

DEVELOPMENTS IN PROFESSIONAL ETHICS

2024

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November 20, 2024

I. INTRODUCTION.

II. RECENT IOWA SUPREME COURT CASES.

A. *SK v. Obstetric & Gynecologic Associates of Iowa City and Coralville, P.C.*,
2024 WL 4714425 (November 8, 2024).

1. Medical malpractice case with \$97 million verdict.
2. Main issue on appeal: admission of insert in package to a vacuum used in the case.
3. Concurring opinion by Chief Justice Christiansen, joined by Justice Waterman.

* Rule 3.4 (e):

A lawyer shall not:

. . . in trial, allude to any matter that the lawyer does not reasonable believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused . . .

* found plaintiff’s lawyer violated the rule multiple times

** “I can guarantee there’s an absolute requirement that the records have to be truthful, and the records are”

- ** “They’ll say anything. They’ll literally come up her, they’ve got a script”
- ** calling defense “the most fantastical story that anybody could ever hear”
- ** “no one in real life . . . has ever accepted this nonsensical defense that’s been offered in this case.”
- ** “if you believe that, then I’ve got a bridge to sell you in Brooklyn”
- ** “the dollar is more important than admitting the standard of care”
- * an appeal for civility in the legal profession
- * “This case should serve as a reminder to attorneys that their “conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those tiers.” Iowa Ct. ER. 33.1(1).

B. *Iowa Supreme Court v. Fenton*, 24 WL 4399316 (Oct. 4, 2024).

1. Once again, an ethics case directly tied to mental health.
 - * Iowa Supreme Court has recognized the problem.
 - * Development of CLE’s related to wellness.
2. Lawyer suffered from depression and anxiety for many years.
3. In 2002 had disability suspension.
4. Ten years later, reinstated, but hires no support staff.
 - * Handled court appointed cases.
5. 2017 private admonition for failure to communicate with clients over several months.
6. Agreed to 60 day consent suspension in 2020 due to numerous blown deadlines.

7. Agreed to one year deferral agreement pursuant to Iowa Court Rule 35.14.
 - * Successful compliance with deferral agreement leads to dismissal or closing of investigation.
 - * Deferral agreement included completing an attorney self assessment, implementing self care practices, complying with mental health treatment, meet with appointed supervisor, provide written reports certifying compliance.
 - * Did not comply.
 - * Board revoked deferral agreement, proceeded to file a complaint based on ethical violations.
8. The Commission found violation of Rule 1.3 and Rule 1.4 in various matters .
 - * License suspended for ninety days.
9. Iowa Lawyers Assistance Program
 - * Call 800-243-1533.
 - * help@iowalap.org

C. *Iowa Attorney Disciplinary Board v Neff*, 5 N.W.2d 296 (Iowa 2024).

1. Once again, inappropriate sexually themed statements in the practice of law.
2. Alleged violation of Rule 32:8.4(g).

. . . it is professional misconduct for a lawyer to . . . engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer’s discretion and control to do so”.
3. Wapello County Attorney comments.
 - * Strong sexual language used toward defendants, judges, members of the public.

- * When staff member objected, lawyer repeated offensive ter.
7. No problem on facts finding violation, though not as severe as in some cases.
 8. Rejects First Amendment challenge to disciplinary rule, on its face and as applied.
 - * Preventing sexual harassment and discrimination “is not only a legitimate but compelling governmental interest.”
 - * “Some tension” with First Amendment.
 - * But here, more than expressive impact; objective harm beyond mere “adverse emotional impact” on audience , an “objective harm standard.”
 9. Objective standard of harm met.
 - * Employees complained about conduct.
 - * Use of derogatory terms repeated after objection.
 - * Two employees out of ten resigned, in part, due to comments and statements.
 9. Notes that Rule 32:8.4(g) may be violated even though does not give rise to liability in the employment context.
 10. Rejected facial challenge, many nonexpressive applications of rule.
 11. Sanction of public reprimand imposed:
 - * a county attorney;
 - * no prior discipline;
 - * different in degree from other cases with stronger sanction;
 - * Chief Justice Christiansen did not participate.

D. *Iowa Supreme Court Attorney Disciplinary Board v Mbanza*, 996 N.W.2d 711 (2023).

1. False information provided to immigration authorities on Form I-485.

- * False statement of marital status.
- * Failure to disclose domestic abuse assault, arrest, criminal charges, guilty plea, and deferred judgment.

2. Certified as true by attorney.
3. Attorney defends arguing that paralegal filled out form after interview with client.
4. Attorney representing himself pro se stonewalls disciplinary authorities, files frivolous motions.
5. Thirty day suspension powered by behavior in the disciplinary process.

E. *Iowa Supreme Court Disciplinary Board v. Ranniger*, 981 N.W.2d 9 (Iowa 2022).

1. Involves violation of Rule 32:1.8(a) by entering into improper business relationship with client and preparing a will that included a gift to lawyer's son contrary to Rule 32:1.8(c).
2. Friendship and attorney client relationship.
3. Bought forklift, semi truck, grain elevator, vacant land, pickup truck, and vehicle.
 - * Simply paid price asked for by client.
 - * No writing about desirability of seeking independent legal counsel regarding sales.
 - * No informed consent.
4. Defense of fairness insufficient.
5. Individualized sales, not standard commercial transactions.
6. Net of \$5,000 is a substantial gift.
7. Close friendship is not the same as family.

III. RECENT OPINIONS FROM THE AMERICAN BAR ASSOCIATION

A. Formal Opinion 510: Avoiding the Imputation of a Conflict of Interest When a Law Firm is Adverse to One of its Lawyer’s Prospective Clients (March 20, 2024).

1. Rule 1.18(2) establishes duties to a prospective client, “a person who consults with a lawyer about the possibility of forming a client lawyer relationship with respect to the matter.”

2. A prospective client is entitled to confidentiality similar to that afforded a former client.

* Under Rule 1.18(b) cannot use or reveal information of prospective client except as Rule 1.9 would permit, namely, through informed consent.

3. Disqualification rule is more relaxed under Rule 1.18(c).

* Disqualification in the same or related subject matter occurs only if lawyer received “disqualifying” information, information that could be significantly harmful to prospective client . . .”

4. Once lawyer is disqualified, question arises whether disqualification will be imputed to the firm.

5. Rule 1.18(d) provides two routes to escape imputation to firm

* Informed consent, confirmed in writing;

OR

* when the disqualified lawyer “took reasonable measures to avoid exposure to more disqualifying information than was” reasonably necessary to determine whether to represent the prospective client”; AND

* the disqualified lawyer is timely screened from any participation and receives no portion of fee; AND

* written notice is promptly given to prospective client.

6. What are reasonable measures under Rule 1.18(d) sufficient to avoid imputation of disqualification to other lawyers in firm?

- * Caution: failure to take reasonable measures to avoid disqualification in NOT misconduct – it only means that other lawyers in the firm are disqualified through imputation.
7. What information is reasonably necessary to representation?
- * Detailed inquiry seems desirable, but is it necessary to determine whether to represent the client?
 - ** Inquiry to determine that you can handle competently, Rule 1.1.
 - ** Inquiry to avoid violation meritless claims in violation of Rule 3.1 (frivolous claims).
 - ** Inquiry necessary to avoid crime fraud problems, Rules 1.12(d) and 1.16(a).
 - * But, a very detailed interview, might be good lawyering, but will likely exceed what is necessary to determine whether to engage in representation.
 - * Detailed interview may serve a legitimate purpose of determining whether to represent the client, but not be necessary to serve that purpose.
 - ** Free flowing report from client – tell me what is going on – likely problematic.
 - ** Contrast limitation of disclosure pending conflict check.
 - ** Good practice may include a warning from counsel to prospective clients that the lawyer has not yet agreed to take on matter and should limit information to that designed to determine whether to enter into attorney client relationships .
 - * Notion of timely screen.
 - ** Must be created once the lawyer is aware that there is a potential conflict.

B. Formal Opinion 511R: Confidentiality Obligations of Lawyers Posting to Listservs (May 8, 2024).

1. ABA speaks out on controversial issue of participation in list servs.
2. Basic structure of Rule 1.6.
 - * A lawyer shall not reveal “information” related to representation absent informed consent or the disclosure is impliedly authorized.
 - * Generally includes identity of the lawyers clients.
 - * Comment 4 – may use a hypothetical to discuss issues related to representation so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.
3. So, on list serve, should not disclose information that may be reasonably connected to an identifiable client.
4. If revealed information reasonably can lead to identity, informed consent required.

C. Formal Opinion 512: Generative Artificial Intelligence Tools (July 29, 2024).

1. Broad term AI:
 - * electronic discovery;
 - * drafting contracts;
 - * legal research;
 - * predictive litigation analysis.
2. Generative AI can create various types of new content in response to a user’s prompts and questions.
 - * Some GAI described as self learning.
 - * A rapidly moving target in the ethical world.
4. Competence.

* Rule 1.1 includes requirement that lawyers understand “the benefits and risks associated” with the technologies used to deliver legal services to clients.

* Need not be experts, but must have a reasonable understanding of the capacities and limitations of specific GAI technology.

- Risks include inaccurate output.
- Possibility of “hallucinations.”
- Need for independent review of outputs.

5. Confidentiality.

* Broad approach of Rule 1.6.

* Will inputting client information expose to disclosure.

** Self learning AI might be used by lawyers in briefs, share output with other clients, worm their way into other disclosures.

* Informed consent must be informed.

** Why lawyer is using AI?

** What are the risks?

** What are the alternatives?

** Watch for use of boiler plate, might not be sufficient.

** “As a baseline, all lawyers should read and understand the Terms of Use, privacy policy and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the

lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies“

6. Communication.

- * Rule 1.4(a)(2) provides that a lawyer shall “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”

- * Consultation with client about means if used, for instance, to evaluate potential litigation outcomes or to make jury selection.

- * Or where risk of breach of confidentiality

7. Meritorious Claims.

- * Rule 3.1 provides that a lawyer “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”

- * Rule 3.3 prohibits false statements of law and fact to a tribunal.

- * Generation of false authorities.

8. Supervisory Responsibilities.

- * Rule 5.1 and 5.3 address ethical duties of lawyers charged with managerial and supervisory responsibilities of lawyers.

- * Managerial lawyers must establish clear policies regarding the law firm’s permissible use of AI.

- * Must provide training and instruction on actual tools.

- * Duty to supervise if outsourcing non legal tasks to third parties using AI.

9. Fees.

- * Rule 1.5 requires fees be “reasonable.”

- * Rule 1.5(b) requires lawyer to communicate to client the basis on which the lawyer will charge for fees and expenses.

- * May be unreasonable to charge same flat fee in light of efficiencies of AI.

- * How to charge for inhouse services not a part of office overhead.

- * May not opt for new profit centers.

- D. Formal Opinion 513: Duty to Inquire Into and Assess the Facts and Circumstances of Each Representation (August 23, 2024).
1. Last year, the ABA has amended Model Rule 1.16 to provide:
“A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue representation.”
 2. Amendment arose out of concern for transactions involving money laundering and terrorist financing, but amended language sweeps broadly.
 3. Not adopted as yet in Iowa; but are mainly clarifying in nature.
 4. Comments emphasize risk based approach to proper inquiry; not a zero failure approach.
 5. When a lawyer has unresolved questions, must engage in additional inquiry that is reasonably likely to resolve issues.
 6. Hypothetical 1:
 - * An investor based outside the United States contacts an established real estate lawyer seeking representation regarding the proposed purchase of an office built in the lawyer’s city. The lawyer has not represented the investor previously but was referred to the lawyer by a well known real estate lawyer in another part of the same state who, before retiring, had represented the investor in several similar purchases.
 - * Inquiry might would likely start with:
 - ** identity of prospective client;
 - ** structure and place of business;
 - ** any beneficial interests involved beside prospective client’s
 - ** scope of requested legal services;
 - ** proposed source and nature of financing;

** will funds be deposited in lawyers trust account.

* Lawyer must understand that transaction involving real estate is more susceptible to money laundering than other transactions and is therefore associated with heightened risks.

* Good practice to verify identities through reliable, independent sources such as passport, driver's license, other government issued identification.

7. Ongoing duty to identify and resolve potential risks.

E. Formal Opinion 508: Ethics of Witness Preparation (August 5, 2023).

1. Natural tension: competent lawyer prepares a witness, but when does preparation cross the line into impermissible "coaching."
2. "Lawyers must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."
3. Of course cannot counsel false testimony, Rule 3.4(b), but can be indirect such as counseling a witness to "downplay" the number of times a lawyer and witness met to prepare for trial.
4. Rejects covert coaching such as "speaking objections."
5. Misconduct using technology: texting a witness, off camera assistance to a witness.
6. Possible systemic precautions include remote protocols and orders.

IV. ETHICAL ISSUES SURROUNDING MEDIATION

A. Iowa Rules of Professional Responsibility.

1. Governed by Rule 2.4.
 2. Most are client centered, do not apply to mediation.
 3. Notable requirement that lawyer serving as third party neutral shall inform unrepresented parties that the lawyer is not representing them, Rule 2.4.
 4. Nonclient centered rules do apply, such as Rule 8.4 c).
- B. Iowa Code Chapter 679C.
1. Confidentiality of mediation communications, Iowa Code Section 679C.108.
 2. Disclosure of conflicts of interest, Iowa Code Section 679C.109.
 3. Immunity of mediators, Iowa Code Section 679C.115.
- C. Iowa Supreme Court Rules: Standards of Conduct For Mediators
1. Iowa Supreme Court Rules Chapter 11.
 2. Standards generally emphasize self determination, maintenance of confidentiality, transparency of fees, actual and potential conflicts.

V. ETHICAL REGULATION IN THE UNITED STATES SUPREME COURT

- A. Statement of the Court Regarding Code of Conduct.
1. Published November 13, 2023.
 2. Five pages entitled “Code of Conduct for Justices of the Supreme Court of the United States.
 3. Five pages of commentary.
 4. Code of Conduct subscribed to by all Justices.
- B. Code of Conduct.
1. Patterned after ABA Code of Judicial Conduct.
 - * Canon 1: A Justice Should Uphold the Integrity and Independence of the Judiciary.

* Canon 2: A Justice Should Avoid Impropriety and the Appearance of Impropriety in All Activities.

* Canon 3: A Justice Should Perform The Duties of Office Fairly, Impartially, and Diligently.

* Canon 4: A Justice May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office.

2. Miscellaneous provisions

* “. . . a Justice is presumed impartial and has an obligation to sit unless disqualified”

* “. . . a Justice may assist nonprofit law-related, civil, charitable, educational, religious, or social organization in the planning of fundraising activities and may be listed as an officer, director, or trustee. Use of a Justice’s name, position in the organization, and judicial designation on an organizations letter head, including when used for fundraising or soliciting members, is permissible if comparable information and designations are listed for others .”

* “neither the filing of a brief amicus curiae nor the participation of counsel for amicus curia requires a Justice’s disqualification. . .”

* Disqualification not required for financial interest if the Justice of spouse or minor child divests the interests.

C. Enforcement.

1. Use of term “should” throughout documents.

2. No enforcement mechanism.

3. Determination of ethics issues up to individual justices.

4. No process for individual justice consideration.

D. Ongoing Examination.

1. Chief Justice has directed court officers to undertake an examination of best practices and consider appropriate amendments and revisions.

VI. SPECULATIONS: STARING AT THE CRYSTAL BALL.

- A. Continued discussion of lack of enforceable ethics regime for the United States Supreme Court.
- B. Continued effort to coordinate state and national courts with political movements.
- C. Continued pressure on access to justice issues across the country.
 - 1. US ranks 116th out of 142 countries in access to civil justice.
 - 2. Barriers to civil justice severely undermines citizen confidence in the court system and the rule of law.
 - 3. Continued innovation across the country, limited licensure, court house navigators, night court.
 - 4. Activities of Iowa Access to Justice Commission.
 - 5. Iowa People's Law Library.
 - * User friendly source of legal information.
 - * Information on abuse of older persons, consumer law, family law, guardianship, & conservatorships, housing law, insurance law, life planning, public benefits, veterans law, work law.

VI. CONCLUSION.