

Understanding the Ethics of An Iowa Lawyer

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I. Introduction

This ethics presentation focuses on current legal issues facing the Iowa lawyer. Iowa lawyers are recognized both within and outside the state as demonstrating high regard for legal ethics. That is not to say, however, that even lawyers in Iowa do not make mistakes. Those mistakes are an opportunity for review, analysis, and to recommit to the values and ideals that otherwise distinguish the lawyer from other professions and lawyer from the Iowa lawyer.

II. Professional Regulation in Iowa

Professional Regulation in Iowa is generally treated within the Iowa court rules. The Iowa court rules on Professional Regulation span nearly 20 chapters. They begin at Chapter 31, which addresses Admission to the Bar, and march to through Chapter 49, which deals with the Office of Professional Regulation. Those chapters are set forth as follows:

- Chapter 31. Admission to the Bar
- Chapter 32. Iowa Rules of Professional Conduct
- Chapter 33. Standards for Professional Conduct
- Chapter 34. Administrative and General Provisions
- Chapter 35. Iowa Supreme Court Attorney Disciplinary Board Rules of Procedure
- Chapter 36. Grievance Commission Rules of Procedure
- Chapter 37. Commission on the Unauthorized Practice of Law
- Chapter 38. Rules of Procedure of the Commission on the Unauthorized Practice of Law
- Chapter 39. Client Security Commission
- Chapter 40. Regulations of the Client Security Commission
- Chapter 41. Continuing Legal Education for Lawyers
- Chapter 42. Regulations of the Commission on Continuing Legal Education
- Chapter 43. Lawyer Trust Account Commission
- Chapter 44. Lawyer Trust Account Commission Grant Criteria and Guidelines
- Chapter 45. Client Trust Account Rules
- Chapter 46. Rules of the Board of Examiners of Shorthand Reporters
- Chapter 47. Court Interpreter and Translator Rules
- Chapter 48. Code of Professional Conduct for Court Interpreters and Translators
- Chapter 49. Office of Professional Regulation
- Chapter 50 Reserved

III. The Iowa Rules of Professional Conduct

On July 1, 2005, the Iowa Supreme Court adopted the then new Iowa Rules of Professional Conduct.¹ The Iowa Rules of Professional Conduct track the American Bar Association's Model Rules closely.² Prior to the Model Rules, Iowa followed the Model Code of Professional Responsibility.

The Iowa Rules of Professional Conduct have eight articles, like the Model Rules. The articles focus on the following topics:

- I. Client-Lawyer Relationship
- II. Counselor
- III. Advocate
- IV. Transactions with Persons other than Clients
- V. Law Firms and Associations
- VI. Public Service
- VII. Information about Legal Services
- VIII. Maintaining the Integrity of the Profession

As outlined above, these Rules are set forth in Chapter 32 of the Iowa Court Rules.

The Iowa Rules of Professional Conduct have undergone some revision recently. The rules with respect to lawyer advertising were modified in 2013.³ The old rule regarding advertising had two subsections; the new rule maintains only the first subsection:

32:7.1 Communications Concerning a Lawyer's Services	
<i>Old Rule</i>	<i>New Rule</i>
(a) A lawyer shall not make a false or misleading communication about the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.	(a) A lawyer shall not make a false or misleading communication about the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

¹ In the Matter of Iowa Court Rules Chapter 32 (Iowa Sup. Ct., Apr. 20, 2005)

² See Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 Okla. City U. L. Rev. 637 (2005) (showing Iowa and Nebraska were essentially tied among for most closely following the revised ABA Model Rules).

³ See Rule 32:7.1 Communications Concerning a Lawyer's Services, which was adopted Aug. 29, 2012, and effective January 1, 2013.

(b) A lawyer shall not communication with the public using statement that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain an statement or claim relating to the quality of the lawyer's legal services.	(b) A lawyer shall not communication with the public using statement that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain an statement or claim relating to the quality of the lawyer's legal services.
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Also modified in 2013 was Rule 32:7.2, which combined the prior rule on advertising with the prior rule on recommendation on professional employment. The new rule in relevant part states:

“A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if the reciprocal referral agreement is not exclusive, and the client is informed of the existence and nature of the agreement.”

Rule 32:7.2(b)(4). Rule 32:7.3 also underwent some modification relative to solicitation and suggestion of need of legal services.

Other changes to Chapter 32 have been even more recent (adopted October 15, 2015) and are as follows:

- 1.1. New comment about lawyers retaining or contracting with other lawyers outside one’s firm.
- 1.4. Comment change from promptly returning telephone calls to promptly responding to or acknowledging client communications
- 1.6. Additional subsections and comments added
 - o (b)(7): A lawyer may reveal information necessary to detect and resolve conflicts of interest arising from change in employment or ownership of the firm if it doesn’t compromise attorney–client privilege or prejudice the client
 - o (d): A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
 - o New comments on detecting conflicts of interest
 - o Comment edited about acting competently to preserve confidentiality
- 1.10. Added subsections and comments
 - o (a) was split into subsections and additional subsections were added regarding disqualification of a lawyer and associated screening and notice

- Comments were added to explain the changes
- 1.18. Comments added regarding notice once it becomes apparent screening is necessary
- 4.4. Subsection (b) and Comment [2] edited regarding inadvertent receipt of documents.
- 5.3. Comments extensively edited
 - Comment [1] about employing assistants struck.
 - 3 comments added regarding use of nonlawyers within and outside the firm.

IV. Professional Misconduct & Discipline

What is professional misconduct? Rule 8.4 defines professional misconduct. Indeed, it thus serves as a link from the substantive rules of professional ethics to the procedural rules that govern the professional disciplinary process for investigating and restraining professional misconduct. Professional misconduct includes:

- committing criminal acts;
- engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- engaging in conduct prejudicial to the administration of justice;
- suggesting that the lawyer may improperly influence a government agency or official to achieve results by improper means;
- knowingly assisting a judge or judicial officer to violate applicable rules of judicial conduct or law; and
- engaging in sexual harassment or unlawful discrimination.⁴

What should a lawyer who observes professional misconduct do? Iowa Rule 8.3(a) imposes a fairly expansive duty to report another lawyer's violation of the Iowa Rules of Professional Responsibility, although the reporting duty is limited to those violations that truly are known to, and not merely suspected by, the reporting lawyer (and is limited as well by the lawyer's duty to maintain client confidences, as discussed below). By providing that the duty arises when the lawyer has come to “know” that another lawyer has violated the rules, paragraph (a) incorporates the definition of “knows” from Rule 1.0(f) as “denot[ing] actual knowledge of the fact in question.” Thus, the lawyer must have more than a subjective belief that misconduct may have occurred. Rather, the duty to report

⁴ See 16 Ia. Prac., Lawyer and Judicial Ethics § 12:4(b)

arises when the lawyer has a firm factual basis, typically grounded in personal knowledge, upon which to conclude that a violation has taken place, although absolute certainty is not necessary before the reporting requirement is triggered.

Paragraph (b) of Iowa Rule 8.3, which imposes a duty to report the misconduct of judges, is directly parallel to paragraph (a) in likewise expressing an expansive duty to report violations by judges that are known to the lawyer.

The Iowa rule is broader in scope than that stated in Rule 8.3 of the American Bar Association's Model Rules of Professional Conduct. Paragraph (a) of Model Rule 8.3 limits the duty to report another lawyer's misconduct to a violation of the rules "that raises a substantial question as to that lawyer's honesty, untrustworthiness or fitness as a lawyer in other respects." Paragraph (b) of Model Rule 8.3 similarly limits the duty to report a judge's misconduct to a matter "that raises a substantial question as to the judge's fitness for office."⁴ Comment 3 to Model Rule 8.3 explains the drafter's view that a duty to report every violation of the rules would be "unenforceable" and that the reporting obligation should be limited "to those offenses that a self-regulating profession must vigorously endeavor to prevent."⁵ By omitting this qualifying language in paragraphs (a) and (b) of Iowa Rule 8.3 and by striking Comment 3 altogether, the Iowa Supreme Court seemingly contemplates a broader duty to report in this state.

Reporting of Complaints to Whom? An attorney who determines reporting is required under the rules should file a complaint with the Iowa Supreme Court Attorney Disciplinary Board ("the Board"). See Iowa R. Civ. P. 35.3

Iowa Supreme Court Attorney Disciplinary Board. The Board consists of nine lawyers and three lay members. All Board members are appointed by the Supreme Court. The Board has a standard form relative to each complaint. See Iowa R. Civ. P. 35.1 ("Complaints alleging that an attorney has committed a disciplinary infraction must be accepted from any person, firm, or other entity. The Iowa Supreme Court Attorney Disciplinary Board (disciplinary board) may, upon its own motion, initiate any investigation or disciplinary action."). A standard complaint form is available here: <http://www.iowacourts.gov/wfdata/frame7922-1202/File1.pdf>. See also, Rule 35.15-Form 1.

The Board's Process Upon Receipt of a Complaint. The assistant director for the attorney discipline evaluates the complaints. The assistant director is authorized to decline to open an investigation of a complaint if the information if: "the information, if true, would not constitute misconduct or incapacity or if the complaint is facially frivolous, stale, lacking in adequate factual detail, duplicative; or is outside the disciplinary board's jurisdiction; or does not otherwise reasonably warrant investigation." See Iowa R. Civ. P. 35.4.

If a complaint is not dismissed at this screening stage, it will be recorded. *Id.* The Board must, however, keep all files confidential absent a statutory exception.

Id. However, the Board must notify the complainant as to whether it will take action or no action. See Iowa R. Civ. P. 35.5. The Board will also notify the respondent, unless the complaint was dismissed at the initial screening stage. See Iowa R. Civ. P. 35.6. The respondent must provide response to the complaint; failure to do so may be its own ethical violation. See Iowa R. Civ. P. 35.7.

Upon receipt of a response, the Board may dismiss a complaint, seek further investigation, or docket the matter for hearing. See Iowa R. Civ. P. 35.8. Should the Board seek further investigation or set the matter for hearing, it may use subpoena power.

Board hearings are held *at least* quarterly. See Iowa R. Civ. P. 35.11. Evidence may be taken. *Id.* After consideration of any matter before the Board, the members, by majority vote of those present, must do one of the following:

- (1) Continue the matter,
- (2) Dismiss the complaint,
- (3) Admonish the respondent,
- (4) Reprimand the respondent and file the same with the grievance commission clerk, or
- (5) File a complaint before the grievance commission and prosecute the complaint to final determination.

Iowa R. Civ. P. 35.11.

Board Statistics from 2015. The Board was hard at work in 2015 relative to new complaints and additional determinations.

New Complaints. The Board opened 389 new complaint files for investigation during 2015, which is up from 337 new complaint files in 2014, and 366 in 2013.

Board Determinations. The Board made determinations in 316 complaint files. The determinations by the Board in 2015 were as follows:

Dismissed upon a finding of no ethical violation	189	(59.81 %)
Private Admonition	47	(14.87 %)
Public Reprimand	35	(11.08 %)
Deferral per Iowa Court Rule 34.13	2	(0.63 %)
Other (Death of Respondent; Contempt Citation)	2	(0.63 %)
Referred to staff counsel for filing with the Grievance Commission	41	(12.97 %)

TOTAL

316 (100.0 %)

See 2015 Annual Report of the Attorney Disciplinary Board and the Grievance Commission of the Supreme Court of Iowa (Filed Feb. 1, 2016) (available here: <http://www.iowacourts.gov/wfdata/frame7922-1202/File4.pdf>)

The Grievance Commission. The Grievance Commission procedure is set forth within Chapter 36. The Grievance Commission commissioners may act as a body or in divisions as the chair directs. The proceedings thereafter are similar to other board matters and there is a right to discovery governed by various Iowa procedural rules. See Iowa R. Civ. P. 36.13. A matter not otherwise resolved will proceed to hearing. After hearing, the commission renders a decision. In doing so:

The commissioners must dismiss the complaint, issue a private admonition, or recommend that the supreme court reprimand the respondent or suspend or revoke the respondent's license. If the commissioners recommend a reprimand, suspension, or revocation, they must file with the supreme court clerk a report of their findings of fact, conclusions of law, and recommendations within 60 days of the date set for filing of the last responsive brief and argument.

See Iowa R. Civ. P. 36.19. If an appeal is taken, it must be taken in 10 days. Thereafter, the Iowa Rules of Appellate Procedure apply to the extent they are not inconsistent with Chapter 36.

V. Ethics Case Law Update

Iowa Supreme Court Attorney Disciplinary Bd. v. J.D., 875 N.W.2d 728 (Iowa 2016)

- Attorney had been drinking in various bars with his girlfriend (Doe), got in an argument and separated. Attorney then went to Doe's house and broke in front door and left. Attorney later returned to the house and assaulted Doe, punching her in the face multiple time, pulling out her hair. Attorney pled guilty to domestic abuse assault and trespass and was placed on probation. Attorney has undergone substance abuse evaluation and is now sober, and still talks with Doe daily. The Court stated it was escalating sanctions for domestic abuse as conduct that will not be tolerated. License suspended indefinitely with no possibility of reinstatement for three months, with required mental health evaluation and substance abuse evaluation each indicating fit to practice law.

Iowa Supreme Court Attorney Disciplinary Bd. v. Attorney Doe No. 792, 878 N.W.2d 189 (Iowa 2016), reh'g denied (Mar. 3, 2016)

- A complaint regarding an ex parte email questioning the judge's integrity, written when acting pro se and prior to attorney's reactivation as an Iowa lawyer, while unprofessional and not objectively reasonable or entitled to

First Amendment protection, was private and did not hinder the administration of justice. The email was ex parte communication during a proceeding and thus a rule violation. Attorney Doe was not notified of any other potential rule violations, so other violative conduct could not be sanctioned. Private admonition imposed for ex parte communication.

Iowa Supreme Court Attorney Disciplinary Bd. v. L.S., 879 N.W.2d 199 (Iowa 2016), related to *NuStar Farms, LLC v. Zylstra*, 880 N.W.2d 478 (Iowa 2016).

- Attorney represented both sides in a commercial lease agreement, established new corporation for one side, created consent form to retain equipment which party had no authority to sign to perpetrate a sham transaction that converted former tenant's property without court order, all before had parties sign consent to conflict form. For a separate pair of clients (see related case), represented one party in a variety of other actions, including an open court case, when contacted them on behalf of another client regarding ingress deeds that he had also reviewed for first client. Did not obtain written informed consent regarding conflict form either party. License suspended for sixty days.

Iowa Supreme Court Attorney Disciplinary Bd. v. M.R., 884 N.W.2d 761 (Iowa 2016)

- License had been revoked in 2006 for misappropriation of client funds. Changes to rules now permit license reinstatement. Submitted affidavit detailing progress since revocation, letters from attorneys recommending recommendation, work history following revocation, report regarding previous addiction treatment. Established standards (convincing preponderance of the evidence) to determine eligibility for reinstatement, adopting 7 factors to evaluate, and reserving the right to impose additional conditions on license. License reinstated following report of thirty CLE credits and posting Iowa Bar required MPRE score (court declined to require re-passage of bar exam because maintained familiarity with current law).

Iowa Supreme Court Attorney Disciplinary Bd. v. D.J., 884 N.W.2d 772 (Iowa 2016)

- Began an intimate relationship while representing client in several court-appointed cases. Was asked by prosecutor's office to withdraw from some cases because of personal conflict, and withdrew from all. No prior discipline, self-reported, seeking mental health counseling, no harm resulted to anyone. License suspended thirty days.

Iowa Supreme Court Attorney Disciplinary Bd. v. S.S., 885 N.W.2d 185 (Iowa 2016)

- Attorney failed to maintain adequate trust account records (both content and length of time), withdrawing fees before earned, commingling personal and trust account funds, and failing to respond to records demand from the Board. License suspended for sixty days.

Iowa Supreme Court Attorney Disciplinary Bd. v. K.W., 885 N.W.2d 198 (Iowa 2016)

- Attorney failed to deposit part of retainer in trust account, did not refund unearned fee when representation terminated. Failed to communicate difficulties in filing to client or to timely correct rejected filing, misled client as to status of petition and notice, failed to return client phone calls, failed to inform client petition successfully filed, failed to withdraw as attorney of record immediately upon termination of representation, and subsequently did not provide former client notice of pretrial conference or appear. License suspended sixty days.

Iowa Supreme Court Attorney Disciplinary Bd. v. K.B., 885 N.W.2d 408 (Iowa 2016)

- Attorney charged unreasonable fee, repeatedly refused to repay \$14,000 out of \$15,000 overcharge as determined by PCBA Fee Arbitration Committee, made misrepresentations about sending payment, former client had to bring suit to recover and counterclaimed against client, new attorney, and firm. Court found for client, awarded attorney fees, and imposed sanction. Client 2: attorney missed filing deadlines, failed to produce required documents, and made misrepresentations regarding document availability and facts about insurance coverage, court sanctioned attorney for filing a frivolous suit and misrepresentations. Previous suspension for bringing frivolous suits around time of current case's events. Attorney intends voluntary retirement from practice of law. Pattern of misconduct results in license suspended indefinitely, no possibility of reinstatement for six months.

Iowa Supreme Court Attorney Disciplinary Bd. v. Attorney Doe No. 819, No. 16-0652 (Iowa 2016)

- The consequence for failure to file an answer to a complaint (Rule 36.7) is self-executing and does not require motion from the Board to enforce the rule. Nor may the Board waive enforcement—only the commission can upon a filing by the respondent. The commission has some discretion regarding good cause, and should favor hearing on the merits when attorney wishes to respond and participate despite missing deadlines.

Iowa Supreme Court Attorney Disciplinary Bd. v. D.M., No. 15-1502 (Iowa 2016)

- Attorney deposited check for trial transcript into trust account and did not forward payment to court reporter, but instead applied to own fees. Failure to pay the court reporter resulted in no transcript, leading to the dismissal of their appeal for failure to file the transcript. License suspended for thirty days.
 - o Concurrence: Thirty days appropriate because no misappropriation or conversion alleged by Board. Can only decide on violations for which the attorney has been given adequate notice. However, may be time to

reevaluate approach to misappropriation and conversion as suggested in the dissent when parties have notice and a chance to properly brief.

- CIP/DIP: Yes, violations of Rules of Professional Conduct. But the distinction between legal stealing (i.e. colorable future claim) and illegal stealing does not make sense now that revocations do not have to be permanent. Distinction is legally questionable and undermines trust account rule. Urges use of objective criteria in *ABA Standards for Imposing Lawyer Sanctions* (1992) to increase uniformity and consistency in disciplining attorneys. Real harm was caused to clients, attorney's suspension should be for longer than thirty days.

Iowa Supreme Court Attorney Disciplinary Bd. v. K.A., No. 15-2109 (Iowa 2016)

- Attorney charged extraordinary fees without court approval in probating an estate. While other violations may have occurred, the Board stipulated to the single issue as the scope of the proceeding. Court found misrepresentations by attorney, but also noted a “commendable record of volunteer community service” and measures to prevent future errors. License suspended for thirty days and required to refund extraordinary fee charged.
 - CIP/DIP: Concur on finding of violations, dissent as to sanction, not using objective criteria from *ABA Standards for Imposing Lawyer Sanctions* (1992).

Iowa Supreme Court Attorney Disciplinary Bd. v. K.T., No. 16-0130 (Iowa 2016)

- Attorney stipulated to willfully failing to file federal and state income taxes for eleven years, engaging in criminal and dishonest conduct. During divorce proceedings, Court ordered both parties to file and pay delinquent tax returns. Although previous unrelated discipline, and extended nature of violation, also many mitigating circumstances (cooperation, remorse, took responsibility, substantial pro bono legal work). License suspended for six months.
 - Concurrence: While a longer suspension could be supported, purposes are accomplished with 6 months, and attorney required maintain repayment of all back taxes and establish fit to practice law.
 - Dissent: 6 months too lenient—should be 1 year suspension, attorney's income was substantial and would have allowed for payment of taxes, had been ordered by court part way through period to file delinquent returns

Iowa Supreme Court Attorney Disciplinary Bd. v. L.P., No. 16-0199 (Iowa 2016)

- In an estate matter, the attorney improperly communicated directly with represented parties, took probate fee prematurely, and entered into an unwritten loan agreement with her client without providing an opportunity for independent counsel or informed consent. In a custody matter, the attorney failed to deposit a flat fee into her trust account, failed to obtain

written informed consent for limited representation, and failed to respond to request for information from the client's new attorney. Although the individual violations were not serious, they indicated a "careless and casual approach" to the practice of law of a repetitive nature. The attorney's license was suspended for sixty days.

- o CIP/DIP: Concur on finding of violations, dissent as to sanction, not using objective criteria from *ABA Standards for Imposing Lawyer Sanctions* (1992).

VI. Conclusion

Please feel free to contact us with questions or comments on this outline or the presentation.

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