



**IOWA STATE BAR ASSOCIATION  
COMMITTEE ON  
ETHICS AND PRACTICE GUIDELINES**

NICK CRITELLI, JD, CHAIRMAN  
317 SIXTH AVENUE  
SUITE 950  
DES MOINES, IA 50309  
515.243.3122  
NICK@CRITELLILAW.COM

DAN MOORE, JD, SIOUX CITY, IA  
DAVE PHIPPS, JD, DES MOINES, IA  
ERIC LAM, JD, CEDAR RAPIDS, IA  
TIMOTHY SWEET, JD, REINBECK, IA

---

August 15, 2007

Mr. Dwight Dinkla  
Executive Director  
Iowa State Bar Association  
521 E. Locust  
Des Moines, IA 50309

Re: Opinion on Client involvement in drafting legal briefs.  
Opinion No. 07-06

Dear Mr. Dinkla:

We have been asked to opine on two separate matters which unfortunately extol subjectivity over objectivity in legal representation.

**Questions Presented**

In the first matter we are concerned with the propriety of an Iowa lawyer allowing a client to formulate and choose the words to be included in a legal brief filed with the court under the signature of the lawyer. The situation stems from litigation which has become extremely contentious. The client has requested that all written documents filed in the litigation be supplied for review before they are filed. After being submitted, the client edited the brief to include personal invective, accusation and vituperation against the opponent and opposing counsel. However, the client did not edit or otherwise attempt to control the legal argument or citation of authority. Counsel's view was that the approach would be counter-productive and cause loss of credibility before the Court. Unfortunately, the client is unpersuaded and requested the lawyer to follow instructions. The

lawyer wishes guidance.

The second situation concerns conduct of opposing counsel which has become extremely subjective, personal and vituperative toward the lawyer and her client. This situation arises during the negotiation of a business transaction. It has caused disruption to the transaction, distrust between the parties and frustration to counsel. Counsel on the receiving end has asked for guidance.

### **Opinion**

Our response to the questions posed and our guidance to the Bar is as follows:

1. All clients have the right to review and suggest changes to legal pleadings, briefs and arguments, but, ultimately, it is the lawyer who, in the exercise of professional independent judgment, is responsible to ensure that the pleadings, briefs and argument further the client's objectives and are consistent with the law, rules of court and the lawyer's professional obligations as described in the Iowa Rules of Professional Conduct.
2. In providing legal services lawyers should strive to maintain their objectivity so as to provide professional independent judgment to and on behalf of their clients.

### **Analysis**

Both matters require us to review the very nature of the role that a lawyer plays in the delivery of legal services and the administration of justice. Is a lawyer the mere agent of the client or something more. We believe that lawyers are more than agents and are held to a higher standard requiring professional independence and objectivity.

Guidance is given in the Preamble to the Iowa Rules of Professional Conduct. Comment [5] teaches that:

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use

the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

And Comment [9] provides the following guidance:

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Iowa Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

The term "zeal" is one that is not common in today's parlance. To some it connotes an unrelenting persistence or a "win at all cost" attitude. Yet the common definition of the term by the American Heritage Dictionary defines it as an "Enthusiastic devotion to a cause, ideal, or goal and tireless diligence in its furtherance." Clearly zealousness has nothing to do with subjectivity but with the effort and diligence that one uses in pursuing the objectives of the client. This begs the question as to the role subjectivity plays in the delivery of legal service. We believe it has no role and in fact is detrimental to good representation. Lawyers are bound to render independent professional judgment on behalf of their clients. Judgment that is subjective is by its very nature not independent for it finds its genesis not in careful dispassionate analysis but in emotion. Rule 32:2.1 mandates that a lawyer's judgment be independent:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but

to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Of course clients are not bound to accept the advice. In the first matter, if, after advising the client that the requested editions to the written argument were counter-productive to the client's cause, counsel would be free to withdraw from the representation. See, for example Pa. Ethics Op 97-48 (1977) (lawyer who thinks client is mistaken in wanting to take particular legal action is obligated to either follow client's instructions or withdraw from representation.). Indeed, when it comes to drafting litigation-based documents, e.g. briefs, pleadings, motions, etc., courts have held, in applying Fed. R.Civ.P. 11 sanctions, that a lawyer is not a mere "errand boy for his client," but is also an officer of the court. Wallic v. Owens-Corning Fiberglass Corp., 40 F.Supp 2d. 1185 (D. Colo). Admittedly the lawyer's obligation changes when the document is non-litigation based. For example, in Olson v. Fraase, 421 N.W.2d 820 (N.D. 1988), the court held that a lawyer had a duty to follow the client's reasonable instructions to prepare documents to create a joint tenancy, despite the honest belief that the instructions were not in the client's best interest.

Unlike lay agents, lawyers are professionals with expert knowledge and skill. Even when representing other lawyers, their judgment is superior inasmuch as it is not clouded by subjective concerns. A lawyer who represents a client who does not follow advice or who otherwise interrupts or attempts to interfere with the representation to the detriment of the matter should consider withdrawing from the representation. To do otherwise creates serious legal and ethical implications for the lawyer. It is the lawyer who signs the document and is ultimately responsible to the court and possibly third parties for its contents.

We do not imply that there is no role for the client in the decision-making process. To the contrary Rule 32:1.2 mandates that it is the client who determines the objectives from the representation. Likewise, it is the client and lawyer who jointly determine the strategy to be used to meet the objectives. It is only in the area of determining the tactics to be used to further the strategy where the lawyer's judgment--guided by the professional obligation to the client as well as the duties inherent in being an officer of the court--prevails. See Rule 32:1.2 Comment [2]:

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's

objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

The second matter causes us to address the concept of objectivity in the rendering of legal services from the perspective of a lawyer who has become subjective. The complaint is that the lawyer's overly subjective conduct has caused discord between the parties and disruption to their business transaction. We recognize that what an opponent or opposing counsel may believe to be overly subjective may not be so in point of fact. However for the purposes of this opinion and for guidance to the Bar we will assume that the lawyer in question has crossed the line and become overly subjective.

Pursuant to Rule 32:2.1 professional independence is the hallmark of the Bar. A lawyer must be independent of outside influences and personal interests in order to provide solid legal advice and representation to a client. Threats to professional independence come in a variety of forms. They can take the form of economic, political or even romantic involvement and all diminish the independence of the lawyer's judgment. ABA Formal Ethics Op. 92-364 (1992) teaches that "emotional detachment" is essential to the lawyer's ability to render competent legal services. For example, a lawyer who engages in a personal romantic relationship with a client risks losing "the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment." This duty forms the basis for all the rules relating to conflicts of interest, e.g. Rules 32:1.7; 1.8; 1.9; 1.18 and 5.4. We believe that a lawyer's professional judgment can also be diminished through extreme subjectivity either to the client, the client's cause or the legal theories developed by the lawyer to further the same. This is not to imply that lawyers should avoid friendships or representing family, but, in so doing, we give caution to remain objective so as to be able to provide independent professional judgment. We recognize the wisdom in the ancient adage that "a person who represents himself has a fool for a client."

Because subjectivity is the antithesis of professional independence, lawyers should guard against becoming personally or emotionally vested in the legal theory or the client's cause. One who does runs the risk of losing their professional independence.

Clients, especially those who are involved in contentious situations need lawyers who can bring reason and rational decision-making to what would otherwise be a chaotic situation. This requires lawyers representing opposing clients to dispassionately and objectively communicate and cooperate, especially in those situations where their clients cannot. Lawyers who have become overly subjective or who are otherwise uncooperative deprive their client of this important capability. We suggest that lawyers always remember that while their clients operate on a personal level, they are called upon to operate on a professional level. In dealing with opposing counsel, lawyers should remember that the controversy is between client and client, and not lawyer versus lawyer. Furthermore, lawyers must be mindful that even though they represent parties they are colleagues nonetheless.

### **Conclusion**

All clients want and should expect their lawyer to be committed to them and their cause. Few clients, especially those in the midst of legal controversy would perceive risk when their lawyer turns subjective. In fact we suspect that they would view it as a sign of commitment. The lawyer, however is an expert and knows and appreciates the risk and must take steps to avoid it. We realize that there is no bright line between objectivity and subjectivity. Furthermore we realize that there is great difficulty in attempting to determine where the barrier is and if and when it has been breached. But difficulty in discernment or enforcement is no excuse for failing to call the Bar's attention to the very real risks inherent in a lawyer becoming overly subjective in rendering legal service.

Very truly yours,



Nick Critelli