id.*

In disagreeing with the Commission, the Court concluded:

1. "First, we find Stowers was representing his wife and himself through the email communications." *Id.*

2. "Similarly, we find a convincing preponderance of the evidence establishes Stowers's emails to M.M. and R.T. were made pursuant to his attorney-client relationship with Reis. (citation omitted)." *Id.*

3. "Second, Reis and Stowers had an ongoing dispute with Care Initiatives over the return of the confidential documents pursuant to the settlement agreement and protective order that remained in effect." *Id.* at 10-11.

4. "Third, we conclude M.M. is a constituent of Care Initiatives within the meaning of rule 32:4.2(a). Although the rules do not contain a formal definition of "constituent," the rule of professional conduct that governs attorneys' conduct when representing an organizational client identifies the organization's directors, officers, employees, members, and shareholders as constituents of the organization. *See* Iowa R. Prof'l Conduct 32:1.13(f) (citations omitted). Under this definition, M.M., an officer, and R.T., a member of the board of directors, were both constituents of Care Initiatives." *Id.* at 11.

Turning to Rule 32:4.2, Comment [7], and the *Terra Int'l* case, the Court concluded that M.M. was a protected constituent under Rule 32:4.2(a) because he was a managerial level employee of Care Initiatives. *Id.* at 11.

Looking again at Comment [7], the Court concluded that R.T. was not a protected constituent because "[t]he record does not establish R.T. possessed individual authority to manage or bind the corporation. Thus, the Board has failed to prove by a convincing preponderance of the evidence that R.T. was a constituent of Care Initiatives who rule 32:4.2(a) protected from ex parte contact by Stowers." *Id.* at 12.

In ***Attorney Disciplinary Bd. v. Rasmussen***, 823 N.W.2d 404 **(Iowa 2012)**, the Court found no Rule 32:4.2(a) violation. *Id.* at 409. The Board brought this prosecution as a companion to its prosecution of attorney Olson, decided by the Court in 2011 and summarized above. *Id.* at 406. Rasmussen visited DNA Today's office and engaged in the self-help repossession of its computer server that contained the Sac and Fox Tribe of the Mississippi's collateral. *Id.*

The court summarized the Board's allegations about the Rule 32:4.2(a) violation:

> In essence, Rasmussen was alleged to have acted in concert with Olson, who repeatedly communicated directly with [DNA Today president] Whitehead after Whitehead was represented by lawyer Frank Carroll of the Des Moines law firm of Davis Brown. However, Rasmussen is not alleged to have personally interacted with Whitehead during this series of communications.

Id.

The Court found the evidence in the *Rasmussen* record even more compelling than the *Olson* record that Whitehead's lawyer authorized direct communications between his client, Whitehead, and the Tribe's lawyer, Olson. *Id.* at 408-09. Since the Court cleared Olson of violating Rule 32:4.2, it could not conclude that Rasmussen violated it. *Id.*

The evidence established that Olson wrote Whitehead directly on July 25, 2006, and the next day, it appeared that Olson and Whitehead, by himself, attended a meeting with Tribal representatives. *Id.* at 408. In late July and early August, Whitehead "diligently initiated additional communications with Olson numerous times". *Id.* at 408-09.

Since the Board did not meet its burden of proof regarding Olson, the Court did "not decide whether Rasmussen was complicit in the communications between Olson and Whitehead in the weeks leading up to August 8." *Id.* at 409.

Iowa R. of Prof'l Conduct 32:3.3
Candor toward the tribunal

Iowa R. of Prof'l Conduct 32:3.3 provides, in part:

> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment [14] to Iowa R. of Prof'l Conduct 32:3.3 provides:

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

In *State v. Lemburg,* 257 N.W.2d 39 (Iowa 1977), the Court rejected Lemburg's postconviction relief claim that the district judge should have disqualified himself from Lemburg's change of plea hearing because the prosecutor had an ex parte communication with the judge requesting "special security measures for the trial. Judge Vietor denied the request and mentioned the substance of the conversations to defense counsel." *Id.* at 46. The Court cited Canon 3(A)(4)[2] regarding the district judge's need to act impartially and without considering ex parte communications, but it was "not persuaded the discussions in any way affected Lemburg's rights or the trial court's ability to receive and consider his offer to plead guilty." *Id.*

In *Comm. on Prof'l Ethics & Conduct v. Zimmerman,* 354 N.W.2d 235 (Iowa 1984), the Court concluded that Zimmerman violated DR 1-102(A)(4)[3] and (5)[4] when he persuaded "a district judge to ex parte set aside ... default judgments ...." *Id.* at 238.

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[2] Canon 3(A)(4) provided that a judge should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

[3] DR 1-102(A)(4) provided that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[4] DR 1-102(A)(5) provided that a lawyer shall not engage in conduct that is prejudicial to the administration of justice.

Claiming that he was owed unpaid wages, an employee sued a corporation and five general partners; he obtained a default judgment against each defendant. *Id.* at 236. Because of their pending bankruptcies, the employee did not sue the actual partnerships. *Id. W*hile the bankruptcy court had "issued a temporary injunction against all persons, including creditors, from interfering with any assets of the bankrupts by judicial action or otherwise[, t]his injunction never mentioned the corporation nor the general partners." *Id.*

Several months later, the corporation sold a tract of real estate, and it hired Zimmerman to "aid in removing the judgment lien on the real estate." *Id.* According to the Court, "Zimmerman checked the court rule, conducted some research, and then sought advice from another attorney, a specialist in bankruptcy law. Zimmerman did not advise the specialist that the titleholder to the property in question was the corporation and that the corporation was not involved in bankruptcy proceedings." *Id.* at 237. The specialist opined "that the judgment was void ab initio because of the bankruptcy injunction." *Id.*

Zimmerman

> filed a motion to set aside the default judgment, alleging that plaintiff perpetuated extrinsic fraud against the court by obtaining the default judgments when he knew of the bankruptcy proceedings. Although the court file indicated the corporation's status as a defendant and judgment debtor, the motion never set out any facts concerning corporation immunity from suit. Without a formal hearing, the judge signed a prepared ruling setting aside the judgments against all defendants, expunging the record, and ordering that all liens arising from the judgment were satisfied and discharged. The ruling was conditioned, however, on payment into the court of $1515.37, the net wages due the plaintiff employee. It also made provision for a hearing on plaintiff's right to the proceeds.

Id. The judge reported that he had "not inspect[ed] the file and relied on [Zimmerman] to make a full disclosure of all of the circumstances." *Id.*

The plaintiff/employee "promptly moved to set aside the court's ex parte order nullifying his judgments. After hearing, this motion was sustained ...." *Id.*

The Court concluded, "Zimmerman's want of disclosure evinces indefensible irresponsibility and a conscious disregard for the rights of a litigant convincing us his conduct constituted misrepresentation within the meaning of our disciplinary rules." *Id.*

In ***Comm. on Prof'l Ethics & Conduct v. Postma,*** 430 N.W.2d 387 **(Iowa 1988)**, the Court concluded that Postma violated DR 7-110(B)[5] when he met ex parte with district judge Branco, without notice to the adversary, VanderWel, or his lawyer, and obtained a court order authorizing the release of more than $90,000 of disputed corporate funds to Postma and his client. *Id.* at 390-91. The Court observed:

> Judge Branco was not advised that VanderWel was represented by counsel, nor was he advised that the matter was subject to controversy. Neither was the judge advised of the infirmities of the corporate proceedings. He was provided only with Postma's version of the conduct of VanderWel. On the basis of the presentation the judge signed an order which had been prepared by Postma. The order falsely indicated that VanderWel had been notified of the application by referring to notice of the third corporate meeting. It stated "the court, having reviewed the application together with the minutes of the 1987 annual meeting of the corporation board of directors, together with *proofs of service upon VanderWel*, and noting that VanderWel *failed to appear*..." (Emphasis added.) The order was not filed in any Iowa district court. (footnote omitted).

Id.

The Court concluded:

> The violation was seriously aggravated in this case because of all the things Postma did not disclose to the judge. The judge was not told that VanderWel was represented by an attorney and that neither the attorney nor VanderWel were notified of the application. Indeed the form of the order strongly indicated the contrary. The judge was not told VanderWel's version of the controversy. Because these matters were not disclosed the judge was deceived about the effect of the order he was persuaded to sign. This amounted to a misrepresentation of material facts by an attorney to a court. This is a gravely serious breach of professional ethics. (citations omitted).

Id. at 391.

In ***Johnson v. Nickerson,*** 542 N.W.2d 506 **(Iowa 1996)**, the Court rejected Johnson's claim, in his defamation lawsuit, that the district court should have granted his motion for a new trial because of an ex parte communication between the district judge and

[5] DR 7-110(B) provided that in an adversary proceeding, a lawyer shall not communicate as to the merits of the cause with a judge before whom the matter is pending, except (1) in the course of official proceedings in the cause, (2) in writing if a copy is promptly delivered to opposing counsel or to the adverse party, if not represented by a lawyer, (3) orally upon adequate notice to opposing counsel or to the adverse party if not represented by a lawyer, or (4) as otherwise authorized by law.

defense counsel. *Id.* at 513. Citing Canon 3(A)(4), the Court noted its "dim view on ex parte communications, but no prejudice can be found here. (citation omitted)." *Id.* The district judge denied that defense counsel and he discussed "the merits of the case". *Id.* Further, citing *Lemburg*, the Court found "[t]here [was] some indication in the record that the ex parte communication dealt with courtroom safety (*i.e.,* placement of an armed deputy in the courtroom)." *Id.*

In ***Bd. of Prof'l Ethics & Conduct v. Alexander***, 574 N.W.2d 322 **(Iowa 1998)**, the Court concluded that Alexander's presentation of a "modification order which incorrectly indicated it was an order agreed upon by the parties without notifying opposing counsel violated DR 7-110(B) and DR 1-102(A)(4)." *Id.* at 326.

In ***Bd. of Prof'l Ethics & Conduct v. Lesyshen,*** 585 N.W.2d 281 **(Iowa 1998)**, the Court concluded that Lesyshen violated DR 7-110(B) when she obtained an *ex parte* order, "which transferred the physical custody of Pircer's child to Lesyshen's client, Shawn Burt. Pircer and Burt were not married, but they had a daughter who lived with Pircer." *Id.* at 287.

The Court concluded that Lesyshen met none of the DR 7-110(B) exceptions. *Id.* With regard to the fourth exception, "as otherwise authorized by law[,]" the Court agreed with Professor Charles Wolfram's interpretation limiting it "to include only *ex parte* communications for the purpose of 'obtain[ing] ex parte restraining orders, submissions made in camera by order of the judge, or similarly rare occasions.' (citation omitted)." *Id.*

Referring to its *Postma* decision, the Court wrote:

> Likewise here, Lesyshen did not tell the judge that Pircer was represented by [lawyer Kirk]. Nor did she tell the judge about Kirk's letter to Burt and the circumstances prompting the letter. The judge was therefore deceived into signing the change of custody order. Had the judge known about the true circumstances, we are convinced he would not have signed the order.

Id. at 288.

In ***Bd. of Prof'l Ethics & Conduct v. Ackerman***, 611 N.W.2d 473 **(Iowa 2000)**, the Court concluded that Ackerman violated DR 7-110(B) when he presented a dismissal order on a child endangerment charge, in an ex parte communication with the district judge, without advising the county attorney. *Id.* at 474. The Court described Ackerman's dismissal motion as "misleading" because it was incorrect; the facts did not support his motion. *Id.* The Court rejected Ackerman's attempt to blame his legal assistant; "Ackerman cannot be rescued from the violation[s] by an isolating wall of sloppiness and confusion." *Id.*

In ***Bd. of Prof'l Ethics & Conduct v. Rauch,*** 650 N.W.2d 574 **(Iowa 2002)**, the Court disciplined Rauch for violating DR 7-110(B) five times: engaging in three ex parte conversations with three judges and obtaining two ex parte orders in one contested dissolution of marriage case. *Id.* at 575, 580.

In December 1999, Rauch met with a district judge and obtained an ex parte order terminating the wage withholding order against his client; opposing counsel learned of this order "over a month later." *Id.* at 576. Later that same month, Rauch met with a second judge and obtained an ex parte order "correcting the first order to make it retroactively stop income withholding." *Id.* Opposing counsel did not know about this order either. *Id.*

In April 2000, Rauch met with a third judge to obtain an ex parte order continuing the child custody and support modification trial; "[t]he judge testified Rauch led him to believe opposing counsel was aware of and supported the request for a continuance." *Id.* Opposing counsel "had no knowledge of this request." *Id.*

In addition to the DR 7-110(B) violation, the Court concluded that Rauch violated DR 1-102(A)(4), (5), and (6).[6]

With regard to obtaining the ex parte order terminating the wage withholding order, Rauch offered a novel defense to the charge that he violated DR 7-110(B): "he did not tell [opposing counsel] because [opposing counsel's] client would insist on filing a resistance." *Id.* at 577.

The Court concluded that Rauch did not meet any of the exceptions recognized by DR 7-110(B). *Id.*

The Court stressed the importance of abiding by the DR 7-110(B) restriction: "It is imperative that we avoid even the appearance of granting one party a procedural or tactical advantage over the other as a result of an ex parte contact. Both judges and lawyers must demonstrate due regard for the rights of parties to be heard." *Id.* at 578.

The Court rejected Rauch's and our favorite childhood excuse: everyone does it. The Court wrote:

> Rauch attempts to offer as a mitigating circumstance the fact that many other lawyers also have ex parte communications with judges, especially in domestic relations court, as to routine scheduling matters. Rauch states such communications are "a fact of life." Even if there is some evidence of ex parte communications regarding scheduling matters, Rauch's contention that everyone does it is without merit. Rauch does not articulate the difference

[6] DR 1-102(A)(6) provided that a lawyer shall not engage in any other conduct that adversely reflects on the fitness to practice law.

> between an ex parte request asking that a motion or other matters be set for hearing and a motion to continue a trial. There is no evidence, other than Rauch's testimony, in the record to suggest ex parte trial continuances are routinely granted in divorce matters. (citation omitted).

Id. at 579.

In ***Attorney Disciplinary Bd. v. Gottschalk***, 729 N.W.2d 812 **(Iowa 2007)**, the Court concluded that Gottschalk violated Rule 32:3.3(d). Notwithstanding three recent communications from opposing counsel about the requirement that opposing counsel's client "be allowed to walk through the house and resolve any issues of disputed property prior to the [dissolution of marriage] decree being entered[,]" Gottschalk "presented the ... decree to the court without notifying the court of the walk-through provision." *Id.* at 817. When opposing counsel learned that the decree had been entered, he "contacted the court and had the decree set aside." *Id.*

The Court rejected "Gottschalk's contention that he inadvertently forgot about the walk-through provision;" the Court concluded that Gottschalk's "omission was more than mere negligence considering [opposing counsel's] emphasis on the provision in his letter to Gottschalk just days prior to Gottschalk presenting the stipulation and decree to the court. (citations omitted)." *Id.* 818-19.

In ***Attorney Disciplinary Bd. v. Johnson***, 792 N.W.2d 674 **(Iowa 2010)**, the Court concluded that Johnson violated multiple Rules when he presented to a district judge, in an ex parte communication, a temporary order in a dissolution of marriage proceeding to which he had added a sentence, without opposing counsel's knowledge or consent, that changed the status quo of the custody of the parties' minor children. *Id.* at 679.

The Court concluded that Johnson violated Rules 32:3.3(d), 32:3.5(b),[7] 32:8.4(c),[8] and 32:8.4(d).[9] *Id.* at 680.

Citing § 112 of the Restatement (Third) of the Law Governing Lawyers, **Professor Sisk** notes this limitation on ex parte disclosure:

> While the lawyer who chooses to make an ex parte application is bound to reveal all material information, even that which otherwise would be confidential, the lawyer is not required to reveal information that is actually

[7] Rule 32:3.5(b) provides that a lawyer shall not communicate ex parte with a [judge, juror, prospective juror, or other official] during the proceeding unless authorized to do so by law or court order.

[8] Rule 32:8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[9] Rule 32:8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

privileged, which the lawyer reasonably believes would not be subject to discovery or subpoena by reason of an evidentiary privilege such as that afforded to attorney-client communications. (footnote omitted.)

16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 7.3(g) p. 648 (2013).

Iowa R. of Prof'l Conduct 32:3.4
Fairness to opposing party and counsel

Iowa R. of Prof'l Conduct 32:3.4 provides, in part:

A lawyer shall not:

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment [4] to Iowa R. of Prof'l Conduct 32:3.4 provides, in part:

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. . . . .

Professor Sisk adds this caveat to advising close associates of a client to withhold information: "The permission granted to the lawyer to encourage such close associates of the clients to withhold information is conditioned, however, upon the lawyer's reasonable determination that the person's interests will not be adversely affected." 16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 7.4(b)(6)(C) p. 669 (2013).

Iowa R. of Prof'l Conduct 32:4.4
Respect for rights of third persons

Iowa R. of Prof'l Conduct 32:34.4 provides, in part:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment [1] to Iowa R. of Prof'l Conduct 32:4.4 provides:

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. For example, present or former organizational employees or agents may have information protected by the attorney-client evidentiary privilege or the work product doctrine of the organization itself. If the person contacted by the lawyer has no authority to waive the privilege, the lawyer may not deliberately seek to obtain the information in this manner.

Focusing on the risk of invading confidential information in his commentary about Rule 32:4.4(a), Professor Sisk notes: "The harm caused to the legal rights of another party is greatest when improper methods of obtaining evidence have the effect of circumventing the important protections for privilege, work product, and other confidential information that are afforded through the civil discovery process." 16 Gregory C. Sisk, Iowa Practice Series: Lawyer and Judicial Ethics, § 8.4(c) p. 813 (2013).

Iowa R. of Prof'l Conduct 32:3.5
Impartiality and decorum of the tribunal

Iowa R. of Prof'l Conduct 32:3.5 provides, in part:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress, or harassment[.]

In *State v. Neville*, 227 Iowa 329, 288 N.W. 83 (1939), the Court reversed Neville's conviction for manslaughter, not because of "intentional misconduct", but because of the Court's concern for the "unconscious influence upon jurors as a result of favors from and social intercourse with parties, counsel and others connected with litigation. It has to do with the duty of the court to preserve the purity of the verdict, with public policy and with the effect of such irregularities upon the minds of litigants and the public at large. (citations omitted)." 288 N.W. at 84.

A juror and the county attorney lived across the street from each other in Perry; the courthouse, in Adel, was 20 miles away. *Id.* The two had known each other for years. *Id.* During Neville's three-day trial, the county attorney drove the juror to and from the courthouse four times. *Id.*

In *Omaha Bank for Cooperatives v. Siouxland Cattle Co-op.,* 305 N.W.2d 458 (Iowa 1981), the Court concluded that the district court abused its discretion in refusing to grant Siouxland's request to replace a juror who bought drinks for and conversed with Omaha Bank's lawyers after a day of trial. *Id.* at 461-62. The Court wrote: "The juror's offer of drinks and the lawyers' acceptance was clearly misconduct by all of them. .... The bank's lawyers violated their ethical obligation prohibiting communication with a juror during trial unless it is in the course of official proceedings. (citations omitted)." *Id.* at 461. The Court cited DR 7-108(B).[10] *Id.*

With regard to administrative, contested case matters, Iowa Code § 17A.17, Ex parte communications and separation of powers, provides, in part:

> 2. Unless required for the disposition of ex parte matters specifically authorized by statute, parties or their representatives in a contested case and persons with a direct or indirect interest in such a case shall not communicate, directly or indirectly, in connection with any issue of fact or law in that contested case, with a presiding officer in that contested case, except upon notice and opportunity for all parties to participate as shall be provided for by agency rules.
>
> . . . .
>
> 4. A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all such written communications received, all written responses to the communications, and a memorandum stating the substance of all such oral and other communications received, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte

[10] DR 7-108(B)(1) provided that during the trial of the case, a lawyer connected therewith shall not communicate with any member of the jury.

communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the prohibited ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within ten days after notice of the communication.

5. If the effect of an ex parte communication received in violation of this section is so prejudicial that it cannot be cured by the procedure in subsection 4, a presiding officer who receives the communication shall be disqualified and the portions of the record pertaining to the communication shall be sealed by protective order.

6. The agency and any party may report any violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule shall provide for appropriate sanctions, including default, suspending or revoking a privilege to practice before the agency, and censuring, suspending, or dismissing agency personnel, for any violations of this section.

7. A party to a contested case proceeding may file a timely and sufficient affidavit alleging a violation of any provision of this section. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

In *Anstey v. Iowa State Commerce Comm'n*, 292 N.W.2d 380 **(Iowa 1980)**, the Court did not condone the ex parte communications, but decided not to reverse the Commerce Commission's decision about placement of power lines because of the Commission's chairperson's ex parte communications with employees of the "petitioning utility". *Id.* at 391. The Court found:

> The ex parte communications complained of occurred after the commission had dismissed the franchise petition. On both occasions the power company officials called [the chairperson] to discuss the reasons for the dismissal. There is no evidence that there was input from those officials which could influence a matter then pending or which would go to the merits of their petitions once they were refiled. . . . [T]here are means available under our procedural rules for parties to request more specific findings and conclusions in such a manner as to inform opposing parties of their actions and avoid the appearance of impropriety almost certain to attend any one-sided discussion of matters in controversy.

Id.

Disqualification of counsel for ex parte communications

In *Meat Price Investigators Ass'n v. Spencer Foods, Inc.*, 572 F.2d 163 (8th Cir. 1978), the Court of Appeals agreed with the district court and did not disqualify Meat Price Investigators' lawyers from representing it. *Id.* at 165. The Court did not find enough prejudice to Spencer Foods to justify disqualification; Meat Price Investigators' lawyers' conduct presented a close question, however. *Id.*

Spencer Foods moved to disqualify two of Meat Price Investigators' lawyers because they had interviewed Hughes Bagley, a Spencer Foods' officer, without Spencer Food's consent or without the consent or presence of its lawyers. *Id.* at 164-65. Spencer Foods argued that the lawyers had violated DR 7-104 and prejudiced its ability to defend this antitrust action. *Id.* at 165.

The district court had "serious reservations" about Bagley's credibility and declined to find a DR 7-104 violation. *Id.* When the district court assumed that Meat Price Investigators' lawyers had violated this ethics Rule, it still declined to disqualify them; it found insufficient prejudice to Spencer Foods and instead found significant prejudice to Meat Price Investigators. *Id.*

The Court of Appeals found no abuse of discretion by the district court. *Id.* The Court weighed these competing interests: "1) the client's interest in being represented by counsel of its choice; 2) the opposing party's interest in a trial free from prejudice due to disclosures of confidential information; and 3) the public's interest in the scrupulous administration of justice. (citation omitted)." *Id.*

Other Authorities

Rules of Civil Procedure

Iowa R. Civ. P. 1.910, Motions for continuance, subsection (2) provides, in part: "No case assigned for trial shall be continued ex parte. . . . ."

Iowa R. Civ. P. 1.977, Setting aside default, provides, in part: "On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. . . . ."

Iowa R. Civ. P. 1.1504, Statement re prior presentation [of temporary injunction], provides: "A petition seeking a temporary injunction shall state, or the attorney shall certify thereon, whether a petition for the same relief, or part thereof, has been previously presented to and refused by any court or justice, and if so, by whom and when."

Iowa R. Civ. P. 1.1507, [Temporary Injunction] Notice, provides, in part: "When the applicant is requesting that a temporary injunction be issued without notice, applicant's attorney must certify to the court in writing either the efforts which have been made to give notice to the adverse party or that party's attorney or the reason supporting the claim that notice should not be required."