Conflicts of Interest – A Review of the Ethics Rules and Cases

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Clients do not arrive at our office door and announce they will cause an ethics question. We must identify the conflicts and respond in accordance with our duty under Iowa law. Sometimes it is difficult to determine whether a conflict exists. It is critical to stay informed of changes in the law in this area and have relationships with experienced attorneys who can serve as a sounding board for ethical dilemmas. (Recent cases are in bold.) These safeguards will protect our clients, the Courts, and the reputation of the Bar.

This presentation addresses the following questions:

1. What is at stake when attorneys do not properly apply the rules regarding conflicts of interest?
2. When does an attorney-client relationship exist and can this relationship be turned off and on?
3. What are the *general principles* provided in Iowa Rules of Professional Conduct 32:1.7?
4. What are the *twelve specific rules* contained in Iowa Rules of Professional Conduct 32:1.8?
5. What duties are owed to former clients found in Iowa Rules of Professional Conduct 32:1.9?
6. What is imputed disqualification under Iowa Rules of Professional Conduct 32:1.10?

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I. The consequences of violating the rules regarding conflicts of interest.

A breach of the rules of ethics in this area has a rippling impact. The Iowa Supreme Court has issued rulings that drive home what may be obvious.

A. For the client.

As professionals, we are called to a high level of concern for the client. The Supreme Court in *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Wagner*[1] took the opportunity to reinforce the impact of breaches of the rules in the area on the client:

> Although Wagner's dual representation may have resulted from poor judgment, his failure to reveal his financial interest in the transaction struck at the heart of the attorney-client relationship:
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> > Every client has the right to expect that his attorney is . . . not someone with a secret personal interest in the outcome of the client's case. Clients do not pay legal counsel for advice and representation which is or may be affected by counsel's own interests in the matter, and clients have a right to know not only whether an attorney has any interest in the subject matter of the representation, but also, if he has an interest, exactly what that interest is and how it may affect his judgment in their case.[2]

Practice pointer. If we apply the Golden Rule to this setting, the question becomes: Would we want an attorney who has a conflict of interest representing us or family members?

B. For the Court.

The Supreme Court in *State v. Vanover*[3] recognized the impact that a conflict of interest has on the Court:

> When a trial court encounters such conflicts and finds that they impair[ ] the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's

[1] 599 N.W.2d 721 (Iowa 1999).
[2] *Wagner* 599 N.W.2d at 730 (citation omitted).
[3] 559 N.W.2d 618 (Iowa 1997).

comprehension of the waiver.[4]

C. For the public and the Bar.

When an attorney violates prohibitions on conflicts of interests, the Court has rightly held that the damage extends well beyond the client and the trial court.[5] The reputation of the entire Bar suffers because of the actions of a few.

D. For the attorney.

The consequence for the attorney who violates the rules on conflicts of interest is subject to the full range of sanctions, depending on the gravity of the offense. For violations of rule 32:1.7, the sanctions have varied between a public reprimand and a two-year license suspension.[6]

II. When does an attorney-client relationship exist and can this relationship be "turned off and on"?

A. When does an attorney-client relationship exist?

This question was addressed in *Iowa Supreme Court Attorney Disciplinary Bd. v. Netti* (2011).[7] The attorney in this case settled a personal injury suit where there was a claim for reimbursement of medical subrogation by a hospital. Rather than pay the hospital from the settlement, the attorney provided the client his share and retained the attorney fees. The fee agreement with the client required the client to pay any subrogation claims from the recovery. With the subrogation claims unpaid, the hospital sued the insurance company, and the insurance company filed a third-party petition against the attorney and client. The attorney filed an appearance and answer for himself and the client. However, the client did not authorize this filing. In response to an assertion of a

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[4] *Id.* at 627 (Iowa 1997).

[5] *See Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Winkel*, 541 N.W.2d 862, 864 (Iowa 1995) ("We view a violation of this ethical rule as extremely serious. Few infractions can be calculated to so enrage the public, or to undermine its confidence in the profession, than for a lawyer to use his or her considerable influence to acquire personal ownership of the property of a trusting client.").

[6] *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Stoller*, 879 N.W.2d 199 (Iowa 2016).

[7] 797 N.W.2d 591 (Iowa 2011).

conflict of interest by opposing counsel, the attorney moved to withdraw the answer, filed a new answer only for himself, and cross-claimed against the client for indemnification. The Disciplinary Board analyzed whether there was a conflict of interest when the attorney filed the appearance and answer.

> The Court stated that an attorney-client relationship exists when:
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> (1) a person sought advice or assistance from an attorney, (2) the advice of assistance sought pertained to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agreed to give or actually gave the desired advice or assistance.[8]

In addition, the filing of an appearance creates a presumption of an attorney-client relationship, but this may be rebutted where a client does not assent to the filing of the appearance.[9] Although the Court found that there was no attorney-client relationship at the time the attorney filed the appearance and answer (because of the lack of client authorization), a conflict still existed because the client was then considered a prior client at the relevant point in time. The conflict violated rule 32:1.7(a)(2).

Practice pointer. Be careful of the grocery store parking lot conversation where you are asked a "quick question." Have you inadvertently created an attorney-client relationship?

B. Can the attorney-client relationship be turned off and on such that a conflict of interest can be avoided?

The Supreme Court addressed this in *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Fay*.[10] In this case, an attorney (Fay) entered into a lease of a family property with his client (Havlik). The Court analyzed the client's reliance on the attorney as follows:

> DR 5-104(A) applies only to transactions with clients. Yet, a client under the rule means not only an existing attorney-client relationship, but also a person

[8] *Id.* at 599 (citations omitted); *NuStar Farms, LLC v. Zylstra*, 880 N.W.2d 478, 483 (Iowa 2016) (holding "a lawyer's representation of a client extends until the time period for motions or appeals expires in a civil action").
[9] *Id.*(citation omitted) (also analyzing when representation ends).
[10] 619 N.W.2d 321 (Iowa 2000).

> "who regularly rel[ies] on an attorney for legal services . . . on an occasional and on-going basis." Thus, *an attorney-client relationship cannot be turned off and on to avoid the rule as Fay seems to suggest*. Havlik had relied on Fay for legal services on an on-going basis in the past and specifically consulted him about moving her business to a new location at the end of her existing business lease. Havlik was clearly a client under the rule at the time the lease was negotiated and executed.[11]

Although it would be convenient for the attorney to flip the switch, the attorney must treat the person as a client. It follows that where there is no attorney-client relationship with a party that the attorney wishes to conduct a transaction with (*e.g.*, a commercial lease), it would be wise for the attorney to memorialize that there is no attorney-client relationship.

III. The general principles provided in Iowa Rules of Professional Conduct 32:1.7.

The adoption of the Iowa Rules of Professional Conduct (effective July 1, 2005), ushered in a major change in the way attorneys approach conflicts of interest. The new Rules replaced the Iowa Code of Professional Responsibility (followed between 1971 and 2005). However, before examining the specific provisions governing conflicts of interest, it is helpful to remind ourselves of the Preamble to the Rules. Paragraph 14 from the Preamble and Scope of the Rules states:

> The Iowa Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.[12]

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[11] *Id*. at 325 (emphasis added) (citation omitted).
[12] Iowa Rules of Professional Conduct 32: Preamble and Scope.

Practice pointer. How does one obtain professional judgment? Newer lawyers are going to need help navigating questions requiring the use of professional judgment. Thus, if you have practiced less than five years, find experienced lawyers who can help you with ethics questions. If you have practiced for more than twenty years, be intentional to invite newer attorneys (particularly sole practitioners) out to lunch and offer to be a sounding board. Build community among your local bar. If needed, take the imitative to jump start county bar meetings.

A. General principles. Iowa Rules of Professional Conduct 32:1.7. Conflict of interests: current clients.

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

(1) the representation of one client will be directly adverse to another client; or

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

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

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

B. Important cases and ethics opinions.

1. *A client waiver does not end the analysis*. *State v. Vanover*, 559 N.W.2d 618 (Iowa 1997). A criminal defense attorney personally interviewed a co-defendant and put himself in the position of a witness and in the process disqualified himself to represent his client even though the client waived the conflict and even after the co-defendant's case was resolved.[13] The Court stated:

> Although the accused may waive counsel's conflict of interest, the waiver does not mean that the presumption in favor of the accused's counsel of choice is irrebuttable or that further judicial enquiry ends with the waiver. The trial court may reject the accused's waiver of a conflict-free attorney when the State shows the attorney has an actual conflict of interest or a serious potential for conflict of interest.[14]

Note that this case was decided prior to the adoption of the new Rules and the significant risk analysis.

Vanover was revisited in *State v. Smith*.[15] In *Smith*, a criminal defense attorney (Montgomery) learned that one of the approximately 100 witnesses named by the State

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[13] *See* Ethics Opinion 09-03 (The Iowa State Bar Association Committee on Ethics and Practice Guidelines) dated August 25, 2009. The Committee observed that the "necessary witness" analysis required under Rule 32.3.7 requires "a qualitative analysis which is by its very nature subjective and greatly influenced by the motive of the individual performing the analysis." *Id.* at 5. Thus, the best practice is to avoid representation where the lawyer's or law firm's conduct in the underlying transaction is offered as evidence. *Id.* at 6.

[14] *State v. Vanover*, 559 N.W.2d 618, 626-27 (Iowa 1997).

[15] 761 N.W.2d 63 (Iowa 2009). *See State v. McKinley*, 860 N.W.2d 874, 882 (Iowa 2015) (Waterman and Mansfield, JJ, concurring) (the District Court Judge disqualifying all the attorneys employed at the public defender's office from serving as defense counsel based on the fact that public defenders had previously represented three of the state's witnesses on unrelated matters; however, the Supreme Court reversed, finding no risk of materially limiting the attorneys' representation of the defendant under rule 32:1.7). The concurrence in *McKinley* argues "We should follow the well-reasoned decisions of other courts applying equivalent rules of professional conduct that decline to automatically impute conflicts of interest of an individual public to defender to others in the office. Specifically, we should hold that . . . public defenders are 'government lawyers' within the meaning of Iowa Rule of Professional Conduct 32:1.11." *Id*. at 887. *See also State v. Iowa District Court for Dubuque County*, 870 N.W.2d (Iowa 2015) (a case of first impression, holding that a defendant's threats to a prosecutor alone did not create a disqualifying personal interest for the prosecutor individually and the entire county attorney's office). *See also* ***State v. Mulatillo***, 907 N.W.2d 511 (Iowa 2018) (holding that

was represented in a different criminal case by another attorney in his firm. The Court found that a number of factors weighed against an actual conflict of interest: the presence of non-conflicted co-counsel, the defendant's voluntary waiver on the record, Montgomery's careful avoidance of any information regarding the witness in question, and the purely speculative nature of the State's claim that Montgomery's representation will adversely affect his client.[16] This case serves as a valuable guide when facing a possible conflict.

In ***Iowa Supreme Court Attorney Disciplinary Bd. v. Willey*** (2021), the Court reinforced that "Attorneys who engage in business dealings with their clients create an inherent conflict of interest under our rules of professional conduct. Such conflicts are not prohibited – as long as the attorney first meets strict disclosure requirements and provides adequate information so their clients can make an informed consent to the conflict."[17] In *Willey*, the attorney entered into a complex business matter with his client. Although Willey provided a three-page consent and waiver, the analysis was not done.

> Here, the Midwest waiver violated rule 32:1.8(a) in a number of ways. *First, it misrepresented Willey's interest in Catalyst as an "anticipate[d]" and "future" interest rather than identifying his actual 50% ownership interest through Orion's Pride in violation of subparagraph (3) requiring written disclosure of the attorney's "role in the transaction."* Iowa R. Prof'l Conduct 32:1.8(a)(3); *see also Iowa Sup. Ct. Att'y Disciplinary Bd. v. Wright*, 840 N.W.2d 295, 301–02 (Iowa 2013) (holding attorney "failed to obtain the clients' written informed consent to the proposition that he held a contingent fee interest in Madison's inheritance claim"). *Willey also failed to disclose that Wild had significant financial liabilities, was judgment proof, and had failed to enter any successful ventures in the time they worked together, information that made his personal guaranty likely worthless.* The purpose for the loan—to fund Catalyst's investment in a risky and unsecured foreign trading platform—was important information about the nature of the proposed loan. *Each of these pieces of information were omitted in violation of rule 32:1.8(a)(1), requiring the transaction and terms on which the attorney obtained his interest in the company to be "fair and reasonable to the*

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there was insufficient evidence that the defendant's attorney had a conflict of interest where he had previously represented the confidential informant in the case).

[16] *Id.* at 72. Note that although the State was aware of the possible conflict from early in the case, the State waited for a year (only two weeks before trial was to begin) before seeking to disqualify Montgomery.

[17] *Iowa Supreme Court Attorney Disciplinary Bd. v. Willey*, 965 NW2d 599, 602 (Iowa 2021).

client" and "fully disclosed and transmitted in writing." Iowa R. Prof'l Conduct 32:1.8(a)(1); *see also Iowa Sup. Ct. Att'y Disciplinary Bd. v. Lynch*, 901 N.W.2d 501, 507 (Iowa 2017) (holding loan terms were not fair and reasonable where the interest rates were low for the unsecured risk involved).

Finally, the consent and waiver failed to provide the essential terms of the transaction required to ensure informed consent as required by rule 32:1.8(a)(3). Here, we reject Willey's suggestion that his written disclosure adequately summarized his more detailed oral conversations—conversations he refused to disclose under the attorney–client privilege. " 'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Iowa R. Prof'l Conduct 32:1.0(e). Comment six further explains:

> Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and *611 disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives.

Id. r. 32:1.0(e) cmt. [6]. We recognize informed consent contemplates verbal discussions with the client, and not all details can be reduced to writing. *See, e.g.*, *id.* r. 32:1.7 cmt. [20] ("The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing."). But in the context of rule 32:1.8, an attorney engaging in a business transaction with a client must first obtain "informed consent, in a writing signed by the client, to the essential terms of the transaction." *Id.* r. 32:1.8(a)(3). Thus, *the writing must include, at a minimum, the essential terms to which the client is making an informed consent. See also In re Kahn*, 306 Ga. 189, 829 S.E.2d 344, 346 (2019) (per curiam) (characterizing Georgia's identical version of rule 32:1.8(a) as requiring "client's written consent to the essential terms of the transactions"); *In re Conduct of Spencer*, 355 Or. 679, 330 P.3d 538, 541 (2014) (en banc) (per curiam) (holding Oregon's identical version of rule 32:1.8(a) requires client to "consent[ ] in a signed writing to the transaction's essential terms and the role that the lawyer will play in the transaction").

In the context of this loan transaction between an attorney and his client, the essential terms include material details about the purpose and security for the loan known to Willey but withheld from Midwest. *See Lynch*, 901 N.W.2d at 507

(concluding attorney who "did not convey the full extent of his financial distress to the Bells" in a loan transaction with his client violated rule 32:1.8(a)'s informed consent requirements). Willey did not disclose to Midwest that its funds would be used in an unsecured and risky foreign transaction in which Catalyst had no experience. Nor did Willey disclose that Catalyst itself had no other funds, or source of funds, to repay Midwest in the event its venture with Ramis did not pan out. Essential terms of the secured loan also include Willey's contemporaneous knowledge that Wild's personal guarantee and the pledged interest in The IDEA Group would be essentially valueless to Midwest in the event Ramis failed to repay Catalyst and Catalyst failed to repay Midwest. The consent and waiver was woefully deficient in meeting Willey's disclosure requirements, and we agree with the commission that he violated rule 32:1.8(a).[18]

Practice pointer. Lawyers who believe they need to enter into business transactions with clients need to read *Willey* carefully. Is the benefit of the transaction worth the risk of an ethics violation?

2. *"Directly adverse" analysis under rule 32:1.7(a)(1). NuStar Farms, LLC v. Zylstra*, 880 N.W.2d 478 (Iowa 2016).

a. Facts.

1) 2002 to 2014. Attorney Larry Stoller represents Robert and Marcia Zylstra in a variety of legal matters "including financial issues, business acquisitions, and real estate transactions."[19]

2) January 2, 2007. Robert Zylstra meets with Stoller to discuss estate planning and proposed manure easement agreements with NuStar Farms, LLC (NuStar). There is a dispute regarding the extent of the advice. Stoller advises Robert to seek other counsel to review the manure easement agreements.[20]

3) December 2013. Stoller represents Zylstras in a small claims matter. The case was submitted on February 10, 2014 and the ruling was issued May 30, 2014.[21]

4) Early May 2014. Stoller begins to represent NuStar.[22]

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[18] *Id*. at 610-11 (emphasis added).
[19] *NuStar Farms, LLC*, 880 N.W.2d at 480.
[20] *Id*.
[21] *Id*. at 481.

5) May 13, 2014. Stoller sends an e-mail on behalf of NuStar to Zylstras which said: "I must now put you on formal notice that if the signed deed is not received by my office by the close of business on Wednesday, May 14, 2014, that I will need to pursue the appropriate remedies for specific performance and damages on behalf of NuStar." He also stated that he would no longer be representing Zylstras.[23]

6) May 15, 2014. New attorney for Zylstras requests that Stoller cease further representation of NuStar as to Zylstras.[24]

7) June 5, 2014. Stoller writes to Zylstras regarding the judge's ruling in the small claims case and informs them that the decision is appealable and that he would be wiling to file an appeal on their behalf.[25]

8) July 9, 2014. Stoller files a petition on behalf of NuStar against Zylstras regarding a deed that Zylstras had not been tendered and alleging failure to abide by the manure easement agreements.[26]

9) July 2014. Zylstras file a motion seeking to disqualify Stoller in his representation of NuStar based on a conflict of interest.[27]

10) October 14, 2014. The district court denies the motion. Zylstras file an application for interlocutory appeal seeking review of the denial of their motion to disqualify Stoller.[28]

b. *Analysis under rule 32:1.7(a)(1)*.

1) **When did Stoller cease to represent Zylstras and when did he begin to represent NuStar?** The Court found that the relationship between Stoller and the Zylstras ended May 13, 2014 with the e-mail. The Court also found that the relationship between Stoller and NuStar began in early May 2014.[29]

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[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*. at 481-82.
[28] *Id*. at 482.
[29] *Id*. at 483-84.

2) **Whether Stoller's representation of NuStar involved a conflict of interest that violates rule 32:1.7(a)(1).** Iowa R. Prof'l Conduct 32:1.7 comment 6 states:

> Loyalty to a current client prohibits undertaking representations directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

When Stoller sent the e-mail on May 13, he had already formed the intent to pursue legal action against Zylstras unless they complied with the demand. Stoller did not obtain written consent from the Zylstras to permit him to represent NuStar against them. Thus, Stoller violated rule 32:1.7(a)(1). The Court reversed the district court.

The Iowa Supreme Court applied *NuStar Farms, LLC v. Zylstra* in ***Liquor Bike, LLC v. Iowa District Court for Polk County***.[30] In *Liquor Bike*, the District Court found that the Brick Gentry firm found itself "on both sides of the fence" in a boundary dispute.[31] However, the Iowa Supreme Court sustained Liquor Bike's writ of certiorari because there was no "direct adversity between existing clients" (noting that an LLC is an entity distinct from its members[32]) and under a significant risk analysis under *Bottoms* (discussed below).[33] "Motions to disqualify opposing counsel are thus disfavored and 'should be subjected to particularly strict scrutiny.'"[34] Brick Gentry was not disqualified.

3. *"Significant risk" analysis under rule 32:1.7(a)(2)*. *Bottoms v. Stapleton*, 706 N.W.2d 411 (Iowa 2005). In *Bottoms*, The Court interpreted the new rules and found that an attorney's representation of a limited liability company and its majority owner was permissible because there was not yet a significant risk of material limitation to the attorney's representation of one client.[35] The Court recites the standard as follows:

The question to be answered under rule 32:1.7(a)(2) is whether there is "a

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[30] 959 N.W.2d 693 (Iowa 2021).
[31] *Id*. at 696.
[32] Iowa Code § 489.104(1).
[33] *Bottoms v. Stapleton*, 706 N.W.2d 411, 417 (Iowa 2005) ("[I]f there is a significant risk that representation of one client will materially limit the representation of another client, a conflict of interest actually exists.).
[34] *Liquor Bike*, 959 N.W.2d at 700 (citations omitted).
[35] *See* Iowa Rules of Professional Conduct 32:13 Organization as client.

> significant risk" that counsel's representation of one client "will be materially limited by [his or her] responsibilities to another client." Although related to the old "appearance of impropriety" test, the modern approach focuses on the degree of risk that a lawyer will be unable to fulfill his or her duties to both clients.
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> A comment to rule 32:1.7 sheds light on when a conflict of interest will materially limit an attorney in the performance of the attorney's responsibilities:
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> > [A] conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities.... The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.
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> Iowa R. of Prof'l Conduct 32:1.7 cmt. [8]; *see also id.* r. 32:1.7 cmt. [29] ("[R]epresentation of multiple clients is improper when it is unlikely that impartiality can be maintained."). The representation of codefendants will give rise to a conflict in situations involving a "substantial discrepancy in the [represented] parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." *Id.* r. 32:1.7 cmt. [23].[36]

Thus, under the new rules, the analysis is for an *actual* conflict of interest rather than a mere *potential* conflict.[37] However, the Court held open the possibility that a conflict could arise in the future.

In *Iowa Supreme Court Attorney Disciplinary Bd. v. Willey* (2017), in addressing whether an attorney who, representing a client who loaned money to another client, violated rule 32:1.7(a)(2), stated:

> The key questions a lawyer must ask are whether it is likely a difference in interests will occur between the clients and, if so, whether that difference in

[36] *Bottoms v. Stapleton*, 706 N.W.2d 411, 416-17 (Iowa 2005) (citations omitted).

[37] *See* Ethics Opinion 99-05 (Iowa Supreme Ct. Bd. of Professional Ethics and Conduct) dated Dec. 9, 1999 (permitting an attorney to represent a bank and its customers in unrelated matters, although not the same or potentially related matters). Note that this opinion was issued prior to the changes in 2005.

> interests will interfere with the lawyer's ability to offer independent, professional judgment to each client.[38]

The Court held that there was a concurrent conflict of interests in this matter and that because the attorney did not obtain "informed consent, confirmed in writing" from both clients as required by rule 32:1.7(b)(4), he failed to cure the conflict and therefore violated both rule 32:1.7(a)(2) and 32:1.7(b)(4).

The adoption of the Iowa Rules of Professional Conduct represented a shift from a paternalistic, bright-line approach to a paradigm that presents greater respect for the autonomy of a party to waive conflicts of interest.[39] The new rule, with its greater flexibility, is proving challenging for attorneys to properly apply.

4. *"Material limitation" analysis*. In Ethics Opinion 09-03 (dated August 25, 2009), the Iowa State Bar Association Committee on Ethics and Practice Guidelines considered whether an attorney or law firm has a material limitation under rule 32:1.7(a)(2) where the lawyer or firm first advises on a transaction and then is called to represent the client in litigation involving the same matter. The risk identified by the Committee is that "a lawyer or law firm whose work product is attacked may easily become subjective and self-defensive at the expense of providing objective and independent judgment to the client."[40] The Committee posed the following rhetorical question for the attorney or law firm to ask:

> If, at the conclusion of the subsequent litigation, the lawyer's or law firm's work product or performance in the underlying matter is found to be deficient, have they by undertaking the representation needlessly exposed themselves to a legal claim or ethics complaint alleging that they have failed to provide independent professional judgment and conflict-free representation or that their actions on behalf of the client were merely an attempt to gloss over or cover up their own mistakes.[41]

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[38] *Iowa Supreme Court Attorney Disciplinary Bd. v. Willey*, 889 N.W.2d 647, 653-54 (Iowa 2017) (quoting Iowa R. Prof'l Conduct 32:1.7 cmt. 8).
[39] *See generally* Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407 (1998) (analyzing the California and ABA-proposed alternatives to waiving conflicts of interest among concurrent clients).
[40] Ethics Opinion 09-03 at 3.
[41] *Id.*

If the attorney or law firm believes that they are not materially limited, there must still be an analysis of whether the lawyer will be barred from serving as an advocate because of the need to serve as a witness.

Practice pointer. An attorney is required to adopt procedures appropriate for the firm to identify conflicts.[42] This could be a formal software package or a more informal process of reviewing client records to determine whether there has been prior representation.

IV. The twelve specific rules contained in Iowa Rules of Professional Conduct 32:1.8.

A. Iowa Rules of Professional Conduct 32:1.8. Conflict of interests: current clients: specific rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.[43]

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[42] Iowa Rules of Professional Conduct 32:1.7 cmt. [3].

[43] *See* ***Iowa Supreme Court Attorney Disciplinary Bd. v. Pederson***, 887 N.W.2d 387 (Iowa 2016) (finding that an attorney violated rule 32:1.8(a) by entering into a loan agreement with the former executor of an estate after the attorney was removed as the attorney for the estate); *See* ***Iowa Supreme Court Attorney Disciplinary Bd. v. Willey***, 965 N.W.2d 599 (Iowa 2021) (holding that an attorney who engaged in a business matter with a client violated Rule 32:1.8(a) where, although there as a waiver, it failed to provide critical information necessary for the client to provide informed consent); ***Iowa Supreme Court Attorney Disciplinary Bd. v. Hamer***, 915 N.W.2d 302 (Iowa 2018) (failure to obtain informed consent in complex and large transactions).

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, sibling, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;[44] and

(3) information relating to representation of a client is protected as required by rule 32:1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include

[44] *See* Ethics Opinion 08-01 (Iowa State Bar Association Committee on Ethics and Practice Guidelines) dated March 3, 2008 (restating a lawyer's duty to advise the client of the risks of hypothecating the client's claim (*i.e.,* assigning "any future recovery that a client may have to a third party lender as a guarantying present payment to the client") and to guard against ceding control of the case to the lender).

the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the client-lawyer relationship. Even in these provisionally exempt relationships, the lawyer should strictly scrutinize the lawyer's behavior for any conflicts of interest to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the lawyer should immediately withdraw from the legal representation.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(l) A lawyer related to another lawyer shall not represent a client whose interests are directly adverse to a person whom the lawyer knows is represented by the related lawyer except upon the client's informed consent, confirmed in a writing signed by the client. Even if the clients' interests do not appear to be directly adverse, the lawyer should not undertake the representation of a client if there is a significant risk that the related lawyer's involvement will interfere with the lawyer's loyalty and exercise of independent judgment, or will create a significant risk that client confidences will be revealed. For purposes of this paragraph, "related lawyer" includes a parent, child, sibling, spouse, cohabiting partner, or lawyer related in any other familial or romantic capacity.

B. Important cases.

1. *Misuse of a trust account*. *Comm. on Professional Ethics and Conduct of the Iowa State Bar Ass'n. v. Oehler*, 350 N.W.2d 195 (Iowa 1984). An attorney made numerous loans from his trust account from a trust where he served as trustee and attorney. (Ironically, the trust had the goal of preparing law students in the practical aspects of the practice of law.) The Court found "[i]t is apparent respondent treated the trust and foundation assets as a ready source for funding his own and his clients' purposes. He engaged in wholesale and outrageous conflicts of interest."[45]

2. *No circumvention of rule regarding wills*. *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Winkel*, 541 N.W.2d 862 (Iowa 1995). A long-time client wanted to leave a bequest for his attorney and office staff. The attorney refused, but eventually consented to having his staff draft the will. The client died and, even though the attorney disclaimed the bequest, the Court reprimanded the attorney. In responding to the attorney's explanations, the Court held:

> It is no defense that the idea for the bequest originates with the client or that the bequest was not actually enjoyed. It is certainly no answer that the lawyer exercised no undue influence in precipitating such a bequest. Even a strong desire by the client to bequeath property to a lawyer will not justify the lawyer in drafting such a will. Lawyers who would enjoy the right to inherit property from persons disposed to favor them must take extreme pains to distance themselves from any professional activity incident to establishing the bequest. All professional advice and legal work in such an undertaking must come from an independent lawyer of the client's, not the initial lawyer's, choosing.[46]

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[45] *Comm. on Professional Ethics and Conduct of the Iowa State Bar Ass'n. v. Oehler*, 350 N.W.2d 195, 198 (Iowa 1984).

[46] *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Winkel*, 541 N.W.2d 862, 864 (Iowa 1995) (citations omitted). *See also Iowa Supreme Court Attorney Disciplinary Bd. v. Murphy*, 800 N.W.2d (Iowa 2011). In *Murphy*, the attorney engaged in a pattern of self-dealing and misrepresentation to the Court while serving as the conservator for an elderly client. The attorney also participated in the sale of the ward's home where another attorney in the firm represented the buyer; however, the seller and buyer did not sign a waiver of the conflict of interests.

This case is followed by ***Iowa Supreme Court Attorney Disciplinary Bd. v. Ranniger***[47] where, in addition to purchasing assets from his client (Lipton) without obtaining informed written consent from him, Ranniger drafted a will for Lipton to benefit Ranniger's son, who is not related to Lipton. "After learning about the contents of the Will, Lipton's family and friends were concerned that the lawyer's son was inheriting almost all of Lipton's property."[48] The Court was unpersuaded that the close friendship between Ranniger and Lipton qualified as familial as required by the rule and concluded that Ranniger violated Rule 32:1.8(c).[49]

Practice pointer. Even though the rules provide latitude in drafting estate planning documents for your family, be very cautious. What can go wrong, will go wrong. It may be better to review the work of another attorney.

3. *No charitable gifts to clients*. *Comm. on Professional Ethics and Conduct of the Iowa State Bar Ass'n. v. Bitter*, 279 N.W.2d 521 (Iowa 1979). When an attorney assisted clients during pending litigation who were in dire financial difficulty with no-interest loans, the Court made no exception to the bar against advancing money for purposes other than the cost of litigation.

Practice pointer. The key is to protect your **objective detachment** in representing clients. Becoming a source of financial assistance will compromise this objective detachment.

4. *Failure to disclose and the pitfalls of dual representation*. *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Wagner*, 599 N.W.2d 721 (Iowa 1999). An attorney represented the seller of a restaurant and a couple of attempted buyers before buying the restaurant with his wife. The attorney failed to disclose the commission he was to be paid and did not provide a disclosure beyond the mere recital of

[47] 981 N.W.2d 9 (Iowa 2022).
[48] *Id*. at 14.
[49] *Id*. at 16-18.

there being a conflict. The Court recited the concerns of representing the buyer and seller:

> The process by which a buyer and seller of property transact their business is fraught with conflicts of interests. Indeed, a lawyer's simultaneous representation of a buyer and a seller in the same transaction is a paradigm of a conflict of interest. Beginning with such basic elements as determining the price and describing the property to be sold, what one party gets the other must concede. Terms of payment, security for unpaid balances, warranties of quality and of title, date of closing and risk of loss in the interim, tax consequences, and a host of other details should be addressed by each party or the party's adviser in a well-thought-out transaction. When the transaction is a large one-such as the purchase and sale of a residence, commercial property, or a business – the transaction typically becomes further complicated because the additional interests of banks, brokers, tenants, and title insurance companies may intrude.[50]

This case serves as a clear warning of the pitfalls of dual representation.

With respect to the manner of full disclosure, the Court in *Wagner* made it clear that more is required than simply reciting that the attorney is representing both buyer and seller:

> In a dual representation situation, it is not enough for a lawyer simply to inform the client that the lawyer is representing both sides. Full disclosure under DR 5-105(D) requires the attorney not only to inform the prospective client of the attorney's relationship with the seller, but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer obtain independent counsel.
> . . . .
>
> Such a disclosure is crucial in a large commercial transaction as the one here because as one court put it:

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[50] *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Wagner*, 599 N.W.2d 721, 726-27 (Iowa 1999) (citations omitted). *See also Shivvers v. Hertz Farm Management, Inc.,* 595 N.W.2d 476 (Iowa 1999) (holding that a seller's attorney cannot owe a duty to the purchaser without encroaching on the essential obligations of undivided loyalty); *Iowa Supreme Ct. Att'y. Disciplinary Bd. v. Johnston*, 732 N.W.2d 448 (Iowa 2007) (holding an attorney had a conflict of interest where representing two different clients with competing interests in the redemption of property, a portion of which was deeded to the attorney's apartment operation, without obtaining client consent after full disclosure); *Iowa Supreme Ct. Att'y. Disciplinary Bd. v. Clauss*, 711 N.W.2d 1 (Iowa 2007) (waiver without full disclosure of potential pitfalls that might arise); *Iowa Supreme Ct. Att'y. Disciplinary Bd. v. Kaiser*, 736 N.W.2d 544 (Iowa 2007) (attorney sanctioned for entering into business venture without required disclosure to client although there was no harm to the client).

> A client cannot foresee and cannot be expected to foresee the great variety of potential areas of disagreement that may arise in a real estate transaction of this sort. The attorney is or should be familiar with at least the more common of these and they should be stated and laid before the client at some length and with considerable specificity.

A board opinion on multiple representation echoes these holdings:

> [A full disclosure] requires a detailed explanation to the client of all possible areas where the interest of one client may differ from that of the other. The burden is upon the lawyer to raise all possibilities. A simple recitation of the applicable law is inadequate. An explanation of the applicable law to every possible factual situation is essential.[51]

5. *What constitutes full disclosure. Iowa Supreme Court Att'y. Disciplinary Bd. v. Wintroub*, 745 N.W.2d 469 (Iowa 2008). An attorney engaged in business transactions with his client without full and fair disclosure. The Court provides the following guidance on full disclosure:

> We have further found that full disclosure means more than simply disclosing the material terms of a transaction. Full disclosure means the use of active diligence on the part of the attorney to "fully disclose every relevant fact and circumstance which the client should know to make an intelligent decision concerning the wisdom of entering the agreement." Further, the attorney must give the same kind of legal advice that the client would have received if the transaction involved a stranger and not the attorney. More recently, we emphasized that lawyers engaged in business transactions with clients involving conflicting interests " 'have a duty to explain carefully, clearly and cogently why independent legal advice is required.' "[52]

Later in the decision, the Court reiterated that "the safest and best course for an attorney is to decline to personally participate in business transactions where the attorney and the client have differing interests. The high standard expected in these situations is difficult to meet."[53]

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[51] *Wagner*, 599 N.W.2d at 728-29 (citations omitted). *See also Comm. on Professional Ethics and Conduct of the Iowa State Bar Ass'n. v. Qualley*, 1992 N.W.2d 327 (Iowa 1992) (no informed consent).

[52] *Iowa Supreme Court Att'y. Disciplinary Bd. v. Wintroub*, 745 N.W.2d 469, 474 (Iowa 2008) (citations omitted).

[53] *Id*. at 476 (citation omitted).

Practice pointer. Be sure to consider whether your client is a lender or the buyer when examining an abstract.[54] There *can* be different issues that influence title examination. For example, if you know the buyer has particular intentions for the property, this would create a duty to determine whether restrictive covenants precluded this activity. Such a restrictive covenant may be irrelevant for a lender's goal of a first-position mortgage, but of great importance to the buyer.[55]

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

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

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[54] *See* Ethics Opinion 01-07 (Iowa Supreme Ct. Bd. of Professional Ethics and Conduct) dated Mar. 7, 2002 (permitting an attorney to represent the seller in the sale of residential real estate and prepare the abstract).

[55] *See generally Bazal v. Rhines*, 600 N.W.2d 327 (Iowa App. 1999) (holding that a real estate broker had a duty to disclose to buyers a restrictive covenant limiting the number of dogs a homeowner could keep).

> may rightfully expect that confidences vouchsafed to the lawyer will be solely used to advance the client's interest, and will not be used to advance the lawyer's interest, sexual or otherwise."[56]

Practice pointer. Protect yourself from accusations. Consider office policies which limit the manner in which you are alone with clients. Be sensitive to risks posed by emotionally vulnerable clients.

C. Hypotheticals.

1. Two long-time clients of yours come to see you at 4:00 P.M. on Christmas Eve. You are scrambling to get out of the office for a trip to your in-laws. Your spouse has given up calling you. The staff has been sent home. The clients want you to "just look over" the purchase agreement they have put together using a form they found on the internet for the sale of one client's house to the other client. They promise they have only a few "quick questions."

a. Aside from the trouble you are in with your spouse, any problems so far with the Iowa Rules of Professional Conduct?

b. You agree to "look over" the purchase agreement. You notice that the buyer has not reserved a contingency for financing. You ask why and the buyer explains that financing has been "pre-approved." Concerns?

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[56] *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Morrison*, 727 N.W.2d 115, 118 (Iowa 2007) (citations omitted); *Iowa Supreme Court Attorney Disciplinary Bd. v. Johnson*, 884 N.W.2d 772 (Iowa 2016) (sexual relations with a client resulting in a 30-day suspension); *Iowa Supreme Court Attorney Disciplinary Bd. v. Moothart*, 860 N.W.2d 598 (Iowa 2015) (sexual relations with multiple clients resulting in a 30-month suspension); ***Iowa Supreme Court Attorney Disciplinary Bd. v. Johnson***, 884 N.W.2d 772 (Iowa 2016) (sexual relations with client resulting in a 30-day suspension); ***Stender v. Blessum & Minnesota Lawyers Mut. Ins. Co.***, 897 N.W.2d 491 (Iowa 2017) (claims of legal malpractice, assault and battery where the attorney was involved in a sexual relationship with his client); ***Iowa Supreme Court Attorney Disciplinary Bd. v. Nine***, 920 N.W.2d 825 (Iowa 2018) (sexual relations with client resulting in a 30-day suspension); ***Iowa Supreme Court Attorney Disciplinary Bd. v. Jacobsma***, 920 N.W.2d 813 (Iowa 2018) (sexual relations with client resulting in a 30-day suspension; partners confronted Jacobsma regarding conduct).

c. The buyer has not reserved the right to have an inspection of the house. You ask why and the buyer says that 100 hours of home improvement shows have rendered this unnecessary. The house was built in 1911. Concerns?

d. You are personally aware the seller has made a number of improvements in the last 20 years to the house and has asked you to help complete the residential sellers' disclosure statement. Concerns?

2. You represent a lender in the closing of a residential transaction. It comes to your attention that the seller has agreed to pay some of the buyer's closing costs outside of the closing (*i.e.*, not on the settlement statement) because the amount the seller can pay on the settlement statement for the buyer's costs has already been reached. Concerns?

D. Motions for disqualification.

A motion for disqualification for conflict of interest can come from the attorney, opposing counsel, or *sua sponte* from the Court.[57]

Practice pointer. Inform other parties and the Court as soon as you become aware of a potential conflict. Where necessary, make a record of the potential conflict and the waiver of the other parties.

E. A proposed waiver for residential real estate transactions.

The Court has yet to render an opinion where the waiver of a conflict of interest was deemed adequate. Any waiver based on the current case law necessarily presumes that the Court has provided all the factors it will require in such a waiver. This presumption may be false. This form has **not** been approved by the Iowa Bar Association Forms Committee.

[57] *State v. Vanover*, 559 N.W.2d 618 (Iowa 1997).

Waiver of Conflict of Interest in a Residential Real Estate Transaction

IT IS AGREED between _____, Seller(s), whose address for purposes of this Waiver is _____, and _____, Buyer(s), whose address for purposes of this Waiver is _____, that Sellers and Buyers agree to waive the conflict of interest involving _____ (hereafter Attorney) and _____ (hereafter Law Firm).

Recitals

1. Sellers own real estate located at _____ (hereafter Real Estate).

2. Buyers desire to purchase Real Estate.

3. Sellers desire to sell Real Estate to Buyers.

4. Sellers and Buyers desire to have the above-referenced Attorney and Law Firm represent them in said transaction (hereafter Transaction).

5. The Parties have been informed that Attorney and Law Firm are governed by Iowa Rule of Professional Conduct 32 regarding conflicts of interest.

6. The Parties have been informed that under applicable rules of professional conduct, a law firm owes each of its clients a duty of loyalty, which would normally preclude any attorney within the firm from undertaking a representation adverse to any client of the firm without the affected client's informed consent. Other rules generally prohibit a firm from undertaking any representation involving an actual or potential conflict of interest without the informed consent of all affected parties. Such a situation exists whenever a firm represents two clients simultaneously in a situation in which their interests are actually or potentially adverse.

7. The conflict of interest, and the need for informed consent, exist no matter how cordial the business relationship between the two parties currently is or is anticipated to be, and no matter how non-controversial the transaction is anticipated to be.

8. The Parties have been informed of the following, potential risks to this dual representation:

   a. Compromise in negotiations on the pricing of the real estate.
   b. Compromise in negotiations on the terms of payment and security for unpaid balances.
   c. Compromise as to warranties as to the condition of the real estate.
   d. Compromise as to the quality of title of the real estate.

e. Compromise as to negotiations on the date of closing and the risk of loss in the interim.
f. Compromise as to the tax consequences of the transaction.
g. Compromise as to the Buyers' effort to secure financing.
h. Compromise as to relations with brokers, tenants, and title insurance providers.[58]
i. Transaction-specific risks: _____
_____
_____
_____
_____

9. **The Attorney does not recommend simultaneous representation of adverse parties, and has not recommended this simultaneous representation to the Parties**. **The Parties have been advised to seek separate representation. It has been recommended to each of the Parties that we seek the advice of independent counsel of our own choice regarding this written consent.**

10. The Attorney is undertaking this dual representation of the Parties with respect to this transaction only because the Parties have waived the conflict of interest.

11. If a dispute should arise in the future between the Parties concerning the Transaction or any other aspect of dealings between the Parties, the Attorney would have to withdraw, or would be disqualified, from representing either Party with regard to that dispute or any other relationship they might then have with each other. The Parties would then each have to retain separate counsel, resulting in additional expense and inconvenience that might not have been incurred had the Parties been separately represented from the outset.

Acknowledgement and Consent

Despite any potential or actual conflict of interest which may exist now or in the future, the Parties hereby consent to the Attorney's and Law Firm's simultaneous representation of both Sellers and Buyers with respect to the transaction described above. We further agree that the Law Firm may withdraw its representation of either client or both clients without prejudice should it determine that continued representation might violate applicable rules of professional conduct.

Signatures by Parties

[58] *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Wagner*, 599 N.W.2d 721, 726-27 (Iowa 1999) (citations omitted).

V. Duties owed to former clients found in Iowa Rules of Professional Conduct 32:1.9.

Iowa Rules of Professional Conduct 32:1.9. Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person, and

(2) about whom the lawyer had acquired information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Analysis under rule 32:1.9 from NuStar Farms v. Zylstra.

a. **What was the scope of Stoller's representation of the Zylstras regarding the manure easement agreements?** The Court found that Stoller's representation was not significant.[59]

b. **What was the nature of the lawsuit between Zylstra and NuStar Farms?** The Court found that at least the part of the lawsuit dealing with manure easement agreements related to the scope of Stoller's prior representation of Zylstras.[60]

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[59] *NuStar Farms v. Zylstra*, 880 N.W.2d 478, 485-86 (Iowa 2016). *See* ***Deere & Co. & John Deere Shared Services, Inc. v. Kinze Manufacturing, Inc. & Ag Leader Technology, Inc.,*** 2021 WL 5334212 (SD Iowa Oct 1, 2021) (applying the *NuStar* analysis).

c. **Did Zylstras <u>disclose a confidence</u> to Stoller in the prior representation which could be relevant in NuStar's action against them?** The Court found that Zylstras did not disclose anything in confidence about the manure easement agreements. Thus, the Court did not find a violation under rule 32:1.9(a).

Recently, in ***Matter of Guardianship of J.W.***,[61] the Court reviewed the decision of a juvenile court judge to dismiss an involuntary guardianship petition filed by Attorney Jacob van Cleaf on a pro se basis where he and his partner had represented the Mother in previous custody disputes.[62] The attorney for the Mother alleged violations under Rules 32.1.8 and 32.1.9 if van Cleaf was allowed to continue as petitioner in the case.

> Mother moved to dismiss based on her former attorney's attempt to remove her daughter from her custody and to have himself named as her daughter's guardian while armed with intimate details about her life and her role as a parent—details he learned through their former attorney–client relationship.[63]

The Court found that Rule 32.1.8 did not apply because there were no financial dealings;[64] however, after an extensive analysis of Rule 32.1.9, found that van Cleaf owed a duty to the Mother as a former client and the juvenile court did not abuse its discretion in dismissing the petition.[65]

> Despite van Cleaf's argument that he would not need to use any of Mother's confidential information to advance his current petition, rule 32:1.9(a) does not wait for an actual breach of confidences before disqualification is warranted; the *risk* of such a breach is the proper focus of the disqualification inquiry. *See* Iowa R. of Prof'l Conduct 32:1.9 cmt. [3]. We therefore conclude that the present matter is substantially related to van Cleaf's prior representations of Mother and that, at a minimum, he should have been disqualified from representing himself in this case. *Cf. Rosenthal Furs, Inc.*, 871 S.E.2d at 161 ("[T]he trial court did not abuse its discretion in disqualifying [the attorney] from appearing as an attorney for himself or [for another defendant] on the facts of this case.").[66]

The state or another private party should have filed the petition. Note that Justice Mansfield writes in dissent that, while van Cleaf could not represent himself in the action,

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[60] *Id*. at 486.
[61] 991 N.W.2d 143 (2023).
[62] *Id*. at 146.
[63] *Id*. at 158.
[64] *Id*. at 151.
[65] *Id*. at 152-59.
[66] *Id*. at 157.

it would still be possible for the case to go forward with another attorney representing him.[67]

VI. Imputed disqualification under Iowa Rules of Professional Conduct 32:1.10.

Iowa Rules of Professional Conduct 32:1.10. Imputation of conflicts of interest: general rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 32:1.7 or 32:1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 32:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 32:1.11.

No attorney who was found to have violated the rules regarding conflicts of interest ever set out to do so. Recognizing this should motivate us to study the rules and cases. I hope this material will help attorneys navigate this area of ethics.

[67] *Id*. at 158-59.