

1
2 **RULE 32:1.11: SPECIAL CONFLICTS OF INTEREST**
3 **FOR FORMER AND CURRENT**
4 **GOVERNMENT OFFICERS AND EMPLOYEES**

5 (a) Except as law may otherwise expressly permit, a
6 lawyer who has formerly served as a public officer or
7 employee of the government:

8 (1) is subject to rule 32:1.9(c); and

9 (2) shall not otherwise represent a client in
10 connection with a matter in which the lawyer
11 participated personally and substantially as a
12 public officer or employee, unless the appropriate
13 government agency gives its informed consent,
14 confirmed in writing, to the representation.

15 (b) When a lawyer is disqualified from
16 representation under paragraph (a), no lawyer in a firm
17 with which that lawyer is associated may knowingly
18 undertake or continue representation in such a matter
19 unless:

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

23 (2) written notice is promptly given to the
24 appropriate government agency to enable it to
25 ascertain compliance with the provisions of this
26 rule.

27 (c) Except as law may otherwise expressly permit, a
28 lawyer having information that the lawyer knows is
29 confidential government information about a person,
30 acquired when the lawyer was a public officer or
31 employee, may not represent a private client whose
32 interests are adverse to that person in a matter in which
33 the information could be used to the material
34 disadvantage of that person. As used in this rule, the
35 term "confidential government information" means
36 information that has been obtained under governmental
37 authority and which, at the time this rule is applied, the
38 government is prohibited by law from disclosing to the
39 public or has a legal privilege not to disclose and which

1 is not otherwise available to the public. A firm with
2 which that lawyer is associated may undertake or
3 continue representation in the matter only if the
4 disqualified lawyer is timely screened from any
5 participation in the matter and is apportioned no part of
6 the fee therefrom.

7 (d) Except as law may otherwise expressly permit, a
8 lawyer currently serving as a public officer or employee:

9 (1) is subject to rules 32:1.7 and 32:1.9; and

10 (2) shall not:

11 (i) participate in a matter in which the
12 lawyer participated personally and
13 substantially while in private practice or
14 nongovernmental employment, unless the
15 appropriate government agency gives its
16 informed consent, confirmed in writing; or

17 (ii) negotiate for private employment
18 with any person who is involved as a party or
19 as lawyer for a party in a matter in which the
20 lawyer is participating personally and
21 substantially, except that a lawyer serving as
22 a law clerk to a judge, other adjudicative
23 officer, or arbitrator may negotiate for
24 private employment as permitted by rule
25 32:1.12(b) and subject to the conditions
26 stated in rule 32:1.12(b).

27 (e) As used in this rule, the term "matter" includes:

28 (1) any judicial or other proceeding,
29 application, request for a ruling or other
30 determination, contract, claim, controversy,
31 investigation, charge, accusation, arrest, or other
32 particular matter involving a specific party or
33 parties, and

34 (2) any other matter covered by the conflict
35 of interest rules of the appropriate government
36 agency.

1 **(f) Prosecutors for the state or county shall not**
2 **engage in the defense of an accused in any criminal**
3 **matter during the time they are engaged in such public**
4 **responsibilities. However, this paragraph does not apply**
5 **to a lawyer not regularly employed as a prosecutor for**
6 **the state or county who serves as a special prosecutor**
7 **for a specific criminal case, provided that the**
8 **employment does not create a conflict of interest or the**
9 **lawyer complies with the requirements of rule 32:1.7(b).**

10 **Comment**

11 [1] A lawyer who has served or is currently serving as a
12 public officer or employee is personally subject to the Iowa
13 Rules of Professional Conduct, including the prohibition
14 against concurrent conflicts of interest stated in rule 32:1.7.
15 In addition, such a lawyer may be subject to statutes and
16 government regulations regarding conflict of interest. Such
17 statutes and regulations may circumscribe the extent to
18 which the government agency may give consent under this
19 rule. See rule 32:1.0(e) for the definition of informed consent.

20 [2] Paragraphs (a)(1), (a)(2), and (d)(1) restate the
21 obligations of an individual lawyer who has served or is
22 currently serving as an officer or employee of the government
23 toward a former government or private client. Rule 32:1.10 is
24 not applicable to the conflicts of interest addressed by this
25 rule. Rather, paragraph (b) sets forth a special imputation
26 rule for former government lawyers that provides for
27 screening and notice. Because of the special problems raised
28 by imputation within a government agency, paragraph (d)
29 does not impute the conflicts of a lawyer currently serving as
30 an officer or employee of the government to other associated
31 government officers or employees, although ordinarily it will
32 be prudent to screen such lawyers.

33 [3] Paragraphs (a)(2) and (d)(2) apply regardless of
34 whether a lawyer is adverse to a former client and are thus
35 designed not only to protect the former client, but also to
36 prevent a lawyer from exploiting public office for the
37 advantage of another client. For example, a lawyer who has
38 pursued a claim on behalf of the government may not
39 pursue the same claim on behalf of a later private client after
40 the lawyer has left government service, except when
41 authorized to do so by the government agency under
42 paragraph (a). Similarly, a lawyer who has pursued a claim

1 on behalf of a private client may not pursue the claim on
2 behalf of the government, except when authorized to do so
3 by paragraph (d). As with paragraphs (a)(1) and (d)(1), rule
4 32:1.10 is not applicable to the conflicts of interest
5 addressed by these paragraphs.

6 [4] This rule represents a balancing of interests. On
7 the one hand, where the successive clients are a government
8 agency and another client, public or private, the risk exists
9 that power or discretion vested in that agency might be used
10 for the special benefit of the other client. A lawyer should not
11 be in a position where benefit to the other client might affect
12 performance of the lawyer's professional functions on behalf
13 of the government. Also, unfair advantage could accrue to
14 the other client by reason of access to confidential
15 government information about the client's adversary
16 obtainable only through the lawyer's government service. On
17 the other hand, the rules governing lawyers presently or
18 formerly employed by a government agency should not be so
19 restrictive as to inhibit transfer of employment to and from
20 the government. The government has a legitimate need to
21 attract qualified lawyers as well as to maintain high ethical
22 standards. Thus a former government lawyer is disqualified
23 only from particular matters in which the lawyer participated
24 personally and substantially. The provisions for screening
25 and waiver in paragraph (b) are necessary to prevent the
26 disqualification rule from imposing too severe a deterrent
27 against entering public service. The limitation of
28 disqualification in paragraphs (a)(2) and (d)(2) to matters
29 involving a specific party or parties, rather than extending
30 disqualification to all substantive issues on which the lawyer
31 worked, serves a similar function.

32 [5] When a lawyer has been employed by one
33 government agency and then moves to a second government
34 agency, it may be appropriate to treat that second agency as
35 another client for purposes of this rule, as when a lawyer is
36 employed by a city and subsequently is employed by a
37 federal agency. However, because the conflict of interest is
38 governed by paragraph (d), the latter agency is not required
39 to screen the lawyer as paragraph (b) requires a law firm to
40 do. The question of whether two government agencies should
41 be regarded as the same or different clients for conflict of
42 interest purposes is beyond the scope of these rules. See rule
43 32:1.13 comment [9].

1 [6] Paragraphs (b) and (c) contemplate a screening
2 arrangement. See rule 32:1.0(k) (requirements for screening
3 procedures). These paragraphs do not prohibit a lawyer from
4 receiving a salary or partnership share established by prior
5 independent agreement, but that lawyer may not receive
6 compensation directly relating the lawyer's compensation to
7 the fee in the matter in which the lawyer is disqualified.

8 [7] Notice, including a description of the screened
9 lawyer's prior representation and of the screening
10 procedures employed, generally should be given as soon as
11 practicable after the need for screening becomes apparent.

12 [8] Paragraph (c) operates only when the lawyer in
13 question has knowledge of the information, which means
14 actual knowledge; it does not operate with respect to
15 information that merely could be imputed to the lawyer.

16 [9] Paragraphs (a) and (d) do not prohibit a lawyer from
17 jointly representing a private party and a government agency
18 when doing so is permitted by rule 32:1.7 and is not
19 otherwise prohibited by law.

20 [10] For purposes of paragraph (e) of this rule, a
21 "matter" may continue in another form. In determining
22 whether two particular matters are the same, the lawyer
23 should consider the extent to which the matters involve the
24 same basic facts, the same or related parties, and the time
25 elapsed.

26
27 **RULE 32:1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR,**
28 **OR OTHER THIRD-PARTY NEUTRAL**
29

30 **(a) Except as stated in paragraph (d), a lawyer shall**
31 **not represent anyone in connection with a matter in**
32 **which the lawyer participated personally and**
33 **substantially as a judge or other adjudicative officer or**
34 **law clerk to such a person or as an arbitrator, mediator,**
35 **or other third-party neutral, unless all parties to the**
36 **proceeding give informed consent, confirmed in writing.**
37

38 **(b) A lawyer shall not negotiate for employment**
39 **with any person who is involved as a party or as lawyer**
40 **for a party in a matter in which the lawyer is**
41 **participating personally and substantially as a judge or**

1 **other adjudicative officer or as an arbitrator, mediator,**
2 **or other third-party neutral. A lawyer serving as a law**
3 **clerk to a judge or other adjudicative officer may**
4 **negotiate for employment with a party or lawyer**
5 **involved in a matter in which the law clerk is**
6 **participating personally and substantially, but only after**
7 **the law clerk has notified the judge or other adjudicative**
8 **officer.**

9
10 **(c) If a lawyer is disqualified by paragraph (a), no**
11 **lawyer in a firm with which that lawyer is associated**
12 **may knowingly undertake or continue representation in**
13 **the matter unless:**

14
15 **(1) the disqualified lawyer is timely screened**
16 **from any participation in the matter and is**
17 **apportioned no part of the fee therefrom; and**

18
19 **(2) written notice is promptly given to the**
20 **parties and any appropriate tribunal to enable**
21 **them to ascertain compliance with the provisions**
22 **of this rule.**

23
24 **(d) An arbitrator selected as a partisan of a party in**
25 **a multimember arbitration panel is not prohibited from**
26 **subsequently representing that party.**

27
28 **Comment**

29
30 [1] This rule generally parallels rule 32:1.11. The term
31 “personally and substantially” signifies that a judge who was
32 a member of a multimember court, and thereafter left
33 judicial office to practice law, is not prohibited from
34 representing a client in a matter pending in the court, but in
35 which the former judge did not participate. So also the fact
36 that a former judge exercised administrative responsibility in
37 a court does not prevent the former judge from acting as a
38 lawyer in a matter where the judge had previously exercised
39 remote or incidental administrative responsibility that did
40 not affect the merits. Compare the comment to rule 32:1.11.
41 The term “adjudicative officer” includes such officials as
42 judges pro tempore, referees, special masters, hearing
43 officers, and other parajudicial officers, and also lawyers who
44 serve as part-time judges. Compliance Canons A(2) and C of
45 the Iowa Code of Judicial Conduct provide that a part-time
46 judge or retired judge recalled to active service “shall not

1 practice law in the court on which the judge serves.”
2 Although phrased differently from this rule, those rules
3 correspond in meaning.
4

5 [2] Like former judges, lawyers who have served as
6 arbitrators, mediators, or other third-party neutrals may be
7 asked to represent a client in a matter in which the lawyer
8 participated personally and substantially. This rule forbids
9 such representation unless all of the parties to the
10 proceedings give their informed consent, confirmed in
11 writing. See rule 32:1.0(e) and (b). Other law or codes of
12 ethics governing third-party neutrals may impose more
13 stringent standards of personal or imputed disqualification.
14 See rule 32:2.4.
15

16 [3] Although lawyers who serve as third-party neutrals
17 do not have information concerning the parties that is
18 protected under rule 32:1.6, they typically owe the parties an
19 obligation of confidentiality under law or codes of ethics
20 governing third-party neutrals. Thus, paragraph (c) provides
21 that conflicts of the personally disqualified lawyer will be
22 imputed to other lawyers in a law firm unless the conditions
23 of this paragraph are met.
24

25 [4] Requirements for screening procedures are stated
26 in rule 32:1.0(k). Paragraph (c)(1) does not prohibit the
27 screened lawyer from receiving a salary or partnership share
28 established by prior independent agreement, but that lawyer
29 may not receive compensation directly related to the matter
30 in which the lawyer is disqualified.
31

32 [5] Notice, including a description of the screened
33 lawyer’s prior representation and of the screening
34 procedures employed, generally should be given as soon as
35 practicable after the need for screening becomes apparent.
36

37 **RULE 32:1.13: ORGANIZATION AS CLIENT**

38 **(a) A lawyer employed or retained by an**
39 **organization represents the organization acting through**
40 **its duly authorized constituents.**

41 **(b) If a lawyer for an organization knows that an**
42 **officer, employee, or other person associated with the**
43 **organization is engaged in action, intends to act, or**

1 refuses to act in a matter related to the representation
2 that is a violation of a legal obligation to the
3 organization, or a violation of law that reasonably might
4 be imputed to the organization, and that is likely to
5 result in substantial injury to the organization, then the
6 lawyer shall proceed as is reasonably necessary in the
7 best interest of the organization. Unless the lawyer
8 reasonably believes that it is not necessary in the best
9 interest of the organization to do so, the lawyer shall
10 refer the matter to higher authority in the organization,
11 including, if warranted by the circumstances to the
12 highest authority that can act on behalf of the
13 organization as determined by applicable law.

14 (c) Except as provided in paragraph (d), if

15 (1) despite the lawyer's efforts in accordance
16 with paragraph (b) the highest authority that can
17 act on behalf of the organization insists upon or
18 fails to address in a timely and appropriate manner
19 an action, or a refusal to act, that is clearly a
20 violation of law, and

21 (2) the lawyer reasonably believes that the
22 violation is reasonably certain to result in
23 substantial injury to the organization,

24 then the lawyer may reveal information relating to the
25 representation whether or not rule 32:1.6 permits such
26 disclosure, but only if and to the extent the lawyer
27 reasonably believes necessary to prevent substantial
28 injury to the organization.

29 (d) Paragraph (c) shall not apply with respect to
30 information relating to a lawyer's representation of an
31 organization to investigate an alleged violation of law, or
32 to defend the organization or an officer, employee, or
33 other constituent associated with the organization
34 against a claim arising out of an alleged violation of law.

35 (e) A lawyer who reasonably believes that the
36 lawyer has been discharged because of the lawyer's
37 actions taken pursuant to paragraphs (b) or (c), or who
38 withdraws under circumstances that require or permit
39 the lawyer to take action under either of those
40 paragraphs, shall proceed as the lawyer reasonably

1 **believes necessary to ensure that the organization's**
2 **highest authority is informed of the lawyer's discharge or**
3 **withdrawal.**

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

10 **(g) A lawyer representing an organization may also**
11 **represent any of its directors, officers, employees,**
12 **members, shareholders, or other constituents, subject to**
13 **the provisions of rule 32:1.7. If the organization's**
14 **consent to the dual representation is required by rule**
15 **32:1.7, the consent shall be given by an appropriate**
16 **official of the organization other than the individual who**
17 **is to be represented, or by the shareholders.**

18 **Comment**

19 *The Entity as the Client*

20 [1] An organizational client is a legal entity, but it
21 cannot act except through its officers, directors, employees,
22 shareholders, and other constituents. Officers, directors,
23 employees, and shareholders are the constituents of the
24 corporate organizational client. The duties defined in this
25 comment apply equally to unincorporated associations.
26 "Other constituents" as used in this comment means the
27 positions equivalent to officers, directors, employees, and
28 shareholders held by persons acting for organizational
29 clients that are not corporations.

30 [2] When one of the constituents of an organizational
31 client communicates with the organization's lawyer in that
32 person's organizational capacity, the communication is
33 protected by rule 32:1.6. Thus, by way of example, if an
34 organizational client requests its lawyer to investigate
35 allegations of wrongdoing, interviews made in the course of
36 that investigation between the lawyer and the client's
37 employees or other constituents are covered by rule 32:1.6.
38 This does not mean, however, that constituents of an
39 organizational client are the clients of the lawyer. The lawyer
40 may not disclose to such constituents information relating to

1 the representation except for disclosures explicitly or
2 impliedly authorized by the organizational client in order to
3 carry out the representation or as otherwise permitted by
4 rule 32:1.6.

5 [3] When constituents of the organization make
6 decisions for it, the decisions ordinarily must be accepted by
7 the lawyer even if their utility or prudence is doubtful.
8 Decisions concerning policy and operations, including ones
9 entailing serious risk, are not as such in the lawyer's
10 province. Paragraph (b) makes clear, however, that when the
11 lawyer knows that the organization is likely to be
12 substantially injured by action of an officer or other
13 constituent that violates a legal obligation to the organization
14 or is in violation of law that might be imputed to the
15 organization, the lawyer must proceed as is reasonably
16 necessary in the best interest of the organization. As defined
17 in rule 32:1.0(f), knowledge can be inferred from
18 circumstances, and a lawyer cannot ignore the obvious.

19 [4] In determining how to proceed under paragraph (b),
20 the lawyer should give due consideration to the seriousness
21 of the violation and its consequences, the responsibility in
22 the organization and the apparent motivation of the person
23 involved, the policies of the organization concerning such
24 matters, and any other relevant considerations. Ordinarily,
25 referral to a higher authority would be necessary. In some
26 circumstances, however, it may be appropriate for the lawyer
27 to ask the constituent to reconsider the matter; for example,
28 if the circumstances involve a constituent's innocent
29 misunderstanding of law and subsequent acceptance of the
30 lawyer's advice, the lawyer may reasonably conclude that the
31 best interest of the organization does not require that the
32 matter be referred to higher authority. If a constituent
33 persists in conduct contrary to the lawyer's advice, it will be
34 necessary for the lawyer to take steps to have the matter
35 reviewed by a higher authority in the organization. If the
36 matter is of sufficient seriousness and importance or
37 urgency to the organization, referral to higher authority in
38 the organization may be necessary even if the lawyer has not
39 communicated with the constituent. Any measures taken
40 should, to the extent practicable, minimize the risk of
41 revealing information relating to the representation to
42 persons outside the organization. Even in circumstances
43 where a lawyer is not obligated by rule 32:1.13 to proceed, a
44 lawyer may bring to the attention of an organizational client,

1 including its highest authority, matters that the lawyer
2 reasonably believes to be of sufficient importance to warrant
3 doing so in the best interest of the organization.

4 [5] Paragraph (b) also makes clear that when it is
5 reasonably necessary to enable the organization to address
6 the matter in a timely and appropriate manner, the lawyer
7 must refer the matter to higher authority, including, if
8 warranted by the circumstances, the highest authority that
9 can act on behalf of the organization under applicable law.
10 The organization's highest authority to whom a matter may
11 be referred ordinarily will be the board of directors or similar
12 governing body. However, applicable law may prescribe that
13 under certain conditions the highest authority reposes
14 elsewhere, for example, in the independent directors of a
15 corporation.

16 *Relation to Other Rules*

17 [6] The authority and responsibility provided in this
18 rule are concurrent with the authority and responsibility
19 provided in other rules. In particular, this rule does not limit
20 or expand the lawyer's responsibility under rule 32:1.8,
21 32:1.16, 32:3.3, or 32:4.1. Paragraph (c) of this rule
22 supplements rule 32:1.6(b) by providing an additional basis
23 upon which the lawyer may reveal information relating to the
24 representation, but does not modify, restrict, or limit the
25 provisions of rule 32:1.6(b)(1) - (6). Under paragraph (c) the
26 lawyer may reveal such information only when the
27 organization's highest authority insists upon or fails to
28 address threatened or ongoing action that is clearly a
29 violation of law, and then only to the extent the lawyer
30 reasonably believes necessary to prevent reasonably certain
31 substantial injury to the organization. It is not necessary
32 that the lawyer's services be used in furtherance of the
33 violation, but it is required that the matter be related to the
34 lawyer's representation of the organization. If the lawyer's
35 services are being used by an organization to further a crime
36 or fraud by the organization, rules 32:1.6(b)(2) and
37 32:1.6(b)(3) may permit the lawyer to disclose confidential
38 information. In such circumstances rule 32:1.2(d) may also
39 be applicable, in which event, withdrawal from the
40 representation under rule 32:1.16(a)(1) may be required.

41 [7] Paragraph (d) makes clear that the authority of a
42 lawyer to disclose information relating to a representation in

1 circumstances described in paragraph (c) does not apply
2 with respect to information relating to a lawyer's engagement
3 by an organization to investigate an alleged violation of law
4 or to defend the organization or an officer, employee, or other
5 person associated with the organization against a claim
6 arising out of an alleged violation of law. This is necessary in
7 order to enable organizational clients to enjoy the full
8 benefits of legal counsel in conducting an investigation or
9 defending against a claim.

10 [8] A lawyer who reasonably believes that the lawyer
11 has been discharged because of the lawyer's actions taken
12 pursuant to paragraph (b) or (c), or who withdraws in
13 circumstances that require or permit the lawyer to take
14 action under either of these paragraphs, must proceed as the
15 lawyer reasonably believes necessary to assure that the
16 organization's highest authority is informed of the lawyer's
17 discharge or withdrawal.

18 *Government Agency*

19 [9] The duty defined in this rule applies to
20 governmental organizations. Defining precisely the identity of
21 the client and prescribing the resulting obligations of such
22 lawyers may be more difficult in the government context and
23 is a matter beyond the scope of these rules. *See Scope [18]*.
24 Although in some circumstances the client may be a specific
25 agency, it may also be a branch of government, such as the
26 executive branch, or the government as a whole. For
27 example, if the action or failure to act involves the head of a
28 bureau, either the department of which the bureau is a part
29 or the relevant branch of government may be the client for
30 purposes of this rule. Moreover, in a matter involving the
31 conduct of government officials, a government lawyer may
32 have authority under applicable law to question such
33 conduct more extensively than that of a lawyer for a private
34 organization in similar circumstances. Thus, when the client
35 is a governmental organization, a different balance may be
36 appropriate between maintaining confidentiality and
37 ensuring that the wrongful act is prevented or rectified, for
38 public business is involved. In addition, duties of lawyers
39 employed by the government or lawyers in military service
40 may be defined by statutes and regulation. This rule does
41 not limit that authority. *See Scope*.

42 *Clarifying the Lawyer's Role*

1 [10] There are times when the organization's interest
2 may be or become adverse to those of one or more of its
3 constituents. In such circumstances the lawyer should
4 advise any constituent, whose interest the lawyer finds
5 adverse to that of the organization, of the conflict or potential
6 conflict of interest, that the lawyer cannot represent such
7 constituent, and that such person may wish to obtain
8 independent representation. Care must be taken to ensure
9 that the individual understands that, when there is such
10 adversity of interest, the lawyer for the organization cannot
11 provide legal representation for that constituent individual,
12 and that discussions between the lawyer for the organization
13 and the individual may not be privileged.

14 [11] Whether such a warning should be given by the
15 lawyer for the organization to any constituent individual may
16 turn on the facts of each case.

17 *Dual Representation*

18 [12] Paragraph (g) recognizes that a lawyer for an
19 organization may also represent a principal officer or major
20 shareholder.

21 *Derivative Actions*

22 [13] Under generally prevailing law, the shareholders
23 or members of a corporation may bring suit to compel the
24 directors to perform their legal obligations in the supervision
25 of the organization. Members of unincorporated associations
26 have essentially the same right. Such an action may be
27 brought nominally by the organization, but usually is, in
28 fact, a legal controversy over management of the
29 organization.

30 [14] The question can arise whether counsel for the
31 organization may defend such an action. The proposition
32 that the organization is the lawyer's client does not alone
33 resolve the issue. Most derivative actions are a normal
34 incident of an organization's affairs, to be defended by the
35 organization's lawyer like any other suit. However, if the
36 claim involves serious charges of wrongdoing by those in
37 control of the organization, a conflict may arise between the
38 lawyer's duty to the organization and the lawyer's
39 relationship with the board. In those circumstances, rule

1 32:1.7 governs who should represent the directors and the
2 organization.

3
4 **RULE 32:1.14: CLIENT WITH DIMINISHED CAPACITY**
5

6 (a) When a client's capacity to make adequately
7 considered decisions in connection with a representation
8 is diminished, whether because of minority, mental
9 impairment, or for some other reason, the lawyer shall,
10 as far as reasonably possible, maintain a normal client-
11 lawyer relationship with the client.
12

13 (b) When the lawyer reasonably believes that the
14 client has diminished capacity, is at risk of substantial
15 physical, financial, or other harm unless action is taken,
16 and cannot adequately act in the client's own interest,
17 the lawyer may take reasonably necessary protective
18 action, including consulting with individuals or entities
19 that have the ability to take action to protect the client
20 and, in appropriate cases, seeking the appointment of a
21 guardian ad litem, conservator, or guardian.
22

23 (c) Information relating to the representation of a
24 client with diminished capacity is protected by rule
25 32:1.6. When taking protective action pursuant to
26 paragraph (b), the lawyer is impliedly authorized under
27 rule 32:1.6 to reveal information about the client, but
28 only to the extent reasonably necessary to protect the
29 client's interests.
30

31 **Comment**
32

33 [1] The normal client-lawyer relationship is based on
34 the assumption that the client, when properly advised and
35 assisted, is capable of making decisions about important
36 matters. When the client is a minor or suffers from a
37 diminished mental capacity, however, maintaining the
38 ordinary client-lawyer relationship may not be possible in all
39 respects. In particular, a severely incapacitated person may
40 have no power to make legally binding decisions.
41 Nevertheless, a client with diminished capacity often has the
42 ability to understand, deliberate upon, and reach
43 conclusions about matters affecting the client's own well-
44 being. For example, children as young as five or six years of
45 age, and certainly those of ten or twelve, are regarded as

1 having opinions that are entitled to weight in legal
2 proceedings concerning their custody. So also, it is
3 recognized that some persons of advanced age can be quite
4 capable of handling routine financial matters while needing
5 special legal protection concerning major transactions.
6

7 [2] The fact that a client suffers a disability does not
8 diminish the lawyer's obligation to treat the client with
9 attention and respect. Even if the person has a legal
10 representative, the lawyer should as far as possible accord
11 the represented person the status of client, particularly in
12 maintaining communication.
13

14 [3] The client may wish to have family members or
15 other persons participate in discussions with the lawyer.
16 When necessary to assist in the representation, the presence
17 of such persons generally does not affect the applicability of
18 the attorney-client evidentiary privilege. Nevertheless, the
19 lawyer must keep the client's interests foremost and, except
20 for protective action authorized under paragraph (b), must
21 look to the client, and not family members, to make
22 decisions on the client's behalf.
23

24 [4] If a legal representative has already been appointed
25 for the client, the lawyer should ordinarily look to the
26 representative for decisions on behalf of the client. In
27 matters involving a minor, whether the lawyer should look to
28 the parents as natural guardians may depend on the type of
29 proceeding or matter in which the lawyer is representing the
30 minor. If the lawyer represents the guardian as distinct from
31 the ward, and is aware that the guardian is acting adversely
32 to the ward's interest, the lawyer may have an obligation to
33 prevent or rectify the guardian's misconduct. See rule
34 32:1.2(d).
35

36 *Taking Protective Action* 37

38 [5] If a lawyer reasonably believes that a client is at
39 risk of substantial physical, financial, or other harm unless
40 action is taken, and that a normal client-lawyer relationship
41 cannot be maintained as provided in paragraph (a) because
42 the client lacks sufficient capacity to communicate or to
43 make adequately considered decisions in connection with the
44 representation, then paragraph (b) permits the lawyer to take
45 protective measures deemed necessary. Such measures
46 could include: consulting with family members, using a

1 reconsideration period to permit clarification or improvement
2 of circumstances, using voluntary surrogate decisionmaking
3 tools such as durable powers of attorney, or consulting with
4 support groups, professional services, adult-protective
5 agencies, or other individuals or entities that have the ability
6 to protect the client. In taking any protective action, the
7 lawyer should be guided by such factors as the wishes and
8 values of the client to the extent known, the client's best
9 interests, and the goals of intruding into the client's
10 decisionmaking autonomy to the least extent feasible,
11 maximizing client capacities, and respecting the client's
12 family and social connections.

13
14 [6] In determining the extent of the client's diminished
15 capacity, the lawyer should consider and balance such
16 factors as: the client's ability to articulate reasoning leading
17 to a decision, variability of state of mind, and ability to
18 appreciate consequences of a decision; the substantive
19 fairness of a decision; and the consistency of a decision with
20 the known long-term commitments and values of the client.
21 In appropriate circumstances, the lawyer may seek guidance
22 from an appropriate diagnostician.

23
24 [7] If a legal representative has not been appointed, the
25 lawyer should consider whether appointment of a guardian
26 ad litem, conservator, or guardian is necessary to protect the
27 client's interests. Thus, if a client with diminished capacity
28 has substantial property that should be sold for the client's
29 benefit, effective completion of the transaction may require
30 appointment of a legal representative. In addition, rules of
31 procedure in litigation sometimes provide that minors or
32 persons with diminished capacity must be represented by a
33 guardian or next friend if they do not have a general
34 guardian. In many circumstances, however, appointment of
35 a legal representative may be more expensive or traumatic
36 for the client than circumstances in fact require. Evaluation
37 of such circumstances is a matter entrusted to the
38 professional judgment of the lawyer. In considering
39 alternatives, however, the lawyer should be aware of any law
40 that requires the lawyer to advocate the least restrictive
41 action on behalf of the client.

42
43 *Disclosure of the Client's Condition*

44
45 [8] Disclosure of the client's diminished capacity could
46 adversely affect the client's interests. For example, raising

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

18 *Emergency Legal Assistance*

19
20
21 [9] In an emergency where the health, safety, or a
22 financial interest of a person with seriously diminished
23 capacity is threatened with imminent and irreparable harm,
24 a lawyer may take legal action on behalf of such a person
25 even though the person is unable to establish a client-lawyer
26 relationship or to make or express considered judgments
27 about the matter, when the person or another acting in good
28 faith on that person's behalf has consulted with the lawyer.
29 Even in such an emergency, however, the lawyer should not
30 act unless the lawyer reasonably believes that the person
31 has no other lawyer, agent, or other representative available.
32 The lawyer should take legal action on behalf of the person
33 only to the extent reasonably necessary to maintain the
34 status quo or otherwise avoid imminent and irreparable
35 harm. A lawyer who undertakes to represent a person in
36 such an exigent situation has the same duties under these
37 rules as the lawyer would with respect to a client.

38
39 [10] A lawyer who acts on behalf of a person with
40 seriously diminished capacity in an emergency should keep
41 the confidences of the person as if dealing with a client,
42 disclosing them only to the extent necessary to accomplish
43 the intended protective action. The lawyer should disclose to
44 any tribunal involved and to any other counsel involved the
45 nature of his or her relationship with the person. The lawyer
46 should take steps to regularize the relationship or implement

1 other protective solutions as soon as possible. Normally, a
2 lawyer would not seek compensation for such emergency
3 actions taken.
4

5
6 **RULE 32:1.15: SAFEKEEPING PROPERTY**

7 **(a) A lawyer shall hold property of clients or third**
8 **persons that is in a lawyer's possession in connection**
9 **with a representation separate from the lawyer's own**
10 **property. Funds shall be kept in a separate account.**
11 **Other property shall be identified as such and**
12 **appropriately safeguarded. Complete records of such**
13 **account funds and other property shall be kept by the**
14 **lawyer and shall be preserved for a period of six years**
15 **after termination of the representation.**

16 **(b) A lawyer may deposit the lawyer's own funds in**
17 **a client trust account for the sole purpose of paying**
18 **bank service charges on that account, but only in an**
19 **amount necessary for that purpose.**

20 **(c) A lawyer shall deposit into a client trust**
21 **account legal fees and expenses that have been paid in**
22 **advance, to be withdrawn by the lawyer only as fees are**
23 **earned or expenses incurred.**

24 **(d) Upon receiving funds or other property in which**
25 **a client or third person has an interest, a lawyer shall**
26 **promptly notify the client or third person. Except as**
27 **stated in this rule or otherwise permitted by law or by**
28 **agreement with the client, a lawyer shall promptly**
29 **deliver to the client or third person any funds or other**
30 **property that the client or third person is entitled to**
31 **receive and, upon request by the client or third person,**
32 **shall promptly render a full accounting regarding such**
33 **property.**

34 **(e) When in the course of representation a lawyer is**
35 **in possession of property in which two or more persons**
36 **(one of whom may be the lawyer) claim interests, the**
37 **property shall be kept separate by the lawyer until the**
38 **dispute is resolved. The lawyer shall promptly distribute**
39 **all portions of the property as to which the interests are**
40 **not in dispute.**

1 **(f) All client trust accounts shall be governed by**
2 **chapter 45 of the Iowa Court Rules.**

3
4 **Comment**

5 [1] A lawyer should hold property of others with the
6 care required of a professional fiduciary. Securities should
7 be kept in a safe deposit box, except when some other form
8 of safekeeping is warranted by special circumstances. All
9 property that is the property of clients or third persons,
10 including prospective clients, must be kept separate from the
11 lawyer's business and personal property and, if monies, in
12 one or more trust accounts. Separate trust accounts may be
13 warranted when administering estate monies or acting in
14 similar fiduciary capacities. A lawyer should maintain on a
15 current basis books and records in accordance with
16 generally accepted accounting practice and comply with any
17 recordkeeping rules established by law or court order. *See,*
18 Iowa Ct. R. ch 45.

19 [2] While normally it is impermissible to commingle the
20 lawyer's own funds with client funds, paragraph (b) provides
21 that it is permissible when necessary to pay bank service
22 charges on that account. Accurate records must be kept
23 regarding which part of the funds are the lawyer's.

24 [3] Lawyers often receive funds from which the lawyer's
25 fee will be paid. The lawyer is not required to remit to the
26 client funds that the lawyer reasonably believes represent
27 fees owed. However, a lawyer may not hold funds to coerce a
28 client into accepting the lawyer's contention. The disputed
29 portion of the funds must be kept in a trust account and the
30 lawyer should suggest means for prompt resolution of the
31 dispute, such as arbitration. The undisputed portion of the
32 funds shall be promptly distributed.

33 [4] Paragraph (e) also recognizes that third parties may
34 have lawful claims against specific funds or other property in
35 a lawyer's custody, such as a client's creditor who has a lien
36 on funds recovered in a personal injury action. A lawyer may
37 have a duty under applicable law to protect such third-party
38 claims against wrongful interference by the client. In such
39 cases, when the third-party claim is not frivolous under
40 applicable law, the lawyer must refuse to surrender the
41 property to the client until the claims are resolved. A lawyer

1 should not unilaterally assume to arbitrate a dispute
2 between the client and the third party; but when there are
3 substantial grounds for dispute as to the person entitled to
4 the funds, the lawyer may file an action to have a court
5 resolve the dispute.

6 [5] The obligations of a lawyer under this rule are
7 independent of those arising from activity other than
8 rendering legal services. For example, a lawyer who serves
9 only as an escrow agent is governed by the applicable law
10 relating to fiduciaries even though the lawyer does not
11 render legal services in the transaction and is not governed
12 by this rule.

13 [6] A lawyers' fund for client protection provides a
14 means through the collective efforts of the bar to reimburse
15 persons who have lost money or property as a result of
16 dishonest conduct of a lawyer. Such a fund has been
17 established in Iowa, and lawyer participation is mandatory to
18 the extent required by chapter 39 of the Iowa Court Rules.

19
20 **RULE 32:1.16: DECLINING OR TERMINATING**
21 **REPRESENTATION**

22
23 **(a) Except as stated in paragraph (c), a lawyer shall**
24 **not represent a client or, where representation has**
25 **commenced, shall withdraw from the representation of a**
26 **client if:**

27
28 **(1) the representation will result in violation**
29 **of the Iowa Rules of Professional Conduct or other**
30 **law;**

31
32 **(2) the lawyer's physical or mental condition**
33 **materially impairs the lawyer's ability to represent**
34 **the client; or**

35
36 **(3) the lawyer is discharged.**

37
38 **(b) Except as stated in paragraph (c), a lawyer may**
39 **withdraw from representing a client if:**

40
41 **(1) withdrawal can be accomplished without**
42 **material adverse effect on the interests of the**
43 **client;**

1
2 (2) the client persists in a course of action
3 involving the lawyer's services that the lawyer
4 reasonably believes is criminal or fraudulent;
5

6 (3) the client has used the lawyer's services
7 to perpetrate a crime or fraud;
8

9 (4) the client insists upon taking action that
10 the lawyer considers repugnant or with which the
11 lawyer has a fundamental disagreement;
12

13 (5) the client fails substantially to fulfill an
14 obligation to the lawyer regarding the lawyer's
15 services and has been given reasonable warning
16 that the lawyer will withdraw unless the obligation
17 is fulfilled;
18

19 (6) the representation will result in an
20 unreasonable financial burden on the lawyer or has
21 been rendered unreasonably difficult by the client;
22 or
23

24 (7) other good cause for withdrawal exists.
25

26 (c) A lawyer must comply with applicable law
27 requiring notice to or permission of a tribunal when
28 terminating a representation. When ordered to do so by a
29 tribunal, a lawyer shall continue representation
30 notwithstanding good cause for terminating the
31 representation.
32

33 (d) Upon termination of representation, a lawyer
34 shall take steps to the extent reasonably practicable to
35 protect a client's interests, such as giving reasonable
36 notice to the client, allowing time for employment of
37 other counsel, surrendering papers and property to
38 which the client is entitled, and refunding any advance
39 payment of fee or expense that has not been earned or
40 incurred. The lawyer may retain papers relating to the
41 client to the extent permitted by law.
42

43 **Comment**

44
45 [1] A lawyer should not accept representation in a
46 matter unless it can be performed competently, promptly,

1 without improper conflict of interest, and to completion.
2 Ordinarily, a representation in a matter is completed when
3 the agreed-upon assistance has been concluded. *See* rules
4 32:1.2(c) and 32:6.5. *See also* rule 32:1.3, comment [4].
5

6 *Mandatory Withdrawal*

7

8 [2] A lawyer ordinarily must decline or withdraw from
9 representation if the client demands that the lawyer engage
10 in conduct that is illegal or violates the Iowa Rules of
11 Professional Conduct or other law. The lawyer is not obliged
12 to decline or withdraw simply because the client suggests
13 such a course of conduct; a client may make such a
14 suggestion in the hope that a lawyer will not be constrained
15 by a professional obligation.
16

17 [3] When a lawyer has been appointed to represent a
18 client, withdrawal ordinarily requires approval of the
19 appointing authority. *See also* rule 32:6.2. Similarly, court
20 approval or notice to the court is often required by applicable
21 law before a lawyer withdraws from pending litigation.
22 Difficulty may be encountered if withdrawal is based on the
23 client's demand that the lawyer engage in unprofessional
24 conduct. The court may request an explanation for the
25 withdrawal, while the lawyer may be bound to keep
26 confidential the facts that would constitute such an
27 explanation. The lawyer's statement that professional
28 considerations require termination of the representation
29 ordinarily should be accepted as sufficient. Lawyers should
30 be mindful of their obligations to both clients and the court
31 under rules 32:1.6 and 32:3.3.
32

33 *Discharge*

34

35 [4] A client has a right to discharge a lawyer at any
36 time, with or without cause, subject to liability for payment
37 for the lawyer's services. Where future dispute about the
38 withdrawal may be anticipated, it may be advisable to
39 prepare a written statement reciting the circumstances.
40

41 [5] Whether a client can discharge appointed counsel
42 may depend on applicable law. A client seeking to do so
43 should be given a full explanation of the consequences.
44 These consequences may include a decision by the
45 appointing authority that appointment of successor counsel

1 is unjustified, thus requiring self-representation by the
2 client.
3

4 [6] If the client has severely diminished capacity, the
5 client may lack the legal capacity to discharge the lawyer,
6 and in any event the discharge may be seriously adverse to
7 the client's interests. The lawyer should make special effort
8 to help the client consider the consequences and may take
9 reasonably necessary protective action as provided in rule
10 32:1.14.
11

12 *Optional Withdrawal*

13

14 [7] A lawyer may withdraw from representation in
15 some circumstances. The lawyer has the option to withdraw
16 if the withdrawal can be accomplished without material
17 adverse effect on the client's interests. Withdrawal is also
18 justified if the client persists in a course of action that the
19 lawyer reasonably believes is criminal or fraudulent, for a
20 lawyer is not required to be associated with such conduct
21 even if the lawyer does not further it. Withdrawal is also
22 permitted if the lawyer's services were misused in the past
23 even if that would materially prejudice the client. The lawyer
24 may also withdraw where the client insists on taking action
25 that the lawyer considers repugnant or with which the
26 lawyer has a fundamental disagreement.
27

28 [8] A lawyer may withdraw if the client refuses to abide
29 by the terms of an agreement relating to the representation,
30 such as an agreement concerning fees or court costs or an
31 agreement limiting the objectives of the representation.
32

33 *Assisting the Client upon Withdrawal*

34

35 [9] Even if the lawyer has been unfairly discharged by
36 the client, a lawyer must take all reasonable steps to
37 mitigate the consequences to the client. The lawyer may
38 retain papers as security for a fee to the extent permitted by
39 Iowa Code section 602.10116 or other law. See rule 32:1.15.
40

41 **RULE 32:1.17: SALE OF LAW PRACTICE**

42

43 **A lawyer or a law firm may sell or purchase a law**
44 **practice, or an area of law practice, including good will,**
45 **if the following conditions are satisfied:**
46

1
2 **(a) The seller ceases to engage in the private**
3 **practice of law, or in the area of practice that has been**
4 **sold, in the geographic area in which the practice has**
5 **been conducted;**

6
7 **(b) The entire practice, or the entire area of**
8 **practice, is sold to one or more lawyers or law firms;**

9
10 **(c) The seller gives written notice to each of the**
11 **seller's clients regarding:**

12 **(1) the proposed sale;**

13 **(2) the client's right to retain other counsel**
14 **or to take possession of the file; and**

15 **(3) the fact that the client's consent to the**
16 **transfer of the client's files will be presumed if the**
17 **client does not take any action or does not**
18 **otherwise object within 90 days of receipt of the**
19 **notice.**

20 **If a client cannot be given notice, the**
21 **representation of that client may be transferred to the**
22 **purchaser only upon entry of an order so authorizing by**
23 **a court having jurisdiction. The seller may disclose to**
24 **the court in camera information relating to the**
25 **representation only to the extent necessary to obtain an**
26 **order authorizing the transfer of a file.**

27 **(d) The fees charged clients shall not be increased**
28 **by reason of the sale.**

29
30 **Comment**

31
32 [1] The practice of law is a profession, not merely a
33 business. Clients are not commodities that can be purchased
34 and sold at will. Pursuant to this rule, when a lawyer or an
35 entire firm ceases to practice, or ceases to practice in an area
36 of law, and other lawyers or firms take over the
37 representation, the selling lawyer or firm may obtain
38 compensation for the reasonable value of the practice as may
39 withdrawing partners of law firms. See rules 32:5.4 and
40 32:5.6.
41

1 *Termination of Practice by the Seller*

2
3 [2] The requirement that all of the private practice, or
4 all of an area of practice, be sold is satisfied if the seller in
5 good faith makes the entire practice, or the area of practice,
6 available for sale to the purchasers. The fact that a number
7 of the seller's clients decide not to be represented by the
8 purchasers but take their matters elsewhere, therefore, does
9 not result in a violation. Return to private practice as a
10 result of an unanticipated change in circumstances does not
11 necessarily result in a violation. For example, a lawyer who
12 has sold the practice to accept an appointment to judicial
13 office does not violate the requirement that the sale be
14 attendant to cessation of practice if the lawyer later resumes
15 private practice upon being defeated in a retention election
16 for the office or resigns from a judiciary position.

17
18 [3] The requirement that the seller cease to engage in
19 the private practice of law does not prohibit employment as a
20 lawyer on the staff of a public agency or a legal services
21 entity that provides legal services to the poor, or as in-house
22 counsel to a business.

23
24 [4] This rule contemplates that a lawyer who sells an
25 entire practice may continue in the practice of law in Iowa
26 provided that the lawyer practices in another geographic
27 area of the state.

28
29 [5] This rule also permits a lawyer or law firm to sell an
30 area of practice. If an area of practice is sold and the lawyer
31 remains in the active practice of law, the lawyer must cease
32 accepting any matters in the area of practice that has been
33 sold, either as counsel or co-counsel or by assuming joint
34 responsibility for a matter in connection with the division of
35 a fee with another lawyer as would otherwise be permitted by
36 rule 32:1.5(e). For example, a lawyer with a substantial
37 number of estate planning matters and a substantial
38 number of probate administration cases may sell the estate
39 planning portion of the practice but remain in the practice of
40 law by concentrating on probate administration; however,
41 that practitioner may not thereafter accept any estate
42 planning matters. Although a lawyer who leaves a
43 geographical area typically would sell the entire practice, this
44 rule permits the lawyer to limit the sale to one or more areas
45 of the practice, thereby preserving the lawyer's right to

1 continue practice in the areas of the practice that were not
2 sold.

3
4 *Sale of Entire Practice or Entire Area of Practice*

5
6 [6] The rule requires that the seller's entire practice, or
7 an entire area of practice, be sold. The prohibition against
8 sale of less than an entire practice area protects those clients
9 whose matters are less lucrative and who might find it
10 difficult to secure other counsel if a sale could be limited to
11 substantial fee-generating matters. The purchasers are
12 required to undertake all client matters in the practice or
13 practice area, subject to client consent. This requirement is
14 satisfied, however, even if a purchaser is unable to
15 undertake a particular client matter because of a conflict of
16 interest.

17
18 *Client Confidences, Consent, and Notice*

19
20 [7] Negotiations between seller and prospective
21 purchaser prior to disclosure of information relating to a
22 specific representation of an identifiable client no more
23 violate the confidentiality provisions of rule 32:1.6 than do
24 preliminary discussions concerning the possible association
25 of another lawyer or mergers between firms, with respect to
26 which client consent is not required. Providing the purchaser
27 access to client-specific information relating to the
28 representation and to the file, however, requires client
29 consent. The rule provides that before such information can
30 be disclosed by the seller to the purchaser the client must be
31 given actual written notice of the contemplated sale,
32 including the identity of the purchaser, and must be told
33 that the decision to consent or make other arrangements
34 must be made within 90 days. If nothing is heard from the
35 client within that time, consent to the sale is presumed.

36
37 [8] A lawyer or law firm ceasing to practice cannot be
38 required to remain in practice because some clients cannot
39 be given actual notice of the proposed purchase. Since these
40 clients cannot themselves consent to the purchase or direct
41 any other disposition of their files, the rule requires an order
42 from a court having jurisdiction authorizing their transfer or
43 other disposition. The court can be expected to determine
44 whether reasonable efforts to locate the client have been
45 exhausted, and whether the absent client's legitimate
46 interests will be served by authorizing the transfer of the file

1 so that the purchaser may continue the representation.
2 Preservation of client confidences requires that the petition
3 for a court order be considered in camera.
4

5 [9] All elements of client autonomy, including the
6 client's absolute right to discharge a lawyer and transfer the
7 representation to another, survive the sale of the practice or
8 area of practice.
9

10 *Fee Arrangements Between Client and Purchaser*

11

12 [10] The sale may not be financed by increases in fees
13 charged the clients of the practice. Existing arrangements
14 between the seller and the client as to fees and the scope of
15 the work must be honored by the purchaser.
16

17 *Other Applicable Ethical Standards*

18

19 [11] Lawyers participating in the sale of a law practice
20 or a practice area are subject to the ethical standards
21 applicable to involving another lawyer in the representation
22 of a client. These include, for example, the seller's obligation
23 to exercise competence in identifying a purchaser qualified to
24 assume the practice and the purchaser's obligation to
25 undertake the representation competently (see rule 32:1.1);
26 the obligation to avoid disqualifying conflicts, and to secure
27 the client's informed consent for those conflicts that can be
28 agreed to (see rule 32:1.7 regarding conflicts and rule
29 32:1.0(e) for the definition of informed consent); and the
30 obligation to protect information relating to the
31 representation (see rules 32:1.6 and 32:1.9).
32

33 [12] If approval of the substitution of the purchasing
34 lawyer for the selling lawyer is required by the rules of any
35 tribunal in which a matter is pending, such approval must
36 be obtained before the matter can be included in the sale
37 (see rule 32:1.16).
38

39 *Applicability of the Rule*

40

41 [13] This rule applies to the sale of a law practice of a
42 deceased, disabled, or disappeared lawyer. Thus, the seller
43 may be represented by a non-lawyer representative not
44 subject to these rules. Since, however, no lawyer may
45 participate in a sale of a law practice which does not conform
46 to the requirements of this rule, the representatives of the

1 seller as well as the purchasing lawyer can be expected to
2 see to it that they are met.
3

4 [14] Admission to or retirement from a law partnership
5 or professional association, retirement plans and similar
6 arrangements, and a sale of tangible assets of a law practice,
7 do not constitute a sale or purchase governed by this rule.
8

9 [15] This rule does not apply to the transfers of legal
10 representation between lawyers when such transfers are
11 unrelated to the sale of a practice or an area of practice.
12

13 **RULE 32:1.18: DUTIES TO A PROSPECTIVE CLIENT**

14 **(a) A person who discusses with a lawyer the**
15 **possibility of forming a client-lawyer relationship with**
16 **respect to a matter is a prospective client.**
17

18 **(b) Even when no client-lawyer relationship ensues,**
19 **a lawyer who has had discussions with a prospective**
20 **client shall not use or reveal information learned in the**
21 **consultation, except as rule 32:1.9 would permit with**
22 **respect to information of a former client.**
23

24 **(c) A lawyer subject to paragraph (b) shall not**
25 **represent a client with interests materially adverse to**
26 **those of a prospective client in the same or a**
27 **substantially related matter if the lawyer received**
28 **information from the prospective client that could be**
29 **significantly harmful to that person in the matter,**
30 **except as provided in paragraph (d). If a lawyer is**
31 **disqualified from representation under this paragraph,**
32 **no lawyer in a firm with which that lawyer is associated**
33 **may knowingly undertake or continue representation in**
34 **such a matter, except as provided in paragraph (d).**
35

36 **(d) When the lawyer has received disqualifying**
37 **information as defined in paragraph (c), representation is**
38 **permissible if:**
39

40 **(1) both the affected client and the**
41 **prospective client have given informed consent,**
42 **confirmed in writing, or:**
43

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

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

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

12 **Comment**

13
14 [1] Prospective clients, like clients, may disclose
15 information to a lawyer, place documents or other property
16 in the lawyer's custody, or rely on the lawyer's advice. A
17 lawyer's discussions with a prospective client usually are
18 limited in time and depth and leave both the prospective
19 client and the lawyer free (and sometimes required) to
20 proceed no further. Hence, prospective clients should receive
21 some but not all of the protection afforded clients.

22
23 [2] Not all persons who communicate information to a
24 lawyer are entitled to protection under this rule. A person
25 who communicates information unilaterally to a lawyer,
26 without any reasonable expectation that the lawyer is willing
27 to discuss the possibility of forming a client-lawyer
28 relationship, is not a "prospective client" within the meaning
29 of paragraph (a).

30
31 [3] It is often necessary for a prospective client to
32 reveal information to the lawyer during an initial
33 consultation prior to the decision about formation of a client-
34 lawyer relationship. The lawyer often must learn such
35 information to determine whether there is a conflict of
36 interest with an existing client and whether the matter is one
37 that the lawyer is willing to undertake. Paragraph (b)
38 prohibits the lawyer from using or revealing that
39 information, except as permitted by rule 32:1.9, even if the
40 client or lawyer decides not to proceed with the
41 representation. The duty exists regardless of how brief the
42 initial conference may be.
43

1 [4] In order to avoid acquiring disqualifying
2 information from a prospective client, a lawyer considering
3 whether or not to undertake a new matter should limit the
4 initial interview to only such information as reasonably
5 appears necessary for that purpose. Where the information
6 indicates that a conflict of interest or other reason for non-
7 representation exists, the lawyer should so inform the
8 prospective client or decline the representation. If the
9 prospective client wishes to retain the lawyer, and if consent
10 is possible under rule 32:1.7, then consent from all affected
11 present or former clients must be obtained before accepting
12 the representation.
13

14 [5] A lawyer may condition conversations with a
15 prospective client on the person's informed consent that no
16 information disclosed during the consultation will prohibit
17 the lawyer from representing a different client in the matter.
18 See rule 32:1.0(e) for the definition of informed consent. If
19 the agreement expressly so provides, the prospective client
20 may also consent to the lawyer's subsequent use of
21 information received from the prospective client.
22

23 [6] Even in the absence of an agreement, under
24 paragraph (c), the lawyer is not prohibited from representing
25 a client with interests adverse to those of the prospective
26 client in the same or a substantially related matter unless
27 the lawyer has received from the prospective client
28 information that could be significantly harmful if used in the
29 matter.
30

31 [7] Under paragraph (c), the prohibition in this rule is
32 imputed to other lawyers as provided in rule 32:1.10, but,
33 under paragraph (d)(1), imputation may be avoided if the
34 lawyer obtains the informed consent, confirmed in writing, of
35 both the prospective and affected clients. In the alternative,
36 imputation may be avoided if the conditions of paragraph
37 (d)(2) are met and all disqualified lawyers are timely screened
38 and written notice is promptly given to the prospective client.
39 See rule 32:1.0(k) (requirements for screening procedures).
40 Paragraph (d)(2)(i) does not prohibit the screened lawyer from
41 receiving a salary or partnership share established by prior
42 independent agreement, but that lawyer may not receive
43 compensation directly related to the matter in which the
44 lawyer is disqualified.
45

1 [8] Notice, including a general description of the
2 subject matter about which the lawyer was consulted and of
3 the screening procedures employed, should be given as soon
4 as practicable after the need for screening becomes
5 apparent.
6

7 [9] For the duty of competence of a lawyer who gives
8 assistance on the merits of a matter to a prospective client,
9 see rule 32:1.1. For a lawyer's duties when a prospective
10 client entrusts valuables or papers to the lawyer's care, see
11 rule 32:1.15.
12

13 **COUNSELOR**

14 **RULE 32:2.1: ADVISOR**

15 **In representing a client, a lawyer shall exercise**
16 **independent professional judgment and render candid**
17 **advice. In rendering advice, a lawyer may refer not only**
18 **to law but to other considerations such as moral,**
19 **economic, social, and political factors, that may be**
20 **relevant to the client's situation.**
21

22 **Comment**

23 *Scope of Advice*

24 [1] A client is entitled to straightforward advice
25 expressing the lawyer's honest assessment. Legal advice
26 often involves unpleasant facts and alternatives that a client
27 may be disinclined to confront. In presenting advice, a
28 lawyer endeavors to sustain the client's morale and may put
29 advice in as acceptable a form as honesty permits. However,
30 a lawyer should not be deterred from giving candid advice by
31 the prospect that the advice will be unpalatable to the client.
32

33 [2] Advice couched in narrow legal terms may be of
34 little value to a client, especially where practical
35 considerations, such as cost or effects on other people, are
36 predominant. Purely technical legal advice, therefore, can
37 sometimes be inadequate. It is proper for a lawyer to refer to
38 relevant moral and ethical considerations in giving advice.
39 Although a lawyer is not a moral advisor as such, moral and
40 ethical considerations impinge upon most legal questions
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1 and may decisively influence how the law will be applied. In
2 the final analysis, the lawyer should always remember that
3 the decision whether to pursue or forgo legally available
4 objectives or methods because of nonlegal factors is
5 ultimately for the client and not for the lawyer.

6 [3] A client may expressly or impliedly ask the lawyer
7 for purely technical advice. When such a request is made by
8 a client experienced in legal matters, the lawyer may accept
9 it at face value. When such a request is made by a client
10 inexperienced in legal matters, however, the lawyer's
11 responsibility as advisor may include indicating that more
12 may be involved than strictly legal considerations.

13
14 [4] Matters that go beyond strictly legal questions may
15 also be in the domain of another profession. Family matters
16 can involve problems within the professional competence of
17 psychiatry, clinical psychology, or social work; business
18 matters can involve problems within the competence of the
19 accounting profession or of financial specialists. Where
20 consultation with a professional in another field is itself
21 something a competent lawyer would recommend, the lawyer
22 should make such a recommendation. At the same time, a
23 lawyer's advice at its best often consists of recommending a
24 course of action in the face of conflicting recommendations of
25 experts.

26 *Offering Advice*

27 [5] In general, a lawyer is not expected to give advice
28 until asked by the client. However, when a lawyer knows
29 that a client proposes a course of action that is likely to
30 result in substantial adverse legal consequences to the
31 client, the lawyer's duty to the client under rule 32:1.4 may
32 require that the lawyer offer advice if the client's course of
33 action is related to the representation. Similarly, when a
34 matter is likely to involve litigation, it may be necessary
35 under rule 32:1.4 to inform the client of forms of dispute
36 resolution that might constitute reasonable alternatives to
37 litigation. A lawyer ordinarily has no duty to initiate
38 investigation of a client's affairs or to give advice that the
39 client has indicated is unwanted, but a lawyer may initiate
40 advice to a client when doing so appears to be in the client's
41 interest.

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RULE 32:2.2 (Reserved)

RULE 32:2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by rule 32:1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See rule 32:1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a

1 government lawyer, or by special counsel employed by the
2 government, is not an evaluation as that term is used in this
3 rule. The question is whether the lawyer is retained by the
4 person whose affairs are being examined. When the lawyer is
5 retained by that person, the general rules concerning loyalty
6 to client and preservation of confidences apply, which is not
7 the case if the lawyer is retained by someone else. For this
8 reason, it is essential to identify the person by whom the
9 lawyer is retained. This should be made clear not only to the
10 person under examination, but also to others to whom the
11 results are to be made available.

12 *Duties Owed to Third Person and Client*

13 [3] When the evaluation is intended for the information
14 or use of a third person, a legal duty to that person may or
15 may not arise. That legal question is beyond the scope of this
16 rule. However, since such an evaluation involves a departure
17 from the normal client-lawyer relationship, careful analysis
18 of the situation is required. The lawyer must be satisfied as a
19 matter of professional judgment that making the evaluation
20 is compatible with other functions undertaken in behalf of
21 the client. For example, if the lawyer is acting as advocate in
22 defending the client against charges of fraud, it would
23 normally be incompatible with that responsibility for the
24 lawyer to perform an evaluation for others concerning the
25 same or a related transaction. Assuming no such
26 impediment is apparent, however, the lawyer should advise
27 the client of the implications of the evaluation, particularly
28 the lawyer's responsibilities to third persons and the duty to
29 disseminate the findings.

30 *Access to and Disclosure of Information*

31 [4] The quality of an evaluation depends on the
32 freedom and extent of the investigation upon which it is
33 based. Ordinarily a lawyer should have whatever latitude of
34 investigation seems necessary as a matter of professional
35 judgment. Under some circumstances, however, the terms of
36 the evaluation may be limited. For example, certain issues or
37 sources may be categorically excluded, or the scope of search
38 may be limited by time constraints or the noncooperation of
39 persons having relevant information. Any such limitations
40 that are material to the evaluation should be described in
41 the report. If after a lawyer has commenced an evaluation,
42 the client refuses to comply with the terms upon which it

1 was understood the evaluation was to have been made, the
2 lawyer's obligations are determined by law, having reference
3 to the terms of the client's agreement and the surrounding
4 circumstances. In no circumstances is the lawyer permitted
5 to knowingly make a false statement of material fact or law
6 in providing an evaluation under this rule. See rule 32:4.1.

7 *Obtaining Client's Informed Consent*

8 [5] Information relating to an evaluation is protected
9 by rule 32:1.6. In many situations, providing an evaluation
10 to a third party poses no significant risk to the client; thus,
11 the lawyer may be impliedly authorized to disclose
12 information to carry out the representation. See rule
13 32:1.6(a). Where, however, it is reasonably likely that
14 providing the evaluation will affect the client's interests
15 materially and adversely, the lawyer must first obtain the
16 client's consent after the client has been adequately
17 informed concerning the important possible effects on the
18 client's interests. See rules 32:1.6(a) and 32:1.0(e).

19 *Financial Auditor's Requests for Information*

20 [6] When a question concerning the legal situation of a
21 client arises at the instance of the client's financial auditor
22 and the question is referred to the lawyer, the lawyer's
23 response may be made in accordance with procedures
24 recognized in the legal profession. Such a procedure is set
25 forth in the American Bar Association Statement of Policy
26 Regarding Lawyers' Responses to Auditors' Requests for
27 Information, adopted in 1975.
28

29 **RULE 32:2.4: LAWYER SERVING AS THIRD-PARTY**
30 **NEUTRAL**

31 **(a) A lawyer serves as a third-party neutral when**
32 **the lawyer assists two or more persons who are not**
33 **clients of the lawyer to reach a resolution of a dispute or**
34 **other matter that has arisen between them. Service as a**
35 **third-party neutral may include service as an arbitrator,**
36 **a mediator, or in such other capacity as will enable the**
37 **lawyer to assist the parties to resolve the matter.**

38
39 **(b) A lawyer serving as a third-party neutral shall**
40 **inform unrepresented parties that the lawyer is not**

1 **representing them. When the lawyer knows or reasonably**
2 **should know that a party does not understand the**
3 **lawyer's role in the matter, the lawyer shall explain the**
4 **difference between the lawyer's role as a third-party**
5 **neutral and a lawyer's role as one who represents a**
6 **client.**

7
8 **Comment**

9
10 [1] Alternative dispute resolution has become a
11 substantial part of the civil justice system. Aside from
12 representing clients in dispute-resolution processes, lawyers
13 often serve as third-party neutrals. A third-party neutral is a
14 person, such as a mediator, arbitrator, conciliator, or
15 evaluator, who assists the parties, represented or
16 unrepresented, in the resolution of a dispute or in the
17 arrangement of a transaction. Whether a third-party neutral
18 serves primarily as a facilitator, evaluator, or decisionmaker
19 depends on the particular process that is either selected by
20 the parties or mandated by a court.

21
22 [2] The role of a third-party neutral is not unique to
23 lawyers, although, in some court-connected contexts, only
24 lawyers are allowed to serve in this role or to handle certain
25 types of cases. In performing this role, the lawyer may be
26 subject to court rules or other laws that apply either to third-
27 party neutrals generally or to lawyers serving as third-party
28 neutrals. Lawyer-neutrals may also be subject to various
29 codes of ethics, such as the Code of Ethics for Arbitration in
30 Commercial Disputes prepared by a joint committee of the
31 American Bar Association and the American Arbitration
32 Association or the Model Standards of Conduct for Mediators
33 jointly prepared by the American Bar Association, the
34 American Arbitration Association, and the Society of
35 Professionals in Dispute Resolution. In 1987, the supreme
36 court adopted the Rules Governing Standards of Practice for
37 Lawyer Mediators in Family Disputes, chapter 11 of the Iowa
38 Court Rules. Lawyers engaged in family law mediation
39 should carefully review these rules because they address
40 matters of special concern and state different and more
41 restrictive rules on conflicts of interest.

42
43 [3] Unlike nonlawyers who serve as third-party
44 neutrals, lawyers serving in this role may experience unique
45 problems as a result of differences between the role of a
46 third-party neutral and a lawyer's service as a client

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

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in rule 32:1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Iowa Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (*see* rule 32:1.0(m)), the lawyer's duty of candor is governed by rule 32:3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by rule 32:4.1.

ADVOCATE

RULE 32:3.1: MERITORIOUS CLAIMS AND CONTENTIONS

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, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in

1 **a proceeding that could result in incarceration, may**
2 **nevertheless so defend the proceeding as to require that**
3 **every element of the case be established.**

4 **Comment**

5
6 [1] The advocate has a duty to use legal procedure for
7 the fullest benefit of the client's cause, but also a duty not to
8 abuse legal procedure. The law, both procedural and
9 substantive, establishes the limits within which an advocate
10 may proceed. However, the law is not always clear and never
11 is static. Accordingly, in determining the proper scope of
12 advocacy, account must be taken of the law's ambiguities
13 and potential for change.

14 [2] The filing of an action, defense, or similar action
15 taken for a client is not frivolous merely because the facts
16 have not first been fully substantiated or because the lawyer
17 expects to develop vital evidence only by discovery. What is
18 required of lawyers, however, is that they inform themselves
19 about the facts of their clients' cases and the applicable law
20 and determine that they can make good faith arguments in
21 support of their clients' positions. Such action is not
22 frivolous even though the lawyer believes that the client's
23 position ultimately will not prevail. The action is frivolous,
24 however, if the lawyer is unable either to make a good faith
25 argument on the merits of the action taken or to support the
26 action taken by a good faith argument for an extension,
27 modification, or reversal of existing law.

28 [3] The lawyer's obligations under this rule are
29 subordinate to federal or state constitutional law that
30 entitles a defendant in a criminal matter to the assistance of
31 counsel in presenting a claim or contention that otherwise
32 would be prohibited by this rule.

33
34 **RULE 32:3.2: EXPEDITING LITIGATION**

35
36 **A lawyer shall make reasonable efforts to expedite**
37 **litigation consistent with the interests of the client.**

38
39 **Comment**

40
41 [1] Dilatory practices bring the administration of
42 justice into disrepute. Although there will be occasions when

1 a lawyer may properly seek a postponement for personal
2 reasons, it is not proper for a lawyer to routinely fail to
3 expedite litigation solely for the convenience of the
4 advocates. Nor will a failure to expedite be reasonable if done
5 for the purpose of frustrating an opposing party's attempt to
6 obtain rightful redress or repose. It is not a justification that
7 similar conduct is often tolerated by the bench and bar. The
8 question is whether a competent lawyer acting in good faith
9 would regard the course of action as having some
10 substantial purpose other than delay. Realizing financial or
11 other benefit from otherwise improper delay in litigation is
12 not a legitimate interest of the client.
13

14 **RULE 32:3.3: CANDOR TOWARD THE TRIBUNAL**

15 **(a) A lawyer shall not knowingly:**

16 **(1) make a false statement of fact or law to a**
17 **tribunal or fail to correct a false statement of**
18 **material fact or law previously made to the**
19 **tribunal by the lawyer;**

20 **(2) fail to disclose to the tribunal legal**
21 **authority in the controlling jurisdiction known to**
22 **the lawyer to be directly adverse to the position of**
23 **the client and not disclosed by opposing counsel;**
24 **or**

25 **(3) offer evidence that the lawyer knows to be**
26 **false. If a lawyer, the lawyer's client, or a witness**
27 **called by the lawyer, has offered material evidence**
28 **and the lawyer comes to know of its falsity, the**
29 **lawyer shall take reasonable remedial measures,**
30 **including, if necessary, disclosure to the tribunal.**
31 **A lawyer may refuse to offer evidence, other than**
32 **the testimony of a defendant in a criminal matter,**
33 **that the lawyer reasonably believes is false.**

34 **(b) A lawyer who represents a client in an**
35 **adjudicative proceeding and who knows that a person**
36 **intends to engage, is engaging, or has engaged in**
37 **criminal or fraudulent conduct related to the proceeding**
38 **shall take reasonable remedial measures, including, if**
39 **necessary, disclosure to the tribunal.**

1 **(c) The duties stated in paragraphs (a) and (b)**
2 **continue to the conclusion of the proceeding, and apply**
3 **even if compliance requires disclosure of information**
4 **otherwise protected by rule 32:1.6.**

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

9 **Comment**

10 [1] This rule governs the conduct of a lawyer who is
11 representing a client in the proceedings of a tribunal. See
12 rule 32:1.0(m) for the definition of "tribunal." It also applies
13 when the lawyer is representing a client in an ancillary
14 proceeding conducted pursuant to the tribunal's adjudicative
15 authority, such as a deposition. Thus, for example,
16 paragraph (a)(3) requires a lawyer to take reasonable
17 remedial measures if the lawyer comes to know that a client
18 who is testifying in a deposition has offered evidence that is
19 false.

20 [2] This rule sets forth the special duties of lawyers as
21 officers of the court to avoid conduct that undermines the
22 integrity of the adjudicative process. A lawyer acting as an
23 advocate in an adjudicative proceeding has an obligation to
24 present the client's case with persuasive force. Performance
25 of that duty while maintaining confidences of the client,
26 however, is qualified by the advocate's duty of candor to the
27 tribunal. Consequently, although a lawyer in an adversary
28 proceeding is not required to present an impartial exposition
29 of the law or to vouch for the evidence submitted in a cause,
30 the lawyer must not allow the tribunal to be misled by false
31 statements of law or fact or evidence that the lawyer knows
32 to be false.

33 *Representations by a Lawyer*

34 [3] An advocate is responsible for pleadings and other
35 documents prepared for litigation, but is usually not
36 required to have personal knowledge of matters asserted
37 therein, for litigation documents ordinarily present
38 assertions by the client, or by someone on the client's behalf,
39 and not assertions by the lawyer. *Compare* rule 32:3.1.
40 However, an assertion purporting to be on the lawyer's own

1 knowledge, as in an affidavit by the lawyer or in a statement
2 in open court, may properly be made only when the lawyer
3 knows the assertion is true or believes it to be true on the
4 basis of a reasonably diligent inquiry. There are
5 circumstances where failure to make a disclosure is the
6 equivalent of an affirmative misrepresentation. The
7 obligation prescribed in rule 32:1.2(d) not to counsel a client
8 to commit or assist the client in committing a fraud applies
9 in litigation. Regarding compliance with rule 32:1.2(d), see
10 the comment to that rule. See also the comment to rule
11 32:8.4(b).

12 *Legal Argument*

13 [4] Legal argument based on a knowingly false
14 representation of law constitutes dishonesty toward the
15 tribunal. A lawyer is not required to make a disinterested
16 exposition of the law, but must recognize the existence of
17 pertinent legal authorities. Furthermore, as stated in
18 paragraph (a)(2), an advocate has a duty to disclose directly
19 adverse authority in the controlling jurisdiction that has not
20 been disclosed by the opposing party. The underlying
21 concept is that legal argument is a discussion seeking to
22 determine the legal premises properly applicable to the case.

23 *Offering Evidence*

24 [5] Paragraph (a)(3) requires that the lawyer refuse to
25 offer evidence that the lawyer knows to be false, regardless of
26 the client's wishes. This duty is premised on the lawyer's
27 obligation as an officer of the court to prevent the trier of fact
28 from being misled by false evidence. A lawyer does not
29 violate this rule if the lawyer offers the evidence for the
30 purpose of establishing its falsity.

31 [6] If a lawyer knows that the client intends to testify
32 falsely or wants the lawyer to introduce false evidence, the
33 lawyer should seek to persuade the client that the evidence
34 should not be offered. If the persuasion is ineffective and the
35 lawyer continues to represent the client, the lawyer must
36 refuse to offer the false evidence. If only a portion of a
37 witness's testimony will be false, the lawyer may call the
38 witness to testify but may not elicit or otherwise permit the
39 witness to present the testimony that the lawyer knows is
40 false.

1 [7] The duties stated in paragraphs (a) and (b) apply to
2 all lawyers, including defense counsel in criminal cases. An
3 advocate's obligation under the Iowa Rules of Professional
4 Conduct is subordinate to a court's directive requiring
5 counsel to present the accused as a witness or to allow the
6 accused to give a narrative statement if the accused so
7 desires. *See also* comment [9].

8 [8] The prohibition against offering false evidence only
9 applies if the lawyer knows that the evidence is false. A
10 lawyer's reasonable belief that evidence is false does not
11 preclude its presentation to the trier of fact. A lawyer's
12 knowledge that evidence is false, however, can be inferred
13 from the circumstances. *See* rule 32:1.0(f). Thus, although a
14 lawyer should resolve doubts about the veracity of testimony
15 or other evidence in favor of the client, the lawyer cannot
16 ignore an obvious falsehood.

17 [9] Although paragraph (a)(3) only prohibits a lawyer
18 from offering evidence the lawyer knows to be false, it
19 permits the lawyer to refuse to offer testimony or other proof
20 that the lawyer reasonably believes is false. Offering such
21 proof may reflect adversely on the lawyer's ability to
22 discriminate in the quality of evidence and thus impair the
23 lawyer's effectiveness as an advocate. Because of the special
24 protections historically provided criminal defendants,
25 however, this rule does not permit a lawyer to refuse to offer
26 the testimony of such a client where the lawyer reasonably
27 believes but does not know that the testimony will be false.
28 Unless the lawyer knows the testimony will be false, the
29 lawyer must honor the client's decision to testify. *See also*
30 comment [7].

31 *Remedial Measures*

32 [10] Having offered material evidence in the belief that
33 it was true, a lawyer may subsequently come to know that
34 the evidence is false. Or, a lawyer may be surprised when the
35 lawyer's client, or another witness called by the lawyer, offers
36 testimony the lawyer knows to be false, either during the
37 lawyer's direct examination or in response to cross-
38 examination by the opposing lawyer. In such situations or if
39 the lawyer knows of the falsity of testimony elicited from the
40 client during a deposition, the lawyer must take reasonable
41 remedial measures. In such situations, the advocate's proper
42 course is to remonstrate with the client confidentially, advise

1 the client of the lawyer's duty of candor to the tribunal, and
2 seek the client's cooperation with respect to the withdrawal
3 or correction of the false statements or evidence. If that fails,
4 the advocate must take further remedial action. If
5 withdrawal from the representation is not permitted or will
6 not undo the effect of the false evidence, the advocate must
7 make such disclosure to the tribunal as is reasonably
8 necessary to remedy the situation, even if doing so requires
9 the lawyer to reveal information that otherwise would be
10 protected by rule 32:1.6. It is for the tribunal then to
11 determine what should be done—making a statement about
12 the matter to the trier of fact, ordering a mistrial, or perhaps
13 nothing.

14 [11] The disclosure of a client's false testimony can
15 result in grave consequences to the client, including not only
16 a sense of betrayal, but also loss of the case, and perhaps a
17 prosecution for perjury. But the alternative is that the lawyer
18 cooperate in deceiving the court, thereby subverting the
19 truth-finding process which the adversary system is
20 designed to implement. See rule 32:1.2(d). Furthermore,
21 unless it is clearly understood that the lawyer will act upon
22 the duty to disclose the existence of false evidence, the client
23 can simply reject the lawyer's advice to reveal the false
24 evidence and insist that the lawyer keep silent. Thus the
25 client could in effect coerce the lawyer into being a party to
26 fraud on the court.

27 *Preserving Integrity of Adjudicative Process*

28 [12] Lawyers have a special obligation to protect a
29 tribunal against criminal or fraudulent conduct that
30 undermines the integrity of the adjudicative process, such as
31 bribing, intimidating, or otherwise unlawfully
32 communicating with a witness, juror, court official, or other
33 participant in the proceeding, unlawfully destroying or
34 concealing documents or other evidence, or failing to disclose
35 information to the tribunal when required by law to do so.
36 Thus, paragraph (b) requires a lawyer to take reasonable
37 remedial measures, including disclosure if necessary,
38 whenever the lawyer knows that a person, including the
39 lawyer's client, intends to engage, is engaging, or has
40 engaged in criminal or fraudulent conduct related to the
41 proceeding.

42 *Duration of Obligation*

1 [13] A proceeding has concluded within the meaning of
2 this rule when it is beyond the power of a tribunal to correct,
3 modify, reverse, or vacate a final judgment, or to grant a new
4 trial.

5 *Ex Parte Proceedings*

6 [14] Ordinarily, an advocate has the limited
7 responsibility of presenting one side of the matters that a
8 tribunal should consider in reaching a decision; the
9 conflicting position is expected to be presented by the
10 opposing party. However, in any ex parte proceeding, such
11 as an application for a temporary restraining order, there is
12 no balance of presentation by opposing advocates. The object
13 of an ex parte proceeding is nevertheless to yield a
14 substantially just result. The judge has an affirmative
15 responsibility to accord the absent party just consideration.
16 The lawyer for the represented party has the correlative duty
17 to make disclosures of material facts known to the lawyer
18 and that the lawyer reasonably believes are necessary to an
19 informed decision.

20 *Withdrawal*

21 [15] Normally, a lawyer's compliance with the duty of
22 candor imposed by this rule does not require that the lawyer
23 withdraw from the representation of a client whose interests
24 will be or have been adversely affected by the lawyer's
25 disclosure. The lawyer may, however, be required by rule
26 32:1.16(a) to seek permission of the tribunal to withdraw if
27 the lawyer's compliance with this rule's duty of candor
28 results in such an extreme deterioration of the client-lawyer
29 relationship that the lawyer can no longer competently
30 represent the client. Also see rule 32:1.16(b) for the
31 circumstances in which a lawyer will be permitted to seek a
32 tribunal's permission to withdraw. In connection with a
33 request for permission to withdraw that is premised on a
34 client's misconduct, a lawyer may reveal information relating
35 to the representation only to the extent reasonably necessary
36 to comply with this rule or as otherwise permitted by rule
37 32:1.6.

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1 **RULE 32:3.4: FAIRNESS TO OPPOSING PARTY**
2 **AND COUNSEL**

3 **A lawyer shall not:**

4 **(a) unlawfully obstruct another party's access to**
5 **evidence or unlawfully alter, destroy, or conceal a**
6 **document or other material having potential evidentiary**
7 **value. A lawyer shall not counsel or assist another**
8 **person to do any such act;**

9 **(b) falsify evidence, counsel or assist a witness to**
10 **testify falsely, or offer an inducement to a witness that**
11 **is prohibited by law;**

12 **(c) knowingly disobey an obligation under the rules**
13 **of a tribunal except for an open refusal based on an**
14 **assertion that no valid obligation exists;**

15 **(d) in pretrial procedure, make a frivolous**
16 **discovery request or fail to make a reasonably diligent**
17 **effort to comply with a legally proper discovery request**
18 **by an opposing party;**

19 **(e) in trial, allude to any matter that the lawyer**
20 **does not reasonably believe is relevant or that will not be**
21 **supported by admissible evidence, assert personal**
22 **knowledge of facts in issue except when testifying as a**
23 **witness, or state a personal opinion as to the justness of**
24 **a cause, the credibility of a witness, the culpability of a**
25 **civil litigant, or the guilt or innocence of an accused; or**

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

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

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

34 **Comment**
35

1 [1] The procedure of the adversary system
2 contemplates that the evidence in a case is to be marshaled
3 competitively by the contending parties. Fair competition in
4 the adversary system is secured by prohibitions against
5 destruction or concealment of evidence, improperly
6 influencing witnesses, obstructive tactics in discovery
7 procedure, and the like.

8 [2] Documents and other items of evidence are often
9 essential to establish a claim or defense. Subject to
10 evidentiary privileges, the right of an opposing party,
11 including the government, to obtain evidence through
12 discovery or subpoena is an important procedural right. The
13 exercise of that right can be frustrated if relevant material is
14 altered, concealed, or destroyed. The law may make it an
15 offense to destroy material for the purpose of impairing its
16 availability in a pending proceeding or one whose
17 commencement can be foreseen. Falsifying evidence is also
18 generally a criminal offense. Paragraph (a) applies to
19 evidentiary material generally, including computerized
20 information. The law may permit a lawyer to take temporary
21 possession of physical evidence of client crimes for the
22 purpose of conducting a limited examination that will not
23 alter or destroy material characteristics of the evidence. In
24 such a case, the law may require the lawyer to turn the
25 evidence over to the police or other prosecuting authority,
26 depending on the circumstances.

27 [3] With regard to paragraph (b), it is not improper to
28 pay a witness's expenses, including loss of time in attending
29 or testifying, or to compensate an expert witness on terms
30 permitted by law. It is improper to pay an occurrence
31 witness any fee other than as authorized by law for testifying
32 and it is improper to pay an expert witness a contingent fee.

33 [4] Paragraph (f) permits a lawyer to advise employees
34 of a client to refrain from giving information to another party,
35 for the employees may identify their interests with those of
36 the client. *See also* rule 32:4.2.

37
38
39 **RULE 32:3.5: IMPARTIALITY AND DECORUM**
40 **OF THE TRIBUNAL**

41
42 **A lawyer shall not:**
43

1 **(a) seek to influence a judge, juror, prospective**
2 **juror, or other official by means prohibited by law;**

3
4 **(b) communicate ex parte with such a person**
5 **during the proceeding unless authorized to do so by law**
6 **or court order;**

7 **(c) communicate with a juror or prospective juror**
8 **after discharge of the jury if:**

9 **(1) the communication is prohibited by law or**
10 **court order;**

11 **(2) the juror has made known to the lawyer a**
12 **desire not to communicate; or**

13 **(3) the communication involves**
14 **misrepresentation, coercion, duress, or**
15 **harassment; or**

16 **(d) engage in conduct intended to disrupt a**
17 **tribunal.**

18
19 **Comment**

20
21 [1] Many forms of improper influence upon a tribunal
22 are proscribed by criminal law. Others are specified in the
23 Iowa Code of Judicial Conduct, with which an advocate
24 should be familiar. A lawyer is required to avoid contributing
25 to a violation of such provisions.

26
27 [2] During a proceeding a lawyer may not
28 communicate ex parte with persons serving in an official
29 capacity in the proceeding, such as judges, masters, or
30 jurors, unless authorized to do so by law or court order.

31
32 [3] A lawyer may on occasion want to communicate
33 with a juror or prospective juror after the jury has been
34 discharged. The lawyer may do so unless the communication
35 is prohibited by law or a court order but must respect the
36 desire of the juror not to talk with the lawyer. The lawyer
37 may not engage in improper conduct during the
38 communication.

39
40 [4] The advocate's function is to present evidence and
41 argument so that the cause may be decided according to law.

1 Refraining from abusive or obstreperous conduct is a
2 corollary of the advocate's right to speak on behalf of
3 litigants. A lawyer may stand firm against abuse by a judge
4 but should avoid reciprocation; the judge's default is no
5 justification for similar dereliction by an advocate. An
6 advocate can present the cause, protect the record for
7 subsequent review, and preserve professional integrity by
8 patient firmness no less effectively than by belligerence or
9 theatrics.

10
11 [5] The duty to refrain from disruptive conduct applies
12 to any proceeding of a tribunal, including a deposition. See
13 rule 32:1.0(m).
14

15 16 **RULE 32:3.6: TRIAL PUBLICITY** 17

18 **(a) A lawyer who is participating or has participated**
19 **in the investigation or litigation of a matter shall not**
20 **make an extrajudicial statement that the lawyer knows**
21 **or reasonably should know will be disseminated by**
22 **means of public communication and will have a**
23 **substantial likelihood of materially prejudicing an**
24 **adjudicative proceeding in the matter.**
25

26 **(b) Notwithstanding paragraph (a), a lawyer may**
27 **state:**
28

29 **(1) the claim, offense, or defense involved**
30 **and, except when prohibited by law, the identity of**
31 **the persons involved;**
32

33 **(2) information contained in a public record;**
34

35 **(3) that an investigation of a matter is in**
36 **progress;**
37

38 **(4) the scheduling or result of any step in**
39 **litigation;**
40

41 **(5) a request for assistance in obtaining**
42 **evidence and information necessary thereto;**
43

44 **(6) a warning of danger concerning the**
45 **behavior of a person involved, when there is reason**
46 **to believe that there exists the likelihood of**

1 **substantial harm to an individual or to the public**
2 **interest; and**

3
4 **(7) in a criminal case, in addition to**
5 **subparagraphs (1) through (6):**

6
7 **(i) the identity, residence, occupation,**
8 **and family status of the accused;**

9
10 **(ii) if the accused has not been**
11 **apprehended, information necessary to aid in**
12 **apprehension of that person;**

13
14 **(iii) the fact, time, and place of arrest; and**

15
16 **(iv) the identity of investigating and**
17 **arresting officers or agencies and the length**
18 **of the investigation.**

19
20 **(c) Notwithstanding paragraph (a), a lawyer may**
21 **make a statement that a reasonable lawyer would believe**
22 **is required to protect a client from the substantial undue**
23 **prejudicial effect of recent publicity not initiated by the**
24 **lawyer or the lawyer's client. A statement made pursuant**
25 **to this paragraph shall be limited to such information as**
26 **is necessary to mitigate the recent adverse publicity.**

27
28 **(d) No lawyer associated in a firm or government**
29 **agency with a lawyer subject to paragraph (a) shall make**
30 **a statement prohibited by paragraph (a).**

31
32 **(e) Any communication made under paragraph (b)**
33 **that includes information that a defendant will be or has**
34 **been charged with a crime must also include a statement**
35 **explaining that a criminal charge is merely an**
36 **accusation and the defendant is presumed innocent until**
37 **and unless proven guilty.**

38 **Comment**

39 [1] It is difficult to strike a balance between protecting
40 the right to a fair trial and safeguarding the right of free
41 expression. Preserving the right to a fair trial necessarily
42 entails some curtailment of the information that may be
43 disseminated about a party prior to trial, particularly where
44 trial by jury is involved. If there were no such limits, the

1 result would be the practical nullification of the protective
2 effect of the rules of forensic decorum and the exclusionary
3 rules of evidence. On the other hand, there are vital social
4 interests served by the free dissemination of information
5 about events having legal consequences and about legal
6 proceedings themselves. The public has a right to know
7 about threats to its safety and measures aimed at ensuring
8 its security. It also has a legitimate interest in the conduct of
9 judicial proceedings, particularly in matters of general public
10 concern. Furthermore, the subject matter of legal
11 proceedings is often of direct significance in debate and
12 deliberation over questions of public policy.

13
14 [2] Special rules of confidentiality may validly govern
15 proceedings in juvenile, domestic relations, and mental
16 disability proceedings, and perhaps other types of litigation.
17 Rule 32:3.4(c) requires compliance with such rules.

18
19 [3] The rule sets forth a basic general prohibition
20 against a lawyer's making statements that the lawyer knows
21 or should know will have a substantial likelihood of
22 materially prejudicing an adjudicative proceeding.
23 Recognizing that the public value of informed commentary is
24 great and the likelihood of prejudice to a proceeding by the
25 commentary of a lawyer who is not involved in the
26 proceeding is small, the rule applies only to lawyers who are,
27 or who have been involved in the investigation or litigation of
28 a case, and their associates.

29
30 [4] Paragraph (b) identifies specific matters about
31 which a lawyer's statements would not ordinarily be
32 considered to present a substantial likelihood of material
33 prejudice, and should not in any event be considered
34 prohibited by the general prohibition of paragraph (a).
35 Paragraph (b) is not intended to be an exhaustive listing of
36 the subjects upon which a lawyer may make a statement,
37 but statements on other matters may be subject to
38 paragraph (a).

39
40 [5] There are, on the other hand, certain subjects that
41 are more likely than not to have a material prejudicial effect
42 on a proceeding, particularly when they refer to a civil matter
43 triable to a jury, a criminal matter, or any other proceeding
44 that could result in incarceration. These subjects relate to:

1 (1) the character, credibility, reputation, or
2 criminal record of a party, suspect in a criminal
3 investigation or witness, or the identity of a witness, or
4 the expected testimony of a party or witness;

5 (2) in a criminal case or proceeding that could
6 result in incarceration, the possibility of a plea of
7 guilty to the offense or the existence or contents of any
8 confession, admission, or statement given by a
9 defendant or suspect or that person's refusal or failure
10 to make a statement;

11 (3) the performance or results of any
12 examination or test or the refusal or failure of a person
13 to submit to an examination or test, or the identity or
14 nature of physical evidence expected to be presented;

15 (4) any opinion as to the guilt or innocence of a
16 defendant or suspect in a criminal case or proceeding
17 that could result in incarceration;

18 (5) information that the lawyer knows or
19 reasonably should know is likely to be inadmissible as
20 evidence in a trial and that would, if disclosed, create a
21 substantial risk of prejudicing an impartial trial; or

22 (6) the fact that a defendant has been charged
23 with a crime, unless there is included therein a
24 statement explaining that the charge is merely an
25 accusation and that the defendant is presumed
26 innocent until and unless proven guilty.

27 [6] Another relevant factor in determining prejudice is
28 the nature of the proceeding involved. Criminal jury trials
29 will be most sensitive to extrajudicial speech. Civil trials may
30 be less sensitive. Non-jury hearings and arbitration
31 proceedings may be even less affected. The rule will still
32 place limitations on prejudicial comments in these cases, but
33 the likelihood of prejudice may be different depending on the
34 type of proceeding.

35
36 [7] Finally, extrajudicial statements that might
37 otherwise raise a question under this rule may be
38 permissible when they are made in response to statements
39 made publicly by another party, another party's lawyer, or
40 third persons, where a reasonable lawyer would believe a

1 public response is required in order to avoid prejudice to the
2 lawyer's client. When prejudicial statements have been
3 publicly made by others, responsive statements may have
4 the salutary effect of lessening any resulting adverse impact
5 on the adjudicative proceeding. Such responsive statements
6 should be limited to contain only such information as is
7 necessary to mitigate undue prejudice created by the
8 statements made by others.

9
10 [8] See rule 32:3.8(f) for additional duties of
11 prosecutors in connection with extrajudicial statements
12 about criminal proceedings.

13 14 **RULE 32:3.7: LAWYER AS WITNESS**

15
16
17 **(a) A lawyer shall not act as advocate at a trial in**
18 **which the lawyer is likely to be a necessary witness**
19 **unless:**

20
21 **(1) the testimony relates to an uncontested**
22 **issue;**

23
24 **(2) the testimony relates to the nature and**
25 **value of legal services rendered in the case; or**

26
27 **(3) disqualification of the lawyer would work**
28 **substantial hardship on the client.**

29
30 **(b) A lawyer may act as advocate in a trial in which**
31 **another lawyer in the lawyer's firm is likely to be called**
32 **as a witness unless precluded from doing so by rule**
33 **32:1.7 or rule 32:1.9.**

34 35 **Comment**

36
37 [1] Combining the roles of advocate and witness can
38 prejudice the tribunal and the opposing party and can also
39 involve a conflict of interest between the lawyer and client.

40 41 *Advocate-Witness Rule*

42
43 [2] The tribunal has proper objection when the trier of
44 fact may be confused or misled by a lawyer serving as both
45 advocate and witness. The opposing party has proper
46 objection where the combination of roles may prejudice that

1 party's rights in the litigation. A witness is required to testify
2 on the basis of personal knowledge, while an advocate is
3 expected to explain and comment on evidence given by
4 others. It may not be clear whether a statement by an
5 advocate-witness should be taken as proof or as an analysis
6 of the proof.

7
8 [3] To protect the tribunal, paragraph (a) prohibits a
9 lawyer from simultaneously serving as advocate and
10 necessary witness except in those circumstances specified in
11 paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes
12 that if the testimony will be uncontested, the ambiguities in
13 the dual role are purely theoretical. Paragraph (a)(2)
14 recognizes that where the testimony concerns the extent and
15 value of legal services rendered in the action in which the
16 testimony is offered, permitting the lawyers to testify avoids
17 the need for a second trial with new counsel to resolve that
18 issue. Moreover, in such a situation the judge has firsthand
19 knowledge of the matter in issue; hence, there is less
20 dependence on the adversary process to test the credibility of
21 the testimony.

22
23 [4] Apart from these two exceptions, paragraph (a)(3)
24 recognizes that a balancing is required between the interests
25 of the client and those of the tribunal and the opposing
26 party. Whether the tribunal is likely to be misled or the
27 opposing party is likely to suffer prejudice depends on the
28 nature of the case, the importance and probable tenor of the
29 lawyer's testimony, and the probability that the lawyer's
30 testimony will conflict with that of other witnesses. Even if
31 there is risk of such prejudice, in determining whether the
32 lawyer should be disqualified, due regard must be given to
33 the effect of disqualification on the lawyer's client. It is
34 relevant that one or both parties could reasonably foresee
35 that the lawyer would probably be a witness. The conflict of
36 interest principles stated in rules 32:1.7, 32:1.9, and 32:1.10
37 have no application to this aspect of the problem.

38
39 [5] Because the tribunal is not likely to be misled when
40 a lawyer acts as advocate in a trial in which another lawyer
41 in the lawyer's firm will testify as a necessary witness,
42 paragraph (b) permits the lawyer to do so except in
43 situations involving a conflict of interest.

44
45 *Conflict of Interest*
46

1 [6] In determining if it is permissible to act as advocate
2 in a trial in which the lawyer will be a necessary witness, the
3 lawyer must also consider that the dual role may give rise to
4 a conflict of interest that will require compliance with rule
5 32:1.7 or 32:1.9. For example, if there is likely to be
6 substantial conflict between the testimony of the client and
7 that of the lawyer, the representation involves a conflict of
8 interest that requires compliance with rule 32:1.7. This
9 would be true even though the lawyer might not be
10 prohibited by paragraph (a) from simultaneously serving as
11 advocate and witness because the lawyer's disqualification
12 would work a substantial hardship on the client. Similarly, a
13 lawyer who might be permitted to simultaneously serve as an
14 advocate and a witness by paragraph (a)(3) might be
15 precluded from doing so by rule 32:1.9. The problem can
16 arise whether the lawyer is called as a witness on behalf of
17 the client or is called by the opposing party. Determining
18 whether or not such a conflict exists is primarily the
19 responsibility of the lawyer involved. If there is a conflict of
20 interest, the lawyer must secure the client's informed
21 consent, confirmed in writing. In some cases, the lawyer will
22 be precluded from seeking the client's consent. See rule
23 32:1.7. See rule 32:1.0(b) for the definition of "confirmed in
24 writing" and rule 32:1.0(e) for the definition of "informed
25 consent."
26

27 [7] Paragraph (b) provides that a lawyer is not
28 disqualified from serving as an advocate because a lawyer
29 with whom the lawyer is associated in a firm is precluded
30 from doing so by paragraph (a). If, however, the testifying
31 lawyer would also be disqualified by rule 32:1.7 or rule
32 32:1.9 from representing the client in the matter, other
33 lawyers in the firm will be precluded from representing the
34 client by rule 32:1.10 unless the client gives informed
35 consent under the conditions stated in rule 32:1.7 or 32:1.9.
36
37

38 **RULE 32:3.8: SPECIAL RESPONSIBILITIES**
39 **OF A PROSECUTOR**
40

41 **The prosecutor in a criminal case shall:**

42 **(a) refrain from prosecuting a charge that the**
43 **prosecutor knows or reasonably should know is not**
44 **supported by probable cause;**
45

1 (b) make reasonable efforts to ensure that the
2 accused has been advised of the right to, and the
3 procedure for obtaining, counsel and has been given
4 reasonable opportunity to obtain counsel;
5

6 (c) not seek to obtain from an unrepresented
7 accused a waiver of important pretrial rights, such as the
8 right to a preliminary hearing;
9

10 (d) make timely disclosure to the defense of all
11 evidence or information known to the prosecutor that
12 tends to negate the guilt of the accused or mitigates the
13 offense, and, in connection with sentencing, disclose to
14 the defense and to the tribunal all unprivileged
15 mitigating information known to the prosecutor, except
16 when the prosecutor is relieved of this responsibility by
17 a protective order of the tribunal;
18

19 (e) not subpoena a lawyer in a grand jury or other
20 criminal proceeding to present evidence about a past or
21 present client unless the prosecutor reasonably believes:

22 (1) the information sought is not protected
23 from disclosure by any applicable privilege;

24 (2) the evidence sought is essential to the
25 successful completion of an ongoing investigation
26 or prosecution; and

27 (3) there is no other feasible alternative to
28 obtain the information; and

29 (f) except for statements that are necessary to
30 inform the public of the nature and extent of the
31 prosecutor's action and that serve a legitimate law
32 enforcement purpose, refrain from making extrajudicial
33 comments that have a substantial likelihood of
34 heightening public condemnation of the accused and
35 exercise reasonable care to prevent investigators, law
36 enforcement personnel, employees, or other persons
37 assisting or associated with the prosecutor in a criminal
38 case from making an extrajudicial statement that the
39 prosecutor would be prohibited from making under rule
40 32:3.6 or this rule.

41
42 **Comment**

1
2 [1] A prosecutor has the responsibility of a minister of
3 justice and not simply that of an advocate. This
4 responsibility carries with it specific obligations to see that
5 the defendant is accorded procedural justice and that guilt is
6 decided upon the basis of sufficient evidence. *See generally*
7 *ABA Standards of Criminal Justice Relating to the*
8 *Prosecution Function*. Applicable law may require other
9 measures by the prosecutor, and knowing disregard of those
10 obligations or a systematic abuse of prosecutorial discretion
11 could constitute a violation of rule 32:8.4.
12

13 [2] A defendant may waive a preliminary hearing and
14 thereby lose a valuable opportunity to challenge probable
15 cause. Accordingly, prosecutors should not seek to obtain
16 waivers of preliminary hearings or other important pretrial
17 rights from unrepresented accused persons. Paragraph (c)
18 does not apply, however, to an accused appearing *pro se*
19 with the approval of the tribunal. Nor does it forbid the
20 lawful questioning of an uncharged suspect who has
21 knowingly waived the rights to counsel and silence. In
22 addition, paragraph (c) does not apply to a defendant
23 charged with a simple misdemeanor for which the prosecutor
24 reasonably believes the defendant will not be incarcerated.
25

26 [3] The exception in paragraph (d) recognizes that a
27 prosecutor may seek an appropriate protective order from
28 the tribunal if disclosure of information to the defense could
29 result in substantial harm to an individual or to the public
30 interest. For purposes of paragraph (d), evidence tending to
31 negate the guilt of the accused includes evidence that tends
32 to impeach a witness for the State.
33

34 [4] Paragraph (e) is intended to limit the issuance of
35 lawyer subpoenas in grand jury and other criminal
36 proceedings to those situations in which there is a genuine
37 need to intrude into the client-lawyer relationship.
38

39 [5] Paragraph (f) supplements rule 32:3.6, which
40 prohibits extrajudicial statements that have a substantial
41 likelihood of prejudicing an adjudicatory proceeding. In the
42 context of a criminal prosecution, a prosecutor's
43 extrajudicial statement can create the additional problem of
44 increasing public condemnation of the accused. Although
45 the announcement of an indictment, for example, will
46 necessarily have severe consequences for the accused, a

1 prosecutor can, and should, avoid comments which have no
2 legitimate law enforcement purpose and have a substantial
3 likelihood of increasing public opprobrium of the accused.
4 Nothing in this comment is intended to restrict the
5 statements which a prosecutor may make which comply with
6 rule 32:3.6(b) or 32:3.6(c) and with rule 32:3.6(e).

7
8 [6] Like other lawyers, prosecutors are subject to rules
9 32:5.1 and 32:5.3, which relate to responsibilities regarding
10 lawyers and nonlawyers who work for or are associated with
11 the lawyer's office. Paragraph (f) reminds the prosecutor of
12 the importance of these obligations in connection with the
13 unique dangers of improper extrajudicial statements in a
14 criminal case. In addition, paragraph (f) requires a
15 prosecutor to exercise reasonable care to prevent persons
16 assisting or associated with the prosecutor from making
17 improper extrajudicial statements, even when such persons
18 are not under the direct supervision of the prosecutor.
19 Ordinarily, the reasonable care standard will be satisfied if
20 the prosecutor issues the appropriate cautions to law-
21 enforcement personnel and other relevant individuals.

22
23
24 **RULE 32:3.9: ADVOCATE IN**
25 **NONADJUDICATIVE PROCEEDINGS**

26 **A lawyer representing a client before a legislative**
27 **body or administrative agency in a nonadjudicative**
28 **proceeding shall disclose that the appearance is in a**
29 **representative capacity and shall conform to the**
30 **provisions of rules 32:3.3(a) through (c), 32:3.4(a) through**
31 **(c), and 32:3.5.**

32
33 **Comment**

34
35 [1] In representation before bodies such as
36 legislatures, municipal councils, and executive and
37 administrative agencies acting in a rule-making or policy-
38 making capacity, lawyers present facts, formulate issues,
39 and advance argument in the matters under consideration.
40 The decision-making body, like a court, should be able to
41 rely on the integrity of the submissions made to it. A lawyer
42 appearing before such a body must deal with it honestly and
43 in conformity with applicable rules of procedure. In all such
44 appearances the lawyer shall identify the client if
45 identification of the client is not prohibited by law. It is not

1 improper, however, for a lawyer to seek from an agency
2 information available to the public without identifying a
3 client. See rules 32:3.3(a)-(c), 32:3.4(a)-(c), and 32:3.5.
4

5 [2] Lawyers have no exclusive right to appear before
6 nonadjudicative bodies, as they do before a court. The
7 requirements of this rule therefore may subject lawyers to
8 regulations inapplicable to advocates who are not lawyers.
9 However, legislatures and administrative agencies have a
10 right to expect lawyers to deal with them as they deal with
11 courts.
12

13 [3] This rule only applies when a lawyer represents a
14 client in connection with an official hearing or meeting of a
15 governmental agency or a legislative body to which the
16 lawyer or the lawyer's client is presenting evidence or
17 argument. It does not apply to representation of a client in a
18 negotiation or other bilateral transaction with a
19 governmental agency or in connection with an application for
20 a license or other privilege or the client's compliance with
21 generally applicable reporting requirements, such as the
22 filing of income tax returns. Nor does it apply to the
23 representation of a client in connection with an investigation
24 or examination of the client's affairs conducted by
25 government investigators or examiners. Representation in
26 such matters is governed by rules 32:4.1 through 32:4.4.
27

28 [4] A lawyer representing a client before a
29 governmental body in a nonadjudicative proceeding is
30 engaged in the practice of law, even if such undertakings
31 could also be engaged in by nonlawyers. Accordingly, a client
32 who employs a lawyer to represent that client in lobbying or
33 other advocacy before governmental bodies is entitled to
34 assume that the lawyer will do so pursuant to the lawyer's
35 professional obligations under these rules, specifically
36 including those provisions concerning confidentiality,
37 competence, and conflicts of interest.
38

39 **TRANSACTIONS WITH PERSONS**
40 **OTHER THAN CLIENTS**

41 **RULE 32:4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS**

42
43 **In the course of representing a client, a lawyer**
44 **shall not knowingly:**

1 **(a) make a false statement of material fact or law to**
2 **a third person; or**

3 **(b) fail to disclose a material fact to a third person**
4 **when disclosure is necessary to avoid assisting a**
5 **criminal or fraudulent act by a client, unless disclosure**
6 **is prohibited by rule 32:1.6.**

7 **Comment**

8 *Misrepresentation*

9 [1] A lawyer is required to be truthful when dealing
10 with others on a client's behalf, but generally has no
11 affirmative duty to inform an opposing party of relevant
12 facts. A misrepresentation can occur if the lawyer
13 incorporates or affirms a statement of another person that
14 the lawyer knows is false. Misrepresentations can also occur
15 by partially true but misleading statements or omissions
16 that are the equivalent of affirmative false statements. For
17 dishonest conduct that does not amount to a false statement
18 or for misrepresentations by a lawyer other than in the
19 course of representing a client, see rule 32:8.4.

20 *Statements of Fact*

21 [2] This rule refers to statements of fact. Whether a
22 particular statement should be regarded as one of fact can
23 depend on the circumstances. Under generally accepted
24 conventions in negotiation, certain types of statements
25 ordinarily are not taken as statements of material fact.
26 Estimates of price or value placed on the subject of a
27 transaction and a party's intentions as to an acceptable
28 settlement of a claim are ordinarily in this category, and so is
29 the existence of an undisclosed principal except where
30 nondisclosure of the principal would constitute fraud.
31 Lawyers should be mindful of their obligations under
32 applicable law to avoid criminal and tortious
33 misrepresentation.

34 *Crime or Fraud by Client*

35 [3] Under rule 32:1.2(d), a lawyer is prohibited from
36 counseling or assisting a client in conduct that the lawyer
37 knows is criminal or fraudulent. Paragraph (b) states a
38 specific application of the principle set forth in rule 32:1.2(d)

1 and addresses the situation where a client's crime or fraud
2 takes the form of a lie or misrepresentation. Ordinarily, a
3 lawyer can avoid assisting a client's crime or fraud by
4 withdrawing from the representation. Sometimes it may be
5 necessary for the lawyer to give notice of the fact of
6 withdrawal and to disaffirm an opinion, document,
7 affirmation, or the like. In extreme cases, substantive law
8 may require a lawyer to disclose information relating to the
9 representation to avoid being deemed to have assisted the
10 client's crime or fraud. If the lawyer can avoid assisting a
11 client's crime or fraud only by disclosing this information,
12 then under paragraph (b) the lawyer is required to do so,
13 unless the disclosure is prohibited by rule 32:1.6.

14

15 **RULE 32:4.2: COMMUNICATION WITH PERSON**
16 **REPRESENTED BY COUNSEL**

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

23 **Comment**

24 [1] This rule contributes to the proper functioning of
25 the legal system by protecting a person who has chosen to be
26 represented by a lawyer in a matter against possible
27 overreaching by other lawyers who are participating in the
28 matter, interference by those lawyers with the client-lawyer
29 relationship, and the uncounseled disclosure of information
30 relating to the representation.

31 [2] This rule applies to communications with any
32 person who is represented by counsel concerning the matter
33 to which the communication relates.

34 [3] The rule applies even though the represented
35 person initiates or consents to the communication. A lawyer
36 must immediately terminate communication with a person if,
37 after commencing communication, the lawyer learns that the
38 person is one with whom communication is not permitted by
39 this rule.

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[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 32:8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

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

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[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

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[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults

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with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. *Compare* rule 32:3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* rule 32:4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. *See* rule 32:1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

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

RULE 32:4.3: DEALING WITH UNREPRESENTED PERSON

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

1 **Comment**
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3 [1] An unrepresented person, particularly one not
4 experienced in dealing with legal matters, might assume that
5 a lawyer is disinterested in loyalties or is a disinterested
6 authority on the law even when the lawyer represents a
7 client. In order to avoid a misunderstanding, a lawyer will
8 typically need to identify the lawyer's client and, where
9 necessary, explain that the client has interests opposed to
10 those of the unrepresented person. For misunderstandings
11 that sometimes arise when a lawyer for an organization deals
12 with an unrepresented constituent, see rule 32:1.13(f).

13 [2] The rule distinguishes between situations involving
14 unrepresented persons whose interests may be adverse to
15 those of the lawyer's client and those in which the person's
16 interests are not in conflict with the client's. In the former
17 situation, the possibility that the lawyer will compromise the
18 unrepresented person's interests is so great that the rule
19 prohibits the giving of any advice, apart from the advice to
20 obtain counsel. Whether a lawyer is giving impermissible
21 advice may depend on the experience and sophistication of
22 the unrepresented person, as well as the setting in which the
23 behavior and comments occur. This rule does not prohibit a
24 lawyer from negotiating the terms of a transaction or settling
25 a dispute with an unrepresented person. So long as the
26 lawyer has explained that the lawyer represents an adverse
27 party and is not representing the person, the lawyer may
28 inform the person of the terms on which the lawyer's client
29 will enter into an agreement or settle a matter, prepare
30 documents that require the person's signature, and explain
31 the lawyer's own view of the meaning of the document or the
32 lawyer's view of the underlying legal obligations.