

**ETHICS AND EFFECTIVE APPELLATE ADVOCACY**  
**ANURADHA VAITHESWARAN, JUDGE**  
**CORBIN GARDNER, LAW CLERK**  
**IOWA COURT OF APPEALS**

## **INTRODUCTION**

### **TOPICS:**

#### **A. Rules of Professional Conduct**

Rule 32.3.1 Meritorious claims and contentions

Rule 32.3.2 Expediting Litigation

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

Iowa R. Prof'l Conduct 32:3.1.

### ***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Sporer, 897 N.W.2d 69 (Iowa 2017)***

- **FACTS:** At a contempt proceeding, Sporer testified it was “unfathomable” to him that opposing counsel’s secretary was anything other than a full agent, therefore having authority to bind clients with her signature.
- **HOLDING:** Violation of rule 32:3.1
- **RATIONALE:** Sporer’s testimony had no basis in fact or law.
- **SANCTION:** Six-month suspension

### ***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Barnhill, 847 N.W.2d 466, 472-73, 485, 488 (Iowa 2014)***<sup>1</sup>

- **FACTS:** Attorney filed a petition and application for writ of certiorari on behalf of a resident and taxpayer of a school district against Musco Sports Lighting, Inc., a school district, and the superintendent of the school district. Musco was a product supplier for the successful bidder in a construction project involving the school district. Attorney amended the petition to include only Musco, dismissing the school district and superintendent. The district court dismissed the petition, finding the taxpayer could not maintain suit against Musco alone and imposed sanctions against the attorney.
- **HOLDING:** Violation of rule 32:3.1
- **RATIONALE:** There was no authority for the proposition that a disappointed taxpayer could bring a certiorari action solely against a supplier to a successful bidder who allegedly improperly procured a government contract without naming a government entity.
- **SANCTION:** Sixty-day suspension (there were additional violations)

### ***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Daniels, 838 N.W.2d 672, 678-79 (Iowa 2013)***

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<sup>1</sup> See also *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 279 (affirming \$25,000 sanction against Barnhill under Iowa Rule of Civil Procedure 1.413, which makes counsel’s signature on any document a certification of the meritorious nature of a claim)

- **FACTS:** Attorney asserted claims against his client's previous attorney based solely on alleged violations of the rules of professional conduct.
- **HOLDING:** Violation of Rule 32:3.1
- **RATIONALE:** The rules of professional conduct do not form a basis for civil liability.
- **SANCTION:** Only public reprimand b/c no other unethical conduct

***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Daniels, 838 N.W.2d 672, 678 (Iowa 2013) (DIFFERENT ISSUE)***

- **FACTS:** Attorney filed petition for relief under Iowa Rule of Procedure 1.1012<sup>2</sup> seeking to extend the time to appeal<sup>3</sup>, but he filed more than 60 days after the prescribed time for appeal.<sup>4</sup>
- **HOLDING:** No violation of rule 32:3.1
- **RATIONALE:** “[T]he consequences of failing to seek relief under rule 6.101(5) within the sixty-day period may be addressed indirectly by filing a motion to vacate under rules of civil procedure 1.1012 and 1.1013 with the district court.” See *Hays v. Hays*, 612 N.W.2d 817, 819 (Iowa Ct. App. 2000).

***In re K.C., 660 N.W.2d 29, 36 (Iowa 2003)***

- **FACTS:** A juvenile judge directed a county attorney to file a termination of parental rights petition that the county attorney did not agree with.
- **HOLDING:** No violation of Iowa Code Prof'l Resp. DR 7-102(A)(2)<sup>5</sup>
- **RATIONALE:** County attorney does not bring a frivolous action when s/he complies with the court's order to file a termination petition because the court is requiring the attorney to bring the issue to the court for a judicial determination of the child's best interests. In other words, court order = good faith basis for county attorney.

***Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Wanek, 589 N.W.2d 265 (Iowa 1999)***

- **FACTS:** Wanek pursued judgment of \$1.1 million against major newspapers as sanction in discovery dispute based upon questionable notice.
- **HOLDING:** Violation of DR 7-102(A)(2)

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<sup>2</sup> Iowa Rule of Civil Procedure 1.1012 allows the court to correct, vacate, or modify a final judgment in an order or grant a new trial based on grounds that include mistake, neglect, or omission of the clerk. Iowa R. Civ. P. 1.1012(1).

<sup>3</sup> Under our rules of appellate procedure, the supreme court is authorized to extend the time for filing an notice of appeal in the event a clerk of court fails to notify a prospective appellant of the filing of an appealable order. Iowa R. App. P. 6.101(5)

<sup>4</sup> A motion to extend under Rule 6.101(5) must be filed within sixty days after the prescribed time for appeal. Iowa R. App. P. 6.101(5).

<sup>5</sup> Precursor to rule 32:3.1

- RATIONALE: “Wanek’s dogged pursuit of substantial judgments in the face of compelling legal and factual evidence dictating a contrary course violates the spirit of DR 7-102(A)(1) and (2).” *Wanek* at 271.

### **Rule 32:3.2—Expediting Litigation**

“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” Iowa R. Prof’l Conduct 32:3.2.

#### ***Iowa Supreme Ct. Att’y Disciplinary Bd. v. Weiland, 862 N.W.2d 627 (Iowa 2015)***

- FACTS: Weiland (1) failed to timely file the combined certificate as required by the appellate rules, (2) failed to serve the combined certificate on the court reporter as required by the appellate rules and as ordered by the court, and (3) ultimately allowed the appeal to languish and be administratively dismissed.
- HOLDING: Violation of Rule 32:3.2
- RATIONALE: “Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.” Iowa R. Prof’l Conduct 32:3.2 cmt. [1]. “Expediting an appeal by meeting deadlines, even when the client would benefit from delay, is consistent with *legitimate* interest of the client and is therefore required by the rule. Here, Weiland elevated the client’s interests over his obligations to the court.” *Weiland* at 637.
- SANCTION: Public reprimand

#### ***Iowa Supreme Ct. Att’y Disciplinary Bd. v. Cunningham, 812 N.W.2d 541, 548 (Iowa 2012)***

- FACTS: Cunningham failed to provide his client with discovery requests for two months. This delay resulted in the court granting opposing counsel’s motion to compel. Even then, Cunningham failed to take steps to ensure his client complied with the discovery requests in order to avoid sanctions. Cunningham then failed to attend a hearing on the motion for sanctions and failed to tell his client she needed to attend. The court ordered a \$500 sanction for the discovery violation. Two months later, Cunningham withdrew from the case.
- HOLDING: Violation of Rule 32:3.2.
- RATIONALE: “Cunningham failed to appear at hearings and failed to participate in discovery in a timely manner. Failing to appear at hearings and participate in discovery does not constitute a reasonable effort to expedite litigation and therefore violates rule 32:3.2.”
- SANCTION: 18-month suspension (there were additional violations)

***Iowa Supreme Ct. Att’y Disciplinary Bd. v. Knopf, 793 N.W.2d 525, 529-30 (Iowa 2011)***

- **FACTS:** Knopf failed to file and pay his state income taxes for a number of years. He was charged with and pled guilty to criminal fraudulent practice. Subsequently, the disciplinary board initiated a complaint against Knopf based on this conduct. Knopf then appealed his convictions for fraudulent practice, but did not timely file his proof brief and designation of contents of the appendix. When he failed to timely remedy this, his appeal was dismissed for failure to cure the default. Subsequently, the disciplinary board wanted to add a charge that Knopf’s failure to cure the default and the resultant dismissal of his appeal violated rule 32:3.2.
- **HOLDING:** No violation of Rule 32:3.2.
- **RATIONALE:** Record did not support a finding that Knopf’s “dilatatory handling of his appeal was done for the purpose of frustrating the implementation of his sentence.” Failure to cure default in appeal, by itself, did not constitute violation of this rule. “The purpose of this rule is to prevent the ‘use of tactics that *unreasonably* delay litigation.’” (quoting 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 28.2, at 28-3 (3d. ed. Supp.2007).

### **Rule 32:3.3—Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

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

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

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

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

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

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

Iowa R. Prof'l Conduct 32:3.3.

***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Crotty, 891 N.W.2d 455 (Iowa 2017)***

- **FACTS:** Crotty, at the direction of his client, sought to enforce a judgment lien against the ex-wife of his client's father. Crotty's client was appointed the administrator of his father's estate. Crotty's client said that two of his siblings were not supportive of the estate's claim and wanted nothing to do with it. Relying on his client's representation, Crotty prepared renunciation documents for signature by the two siblings. Crotty's client left with the renunciation documents and returned with them, signed, in less than an hour. Crotty asked his client whether the signatures were authentic and his client represented they were. Crotty then filed the renunciations with the court. Eventually, Crotty learned the signatures were forged. Crotty subsequently applied for the appointment of a successor administrator. However, in that application Crotty did not inform the court that the signatures were forged or that his client had made uneven distributions of the claim proceeds to his siblings. Crotty testified, however, that he revealed the forgeries in conversations with two district court judges before the order appointing a successor. One of the judges remembered such a conversation.
- **HOLDING:** No violation of rule 32:3.3(a)(3)
- **RATIONALE:** "Although . . . it would have been better if Crotty had disclosed the forgeries in a writing filed with the court or specifically sought direction from the court as to any additional measures he should take under the circumstances, we cannot say on this record that his verbal disclosure of the forgeries to the court was an unreasonable measure under the circumstances presented here." *Crotty* at 465; see Rule 32:3.3(a)(3), cmt. 10.

***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Sporer, 897 N.W.2d 69 (Iowa 2017)***

- **FACTS:** Sporer represented the husband in a dissolution case. The two sides engaged in settlement negotiations. During a subsequent contempt proceeding, Sporer testified that he received a settlement letter from the other party's attorney on September 24 and responded on September 27 by sending a marked-up version back via fax, hand delivery, and regular

mail. The other attorney denied ever receiving the marked-up version. Sporer's billing records for September 27 did not contain an entry for either reviewing the letter or responding to the letter on that date. Sporer had no proof of faxing the letter, even though his office had procedures to retained confirmation of faxed messages. Sporer had no proof of hand delivery, even though his office had procedures to document hand deliveries. Additionally, Sporer never mentioned sending the marked-up version in any of his email correspondence with the other attorney.

- HOLDING: Violation of rule 32:3.3(a)(1)
- RATIONALE: Clear and convincing evidence showed that Sporer falsely represented to the court that he marked up the letter and sent it back to the other attorney on September 27.
- SANCTION: Six-month license suspension.

***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Sporer, 897 N.W.2d 69 (Iowa 2017) (DIFFERENT ISSUE)***

- FACTS: At a contempt proceeding, Sporer testified that it was "unfathomable" to him that opposing counsel's secretary was anything other than a full agent.
- HOLDING: Violation of rule 32:3.3(a)(1).
- RATIONALE: Sporer's testimony was absurd. No lawyer reasonably believes clerical staff have authority, actual or apparent, to bind clients of the firm. Almost certainly, Sporer did not believe the secretary had authority. Thus, there was clear and convincing evidence that Sporer knowingly made a false statement to the court.
- SANCTION: Six-month license suspension.

***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Vandel, 889 N.W.2d 659 (Iowa 2017)***

- FACTS: Vandel repeatedly informed judge that she was medically incapable of attending a hearing due to her need for a blood transfusion. However, Vandel could not provide any medical records showing she received a blood transfusion on the day in question.
- HOLDING: Violation of rule 32:3.3(a)(1).
- RATIONALE: "We find Vandel made these statements knowingly due to the number of times she repeated it to various persons and entities." *Vandel* at 665.
- SANCTION: 6-month suspension (there were other violations)

***Iowa Supreme Ct. Att'y Disciplinary Bd. v. Barnhill, 847 N.W.2d 466 (Iowa 2014)***

- FACTS: Attorney falsely represented in her petition that Musco was in a contractual relationship with the school district. Attorney subsequently corrected that statement.
- HOLDING: No violation of rule 32:3.3(a)(1)

- RATIONALE: Misrepresentation must be made “knowingly.” We will not infer an attorney made a misrepresentation “knowingly” simply because the misrepresentation occurred. It is also not enough that an attorney admits he or she misrepresented facts or that an attorney files a motion containing false information. At most, the attorney here acknowledged her petition contained false information. That is not enough to prove a violation occurred.

***Iowa Supreme Ct. Att’y Disciplinary Bd. v. Liles, 808 N.W.2d 203 (Iowa 2012)***

- FACTS: Liles executed his private client’s will, forging the signature of a subscribing witness who was not actually present. When caught, Liles admitted his forgery and expressed remorse.
- HOLDING: Violation of rules 32:3.3(a)(1) and 32:3.3(a)(3)
- RATIONALE: Liles knowingly misrepresented the authenticity of the witness’ signature to a tribunal, in violation of Rule 32:3.3(a)(1), by attaching his client’s will to a petition for small estate administration and filing it with the court. He also knowingly offered evidence of the will’s authentication which he knew to be false in violation of rule 32:3.3(a)(3).
- SANCTION: 60-day suspension.

***State v. Hischke, 639 N.W.2d 6 (Iowa 2002)***<sup>6</sup>

- FACTS: Attorney believed his client planned on committing perjury. He decided to tell the court. The issue was whether the attorney was justified in doing so (i.e. “what standard of knowledge is required before a lawyer may inform the court of his or her client’s plan to commit perjury.” *Hischke* at 9).
- HOLDING: No violation of Model Rule 3.3.<sup>7</sup>
- RATIONALE: There are several factors to consider in deciding whether counsel is justified in informing the court of his/her client’s plan to commit perjury: “(1) how certain counsel was the proposed testimony was false; (2) at what stage of the proceedings counsel discovered the plan; and (3) the ways in which the attorney may be able to dissuade his or her client from committing perjury.” *Hischke* at 9 (citing *Nix v. Whiteside*, 475 U.S. 157, 188-89 (1986)). Here, the attorney had an objectively reasonable basis for believing his client intended to commit perjury (see case for specific factual analysis). Therefore, his decision to tell the court that his client planned on committing perjury was reasonable, competent, and did not violate Model Rule 3.3. “Actual knowledge” is not required.

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<sup>6</sup> This case considers whether the attorney provided ineffective assistance by telling the court his client planned to commit perjury. This inquiry includes whether the attorney violated the rules of professional conduct, specifically rule 3.3.

<sup>7</sup> Model Rule 3.3 is the same as Iowa Rule 33:3.3. (Iowa Rule 33:3.3 was adopted in 2003, after *Hischke* came out.)

***Rural Water System No. 1 v. City of Sioux Center, Iowa*, 967 F. Supp. 1483, 1498 n. 2 (N.D. Iowa 1997)**

- **FACTS:** Counsel for rural water association did not include a recent, noncontrolling court of appeals decision in its opening summary judgment brief, even though it directly considered one of the questions presented. (It was adverse to the association's position in the case.)
- **HOLDING:** Violation of the spirit of DR 7-106(B)(1)<sup>8</sup>
- **RATIONALE:** Despite the fact that the rules only require disclosure of controlling authority, where counsel was also counsel for parties in the noncontrolling case, and cross-motions for summary judgment of the city and association were filed on the same day and, thus, counsel had no assurance that city's counsel would bring the noncontrolling decision to attention of the court, counsel should have included the noncontrolling decision in its summary judgment brief. "Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another." *Rural Water System* at 1498, n. 2. "This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." *Id.*

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<sup>8</sup> Precursor to rule 33:3.3(a)(2).