HOW TO AVOID BEING THE TARGET OF A LEGAL PRACTICE CLAIM

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INTRODUCTION

The rules governing professional conduct are extensive and complex. In addition to attending these mandatory continuing education seminars to keep abreast of our ethical responsibilities as lawyers, all are urged to read the rules and the comments more than once each year. In addition, you should read each and every attorney discipline case that the Supreme Court issues. There is simply no substitute for this. While this material is designed to be instructive, it is not exclusive. Many of our comments and suggestions are simply that - suggestions. What we cannot emphasize enough is that each and every one of you must read the rules and Supreme Decisions for yourself to guide you in your practice.

When I was asked to give this lecture, I thought to myself, "If I were to leave the participants of this seminar with one piece of advice, what would that be?" After much thought, I came to the following conclusion. The best advice that I can give to any lawyer is this: a lawyer must never forget to use common sense in conducting his or her professional duties. If a situation arises in which your common sense questions the ethics of what you are doing, there is a good chance that what you are doing or going to do violates one or many of the rules. If you find yourself in this situation, I strongly encourage you to not only consult the rules, comments, and opinions, but also consult with other lawyers to discuss the situation. I am not alone with this thought. Paragraph seven of the preamble to Iowa's Rules of Professional Conduct says as much.

With that said, the purpose of this lecture is to familiarize the reader with the rules governing our professional conduct as attorneys here in the State of Iowa and to. Learning and relearning these rules is the best way to avoid a legal malpractice claim. Before digging into the specific ethical rules found in Chapter 32 of the Iowa Rules of Court, I would be remiss to not discuss briefly the preamble to the rules.

The preamble to the ethical rules is appropriately entitled "Preamble: A Lawyer's Responsibilities." One must look no further than the preamble to understand why ethical dilemmas often arise in our practice of the law. Our responsibilities as lawyers are numerous.

For example, paragraphs one through three tell us that we, as lawyers, are representatives of clients, officers of the legal system, and public citizens

with special responsibilities for the quality of justice. As a representative of clients, a lawyer must perform various functions. We are advisors. We are advocates. We are negotiators. We are evaluators. While not in a representational capacity, a lawyer may also be a third-party neutral in a proceeding. We must be competent. We must be prompt. We must be diligent. We must maintain communications with our clients. Given the number of roles and responsibilities that we must fulfill as lawyers, it comes as no surprise that ethical dilemmas often arise in our respective practices. This lecture will address ethical dilemmas and legal malpractice issues in nine distinct areas that we encounter as attorneys in the State of Iowa.

A. Screening the Case and the Client

It's the middle of May, a nice beautiful day in Iowa. You would rather be working on your short game at the course, but instead you are stuck at the office working on that motion that should have been finished yesterday. All of a sudden, your secretary buzzes you telling you that Joe Smith is on the line and he would like to talk to an attorney about a potential lawsuit. You pick up the phone and speak with Joe to get a time when he can come in and meet with you. You check your schedule. You have tomorrow open at 2:00 p.m. It's time to begin screening the case and the client. So how do you do that effectively, efficiently, and ethically?

1. Before the client comes into the office, run a conflicts check.

The next section of this seminar will discuss in great detail identifying and avoiding conflicts of interest. A conflicts check is a must when screening a potential case and client. Without limitation, you must ask the following questions:

- Do I have a pending case against the potential client?[1]
- Is this a case where I will have to assert a contrary position to what I am asserting in a pending case?[2]
- Will this case adversely affect a friend, family member, or some other person whose relationship you value?[3]
- Will this case personally affect me economically? Morally?[4]
- Who will be the key witnesses and how do I answer the questions above with respect to the key witnesses?
- Who will be paying for the legal services?[5]
- Does anyone else in the firm have a conflict that is not personal in nature?[6]
- Does this client affect my duties that I owe to a former client?[7]
- Can I get informed consent to waive any conflict?[8]

[1] Iowa R. Prof. Cond. 32:1.7(a)(1); comment [6]
[2] Iowa R. Prof. Cond. 32:1.7(a)(2); comment [24]
[3] Iowa R. Prof. Cond. 32:1.7, comment [10]
[4] Iowa R. Prof. Cond. 32:1.7, comment [10]
[5] Iowa R. Prof. Cond. 32:1.7, comment [13], comment [13a]
[6] Iowa R. Prof. Cond. 32:1.10
[7] Iowa R. Prof. Cond. 32:1.9
[8] Iowa R. Prof. Cond. 32:1.7(b)

Make sure that your conflict check system is thorough and unflappable. Representing a client when you have a conflict of interest can not only lead to ethics violations, but also nasty litigation. For instance, see the case of Wilson v. Vanden Berg, 687 N.W.2d 575 (Iowa 2004). In Wilson, attorney Vanden Berg was retained by Plaintiff after Plaintiff purchased a piece of land that was not the size as advertised by the realtor.

Attorney Vanden Berg had a conflict of interest with the selling agent, Scott Huff, but he failed to disclose this conflict to the Wilsons from the beginning of his representation. While Vanden Berg alleged that he was unaware of the conflict prior to termination of the attorney-client relationship, the Court disagreed, and held that he breached his contract in failing to disclose the conflict of interest that was present at the time of contracting for legal services. While damages in Wilson were limited to $4,000, this situation could expose an attorney to significantly higher damages, especially considering the impact of punitive damages. Accordingly, we cannot stress enough the importance of a thorough conflicts check.

2. Ask: Is the subject matter of this case within your area of expertise?

Perhaps the easiest way to become subjected to a legal malpractice action is to take on a case outside of your area of expertise. Rule 32:1.1 provides:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

Issues of competency often arise when an attorney is asked to do something that he or she has never done before or has only done on rare occasion. For many of us, filing an appeal is something that is rarely done. Accordingly, the strict procedure of the appellate court may be foreign. However, this is no excuse as the Iowa Supreme Court recently noted in Iowa Supreme Court Atty. Disciplinary Bd. v. Curtis, 749 N.W.2d 694 (Iowa 2008).

In Curtis, Attorney Curtis was appointed to represent a client on an appeal in a postconviction relief action. In pursuing this, Ms. Curtis received numerous delinquency notices from the clerk for failing to timely file many of the required filings with the Court. The Court held that Ms. Curtis' conduct was a violation of Rule 32:1.1.

In a rather scathing opinion, the Court noted that "Curtis's conduct in this appeal was deplorable. Instead of meeting the deadlines required by our court rules, she used the clerk's office as her private tickler system."

So what is the best way to avoid a legal malpractice claim and become competent? There are two easy answers to this question. First, a lawyer can become competent through necessary study.[9] This is often the path that the zealous advocate takes here in Iowa. For instance, a friend may come into the office with a legal problem that you have not yet encountered. It may be a personal injury action when your normal practice is criminal defense. It may be a title opinion when your normal practice is workers' compensation. Obviously, you would like to help the person out. Or, you may simply need the work. However, I caution you in going down this path alone. Not only is becoming competent through study necessarily time consuming, it very well may expose you to a malpractice claim by your client that you lacked competence in failing to become competent to handle the matter.

Instead, I strongly encourage you to do what comment [2] to Rule 32:1.1 suggests - association of a lawyer of established competence in the field in question. Retaining co-counsel is a great option, especially if the case is taken on a contingency fee. In my practice, I have been retained as co-counsel on numerous occasions. I can state unequivocally that your client is better off if you screen the case from the beginning, and, assuming you reach the conclusion that you need co-counsel, partner up as soon as possible. In fact, I would recommend retaining co-counsel before even meeting with the client to discuss the merits of the case. Most attorneys who specialize in an area would be more than willing to take the time to do an initial meeting with the client and would prefer that over having inadequate advice given to the client.

[9] Iowa R. Prof. Cond. 32:1.1, comment [2]

3. Ask: Is this a case that you can devote adequate time and resources to?

Again, Rule 32:1.1 forces us to ask this question. Comment [5] is instructive. It states:

> "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence."

Major litigation is not for everyone. Writing title opinions is not for everyone. Drafting contracts is not for everyone. All are very time consuming. While everyone has 24 hours a day, 365 days a year that they *could* devote to the practice of law, realities dictate otherwise. For that reason, it is important when you screen the case to look at and determine whether or not you will have adequate time to give the necessary attention and preparation that a case needs and deserves.

4. Ask: Is this a case that you are financially equipped to handle?

We all know that under the ethical rules we can advance the costs of litigation. Rule 32:1.8(e) states that "a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.[10] However, just because we can ethically advance costs does not mean that every attorney is in a financial position to advance the necessary costs for certain types of litigation. Accordingly, it is important to determine from the

[10] Note: Rule 32:1.5, comment [1] additionally states that "A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

outset of the case whether or not you are financially equipped to handle a case. Failure to do so could result in having inadequate expert testimony or testing conducting, which in turn could result in a legal malpractice claim against you. If you do not have adequate financial resources, do consider retaining co-counsel to help deflect a portion of the costs that are being advanced.

If you are not willing to advance costs to the potential client, it is my position that you must advise the potential client that other attorneys may be willing to do so. If you fail to make this disclosure, you are risking a claim against you for fraudulent concealment or failure to disclose pertinent information. Keep in mind that if you have a case where you elect for the client to advance significant costs, and the case is lost, you will have an angry client, who is likely willing to look at you in placing blame.

5. Ask: Is this client a lawyer hopper or shopper?

We've all heard it at one point or another in practice. A potential client comes into your office bad mouthing his former attorney or another attorney that he or she has consulted. This should jump out at you like a red flag.

If a prospective client has fired his or her previous lawyer, chances are, you will be next. If a prospective client bad mouths his or her former lawyer, chances are, you will be next. Stay away from clients that insist on bad mouthing former attorneys. Your life will be better off without them, even if you don't get attorney's fees in the end. Remember: if the client is dissatisfied with his current or former attorney, he will become dissatisfied with you at some point whether justified or not.

If you are contacted by a prospective new client who still has an attorney, you are required to tell the client that you cannot give any advice or suggestions on the subject of the representation unless the relationship with the client's current attorney is terminated.[11]

Another possible option if you wish to speak with the potential new

[11] Iowa R. Prof. Cond. 32:4.2; comment [3]; Iowa Supreme Court Atty. Diciplinary Bd. v. Box, 715 N.W.2d 758 (Iowa 2006)

client who is currently represented is to send a letter on behalf of the potential new client to his or her lawyer to obtain consent from the other lawyer to speak with the person.[12]

Caveat! There is no more disliked attorney then someone who steals clients. If you know the existing attorney and especially if you know the existing attorney to be very competent, this is probably a client you should not have. The problem may very well be with the client, not the attorney.

6. Ask: Has this client been turned down by other attorneys?

Just like the situation where a prospective client bad mouths his former attorney, if he or she comes into your office and has been turned down by other lawyers with respect to the claim, treat that as a red flag. Find out who turned the person down. Ask: Would that attorney have competently looked through the issues of the case? Was it turned down as outside of the attorney's practice area? Is the client telling you that the other attorney was simply too busy to take on the case?

Don't hesitate to investigate why another attorney turned down the case previously. We all know that attorneys turn down cases for numerous reasons. One attorney may turn down a good case because of financial concerns. Another attorney may turn down a good case due to a conflict of interest. However, do remember that there is always the chance that the potential client is withholding information from you when you ask the client directly why the previous attorney turned down the case. Withholding information is a distinct possibility if another attorney already looked at the case and told the person what the weakness was in the case which caused him or her to deny representation. If a client does this from the beginning, it could be very costly for you down the road. If a client is less than forthcoming regarding the reasons given by another attorney, he or she will likely be less than forthcoming in telling you the entire truth with respect to his or her own claim. This is yet another reason to perform an adequate investigation into the client's claim. An adequate investigation will reveal the inconsistencies in the potential client's story if any exist. Don't forget - another attorney will eventually be doing the exact same thing if it proceeds to litigation.

[12] Iowa R. Prof. Cond. 32:4.2(a)

7. Make sure the client understands that no attorney-client relationship exists until an attorney fee contract is signed.

In a typical legal malpractice cause of action, the establishment of a prima facie claim requires the production of substantial evidence that shows (1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and (4) the client sustained actual injury, loss, or damage.[13]

Accordingly, the Court does not even get to the question of whether or not an attorney's conduct rose to the level of malpractice if the attorney can establish that there was never an attorney-client relationship.

For many clients, the first meeting with you may be the first time they have ever needed an attorney. They may be confused about the relationship. They may think that if they speak to one attorney, they are forever prohibited from seeking the advice of another attorney even though you this is not what you told them. A big problem can arise when the potential client thinks that you are representing him or her when you have actually declined the case. This misunderstanding generally stems from the client's lack of knowledge or experience with the judicial system and lack of dealing with an attorney on a regular basis.

To help avoid this situation, tell the client that no attorney-client relationship will exist until he or she signs an attorney fee contract. This can easily be brought into the conversation at many points during the initial conversation. It doesn't matter when it is said during the initial meeting; rather, it is matters that the conversation takes place. Talking about fees, costs, and contracts is never easy. You may worry that it will turn a client away. However, you must keep in mind what will happen if a client leaves your office thinking that you represent him or her, and you think that you do not.

If a client leaves your office thinking that you represent him or her, and you, in your mind, do not represent him or her, you are setting yourself

[13] Trobaugh v. Sondag, 668 N.W.2d 577, 581 (Iowa 2003)(fn 1).

up for an ethical complaint as well as a potential legal malpractice claim, a claim that would likely be based on violation of a statute of limitations. Addressing the ethical complaint first, we have an ethical duty as lawyers to "act with reasonable diligence and promptness in representing a client."[14] If the client can establish that an attorney-client relationship did in fact exist, violation of this ethical rule is nearly absolute, as you, as an attorney, would have done nothing under the belief that no attorney-client relationship existed.

While the ethical violation is one thing, the potential legal malpractice claim for missing a statute of limitations is a completely separate and distinct animal. Missing a statute is perhaps the worst situation an attorney can find himself or herself in. Juries are not sympathetic to attorneys who miss statutes. Moreover, the opposing counsel in the legal malpractice case is armed with perhaps the strongest argument that can be made in a courtroom - that the position the now-Plaintiff's attorney is advocating is the same that the Defendant attorney would have been advocating had he or she not been sued. In other words, the attorney's defense at trial is nothing but a facade because it's the exact opposite of what the attorney believed in when he or she represented the client.

On a final note in this section, keep in mind, it is not a legal or ethical requirement that a written contract be entered into before an attorney-client relationship is generated.[15] However, we strongly encourage it. The best way to avoid any confusion regarding the attorney-client relationship is to emphasize that no relationship exists without the signing of a contract. This is a concept that all clients can understand and appreciate. Please keep in mind, however, that Rule 32:1.5(c) requires that a contingent fee agreement be in writing signed by the client.

The only exception to this hard fast rule that we encourage a signed written attorney fee contract is in an emergency situation. Under Rule 32:1.1, comment [3], in an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. However, be very leery of these situations. Emergency situations necessarily require advice given without adequate

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[14] Iowa R. Prof. Cond. 32:1.3

[15] See Iowa Supreme Court Atty. Disciplinary Bd. v. Piazza, 2008 Iowa Sup. LEXIS 136 (Iowa 2008).

preparation, which may expose you to a malpractice claim. Accordingly, be certain to emphasize to the client that your advice is being given in an emergency situation and that it may not be 100% accurate. In that case, the client can decide to act accordingly.

8. Ask: Is taking the case on truly in the best interests of the client?

Rule 32:3.1 provides in part:

> "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."

While it may be easy to earn a fee, often a large fee, by representing a person who comes into your office in a matter which has no basis in law or fact, doing so may violate your ethical duties to that client and the Court. Moreover, while a claim may have a basis in law or fact, always address the issue of whether the legal forum is the best venue to settle the dispute.

In addition to this rule, you must consider issues such as:

- What will representation by an attorney do to the client's existing relationships with potential defendants?
- What will representation by an attorney do to the client's existing relationships with potential witnesses?
- If I am only willing to take this on a flat fee or hourly fee, will the fee be more than the expected recovery?
- Can my client, due to age, health, mental capacity withstand the stress of a lawsuit?
- Does my client have a checkered past that he or she would prefer remain private?

These considerations are simply a few of the many that we encourage you to look at when deciding if representation is truly in the best interests of

the client.

9. Ask: Is the prospective client seeking relief for anything other than legitimate purposes?

We've all seen the movies. We've all seen the television shows. Perhaps we have seen it in real life. A person gets upset at a neighbor, a friend, a complete stranger, and the first words out of his or her mouth is, "I'm going to sue you for all you've got!"

While the situation giving rise to these words may give rise to a legitimate claim by the potential client, very often pursuit of the claim may be for less than legitimate reasons, including revenge and harassment. Be sure to adequate screen the case during your initial evaluation to determine what motives the client has in pursuing the action.

10. Final Remarks

The list of 9 above is just a sampling of those questions that must go through your head during the initial screening of the case. Adequately screening the case and the client is perhaps the most important part of our practice. This is what makes our system run efficiently, and it is what keeps our practice within the ethical boundaries that the Court has set for us.

With that said, I would like to emphasize a few final points in this section.

Perhaps the most important factor in having an effective and efficient lawyer-client relationship is communication. Rule 32:1.4 lays the rules regarding communication. The rules are there for you to read.

The methods of keeping a client well informed are changing, however. Most changes are for the good. For instance, we strongly encourage you when you are screening the case to ask the potential client whether or not he or she uses email to communicate. Email is a great method of communication in today's society. It is inexpensive and extremely convenient. Moreover, it allows you to conduct necessary research before answering questions from the client. Don't forget - any type

of communication from a law office to a client is generally welcome, even if it is just a one line email. It signifies that you are doing work on their file, and that's what the client wants to see.

If you choose not to use email, always assume that the client is recording your conversation. Never ever discuss with the client anything that could be construed to be unethical. If the client asks that you engage in unethical conduct, immediately turn the client down.

On the other hand, one change in communication that is rearing its ugly head in today's society is what we like to refer to as the "cell phone switch." People today are often switching their cell phone companies for the new great deal, plan, or rate. The change in companies often brings about a change in cell phone number. While the client may text his or her friends with the new number, he or she may forget to inform the attorney about the change. This often leads to a period of time when the attorney cannot directly contact the client by phone. This can cause many issues. I would suggest emphasizing to the client during the initial meeting to keep you updated on his or her contact information. Tell the client that all he or she needs to do is call and leave a message with your secretary if something changes.

On a different topic, during the initial meeting with the client, be aware of the impact on the meeting if the client brings relatives or friends to the appointments. To allow a non-client to sit in on the meeting can be considered a waiver of the attorney-client privilege, and all of your advice during this meeting can be discoverable. Additionally, it may lead to conflicts of interest and undue influence, particularly for those attorneys practicing in estate planning.

Keep this point in mind as well - Never guarantee a client a certain recovery or give a professional opinion that a certain recovery or result will in fact happen. Clients will hold you to this. More likely than not, you do not have all of the facts at this initial meeting. Remember - there is always two sides to the story.

Always discuss the division of responsibility between client and attorney. The client decides on settlement or the ultimate result; however,

the attorney decides how to get there.[16] If the client disagrees with your approach to how to get to the ultimate result, attempt to resolve it from the very beginning of the representation. While comment [2] states that there is no set rule prescribing how such disagreements should be resolved, we encourage you to attempt to solve the disagreement, and if the client insists on controlling the means of the litigation, reduce the client's wishes to writing to avoid any issues that may arise in the future.

On that same note, never communicate an offer or demand in a civil suit without client consent. It is best to confirm in writing settlement offers and demands. Spell out specifically who you represent.

Don't forget to inform the client how long the case may take and the reasons for it. Remember that months seem like years to many clients.

Discuss with the client when and under what circumstances either the client or the attorney can terminate the legal relationship.

Finally, if the client threatens a lawsuit or an ethics complaint, terminate the relationship immediately.

[16] Iowa R. Prof. Cond. 32:1.2

B. Recognizing and Avoiding Prohibited Transactions with a Client

Rule 32:1.8(a) provides:

> "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."

Comment [1] notes the reason for this rule. A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transactions with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client.

We strongly encourage you to not conduct any type of business transaction with a client despite the rules exception founded on written informed consent. You are setting yourself up for a disciplinary action if you do this. Of course, the rule does not prohibit day to day business transaction such as buying your meat at the local store or frequenting a client's restaurant.

On a similar note, we strongly encourage you to not loan the client any money or participate in any third party association that lends your client

money in anticipation of an anticipated recovery in a lawsuit.

New companies are emerging who wish to loan monies to clients in exchange for a guarantee to be paid out of any recovery. These companies take advantage of the "cash now" mentality that many clients may have, especially if bills are piling up.

Frequently these companies ask for advice from the attorney as to the merits of the claim and to the value of the claim. I believe that in providing this information, you may be waiving attorney-client privilege and the information may be discoverable. I, therefore, refuse to give such information. If the client signs such an agreement, I refuse to acknowledge the assignment. In fact, we have put into our attorney fee contract that we will refuse to acknowledge said companies if contacted. We strongly encourage you to do the same.

For examples of recent disciplinary actions concerning improper business transactions, please read Iowa Supreme Court Atty. Disciplinary Bd. v. Wintroub, 745 N.W.2d 469 (Iowa 2008); Iowa Supreme Court Atty. Disciplinary Bd. v. Kaiser, 736 N.W.2d 544 (Iowa 2007); Iowa Supreme Court Atty. Disciplinary Bd. v. Johnston, 732 N.W.2d 448 (Iowa 2007); Iowa Supreme Court Atty. Disciplinary Bd. v. Honken, 688 N.W.2d 812 (Iowa 2004).

C. Scope of Retention

Rule 32:1.2 provides in relevant part:

> "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. The client's informed consent must be confirmed in writing unless (i) the representation of the client consists solely of telephone consultation; (ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit or court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order."
>
> "If the client gives informed consent in a writing signed by the client, there shall be a presumption that (i) the representation is limited to the attorney and the services described in the writing; and (ii) the attorney does not represent the client generally or in any matters other than those identified in the writing.

Often, a client comes through the door with multiple legal issues that must be addressed. At other times, a client may have legal issues come up while you are already representing him. This presents a ripe situation for alleged legal malpractice when a legal issue arises that is outside of your practice.

So what is the best way to handle this? First and foremost, be specific in your attorney fee contract. If you are being retained to pursue a personal injury cause of action, specify that in the contract. If you are being retained to pursue a workers' compensation cause of action, specify that in the contract. This will help in defense of a claim if, for instance, you fail to recognize that your client has a claim for unemployment.

Of course, this is not an end-all be-all sure fire way to protect you from a malpractice claim based on scope of retention. The second piece of advice that I can on this issue is to stay abreast of potential claims that you, while not having the experience in the subject matter, can identify and properly refer out.

D. Time Limitations

This section will cover two distinct topics, time limitations in the sense of diligence and work load as well as time limitations in the sense of statutes of limitations and repose.

1. Diligence

Rule 32:1.3 states:

> "A lawyer shall act with reasonable diligence and promptness in representing a client."

Comment [1] states that "a lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer..."

Comment [2] states that "a lawyer's work load must be controlled so that each matter can be handled competently."

Comment [3] states that "perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time or the change of conditions."

Rule 32:1.3 and its comments strongly advise lawyers that if they are limited by time in what they can do for a client, the lawyer must advise the client to seek other representation. Accordingly, analysis must be made from the beginning of representation as to whether or not the attorney can handle the work load that he or she is taking on.

If you need to decline representation, please make sure that you tell the prospective client that the reason is due to work load and it is not to be construed as an evaluation of the merits. You do not want the client to not go to another attorney who can adequately protect his or her legal rights because the client believes that he or she does not have a potentially legitimate and viable case just because you have declined it.

2. Statutes of Limitations

Statutes of limitations have been discussed above in the context of

legal malpractice claims. I cannot emphasize enough how important it is to not miss a statute because of the situation it places the attorney in who missed the statute.

I encourage each and every one of you to regularly read through the applicable statutes of limitations and repose and consult the statutes when unsure on the time period.

Just as important as knowing the statute that applies is knowing the true facts of the case so that you can determine the appropriate statute date. Often, clients forget the exact date something happens. To them, it is unimportant that they were in an accident 21 months ago. They simply want compensation. They don't understand or appreciate the possible two year statute just over the horizon. Accordingly, they may give you a wrong date or a general date of when they think something happened. Therefore, it is extremely important to investigate and verify the date when the statute begins to run.

Moreover, in cases where you are unsure when the statute runs because of inadequate facts, error on the side of caution and file. We are a notice pleading state, so it is better to file with minimum facts than investigate thoroughly and find out that you just missed the statute.

E. Implementing Internal Controls in the Office

Every office in the state of Iowa, from sole practitioners to 100 person firms, needs to have internal controls in the office in order to avoid legal malpractice claims. Internal controls must be established for numerous reasons and purposes in the practice of law.

Internal controls must be established for statute of limitation/repose, scheduling deadlines, service dates, etc. Whatever method of control you select, it must be fool-proof. Nothing can slip through the cracks. If someone in the office leaves, the deadline check must remain operable. This may mean that multiple people are doing the same checks. We suggest that you require those persons who are responsible for statute and deadline checks to report to the managing attorney every day on a statute check. Routinely verify their work. If you have a software system that reports the deadlines, make sure it is utilized and properly functioning. Remember that most of these programs are only as successful as the person who enters the data.

As for statutes of limitation, never rely solely on the client for the correct date of when the statute begins. In the personal injury context, independently verify the statue by looking at accident reports, other government reports, conversations with third persons, medical records, etc.

Be sure to do adequate research to determine which statute(s) applies.

It is strongly recommended that the staff maintain a call-up list that can be reviewed every day to ensure that all work is being efficiently conducted at the office. Examples include:

- Dates when answers to petitions need to be served
- Dates when clients were to provide information to you
- Reminders to send out discovery and set depositions
- Reminders when the time to answer discovery or other letter or other non-statute deadlines are about to expire
- Reminders to answer client information or respond to client

If more than one attorney works on a file, make sure everyone knows who lead counsel is and what the clear division of duties is.

Managing partners - keep in mind that you are responsible for an associate's malpractice. Rule 32:5.1 states:

> "A lawyer shall be responsible for another lawyer's violation of the Iowa Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Govern yourself accordingly.

For a case holding a managing attorney responsible for the ethical violations of an associate, please see Iowa Supreme Court Atty. Disciplinary Bd. v. Dunahoo, 730 N.W.2d 202 (Iowa 2007)(holding that attorney Dunahoo neglected an estate despite the fact that he assigned the file to a subordinate case attorney).

F. Identifying Attorney Competency Issues

Attorney competency has been addressed above in Section A in some detail. Without being redundant, we emphasize you to read Rule 32:1.1 and the corresponding comments. It is clear that the Supreme Court is concerned that a lawyer must be competent to handle the client's matters.

One additional point to add is found in comment [6]. Comment [6] states that "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Accordingly, be sure that you have implemented a policy of reading and briefing the Iowa Supreme Court and Iowa Court of Appeals decisions as they are handed down. Maintaining an adequate research file is a must in today's practice. As I'm sure many of you have encountered in your practice, online Lexis or Westlaw research, while extremely convenient, may lead you astray in your research.

G. Collections

Fees and collections are never easy to discuss with a client. The rules are instructive on the types of fees that can be had under the Iowa Rules.

Rule 32:1.5 states in relevant parts:

> "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses, or violate any restrictions imposed by law. The factors to be considered in determining the reasonableness of a fee include the following...."
>
> "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate."
>
> "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited..."
>
> "A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case."

Under comment [4], a lawyer may require advance payment of a fee, but is obliged to return any unearned portion.

Disputes over fees are not uncommon. Comment [9] is instructive on

this issue. It states that “if a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it.

We strongly encourage you to read the entirety of Chapter 45 of the Iowa Rules. Chapter 45 entitled “Client Trust Account Rules” is instructive on the requirements and rules governing the client’s trust account.

H. Counseling or Partnering

As has been mentioned previously, retaining co-counsel on cases outside of your expertise is highly recommended.

Rule 32:1.1, comment [2] states that this is one method to become competent to handle your client's case. The question then comes up: if you partner up, how do you divvy fees and charge the client?

Rule 32:1.5(e) is instructive. The rule provides that "a division of a fee between lawyers who are not in the same firm may be made only if (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

Accordingly, under (1), if you choose to refer out a case and not remain involved in the prosecution of the case, you must be on the hook for the other lawyer's malpractice if you are to receive any fee from the relationship. Under (2), you must make sure that both attorneys have their name on the attorney fee contract and that both sign. Comment [7] gives us a common sense piece of advice. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.

I. Subrogation

True subrogation issues are poorly deal with by the ethical rules. Many of the rules apply tangentially; however, the rules do not directly address the issue of subrogation.

Some subrogation is mandatory. Mandatory subrogation generally arises from affirmative statutory rules which govern our duties with respect to subrogation interests. For instance, you must, from the outset of a case, determine if a Medicare or Medicaid lien exists. You must determine if workers' compensation made payments. You must determine if a hospital lien exists or an ERISA-governed health plan paid medical benefits. This is vitally important as failure to acknowledge said lien may leave the attorney personally responsible for the payback.

With respect to non-mandatory or those liens not covered by affirmative statutory rules, the attorney must place the rights of the client ahead of everyone else. You must consider whether the best interest of the client is being served if the attorney searches whether any subrogation claims exist. I submit that it is error for the attorney to search for subrogation claims in the absence of reasonable notice from some source that subrogation is being claimed.

Even though the attorney may have no liability or a known duty to determine if a subrogation claim exists prior to disbursing money, the right of subrogation follows the money with the client. Accordingly, when disbursing money to the client, the client must acknowledge in writing the client's responsibility for any subrogation claims being made and the fact that at the time of the disbursement, the attorney is not aware of any liens. Accordingly, there should be no duty on the attorney following disbursement to handle any subrogation claims as a collateral issue. However, if you take this position, make sure you protect yourself by putting this in the attorney fee contract as well as the disbursement statement.

An issue that must be examined in depth is whether or not you have to pay back the full amount of subrogation. With health insurance, medpay, and property damage, you are not required by statute to pay back the full amount; however any negotiations must be done in good faith. Negotiating the lien is often the most beneficial thing you can do for a client in your representation. This affects the bottom dollar that goes into your client's

pocket.

If you are contesting the amount to be repaid on subrogation, where do you hold the contested monies? The answer is: All contested monies must be held in the client's trust account. A parallel to this is that all monies not in dispute must be disbursed to the client.

Rule 32:1.15 provides that "when in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interest are not in dispute.

What is a claim? In reading Rule 32:1.15, the first question that one will have is what is considered a claim. For certain, the following are claims under the rule: (1) Subrogation claims (before or after payment of pro rata attorney fees and costs is an issue that must be addressed); (2) Disputed attorney's fees; (3) Dispute costs; (4) Statutory liens such as Medicare, Medicaid, Workers' Compensation.

On that same token, I believe that the rule should also be read that if any person or entity notifies the attorney claiming any interest in any of the monies in the trust account that the amounts so claimed must be kept in the trust account until resolution. Examples include: (1) Claims of attorney fees from other attorneys whether on this matter or different representation; (2) Claims from individuals that they want payment of a debt; (3) Claims that the client promised payment out of the proceeds of the lawsuit. Often times, your client will not contest these claims; however, if he or she does, we strongly advise you to keep the contested money in trust until resolution.

When is a claim resolved? Obviously a claim can be resolved when the two parties in dispute agree to a resolution. A court order may resolve a claim. If there is any doubt, be conservative and do not disburse. You can always seek an opinion from the court.

Finally, are attorneys required to keep monies in the trust account when the attorney is of the opinion that there is no valid "claim" to any of the monies in the trust account? The rule is silent. If there is any doubt, be conservative and do not disburse. You can always seek an opinion from the

Court.

For cases finding a violation of Rule 32:1.15 (formerly DR 9-102) please read Iowa Supreme Court Atty. Disciplinary Bd. v. Ireland, 748 N.W.2d 498 (Iowa 2008)(holding that attorney Ireland violated Rule 32:1.15 in failing to return to the client an unearned retainer); Iowa Supreme Court Atty. Disciplinary Bd. v. Isaacson, 750 N.W.2d 104 (Iowa 2008)(holding that attorney Isaacson violated Rule 32:1.15in failing to deposit settlement funds in a trust account); Iowa Supreme Court Atty. Disciplinary Bd. v. Hall, 728 N.W.2d 383 (Iowa 2007)(holding that attorney Hall violated Rule 32:1.15 in depositing personal funds in his trust account and paying personal and business expenses constituting commingling of funds); Iowa Supreme Court Atty. Disciplinary Bd. v. Reese, 657 N.W.2d 457 (Iowa 2003)(holding that attorney Reese violated Rule 32:1.15 in failing to successfully resolve a subrogation claim made by Wellmark).

CONCLUSION

We hope that the above materials and presentation was informational and instructive with respect to your practice. Once again, we emphasize that you must go back and read or reread the new rules of professional conduct for the State of Iowa. This includes reading the comments to the Rules. There is absolutely no substitute for this practice.

Finally, while this presentation was entitled "How to avoid a legal malpractice claim," we would like to discuss one final point. That is - make sure that you always have adequate malpractice insurance coverage. Those of us who deal with insurance coverage issues on a daily basis have a great appreciation for the different policies that are available out there on the market today. There are low-limit policies. There are high-limit and high-premium policies. There are self-reducing policies. No matter what type of policy you purchase, be sure that it adequately covers your potential liabilities. Do not underestimate your exposure. In addition to making sure that you have adequate insurance coverage, ensure that there is no gap in insurance coverage for any reason.

With that said, we would like to thank you for attending and reading through this material. It has been a pleasure to present this lecture.