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2 **Why are we different?**

Preamble I.R. Professional Conduct Comment [18]

- May have authority ordinarily reposed in client
- Represent multiple clients w/ intergovernmental controversies.
- Will depend on context/type of matter
-

3 **Discretion – Criminal**

- State v. Iowa Dist. Ct. for Johnson County, 568 N.W.2d 505, 508 (Iowa 1997)
- Criminal prosecution decisions ordinarily w/in discretion of elected prosecutor.
 - District Court called grand jury investigate police shooting
 - Charges previously denied by County Attorney
 - Court appointed special prosecutor finding CA personal conflict
 - Dist. Ct. action, "...amounted to a direct affront to a prosecutorial decision in which a court should take no part."

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"

4 **Discretion – Civil**

- *Motor Club of Iowa v. Iowa DOT*, 251 N.W.2d 510 (Iowa 1977).
- Declaratory judgment against DOT truck regulation.
- AG represent DOT –adverse court ruling.
- Composition of DOT Commission change- no longer wanted to pursue action.
- AG can't appeal adverse court ruling against client's wishes under I.C. 13.2(1)(c) (AG duty to defend action against state officer in official capacity)

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5 **Discretion – Regulatory Administrative Hearing**

- *Fischer v. Ia. Bd. Optometry Examiners*, 476 N.W. 2d 78 (Iowa 1991)
- AG- prosecuting professional disciplinary action filed motion to rehear final decision of Bd.
- AG may seek party status-to request rehearing
 - I.C. §17A.16- except as expressly provided by statute-any party may file motion to rehear.
 - I.C. §13.2(1)(b) – AG power to prosecute/defend in court or tribunal, all actions/ proceedings, civil / criminal, in which state may be a party or interested, when, in the attorney general's judgment, the interest of the state requires such action.
 - I.C. §13.7: If AG determines can't represent state board- seek appointment counsel for official/agency from Executive Council.

6 **Why are we different?**

Rule 32.1.13 comment[9]

- client may be a specific agency, branch of government, government as whole.
- may have authority to question client conduct more extensively than lawyer for private
- different balance between maintaining confidentiality/preventing-rectifying wrongful act

7 **Who is the client...**

No duty to represent official for personal matters.

- Defending election contest for successful Bd. Supervisor candidate, *Bartel v. Johnson County*, 322 N.W.2d 901 (Ia. Ct. App. 1982)
- Sheriff deputy charged with murder re: on duty fatal shooting, *Richter v. Shelby County*, 745 N.W. 2d 505 (Iowa 2008)

8 **Who is the client...**

Cole v. Ruidoso Mun. Schools, 43 F3d. 1373 (10th Cir. 1994).

School employee/employment discrimination plaintiff sought to disqualify school's attorney:

- Provided prior advice re: official duties
- Claimed she believed represented her individually.
- No attorney-client relationship created- belief unreasonable for advice re: duties
- Right to determine release representation info is school's.

9 **Inter-governmental disputes...**

- “ Advisory function- legal opinion to settle agency disputes.
- “ Contested matters- may assign attorneys to represent opposing client agencies.
 - . Ethical screens with notice to clients- 32.11

10 **How are we different?**

Conflicts not imputed to other gov't attorneys 32.1.11 comment [2]

- Need for qualified attorneys
- “Special problems” raised by imputation w/in government agency.
- Limit to matter “personally & substantially participated”
- Generally will cure by timely ethical screen

11 **Government service—broader duty.**

- “ 32.1.11 duty to government may extend to non-attorney service
 - . 32.1.9 (duty to former clients) generally limited to attorneys
 - . Personal/substantial involvement as gov't officer/employ in matter may bar subsequent representation against gov't as lawyer.
 - . *Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ.*, 722 F. Supp. 2d 295 (E.D.N.Y. 2010) (firm suing school district with an associate serving on school board creates conflict for firm not cured by screen).

12 **different role ≠ conflict**

- “ Parallel criminal/civil investigations
 - . Not duties differ- must conflict

- . Normally not require screen – can't...
- ~ Use civil invest. merely to collect criminal
- ~ Deceive that won't be used
- ~ Deceive that only civil
- ~
- ~
- ~

13 **Multi-entity boards**

- ~ Ex. 28-E Agencies/Boards
- ~ Represent your client agency.
- ~ Op. Atty. Gen. #04-11-1 (county board of supervisor also director of solid waste Chapter 28E agency does not create a conflict absent conflict in addition to dual service).
- ~ Do legal work on behalf of board?
 - . Co. Atty. may advise joint E-911 Bd. -Op. Atty. Gen. #92-9-92
 - . Remain vigilant of conflicts.

14 **How we are the same...**

- ~ Rule 32.1.11 ...a lawyer currently serving as a public officer or employee...is subject to
 - Rule 32:1.7 (concurrent conflict)
 - Rule 32:1.9 (duty to former clients)

15 **Rogers v. Allen Cty. Dist. Ct.**

U.S. Dist. Ct. N.D. Indiana (7/28/2016)

- ~ Current AAG participated in private practice in pending matter in the office.
 - . Party objecting was not represented by AAG in prior position- adverse party- no standing in claim conflict.
 - . Consumer complaint didn't create client relationship to AG office under R. 1.7(a)
 - . R. 1.11(d)(2)- gov't could waive conflict of gov't attorney (at least for gov't)
 - . No evidence AAG participating in matter
 - . If conflict from prior actions- not imputed under R. 1.11

16 **Admin. Law**

17A.17(8) Separate Functions

- ~ Can't "participate" in proposed/final decision in contested case if personally:
 - . Investigated
 - . Prosecuted
 - . Advocated
- ~ Also can't "participate" in the proposed/final decision if subject to authority, direction, or discretion of someone who has investigated, prosecuted, or advocated.
- ~ Appoint independent counsel

“ May need alternate supervisor &/or screen for independent counsel.

17 **Focus: have the requirements of 17A.17(8) been violated?**

“ Actual exertion of influence is not the issue. “Rather, the issue is whether the statutory requirements of section 17A.17(3) have been violated...” *Blinder, Robinson & Co. v. Goettsch*, 431 N.W.2d 336341 (Iowa 1988)(Supreme Court finds a violation of statute involving admin. hearing at Insurance Division)

“ *Bd. of Dental Examiners v. Hufford*, 461 N.W.2d 194, 200 (Iowa 1990)(Supreme Court finds no merit to claim of violation of statute - AAG assigned to prosecute the case exercises no authority over the Board’s decisions making process)

18 **Know your role (i.e., swim in your own lane)**

“ Attorney as investigator, prosecutor, advocate

. *Fisher v. Iowa Bd. of Optometry*, 510 N.W.2d 873, 877 (Iowa 1994)(“It is neither unlawful nor uncommon for the attorney general to both give advice to various administrative agencies, and thereafter prosecute actions brought by the agency.”)

“ Attorney as “participant” in the decision (i.e., legal advisor to the decisionmaker)

“ Never the two shall meet...

. *Eaves v. Bd. Medical Examiners*, 467 N.W.2d 234, 237 (Iowa 1991)(No violation found because “No individual who acted as advocate for either party participated in the decision making”)

19 **ALJ’s have even more rules to follow**

Iowa Rules of Professional Conduct
Iowa Code section 17A.17(8)

AND...

Iowa Code of Administrative Judicial Conduct 481 IAC 15 (et. seq.)

“

20 **Prosecutors**

“ Cannot engage in defense work while in public employment- R. 32.1.11(f)

“ Doesn’t apply to appointment as special prosecutor –not regularly employed as prosecutor.

“ Former defense counsel- prosecution of client?

. R. 32.1.7(a)(2) significant risk representation materially limited by lawyer’s responsibilities to former client.

. R. 32.1.9(a)- lawyer formerly represented client shall not represent another in the “substantially related matter”

“ same transaction/dispute/substantial risk confidential information obtained in prior representation materially advance subsequent matter.

21 **Public Defenders**

" *State v. Watson*, 620 N.W.2d 233 (Iowa 2000) – duty of criminal defense counsel in prior case owed prosecution witness violated 6th amendment right of current client.

" Prior clients list- maintain client confidences

" Former prosecutors- privileged/confidential information

22 **Support staff/clerks**

" Former judicial law clerk-can't act in matter participated personally and substantially as clerk. R. 32.1.12(a).

" Generally don't impute conflicts from non-lawyers (paralegals/legal secretaries/ law student clerks)

" Must be timely screened from matter. R. 32.1.10 comment[4]

23 **Examples of Conflicts**24

" 32:1.7(a)(2)- conflict b/w current client and personal interest of attorney.

" Examples

. Brother represents criminal defendant. Page 31.

" Screen to cure

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" Matter where gov't attorney personally and substantially participated

. Post conviction relief re: case represented defendant on direct appeal

. Barred by 32:1.9 (Duty Former Client)-same/substantially-related matter

. Implement screen

. Notice to prior client?

. R.32.11: Comment 7:Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

. Not clear if to current client, prior client, or both.

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" Attorney/non-profit bd. member

" Pending declaratory order by non-profit against client agency.

" R.32:1.7(2)Conflict Current Clients -significant risk representation materially limited by the lawyer's responsibilities to 3rd party/ personal interest

" Not imputed to other attorneys (comment 10).

" Screen to cure

" *Berry v. Saline Mem'l Hosp.*, 907 S.W.2d 736 (Ark. 1995) (lawyer/board hospital board member barred from representing client seeking hospital records under FOIA action for civil suit against hospital).

27

- " Contested case before agency.
- " Screen attorney prosecuting action and attorney advising agency on contested case- *Bostko v. Davenport Civil Rights Com'n 774 N.W.2d 841 (Iowa 2009)* (advocacy and advisement of adjudicatory entity in administrative process creates appearance of fundamental unfairness).
- " Person subject to direction/control of person who personally prosecuted or advocated in contested case cannot participate in final decision of case. I.C. 17A.17(8)
 - . Assign alternate supervisor for matter if this conflict exists.

28 **What not to do...**

- " *Night life Partners v. City of Beverly Hills*, 108 Cal. App.4th 81 (2003)
 - . "Boga's presence as Holmquist's advisor was the equivalent of trial counsel acting as an appellate court's advisor during the appellate court's review of the propriety of a lower court's judgment in favor of that counsel's client. It requires no citation of authority exactly on all fours with this fact pattern in order to justify the conclusion that Boga's role as advisor to the decision-maker violated petitioners' right to due process."
- " Solution = independent attorney (outside supervisory chain) + screen

29

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- " *State ex. rel. Miller v. National Dietary Research (old rules)*
 - . IA Supreme Ct.- overturned dist. ct. order disqualifying entire office after hire attorney formerly representing defendant in same matter
 - . Found ethical screen sufficient to prevent "appearance of impropriety"

31 **Process**32 33

- "
- " Consider adopting an office policy -procedures for spotting/reviewing conflicts.
 - . New attorneys/staff i.d. potential conflicts
 - " Prior clients
 - " Personal attachments –family, business, civic organizations
 - . Current attorneys/staff- mindful/vigilant of same

~ Designate who to report potential conflicts to.

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- ~ Define who will review conflict questions
- ~ Receive detail of specific facts.
- ~ What are the interests that conflict?
- ~ How alter judgment- client's interest – perception of fairness?
- ~ Timely consideration
 - . Screen "as soon as practical" reasonably know R. 32.1.0[10]-

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- ~ Notice:
 - . Unlikely require R. 32.1.10 (notice to former client that can object)
 - . Conflict not imputed to gov't atty. (R.32.1.11)
 - ~ Don't need permission for agency to handle matter
 - ~ R. 32:1.10 not applicable to conflicts covered by R.32.1.11

37 **Questions?**