

Government Practice Seminar

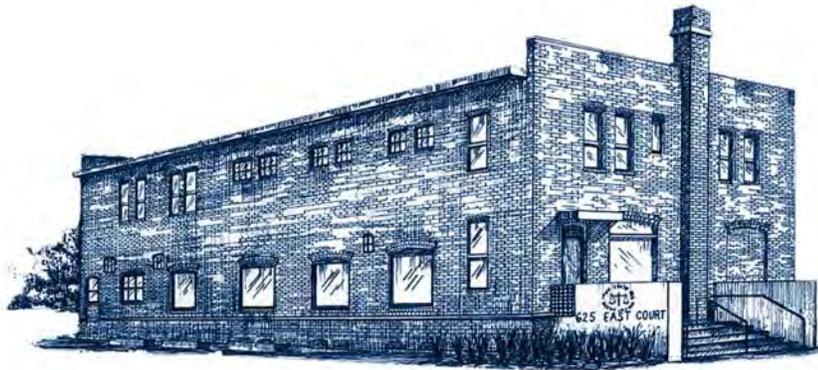
Sponsored by the Government Practice Section



**Friday, May 4, 2018
ISBA Headquarters
625 E. Court Ave
Des Moines, Iowa 50309**

Government Practice Seminar

Sponsored by the Government Practice Section



Caveat

The printed materials contained in this book and the oral presentations of the speakers are not intended to be a definitive analysis of the subjects discussed. The reader is cautioned that neither the program participants nor The Iowa State Bar Association intends that reliance be placed upon these materials in advising your clients without confirming independent research.

Government Practice Seminar

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Friday, May 4, 2018

SCHEDULE

8:00 - 8:30 – Registration

8:30 - 9:00 – Legislative Roundup

Speaker: Doug Struyk, Carney & Appleby PLC

9:00 - 10:00 – A Judicial Perspective on Rules of Professional Conduct 32:3.1 - 32:3.5

Speakers: Hon. Mary Tabor, Iowa Court of Appeals and Hon. Lawrence McLellan, Polk County District Court

10:00 - 10:15 - Break

10:15 - 11:00 – Due Process for Administrative Cases

Speaker: Emily Chafa, Bureau Manager, Iowa Workforce Development

11:00 - 12:00 – Cyber Security Panel

Speakers: Luke Dawson, Assistant Attorney General, Iowa Attorney General's Office; Beth Manley, Iowa State Association of Counties; and John Lande, Dickinson Mackaman Tyler & Hagen PC

12:00 - 12:45 – Administrative Rules

Speaker: Colin Smith, Governor's Legal Counsel

12:45 – 1:00 – Break

1:00 - 2:00 – Sexual Harassment

Speaker: Margaret Hanson, Davis Brown Law Firm

2:00 - 3:00 – City Government in the Philippines

Speaker: Vico Sotto, Member and City Legislator, Sangguniang Panlungsod (City Council), Pasig City

3:00 – 3:30 – Reception for Vico Sotto

2018 Government Practice Seminar

LEGISLATIVE UPDATE ISBA GOVERNMENT PRACTICE SECTION

8:30 a.m. - 9:00 a.m.



Presented by
Doug Struyk
Carney & Appleby PLC
400 Homestead Building
303 Locus Street
Des Moines, Iowa 50309
Phone: 515-282-6803

FRIDAY, MAY 4, 2018

**2018 LEGISLATIVE UPDATE
ISBA GOVERNMENT PRACTICE SECTION**

May 4, 2018

Prepared by:

**JAMES CARNEY
Legislative Counsel
Iowa State Bar Association**

**DOUG STRUYK
JENNY DORMAN
Assistant Legislative Counsel
Iowa State Bar Association**

**400 Homestead Building
303 Locus Street
Des Moines, Iowa 50309
Ph. 515.282.6803
Fax 515.282.4700**

**Email: carney@carneyappleby.com
struyk@carneyappleby.com
dorman@carneyappleby.com**

2018 LEGISLATIVE UPDATE

I. LEGISLATORS AND COMMITTEE INFORMATION

A. Political Composition of the Iowa General Assembly

SENATE

1. 20 Democrats, 29 Republicans, 1 Independent
2. Senate Leadership:
 - a. Jack Whitver (R-Ankeny), Majority Leader
 - b. Charles Schneider (R- West Des Moines), President
 - c. Janet Petersen (D-Des Moines), Minority Leader

HOUSE OF REPRESENTATIVES

1. 59 Republicans, 41 Democrats
2. House Leadership:
 - a. Linda Upmeyer (R-Clear Lake), Speaker
 - b. Matt Windschitl (R- Missouri Valley), Speaker Pro Tempore
 - c. Chris Hagenow (R-Windsor Heights), Majority Leader
 - d. Mark Smith (D-Marshalltown), Minority Leader

B. 2018 Lawyer Legislators

House:

HD47	R	Rep. Chip Baltimore*
HD25	R	Rep. Stan Gustafson
HD43	R	Rep. Chris Hagenow
HD02	R	Rep. Megan Jones
HD33	D	Rep. Brian Meyer
HD09	D	Rep. Helen Miller*
HD41	D	Rep. Jo Oldson
HD31	D	Rep. Rick Olson
HD52	D	Rep. Todd Prichard
HD98	D	Rep. Mary Wolfe
HD22	R	Rep. Jon Jacobson
HD58	R	Rep. Andy McKean

*Retiring after the 2018 Session

Senate:

SD33	D	Sen. Rob Hogg
SD13	R	Sen. Julian Garrett
SD22	R	Sen. Charles Schneider
SD19	R	Sen. Jack Whitver
SD16	D	Sen. Nate Boulton
SD3	R	Sen. Jim Carlin

C. **Judiciary Committee Members**

SENATE

Brad Zaun, Chair Dan Dawson, Vice Chair Rich Taylor, Ranking Member Tony Bisignano Nate Boulton	Julian Garrett Kevin Kinney Janet Petersen Charles Schneider Jason Schultz	Tom Shipley Amy Sinclair
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HOUSE OF REPRESENTATIVES

Zach Nunn, Chair Greg Heartsill, Vice Chair Chip Baltimore Mary Wolfe, Ranking Member Liz Bennett Jacob Bossman Stan Gustafson Lee Hein	Ashley Hinson Megan Jones Kevin Koester Vicki Lensing Andy McKean Brian Meyer Jo Oldson	Rick Olson Ross Paustian Ken Rizer Ras Smith Beth Wessel-Kroeschell Matt Windschitl
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D. **Justice Systems Appropriations Subcommittee Members**

SENATE

Mark Chelgren, Chair
Dan Dawson, Vice Chair
Bob Dvorsky, Ranking Member
Rob Hogg
Julian Garret

HOUSE OF REPRESENTATIVES

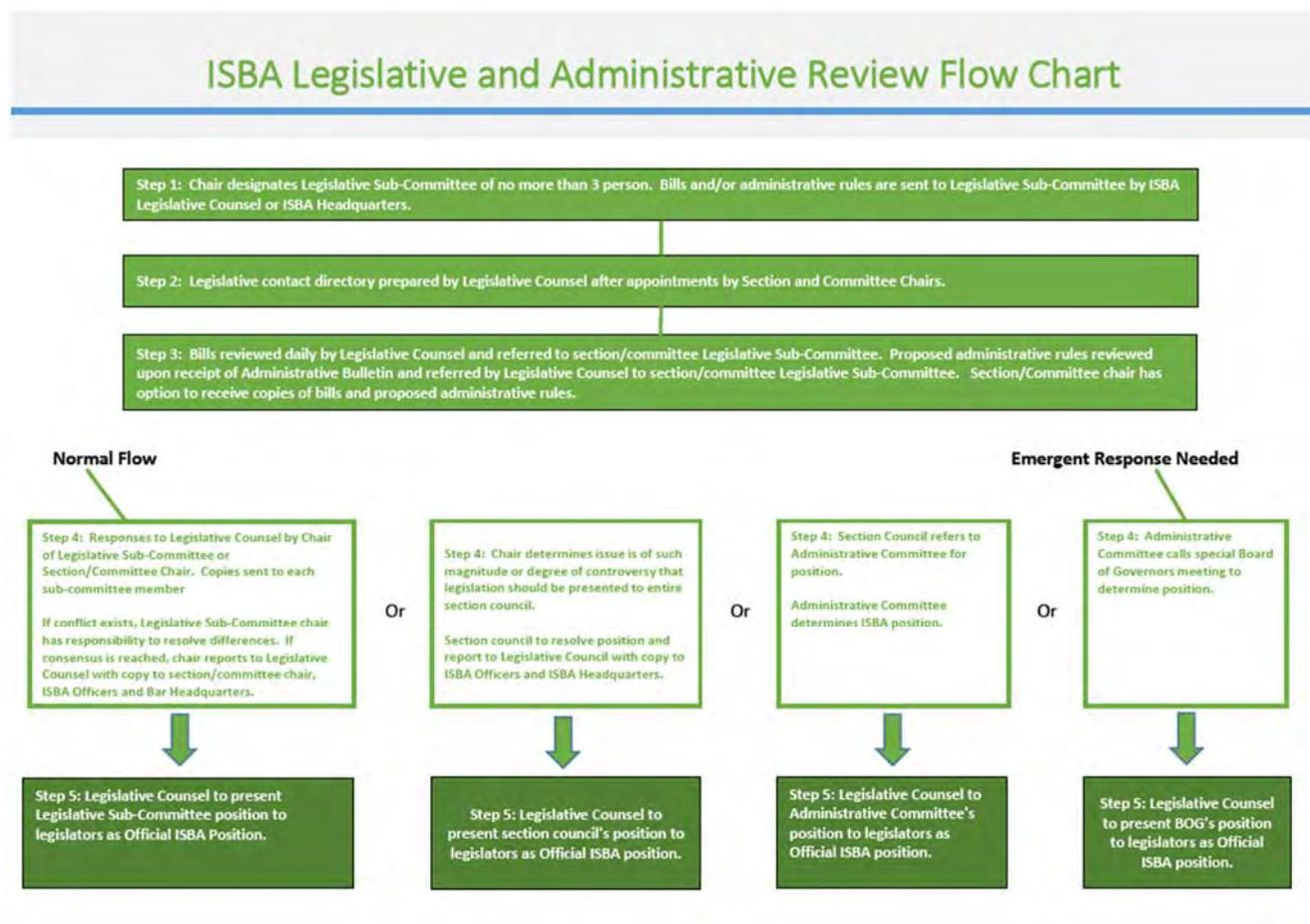
Gary Worthan, Chair
David Sieck, Vice Chair
Wes Breckenridge, Ranking Member
Marti Anderson
Jacob Bossman
Ashley Hinson
Chuck Holz
Tim Kacena
Jerry Kearns

Affirmative legislative program

The ISBA Board of Governors (BOG) has approved the ISBA legislative proposals for the 2018 session. Legislative proposals are prepared by various sections, presented to the BOG for approval, and adopted as a part of the ISBA legislative program. A chart outlining the ISBA affirmative legislative program appears starting on page seven for your review.

The ISBA has one of the most aggressive affirmative programs of any interest group in the state. Normally, the ISBA has anywhere from 15 to 20 proposals each legislative session. The Real Estate and Title Law, Business Law, and Probate, Trust & Estate Planning Sections are among the ISBA sections that had successful legislative proposals for this session.

Below is a chart outlining the ISBA Legislative and Review Process that is utilized throughout session.



**II. IOWA STATE BAR ASSOCIATION
2018 Affirmative Legislative Program**

Bill No.	Subject	Bill Description	Bill Status
SF 2314	Business Law Technical Changes	Amends §504.832 to add an explicit reference to section §504.836 authorizing a safe harbor for business opportunities. Amends §491.16A to include §§490.860 through 490.870 as these sections were not picked up when the Iowa Business Corporation Act was last amended. Clarifies language in Code §§ 9H.1 and 9H.4 regarding nonprofit corporations. The clarification is simply to ensure that all previous nonprofit chapters are included within the definition and restrictions of the chapter. Iowa's nonprofit chapter has been Chapter 504, 504A, and returned to 504.	Sent to Governor
SF 2139	Waiver of Spousal Share	Amends the Iowa Uniform Power of Attorney Act by adding a new subsection (10) to 633B.204 to clarify that an agent under a power of attorney may waive or relinquish a spousal right, homestead, and elective share if the principal has granted the agent Gen. Powers under the real property section 204 to 633B.	Signed by Governor Reynolds on 3/28/2018
HF 639	Calculation of Probate Court Costs	Relates to how the clerk of probate court determines and collects charges regarding services provided in probate matters. Excludes from the determination of court costs property over which the court lacks probate jurisdiction and for which the clerk renders no services. Specifies that for purposes of calculating the costs for other services performed by the court in the settlement of the estate of any decedent, minor, person with mental illness, or other persons laboring under legal disability, the value of such a person's personal property and real estate is equal to the gross assets of the estate listed in the probate inventory minus, unless the proceeds of the gross assets are payable to the estate, joint tenancy property, transfers made during such person's lifetime such as to a revocable trust, and assets payable to beneficiaries.	No Activity in 2018
SF 2098	Conforming Probate Code to EDMS Standards	Conforms old probate statutes with EDMS standards and procedures. Amends §633.22 (Probate Powers of Clerk), Amends §633.27 (Probate Docket), Deletes §633.72 (Manner of Service), Amends §633.82 (Designation of Attorney), and Amends §633.418 (Form and Verification of Claims).	Signed by Governor Reynolds on 3/28/2018

SF 2099	Small Estate Changes	Amend §635.7 to clarify that, when the Personal Representative files a statement of conversion to or from small estate administration, the Clerk will make the conversion without court order; and amend §635.8 to provide clarification to the procedure for closing by sworn statement.	In House Awaiting floor vote on Senate Amendment
SF 2234/ HF 2229	Revised Calculation of Probate Court Fees	Code §633.31 is currently being applied inconsistently throughout the state. There are now several district court cases declaring the clerks in at least six counties to be calculating court fees inappropriately. The bill addresses how the clerk of probate court determines and collects charges in connection with services provided in probate matters. Excludes from the determination of court fees property over which the court lacks probate jurisdiction and for which the clerk renders no services. Increases fees in §633.31 to keep impact of change in treatment of non-probate assets revenue neutral to the state by striking the existing fee structure and creating at 0.25% administration fee. The legislation also creates a \$185.00 filing fee while removing many of the individual charges associated with probate.	Senate – Awaiting Ways and Means Committee Vote House – On Calendar Eligible for floor debate
SSB 3011/ HSB 606	Funeral Directives	Funeral and burial costs are paid from a decedent's estate, but the decedent is not given a say in the funeral and burial process. The proposal will allow a person to define "reasonable funeral and burial costs" so that an heir cannot subvert the person's testamentary intent.	Did not advance this session.
HF 2125	Very Small Estates	Amends Code § 633.356 addressing the distribution of property by affidavit for a very small estate. The legislation increases the amount of a qualifying estate from \$25,000 to \$50,000. Also adds to the current requirements of the affidavit the following: that no debt is owed to the Iowa Department of Human Services for reimbursement of Medicaid benefits, or if there is it will be paid to the extent of the funds received; that no inheritance taxes are owed; and that creditors will be paid to the extent of funds received pursuant to the affidavit.	Signed by Governor Reynolds on 3/28/2018
SF 2303	Deferred Payment of Taxes – Options to Bonding/	Amends §450.48 to clarify satisfactory security to the Department of Revenue to include but not be limited to bank or securities accounts with an irrevocable pay on death or transfer on death provision naming the department of revenue, an escrow agreement with an attorney under which the funds will be held in the attorney's trust account, or the lien imposed by the chapter.	Sent to Governor

SSB 1090	Rule Against Perpetuities	The bill creates an exception to the rule against perpetuities if the Trustor explicitly suspends the rule and if the Trustee has the power to sell trust assets.	No activity in 2018
HF 2318	Redemption from Tax Sale of Property Owned by Persons with Disabilities	Remedies issues arising from Iowa Court of Appeals decision <i>Firestone v. FT13</i> (Filed 4-30-14) relating to redemption issues arising from ownership of property by minors or persons of unsound mind.	Signed by Governor Reynolds on 3/28/2018
HF 2232	Requirements for Timely Filing of Releases or Satisfactions of Mortgages	Remedies ambiguities and inconsistencies in existing statutes & provides remedies for failure of mortgagees to issue releases of mortgages.	Signed by Governor Reynolds on 3/28/2018
SF 2175	Real Estate Partitions	This bill completely reorganizes and renumbers Iowa Code chapter 651, and repeals Division XII of the Iowa Rules of Civil Procedure governing partition procedures. The proposed legislation divides chapter 651 procedures into two divisions, general procedures applicable to all partitions and special procedures applicable to “heirs property,” partitions. This bill adds a definition section, new sections clarifying court procedures governing the initial decree, the appointment of a judicial referee, the appraisal order, and the final determination of real property value. Finally, this bill specifically authorizes the equitable remedy known as “owelty” in Iowa partition actions and provides that attorney fees in partition actions are to be fixed by the court in a reasonable manner and taxed as part of the court costs.	Signed by Governor Reynolds on 4/11/2018
HSB 63	Forcible Entry & Detainer Actions After Forfeiture of Real Estate Contracts	Makes changes to procedures for eviction after forfeiture of a real estate contract. Grants statutory authority under Code Chapter 648 for a vendor in a real estate installment contract to seek Forcible Entry & Detainer action against holdover vendee who fails to vacate after forfeiture proceedings are complete, while affording holdover vendees proper due process. Allows small claims magistrates to hold preliminary hearings in forfeiture cases and to enter judgments of removal only if the defendant defaults or appears and does not raise facts which would constitute a defense to eviction.	No Activity in 2018

In addition to the above legislative proposals, the Iowa State Bar Association supports the following positions as a part of its 2018 Affirmative Legislative Program:

- Full funding of indigent defense and adoption of legislation providing for \$5.00 per hour increase with an automatic cost of living increase in indigent defense fees.
- Full Funding of the Judicial Branch.
- Full funding for Legal Services.
- Full funding of the IA Secretary of State's Office as requested by IA Secretary of State Paul Pate.
- Full funding for the Office of Substitute Decision Maker to protect the interests of Iowans who have no one else to manage their financial and health care needs.
- Support child abuse prevention and treatment efforts and funding for child abuse prevention and treatment.
- Oppose the legalization of title insurance.
 - Will monitor issues regarding lawyer abstracting under Iowa Title Guaranty.
- Oppose absolute immunity legislation.

Iowa Judicial Branch FY 19 Budget Request

FY 18 Appropriation for operations:

\$175,686,612

For the second consecutive year, the Judicial Branch implemented a hiring freeze, held open judicial vacancies, deferred technology projects, and instituted a moratorium on the expansion of specialty courts in order to balance the budget. There are 68 vacant positions due to the freeze increasing the number of unfilled positions to 115, including 11 judicial officers. The FY 19 budget request does not include funding for an additional 67 positions eliminated last year. In total, the Iowa Judicial Branch has 10% fewer employees than in FY 17.

Fiscal Year 2019 Budget Request	Requirements	Purpose	Requested amount
<p>Delivery of Essential Services in all 99 Counties</p> <ul style="list-style-type: none"> • Fill 115 vacant positions, including 11 judicial officers, and 20 juvenile court officers • Continued operation of 47 specialty courts 	<input checked="" type="checkbox"/> Statutory <input checked="" type="checkbox"/> Constitutional <input checked="" type="checkbox"/> Unduplicated	Judicial Branch employees in courthouses across Iowa provide the following services: collect fines, fees and restitution, assist Iowans with their legal disputes, maintain all documents filed with the court, schedule all proceedings, assist jurors, keep the official record of all proceedings, and provide the ongoing maintenance and support of eFile, online fine payment and Iowa Courts Online. Judges resolve Iowans' legal disputes. Juvenile Court Officers target criminogenic behaviors using the Iowa delinquency assessment. Increasing the dosage of evidenced based practices creates a reduction in recidivism, safer neighborhoods, and productive individuals, families, and communities.	\$6,755,291
<p>Access to Court Records & Protection of Personal Information</p> <ul style="list-style-type: none"> • Information security and infrastructure projects including cybersecurity framework • Statewide conversion of historic paper inventory to digital storage • Online access to justice portal • Enhanced jury management software 	<input checked="" type="checkbox"/> Statutory <input checked="" type="checkbox"/> Constitutional <input checked="" type="checkbox"/> Unduplicated	The Judicial Branch has an obligation to protect the personal information of Iowans in the over 20 million documents filed and stored electronically. Whether from a security breach or a natural disaster, any disruption to the case management system and eFile system will impact operations and the ability of the Judicial Branch to provide justice. Any disruption would greatly affect judges, all other court personnel, the public, attorneys, and numerous state agencies. The continued operation of the Judicial Branch depends on the ability to replicate IT systems and data in real time.	\$6,500,000
<p>Specialty Courts Study</p> <ul style="list-style-type: none"> • Evaluate the structure and practices of existing specialty courts to replicate the services 	<input checked="" type="checkbox"/> Statutory <input checked="" type="checkbox"/> Constitutional <input checked="" type="checkbox"/> Unduplicated	Conduct an independent review and assessment of all 47 specialty courts. Evaluate existing specialty courts to ensure they are following evidence-based practices and maximizing cost	\$85,424

statewide		effectiveness.	
Evaluate Digital Audio Recording in targeted District Associate Courts <ul style="list-style-type: none"> Evaluate digital audio recording in targeted courtrooms to address court reporter shortage 	<input checked="" type="checkbox"/> Statutory <input checked="" type="checkbox"/> Unduplicated	This targeted program is not to remove court reporters from the courtroom but to fill in the gaps where there are scheduled court proceedings but no court reporters to make the record. The Iowa Code requires court reporters to keep the official record of hearings and court proceedings. There are 6 court reporter positions that have been vacant for over one year and 12 total current court reporter vacancies.	\$500,000
Total Operations Request			\$13,840,715
Total Operations Budget			\$189,527,327
% Increase			7.9%

*The FY 18 appropriation of \$3.1 million for the Jury and Witness Fund is not included in this information.

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III. BILLS OF INTEREST PASSED DURING 2018 LEGISLATIVE SESSION

GOVERNMENT PRACTICE

- HF 2233** **Public Construction Mechanic's Liens** A bill for an act relating to mechanic's liens and public construction liens.. Signed on 4/10/18. Effective Date 7/1/18.
- HF 2256** **County Engineer Reports**. A bill for an act relating to the submission of certain reports by the department of transportation and county engineers. Signed on 4/4/18. Effective Date 7/1/18.
- HF 2258** **Flood Mitigation Costs**. A bill for an act relating to the uses of remitted sales tax revenue and moneys from the flood mitigation fund under the flood mitigation program and including applicability provisions. Specifically, allows the costs incurred by a government after the approval of a flood control/mitigation projection, including repayment of funds advanced internally or to pay for bonds, to the reimbursements authorized from the flood project funds. Signed on 4/17/18. Effective Date 7/1/18.
- HF 2286** **Municipality Time-of-Sale Requirements**. A bill for an act prohibiting cities and counties from imposing time-of-sale requirements on transactions involving real property. Signed on 3/15/2018. Effective 7/1/18.
- HF 2286** **IUB Bill**. A bill for an act relating to the sale or acquisition of certain utilities. Signed 3/21/18. Effective 7/1/18.
- HF 2340** **Fence Viewing Controversies**. Amends Iowa Fence Law to allow a Board of Trustee fence viewer to recuse themselves when conflicts of interest arise. An example of this type of conflict would be if a fence viewer knew either fence owner party to the the partition fence action. Establishes a process for replacing the fence viewer with alternate. Additionally, the law provides that the fence viewers may determine that the erection of the fence on the property boundary between the adjoining property is not feasible, and establish an alternative proposal for where to place the fence. Signed 4/4/18. Effective 7/1/18.
- HF 2343** **State Agency Rule Making Limitations**. A bill for an act prohibiting state agencies from implementing or enforcing any standard, requirement, or threshold unless that standard, requirement, or threshold is clearly required or clearly permitted by a state statute, rule adopted pursuant to Iowa Code 17A, federal statute or regulation, is required by a court ruling, required by a state or federal executive order or a state or federal directive that failure to adopt a rule would result in the gain or loss of specific funding. Signed and effective on 3/28/18.

- HF 2371 Municipality Honeybee Immunity.** A bill for an act exempting the state and municipalities from liability for claims involving honeybees on public property. Signed 4/17/18. Effective 7/1/18.
- HF 2379 Utility Retirement Systems.** A bill for an act relating to municipal utility retirement systems. Signed 4/10/18. Effective 7/1/18.
- HF 2382 Modification of Engineering and Land Examining Board Make up.** A bill for an act relating to the composition of the engineering and land surveying examining board. Signed 4/4/18. Effective 7/1/18.
- SF 481 Sanctuary City Regulation.** A bill for an act relating to the enforcement of immigration laws and providing penalties and remedies, including the denial of state funds to certain entities who violate the laws requirements. Allows local entities an appeal to show they are properly following all mandates in the law 90 days after funds are taken. Signed 4/10/18. Effective 7/1/18.
- SF 2081 Electronic Notice in House Assessment.** A bill for an act authorizing the use of electronic means for certain notices and information provided by local assessors and including applicability provisions. Those interested in receiving notice electronically must “opt-in” all others will continue to receive notice by current practice. Enacted in hope of streamlining processes and saving local tax-payer money. Signed 3/15/18. Effective 7/1/18.
- SF 2155 Political Subdivisions.** A bill for an act concerning public investment maturity limitations relating to the operating funds of political subdivisions. Signed 4/16/18. Effective 7/1/18.
- SF 2229 Mechanics Lien/Collateral Security** A bill for an act relating to obtaining a mechanics lien when a person takes collateral security on a contract for furnishing material or performing labor, specifically clarifying that personal assurances and guarantees of the quality of the contractor’s final product constitute “additional security” and negate their ability to place a mechanics lien on the property in the case that payment is not tendered. Fixes a law that has been in the books since 1800s. Signed on 3/28/18. Effective 7/1/18.
- SF 2255 State Auditor Request Rules.** A bill for an act relating to the auditor of state concerning legislative requests for auditor reviews, specifically dealing with requests by a member of the legislature to conduct a review concerning the receipt of state or federal funds provided to a state department. Additionally this law concerns applications by taxpayers for certain city or township audits, as well as reimbursement of certain repayments for auditor services. Signed on and effective on 3/28/18.

- SF 2271 Taxi Reform Legislation.** A bill for an act relating to motor carriers, and making penalties applicable. Signed 4/4/18. Effective 7/1/18.
- SF 2290 Board of Hospital Trustees.** Changes the requirements for the composition of the county and city hospital boards from 7 members to 5, either are acceptable. Changes procedural rules on what constitutes a quorum to vote to accommodate the possibility there will be fewer voting members. Signed 3/28/18. Effective 7/1818.
- SF 2310 ABD Technical Clean-up Bill.** A bill for an act relating to alcoholic beverage control and matters under the purview of the alcoholic beverages division of the department of commerce. Signed and Effective on 4/2/18.
- HF 2372 County Supervisor Redistricting Plan.** Deems that counties over 60,000 which selected election from single-member districts for supervisors will be covered by same districting rules that apply to counties of more than 180,000 or which have consolidated city/county government (Plan 3 single-member districts for supervisors). Requires future districting plans to be drawn by LSA after the census. Only allows changes to the representation plan by special election.
- SF 2226 Ground Water Hazard Statements.** A bill for an act relating to formatting requirements for groundwater hazard statements recorded with a county recording office. Signed 4/10/18. Effective 7/1/18
- SF 2227 County Resolution Publication.** Requires the county auditor to include a summary of resolutions, or the full text of resolutions, in the materials furnished to the board of supervisors for publication about the meetings of the supervisors. Requires the adopted resolutions to be posted on the internet if the county has an internet site.

Bills of Interest that did not or have not passed in the 2018 Session

Still Alive as of 4/26/18

- HF 2131 Hotel/Motel Taxes.** A bill for an act relating to the exemption from the hotel and motel taxes for the renting of lodging exceeding a certain number of consecutive days. **In Senate.**
- HF 2369 Local Referendum Votes.** A bill for an act setting the dates for the submission of local public measures to the electors to the second Tuesday in November. On Senate Unfinished Business Calendar.
- SF 220 Modified Ban of ATE's.** A bill for an act regulating the use of automated traffic law enforcement systems, and providing a penalty. Amendment calling for a

total ban and immediate removal of all existing systems was deferred on by the Senate on 4/17/18. The fight wages on.

- SF 2081** **Backfill Phase Out.** A bill for an act modifying appropriation amounts for payment of commercial and industrial property tax replacement claims and including effective date provisions. Phase out all state appropriations by 2020. Funnel proof.
- SF 2382** **Criminal Law Omnibus.** A bill for an act relating to criminal law and procedure including certain related administrative proceedings, providing penalties, and including effective date provisions. On House Unfinished Business Calendar.
- SF 2390** **Sanitation Code Changes Hotel/Food Inspections.** Requires hotel license inspections be done in accordance with DIA rules. Sets the penalty for a failure to renew the license at 10% per month. Requires an inspection on any complaint that a hotel is unsanitary. Makes definitional changes in relationship to food inspections for food establishments. Adds requirements on renewal times. Adds a \$200 general application fee but excludes farmer's markets and temporary food establishments. Requires a person conducting an event to submit a \$50 fee 60 days before the event. Changes the fee schedule for food trucks/pushcarts. Adds new fees, including fees for school inspections. Effective January 2019. Bouncing Bill in the House.

Dead

- SF 2338** **Iowa's Restoration of Freedom of Religion Act.** A bill for an act relating to the standard of judicial review and providing a claim or defense when a state action burdens a person's exercise of religion, and including effective date provisions. Died before Second Funnel.

2018 Government Practice Seminar

A JUDICIAL PERSPECTIVE ON RULES OF PROFESSIONAL CONDUCT 32:3.1—32:3.5

9:00 a.m. - 10:00 a.m.



Presented by

Hon. Mary Tabor
Iowa Court of Appeals
Iowa Judicial Branch Building
1111 East Court Ave.
Des Moines, IA 50309

Hon. Lawrence McLellan
Polk County District Court
Polk County Courthouse
500 Mulberry St.
Des Moines, IA 50309

FRIDAY, MAY 4, 2018

A Judicial Perspective on Rules of Professional Conduct 32:3.1-32:3.5

RULE: 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. of Prof'l Conduct **32:3.1**.

COMMENT

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

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

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

[4] When an applicable rule or order prohibits an appellate attorney from withdrawing on the ground that the appeal is frivolous, the lawyer is permitted to advocate grounds on appeal that the lawyer believes are ultimately without merit. The lawyer must, of course, comply with the remaining rules of this chapter, including rule 32:3.3.

CASES

Filing a termination of parental rights petition, after ordered to do so by the Juvenile Court, did not constitute an ethical violation by the county attorney, even though the county attorney did not support the petition; rules of professional conduct provided that an attorney could advance a claim unwarranted under existing law if there was a good

faith argument for the extension, modification, or reversal of existing law, and the Juvenile Court's order provided the good faith basis for pursuing the termination of parental rights. [In re K.C., 2003, 660 N.W.2d 29.](#)

Attorney violated professional conduct rules governing frivolous claims, defenses, or issues and knowingly making false statements of fact or law to tribunal by asserting, when acting as witness in contempt proceeding against client, arising from divorce matter in which attorney represented husband, that opposing counsel's secretary in divorce case had authority to bind wife to settlement agreement favorable to husband. [Iowa Supreme Court Attorney Disciplinary Board v. Sporer, 2017, 897 N.W.2d 69.](#)

RULE: Expediting Litigation

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

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

CASES

Attorney violated professional conduct rule governing the expediting of litigation by failing to undertake any efforts, for several months, to correct filing of divorce petition that was rejected by electronic filing system, despite knowing of urgency of divorce client's situation, and by failing to ever make any effort to obtain service on client's spouse in state in which spouse resided. [Iowa Supreme Court Attorney Disciplinary Bd. v. Weiland, 2016, 885 N.W.2d 198.](#)

A client's decision not to pursue an appeal does not put an end to the attorney's responsibility for that matter under professional conduct rules requiring reasonable efforts to expedite litigation and requiring that a lawyer's conduct not be prejudicial to the administration of justice. [Iowa Supreme Court Attorney Disciplinary Bd. v. Dolezal, 2011, 796 N.W.2d 910.](#)

RULE: 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**

COMMENT

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

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

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. *Compare* rule 32:3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in rule 32:1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with rule 32:1.2(d), see the comment to that rule. See also the comment to rule 32:8.4(b).

Legal Argument

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

Offering Evidence

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

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

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

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however,

can be inferred from the circumstances. *See* rule 32:1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

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

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by rule 32:1.6. It is for the tribunal then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.

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

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable

remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

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

Ex Parte Proceedings

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

Withdrawal

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

CASES

False statements to a tribunal which violate professional conduct rule may be orally made to the court. [Iowa Supreme Court Attorney Disciplinary Board v. Sporer, 2017, 897 N.W.2d 69.](#)

The omission of information by a lawyer can give rise to a false statement to the court in violation of rules of professional conduct. [Iowa Supreme Court Attorney Disciplinary Bd. v. Daniels, 2013, 838 N.W.2d 672.](#)

RULE: Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. Iowa R. Prof'l Conduct. **32:3.4**

COMMENT

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

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

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

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

CASES

Professional rule prohibiting lawyers from knowingly disobeying an obligation under the rules of a tribunal did not apply to conduct of a lawyer not serving as an advocate representing a client, and thus, attorney did not violate the rule by failing to disclose contingent fee agreements with clients during discovery in his own protracted marital dissolution proceeding; rule is found in a section of the rules entitled "Advocate." [Iowa Supreme Court Attorney Disciplinary Bd. v. Rhinehart, 2013, 827 N.W.2d 169.](#)

Probable cause for a criminal charge means that the circumstances would support a belief by a reasonable person that the defendant committed the crime with which he is charged. [Iowa Supreme Court Attorney Disciplinary Bd. v. Howe, 2005, 706 N.W.2d 360.](#)

Attorney's repeated failure to comply with appellate deadlines in several criminal cases, and her failure to pay resulting penalties in a timely fashion over a period of two years, did not establish a violation of professional conduct rule relating to knowing disobedience of an obligation under the rules of a tribunal, despite attorney's acknowledged receipt of numerous notices of deadlines informing her of specific rules requiring timely filings, in absence of evidence that attorney's conduct undermined the competitive fairness of the appeals or disadvantaged opposing counsel. [Iowa Supreme Court Attorney Disciplinary Bd. v. Kieffer-Garrison, 2014, 847 N.W.2d 489,](#)

RULE: Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress, or harassment; or
- (d) engage in conduct intended to disrupt a tribunal. Iowa R. Prof'l Conduct. **32:3.5**

COMMENT

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

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

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

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

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

CASES

Defense lawyers, in accepting juror's offer of drinks during the trial, violated their ethical obligation prohibiting communications with a juror during trial unless in the course of official proceedings. [Omaha Bank for Cooperatives v. Siouxland Cattle Co-op., 1981, 305 N.W.2d 458.](#)

Conduct of attorney, who sent ex parte e-mail to judge that included allegations of unethical conduct, abuse of judicial power, and a cover-up in proceedings on appeal of fee arbitration award, violated rule of professional conduct prohibiting attorney from communicating ex parte with a judge during the course of a proceeding unless authorized to do so; attorney sent e-mail while case was still under district court's jurisdiction, e-mail was sent when judge was acting in his official capacity during the proceeding, e-mail itself acknowledged that it was an ex parte communication, and attorney admitted sending e-mail. [Iowa Supreme Court Attorney Disciplinary Bd. v. Attorney Doe No. 792, 2016, 878 N.W.2d 189](#)

2018 Government Practice Seminar

DUE PROCESS FOR ADMINISTRATIVE HEARINGS

10:15 a.m. - 11:00 a.m.



Presented by

Emily Chafa

UI Appeals Bureau Manager
Iowa Workforce Development

1000 East Grand Avenue

Des Moines, IA 50319-0209

Email: Emily.chafa@iwd.iowa.gov

Phone: 515-725-1201

FRIDAY, MAY 4, 2018

ISBA Government Practice Section CLE:

Due Process for Administrative Hearings

May 4, 2018, ISBA CLE Centre & Webinar

Speaker:

Emily Chafa

UI Appeals Bureau Manager

Iowa Workforce Development

1000 East Grand Avenue

Des Moines, Iowa 50319-0209

Email: emily.chafa@iwd.iowa.gov

Direct line: 515-725-1201

Fax: 515-478-3528

What process is due?

At its most basic level - Notice and opportunity to be heard –

Goldberg v Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970)

Fundamental due process required to contest agency action.

Agency action denying public benefits affects a basic constitutional property right. 397 U.S. at 262.

Due process requires timely and adequate notice detailing reasons for proposed adverse government agency action. 397 U.S. at 267.

Due process requires an opportunity to be heard. 397 U.S. at 267.

Hearing must be held at a meaningful time and in a meaningful manner. 397 U.S. at 267.

Hearing must include an effective opportunity to confront and cross-examine any adverse witnesses. 397 U.S. at 269.

Hearing must include an effective opportunity to present his or her own testimonial and documentary evidence and arguments. 397 U.S. at 269.

Due process requires that the hearing opportunity be tailored to the capacities and circumstances of those to be heard. 397 U.S. at 268-269.

Due process requires an impartial decision maker. 397 U.S. at 271.

Decision maker's conclusion must rest solely on legal authority and evidence presented and admitted during the hearing. 397 U.S. at 271.

Decision maker's determination must state reasons for his or her decision and indicate evidence he or she relied on to make the decision. 397 U.S. at 271.

Administrative Procedure Act Iowa Code Ch. 17A

The Iowa Administrative Procedure Act (APA) serves as the minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public. Iowa Code 17A.1(2)

The purposes of the Iowa APA include: assuring a uniform minimum procedure for all agencies to follow in the conduct of their most basic functions; increasing fairness of agencies in conducting contested case proceedings; and to simplify the process of judicial review of agency action. Iowa Code 17A.1(3)

The Iowa APA is intended to strike a fair balance between its purposes and the need for efficient, economical and effective government administration. Iowa Code 17A.1(4)

The Iowa APA's impact is limited to procedural rights. Iowa Code 17A.1(4)

The Iowa APA defines a contested case as a proceeding in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing. Iowa Code 17A.2(5)

Requirements for reasonable notice and opportunity to be heard are specified in the Iowa APA. Iowa Code 17A.12.

General rules of evidence for administrative contested case proceedings are defined in the Iowa APA. Iowa Code 17A.14.

General requirements for the form of a decision in a contested case proceeding are specified in the Iowa APA. Iowa Code 17A.16. These decisions are usually issued by an administrative law judge following the contested case appeal hearing.

Prohibited ex parte communications are defined in the Iowa APA. Iowa Code 17A.17.

A fair and impartial decision maker is required by the Iowa APA. Disqualification procedures are specified for various defined circumstances. Iowa Code 17A.11.

Iowa Administrative Code

Individual state agency procedural rules in the Iowa Administrative Code (IAC) further define, specify and clarify processes for various types of contested case proceedings involving state agency action denying or allowing a right, duty or privilege. All administrative rules must flow from statutory authority. See *City of Des Moines, et al v. Iowa Department of Transportation*, No. 17-0686, filed April 27, 2018 (Iowa Sup. Ct.)

For example:

871 IAC Ch. 26 specifies the procedural rules for Iowa Workforce Development unemployment insurance appeal hearings.

481 IAC Ch. 10 specifies the procedural rules for Department of Inspections and Appeals Administrative Hearing Division contested case hearings.

876 IAC Ch. 4 specifies procedural rules for Iowa Workforce Development Workers Compensation Division contested case proceedings.

General Considerations and Best Practices for all administrative proceedings

Language Access – Hearing must be conducted in the language the participant can understand in order to be meaningful and tailored to the capacities and circumstances of the parties to be heard.

Plain Language – Use clear, concise, correct language in written notices and decisions. Hearing instructions and ALJ questions should be stated in simple direct terms. Use language tailored to the parties' capacities and circumstances.

Scheduling and rescheduling hearings – Meet timeliness standards for a prompt outcome. Allow a reasonable length of time for the hearing to give the parties an effective opportunity to present testimony, exhibits and arguments.

Implicit Bias – Fair and impartial decision maker bases decision solely on evidence presented and applicable law.

Bench Card on Procedural Fairness – Practical tips for all proceedings.

Specific Due Process Requirements for agency action

U.S. Department of Labor requires each state's unemployment insurance appeals tribunal administrative law judges to comply with a list of 31 criteria to ensure that fundamental due process is provided to all parties involved in an administrative contested case proceeding. These criteria comply with the basic *Goldberg v Kelly* mandates. These criteria can serve as a "best practices guide" for any administrative contested case proceeding.

This U.S. Department of Labor criteria includes, but is not limited to:

Notice

- Adverse agency action must include appeal rights (IWD statutes and rules)
- Appeal hearing notice must be sent at least ten days before the hearing date (IWD statute)
- Appeal hearing notice must include a statement of the issue(s) on appeal

Opportunity to be heard

- Explain hearing process, including right to question witnesses, general order of testimony
- Give each party chance to ask questions about the hearing process at the beginning

Confrontation

- Each party can confront opposing witnesses
- Each party can cross-examine a witness immediately following the initial testimony
- ALJ can assist a party in forming cross examination questions

Written Decision

- ALJ must prepare a written decision for each case
- ALJ decision includes factual findings on all necessary elements and facts at issue
- ALJ factual findings must be relevant, accurate, complete, specific, clear
- ALJ makes appropriate credibility assessments
- ALJ conclusions of law must provide necessary support and basis for outcome reached

Fair and Impartial (no bias or prejudice)

- No negative demeaning or disparaging behavior
- Maintain high standards of demeanor
- Be fair and appear to be fair
- Put parties at ease
- Nothing in the form of a lecture
- Provide necessary assistance to fully develop the record

IMPLICIT BIAS BENCH CARD

Act Consciously and Deliberately

- Allow more time for cases in which implicit bias may be a concern.
- Avoid decisions under rushed, stressed, distracted or pressured circumstances.
- Engage in thoughtful information processing - objectively and deliberately consider the facts at hand. Avoid low-effort decisions or decision made on auto-pilot.
- Take special care in situations when you must respond quickly to avoid making snap decisions.
- Articulate the reasoning behind your decision before committing to a decision to allow yourself to critically review your decision-making process.

Be Self-Aware

- Analyze your emotional state. Do the negative or positive emotions you are feeling pertain to the case?
- Consider whether you are requiring more or less from a person than you would from others.
- Ask yourself if your opinion of the parties, witnesses, or case would be different if the people presenting belonged to a different social/racial group.
- Consider how the person is different from others in his/her same social/racial group or gender.
- Be mindful of your decision-making process, not just the resulting decision.

Create Processes to Serve as a Check on Unintended Bias

- Take notes and rely on those notes over memory.
- Consider what evidence supports the conclusions you have drawn and how you have challenged unsupported assumptions.
- Seek feedback from others. Would others perceive or handle the situation differently?
- Track your decisions and periodically examine them for any pattern of bias.

Sources: Pamela M. Casey, et al., *Addressing Implicit Bias in the Courts*, 49 Court Review 64 (2013); National Center for State Courts, *Strategies to Reduce the Influence of Implicit Bias*; Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012); National Council of Juvenile and Family Court Judges, *Right from the Start: The CCC Preliminary Protective Hearing Benchcard*

Issued by the Committee for Equality and Justice of the Minnesota Judicial Branch, April 2015

Questions: Contact Committee for Equality and Justice, cej@courts.state.mn.us or <http://mncourts.gov/cej>



**MINNESOTA
JUDICIAL BRANCH**

BENCH CARD ON PROCEDURAL FAIRNESS

PRACTICAL TIPS FOR COURTROOM PROCEEDINGS

INTRODUCE YOURSELF. Introduce yourself at the beginning of proceedings, making eye contact with litigants and other audience members. Court staff can recite the basic rules and format of the court proceedings at the beginning of each court session. Written procedures can be posted in the courtroom to reinforce understanding.

GREET ALL PARTIES NEUTRALLY. Address litigants and attorneys by name and make eye contact. Show neutrality by treating all lawyers respectfully and without favoritism. This includes minimizing the use of jokes or other communication that could be misinterpreted by court users.

ADDRESS ANY TIMING CONCERNS. If you will be particularly busy, acknowledge this and outline strategies for making things run smoothly. This can help relax the audience and make the process seem more transparent and respectful.

Example: "I apologize if I seem rushed. Each case is important to me, and we will work together to get through today's calendar as quickly as possible, while giving each case the time it needs."

EXPLAIN EXTRANEOUS FACTORS. If there are factors that will affect your conduct or mood, consider adjusting your behavior accordingly. When appropriate, explain the issue to the audience. This can humanize the experience and avoid court users' making an incorrect assumption.

Example: "I am getting over the flu. I'm not contagious, but please excuse me if I look sleepy or uncomfortable."

EXPLAIN THE COURT PROCESS AND HOW DECISIONS ARE MADE. The purpose of each appearance should be explained in plain language. Tell the defendant if and when she will have an opportunity to speak and ask questions. Judges and attorneys should demonstrate neutrality by explaining in plain language what factors will be considered before a decision is made.

Example: "Ms. Smith: I'm going to ask the prosecutor some questions first, then I'll ask your lawyer some questions. After that, you'll have a chance to ask questions of me or your attorney before I make my decision."

USE PLAIN LANGUAGE. Minimize legal jargon or acronyms so that defendants can follow the conversation. If necessary, explain legal jargon

in plain language. Ask litigants to describe in their own words what they understood so any necessary clarifications can be made.

MAKE EYE CONTACT. Eye contact from an authority figure is perceived as a sign of respect. Try to make eye contact when speaking and listening. Consider other body language that might demonstrate that you are listening and engaged. Be conscious of court users' body language too, looking for signs of nervousness or frustration. Be aware that court users who avoid making eye contact with you may be from a culture where eye contact with authority figures is perceived to be disrespectful.

ASK OPEN-ENDED QUESTIONS. Find opportunities to invite the defendant to tell his/her side of the story, whether directly or via defense counsel. Use open-ended questions to invite more than a simple "yes" or "no" response. Warn litigants that you may need to interrupt them to keep the court proceeding moving forward.

Example: "Mr. Smith: I've explained what is expected of you, but it's important to me that you understand. What questions do you have?"

EXPLAIN SIDEBARS. Sidebars are an example of a court procedure that can seem alienating to litigants. Before lawyers approach the bench, explain that sidebars are brief discussions that do not go on the record and encourage lawyers to summarize the conversation for their clients afterward.

STAY ON TASK. Avoid reading or completing paperwork while a case is being heard. If you do need to divert your attention briefly, pause and explain this to the audience. Take breaks as needed to stay focused.

Example: "I am going to take notes on my computer while you're talking. I will be listening to you as I type."

PERSONALIZE SCRIPTED LANGUAGE. Scripts can be helpful to outline key points and help convey required information efficiently. Wherever possible, scripts should be personalized—reading verbatim can minimize the intended importance of the message. Consider asking defendants to paraphrase what they understood the scripted language to mean to ensure the proper meaning was conveyed.

Adapted from EMILY GOLD LAGRATTA, *PROCEDURAL JUSTICE: PRACTICAL TIPS FOR COURTS* (2015).

FOR ADDITIONAL READING

EMILY GOLD LAGRATTA, *PROCEDURAL JUSTICE: PRACTICAL TIPS FOR COURTS* (2015), available at <https://goo.gl/YbuC3K>.

Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 Cr. Rev. 4 (2007-2008) (an AJA White Paper), available at <http://goo.gl/afCYT>.

Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 Cr. Rev. 76 (2013) (an AJA White Paper), available at <http://goo.gl/RrFw8Y>.

Brian MacKenzie, *The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Court*, 52 Cr. Rev. 8 (2016) (an AJA White Paper), available at <http://goo.gl/XA75N3>.

David B. Rottman, *Procedural Fairness as a Court Reform Agenda*, 44 Cr. Rev. 32 (2007-2008), available at <https://goo.gl/sXRTW7>.

Tom R. Tyler, *Procedural Justice and the Courts*, 44 Cr. Rev. 26 (2007-2008), available at <https://goo.gl/UHPkxY>.

PROCEDURAL FAIRNESS/PROCEDURAL JUSTICE

A BENCH CARD FOR TRIAL JUDGES

WHAT IS PROCEDURAL FAIRNESS OR PROCEDURAL JUSTICE?

When we speak of **Procedural Fairness** or **Procedural Justice** (two terms for the same concept), we refer to the perceived fairness of court proceedings. Those who come in contact with the court form perceptions of fairness from the proceedings, from the surroundings, and from the treatment people get.

Research has shown that higher perceptions of procedural fairness lead to better acceptance of court decisions, a more positive view of individual courts and the justice system, and greater compliance with court orders.

Researchers sometimes identify the elements of procedural fairness differently, but these are the ones most commonly noted:

VOICE: the ability of litigants to participate in the case by expressing their own viewpoints.

NEUTRALITY: the consistent application of legal principles by unbiased decision makers who are transparent about how decisions are made.

RESPECT: that individuals were treated with courtesy and respect, which includes respect for people's rights.

TRUST: that decision makers are perceived as sincere and caring, trying to do the right thing.

UNDERSTANDING: that court participants are able to understand court procedures, court decisions, and how decisions are made.

HELPFULNESS: that litigants perceive court actors as interested in their personal situation to the extent that the law allows.

MEASURING FAIRNESS

"Measurements . . . define what we mean by performance."

—Peter Drucker

There are tools to help you measure fairness in your court. You can then see if you can improve over time.

The Center for Court Innovation has *Measuring Perceptions of Fairness: An Evaluation Toolkit*, available at <http://goo.gl/TVu42A>.

The National Center for State Courts has its *CourTools*, which includes an Access and Fairness survey in both English and Spanish, available at www.courttools.org.

The Utah Judicial Performance Evaluation Commission has a *Courtroom Observation Report*, which can be used by courtroom observers to give qualitative feedback, available at <http://goo.gl/1bWAVk>.

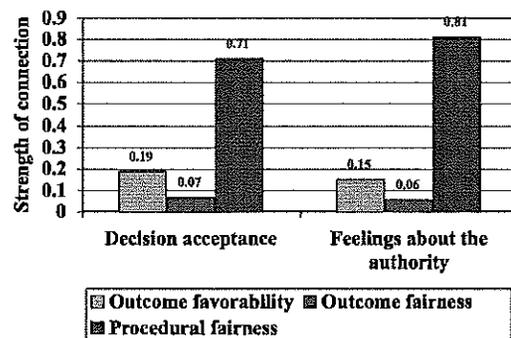
KEEP IN MIND:

- This may be the most important contact with the court system the parties will ever have.
- Filling out forms on the bench may be important, but eye contact and engagement with the parties are critical.
- Trust is not a given. But it can be gained in each hearing through adherence to procedural-fairness principles.
- People make assumptions when they lack knowledge. Explain things.
- Listening is a key skill. Decision acceptance is greater if it's clear you listened—note their key points when ruling.
- Like others, judges can be affected by perceptions, assumptions, and stereotypes—in other words, implicit biases. Be aware.

WHY IS IT IMPORTANT?

Several rigorous evaluations have shown that both acceptance of court decisions and overall approval of the court system are much more closely connected to perceptions of procedural fairness than to outcome favorability (Did I win?) or outcome fairness (Did the right party win?). Studies also show increased compliance with court orders when participants experience procedural fairness.

WHY DO PEOPLE ACCEPT COURT DECISIONS?



Source: Survey of court users in Oakland and Los Angeles, California, reported generally in TOM R. TYLER & YUEN J. HUI, *TRUST IN THE LAW* (2002).

FOR MORE INFORMATION

ProceduralFairness.org
ProceduralFairnessGuide.org
Center for Court Innovation (www.courtinnovation.org)
National Center for State Courts (www.ncsc.org)



Appeals Quality Criteria Checklist

1. Explanation - (6)

- a. Order of testimony
- b. Right to question witnesses
- c. Opportunity for each party to ask questions about the hearing process or procedures before proceeding

2. Opening Statement - (6)

- a. Identify parties
- b. Date
- c. Place
- d. Hearing officer name
- e. Administrative decision appealed
- f. Explained issue

3. Exhibits - (6)

- a. Described and marked all exhibits
- b. Allowed parties to review the exhibits & offer objections
- c. Authenticated offered exhibits if questionable or challenged
- d. Entered all competent, relevant and reasonably available exhibits
- e. Explained why any offered exhibit was not entered
- f. Ruled on admissibility of any documents read into the record as offered exhibits

4. Witness Order - (6)

- a. Called in proper order and sworn
- b. Evidence developed in logical order (no bouncing between witnesses)

5. Order of testimony from each witness [logical & orderly manner] - (3)

6. Timely Opportunity to Question own Witness(es) - (9)

7. Clear Language - (6)

8. Single Point Questions - (6)

9. Clarification of Statements, which include Conclusions - (6)

10. Opportunity to Confront all opposing Witnesses - (9)

11. Cross Examination - (9)

- a. Timely opportunity for cross exam (before testimony from another witness)
- b. Properly controlled cross exam
- c. Provided appropriate assistance when necessary

12. Controlled undue Extension or Repetition of Testimony - (3)

13. No Leading Questions about Material Issues - (6)

- a. by Hearing Officers
- b. Hearing Officer did not allow others to ask leading questions

14. Control of Interruption(s) - (6)

15. Off the Record - (6)

- a. Anticipated
 - i. Before going off record, indicated "going off record"
 - ii. After going off record, summarized what occurred and got Concurrence of the parties
- b. Unanticipated (i.e. tape ended unexpectedly)
 - i. After going back on record, the Hearing Officer reconstructed lost testimony or asked last speaker to repeat missing portion.
 - ii. Got Concurrence of the parties

16. Interpreters - (6)

- a. Instructed how to properly interpret
- b. Administered Oath
- c. If necessary, establish on the record that fluent in both languages
- d. Require word for word interpretation (first person testimony)

Appeals Quality Criteria Checklist

17. Continuances (granted when necessary and supported by the record) – (3)
- | | |
|--|--|
| <input type="checkbox"/> a. granted, necessity supported by the record | <input type="checkbox"/> c. denied, good cause was shown by the record |
| <input type="checkbox"/> b. granted, necessity NOT supported by the record | <input type="checkbox"/> d. denied, good cause was NOT shown by the record |
18. Conclusion of Hearing (asked parties if they had anything further to add) – (6)
19. Within Scope of Notice – (9)
- If new issues arose, got appropriate waivers, after full disclosure of how resolving the issue would affect all parties, so they can agree to proceed or request a continuance to prepare for hearing on the new issue.
20. No Gratuitous Comments (nothing in the form of a lecture, must maintain high standards of demeanor & decorum) – (6)
21. Attitude (fair and appear to be fair, put parties at ease, provide necessary assistance) – (6)
22. Bias & Prejudice (no negative, demeaning, or disparaging behavior) – (9)
23. Obtain Reasonably Available Evidence (necessary to dispose of the issue(s)) – (9)
24. Issue Statement (clear, simple statement of statutory issues) – (3)
25. Findings of Fact supported by Evidence (supported by substantial evidence in the hearing record) – (9)
26. Findings of Fact -- (9)
- | | |
|---|--|
| <input type="checkbox"/> a. findings on all necessary elements and facts at issue | <input type="checkbox"/> c. must be relevant, accurate, and complete |
| <input type="checkbox"/> b. conclusions of laws - provide necessary support & basis | <input type="checkbox"/> d. no inappropriate recitation of testimony |
27. Required Conclusions (conclusions of law must logically follow from the findings of fact) – (6)
28. Logical Reasoning (conclusions of law must logically follow from the findings of fact) – (6)
29. Form, Style, and Organization – (3)
- | | |
|---|--|
| <input type="checkbox"/> a. statement of the issue(s) being decided | <input type="checkbox"/> c. rationale |
| <input type="checkbox"/> b. findings of fact | <input type="checkbox"/> d. conclusions of law |
| | <input type="checkbox"/> e. ruling |
30. Decision states Legal Effect – (3)
- | | |
|--|---|
| <input type="checkbox"/> a. each issue addressed as affirmed, reversed or modified (if modified, how?) | <input type="checkbox"/> b. administrative action to be taken is clearly stated |
|--|---|
31. Understandable Decision – (6)
- | | |
|---|---|
| <input type="checkbox"/> a. grammatically correct | <input type="checkbox"/> d. avoided objectionable or abrasive words or phrases |
| <input type="checkbox"/> b. concise | <input type="checkbox"/> e. professional appearance |
| <input type="checkbox"/> c. easily understood | <input type="checkbox"/> f. correct spelling or absence of typographical errors |

2018 Government Practice Seminar

CYBERSECURITY FOR STATE AND LOCAL GOVERNMENT ATTORNEYS

11:00 a.m. - 12:00 p.m.



Presented by

Luke Dawson

Assistant Attorney General

Office of the Attorney General of Iowa

1305 E. Walnut St.

Des Moines, IA 50319

Phone: 515-414-6187

Beth Manley

Iowa State Association of Counties

5500 Westown Parkway, Suite 190

West Des Moines, IA 50266

Phone: 515-244-7181

John Lande

Dickinson Mackaman Tyler & Hagen PC

699 Walnut St, Suite 1600

Des Moines, IA 50309

FRIDAY, MAY 4, 2018

Cybersecurity for State and Local Government Attorneys—Outline

Why is cyber security important?

- **Good Target.**

- Public sector entities solicit, store, process, and transmit large amounts of sensitive information. Examples include:
 - Personal Information.¹
 - Protected Health Information.²
 - Federal Tax Information.³
 - Criminal Justice Information.⁴
 - Other state sensitive information.⁵
 - Trade secrets.⁶
 - State secrets/classified information.
- Public sector entities are responsible for managing and maintaining critical infrastructure that supports a variety of citizen services and government programs, including communications infrastructure, election systems, energy infrastructure, transportation infrastructure, and water systems. Much of this infrastructure is accessed/operated by or through electronic systems.

- **Actually Targeted.⁷**

- Public sector entities are persistently targeted by a variety of actors, through a variety of methods and means.
 - General (all sectors):
 - In 2017, there were 53,000 incidents,⁸ 2,216 with confirmed breaches⁹
 - Of the 2,216 confirmed breaches: 73% were perpetrated by outsiders; 28% involved internal actors; and 2% involved partners.
 - Of the 2,216 confirmed breaches: 48% featured hacking; 30% included malware; 17% were the result of errors; 17% were social attacks; 12% involved privilege misuse; and 11% involved physical actions.
 - Public Sector:
 - In 2017, in the public sector, there were 22,788 incidents, 304 with confirmed breaches.
 - Of the 304 confirmed breaches: 67% were perpetrated by outsiders; 34% involved internal actors; and 2% involved partners.

- Of the 304 confirmed breaches: 44% featured cyber espionage, many of which were state affiliated; 50% were the result of errors; 24% involved phishing; and 17% involved privilege misuse.
- In Iowa:
 - In Iowa, in 2017, the Office of the Chief Information Officer’s (“OCIO”) Security Operations Center (“SOC”)—a centralized Cyber Threat monitoring center—identified 2,019 incidents involving the cities, counties, school districts, and state agencies to which the SOC provides services.
- Case studies:
 - IPERS/Account Takeover: Criminals obtained Social Security numbers and birth dates from other sources and used that information to register for online accounts for retirees who had not yet set up an online account. They then changed the bank account where the IPERS-member’s monthly payment was electronically deposited.¹⁰
 - Johnston Schools/Hacking: Hackers obtained and posted student information online, which was subsequently used to send anonymous text messages to parents threatening violence in schools.¹¹
 - *Medidata Solutions, Inc. v. Federal Insurance Co.*, 268 F.Supp.3d 471 (S.D.N.Y. 2017): Fraudsters sent ghosted emails to corporate accounting departments that convinced accounting employees to initiate \$4.7 million wire transfers.
 - *Aqua Star (USA) Corp. v. Travelers Casualty & Surety Co. of America*, --- Fed.Appx. ----, 2018 WL 1804338 (9th Cir. April 17, 2018): Seafood importer did not have insurance coverage for wire transfer initiated by employee when the employee was duped into initiating funds transfer based on spoofed email from fraudsters. Insurance policy excluded coverage for data that was entered into electronic system by authorized by employees.
 - See the Iowa Attorney General’s Office’s Consumer Protection Division’s Website for Data Breach Notices issued in Iowa: <https://www.iowaattorneygeneral.gov/for-consumers/security-breach-notifications/>.
- **Costly/Time Consuming.**¹² In 2017, the average **per-record** cost of data breach was **\$225** in the United States. Public sector entities are on the lower end of the scale, at **\$71** per record, in large part because citizens cannot opt out of their government, like they can their health care provider or bank.
 - Forensics to determine cause and scope.
 - Organizing breach response team.
 - Contacting/working with law enforcement.
 - Notifying those affected. See, e.g., Iowa Code § 715C.

- Providing credit-monitoring services to victims.
- Reporting to regulators.
- Subsequent audit/remedial measures.
- Regulatory penalties, including fines and loss of access to information necessary to carry out core mission.
- Loss of reputation/public trust.
- Legal fees/Litigation.

What are some of the ethical components of Cybersecurity that attorneys need to consider?

- **2012 “Technology Amendments” (Effective in Iowa as of October 15, 2015):**

- Iowa R. Prof. Resp. 32:1.1 (Competence): “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

- **Comment 8: Maintaining Competence.** To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**

- “[This rule] requires a lawyer to provide competent representation, and [the corresponding comment] specifies that, to remain competent, lawyers need to “keep abreast of changes in the law and its practice. . . . [I]n order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.”¹³

- Iowa R. Prof. Resp. 32:1.6(d) (Confidentiality of Information): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

- **Comment 18:** “Paragraph [(d)] requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. . . . The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph [(d)] if the lawyer has made **reasonable efforts** to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to[:]

- (1) the sensitivity of the information,
- (2) the likelihood of disclosure if additional safeguards are not employed,
- (3) the cost of employing additional safeguards,
- (4) the difficulty of implementing the safeguards, and
- (5) the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to

safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. . . .

- **Comment 19:** Applies the same general principles as outlined in comment 18 to transmitting communications.

- Iowa R. Prof’l Resp. 32:1.15 cmt. 1 (safekeeping of property): “A lawyer should hold property of others with the care required of a professional fiduciary.”

- **ABA FORMAL OPINION 477, MAY 11, 2017: SECURING COMMUNICATION OF PROTECTED CLIENT INFORMATION.**

At the intersection of a lawyer’s competence obligation to keep “abreast of knowledge of the benefits and risks associated with relevant technology,” and confidentiality obligation to make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,” lawyers must exercise reasonable efforts when using technology in communicating about client matters. . . .

[I]n an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the **reasonable efforts** standard: . . . “rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a ‘process’ to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.”¹⁴

- **Takeaways:**

- Engage in an ongoing risk assessment process. Fact specific, no one size fits all.
 - Understand the sensitivity of the information under your control, who wants to get it, and how they are most likely to go about that.
 - Understand where information enters, is stored or processed, and exits. *E.g.*, networks, servers, devices.
 - Identify reasonable, cost-effective security measures you can institute to safeguard that information over the course of its lifecycle. *E.g.*, firewalls; Anti-Malware, Anti-Spyware, Antivirus; remote wipe, encryption, multi-factor authentication.
 - Take into consideration where/how recipients of communications may receive confidential information transmitted by you. For example, sending attorney-client

privileged communications to clients who may access such communications on work devices that are subject to employer-monitoring policies can waive the privilege.¹⁵ You may need to warn the client or implement an encryption solution.

- Label communications as privileged/confidential where appropriate.
- Train non-lawyer assistants.
- Conduct due diligence on Vendors providing services.
- Engage experts to assist in developing and implementing best practices.
- Discuss security practices with clients and obtain informed consent in cases of deficient security measures.

What statutes and regulations apply to the Information I have? In the United States, security/privacy laws are sector specific, such as HIPAA, FERPA, or Gramm-Leach Bliley. However, all jurisdictions have breach notification laws, which generally apply to Personal Information or Personally Identifiable Information.

- **Iowa Code section 715C:** Breach notification statute that applies to “**Personal Information**” of “**Consumers.**”
 - **Key Definitions:**
 - “**Personal Information**” means: “an individual’s [(a)] first name or first initial and last name [(b)] in combination with any one or more of the following data elements that relate to the individual [(c)] if any of the data elements are not encrypted, redacted, or otherwise altered by any method or technology in such a manner that the name or data elements are unreadable or are encrypted, redacted, or otherwise altered by any method or technology but the keys to unencrypt, unredact, or otherwise read the data elements have been obtained through the breach of security:”
 - (1) Social security number.
 - (2) Driver’s license number or other unique identification number created or collected by a government body.
 - (3) Financial account number, credit card number, or debit card number in combination with any required expiration date, security code, access code, or password that would permit access to an individual’s financial account.
 - (4) Unique electronic identifier or routing code, in combination with any required security code, access code, or password that would permit access to an individual’s financial account.
 - (5) Unique biometric data, such as a fingerprint, retina or iris image, or other unique physical representation or digital representation of biometric data.
 - “**Consumer**” means: “an individual who is a resident of this state.”
 - “**Breach of security**” means the “unauthorized acquisition of personal information maintained in computerized form by a person that compromises the security, confidentiality, or integrity of the personal information. ‘**Breach of security**’ also means unauthorized acquisition of personal information maintained by a person in any medium, including on paper, that was transferred by the person to that medium from computerized form and that compromises the security, confidentiality, or integrity of the personal information. Good faith acquisition of personal information by a person or that person’s employee or agent for a legitimate purpose of that person is not a breach of security, provided that the personal information is not used in violation of applicable law or in a manner that harms or poses an actual threat to the security, confidentiality, or integrity of the personal information.

- **Requires:**
 - Notice to consumers impacted by breach of security.
- **Dictates:**
 - Timing: In “the most expeditious manner possible and without unreasonable delay,” subject to coordination with law enforcement and time to identify those affected, scope, and remediation.
 - Manner of notice: written notice to last available address; electronic notice if customary method of communication is by electronic means; substitute notice, *i.e.*, email, posting online, and major statewide media, where cost of notice would exceed \$250,000.
 - Content of notice: description of the breach; date of occurrence; type of information obtained; information for consumer reporting agencies; advice to consumer to report suspected incidents of identity theft to local law enforcement or attorney general.
- **Does not apply:**
 - To data of entities (*e.g.*, FEIN #s): “an individual’s.”
 - To non-residents: “this state.”¹⁶
 - When data is merely accessed by an unauthorized individual, as opposed to “acquired.”
 - Is the information in the physical possession and control of an unauthorized person? Lost or stolen laptop?
 - Has the information been downloaded or copied?
 - Has the information been used by an unauthorized person? Fraudulent accounts opened or instances of identity theft reported?
 - When after appropriate investigation or consultation with law enforcement, no “reasonable likelihood of financial harm.”
 - “Encryption Exception” (or redacted or otherwise altered).¹⁷
 - “A person who complies with notification requirements or breach of security procedures that provide greater protection to personal information and at least as thorough disclosure requirements than that provided by this section pursuant to the rules, regulations, procedures, guidance, or guidelines established by the person’s primary or functional federal regulator.”
 - “A person who complies with a state or federal law that provides greater protection to personal information and at least as thorough disclosure requirements for breach of security or personal information than that provided by this section.”
 - “A person who is subject to and complies with regulations promulgated pursuant to Tit. V of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. § 6801-6809.

- **Individuals:** shall be notified of a Breach “without unreasonable delay and in no case later than 60 calendar days after discovery of a breach.”²⁵
- **Media:** shall be notified of a Breach “involving more than 500 residents of a State or jurisdiction...without unreasonable delay and in no case later than 60 calendar days after discovery of a breach.”²⁶
- **HHS:**
 - For Breaches involving 500 or more individuals: Shall be notified of a Breach “without unreasonable delay and in no case later than 60 calendar days after discovery of a breach.”²⁷
 - For Breaches involving less than 500 individuals: The “covered entity shall maintain a log or other documentation of such breaches and, not later than 60 days after the end of each calendar year, provide the notification” electronically to HHS.²⁸
- **Does not apply to:**
 - Data held by anyone that is not a Covered Entity or Business Associate.
 - The definition of Protected Health Information excludes Individually Identifiable Health Information:
 - In education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g;
 - In records described at 20 U.S.C. 1232g(a)(4)(B)(iv);
 - In employment records held by a covered entity in its role as employer; and
 - Regarding a person who has been deceased for more than 50 years.²⁹
- **Iowa Code 554.12101, et. seq. (Uniform Commercial Code).**
 - Governs liability for unauthorized electronic fund transfers (wire transfers or ACH). Payroll is generally processed via ACH transactions, and large payments are made via wire transfers.
 - Under UCC, a bank is liable for unauthorized payment orders (requests for ACH/wire transfers) unless the bank and depositor have agreed to verify the authenticity of payment orders via a commercially reasonable security procedure and the institution accepts the payment order in good faith.
 - UCC governs all payment orders not subject to federal Electronic Funds Transfer Act (EFTA), which only applies to consumer accounts. 15 U.S.C. 1693a(6). EFTA protects consumers from fraudulent transactions (i.e. credit card fraud), but does not apply to non-consumer accounts like schools, local governments, and businesses.

- **Children’s Online Privacy Protection Act (“COPPA”).**
 - “It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under subsection (b).” 15 U.S.C. § 6502.
 - 15 U.S.C. § 6502(b) requires:
 - (A) websites to provide notice that they are collecting information and obtain verifiable parental consent
 - (B) require the operator to provide, upon request of a parent under this subparagraph whose child has provided personal information to that website or online service, a description of the information gathered and an opportunity to refuse further gathering information.
 - (C) prohibit conditioning a child’s participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity; and
 - (D) require the operator of such a website or online service to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

- **CUI (Controlled Unclassified Information) Rule:** Requires Federal Agencies sharing information with Non-Executive Branch entities (including State and Local Governments) to enter into agreements requiring compliance with the CUI Rule, which in turn requires compliance with National Institute of Standards and Technology (“NIST”) Special Publication (“SP”) 800-171, Revision (“r.”) 1 for Non-Federal Information Systems (“CUI Basic”); unless, specific law, regulation, or policy imposes additional or more specific safeguarding requirements (“CUI Specified”).³⁰
 - **“Controlled Unclassified Information” or “CUI”** is “information the [Federal] Government creates or possesses, or that an entity creates or possesses for or on behalf of the [Federal] Government, that a law, regulation, or Government-wide policy requires or permits an agency to handle using safeguarding or dissemination controls. However, CUI does not include classified information . . . or information a non-executive branch entity possesses and maintains in its own systems that did not come from, or was not created or possessed by or for, an executive branch agency or an entity acting for an agency.”³¹
 - **NIST SP 800-171, r. 1:** “[P]rovides federal agencies with a set of recommended security requirements for protecting the confidentiality of CUI when such information is resident in nonfederal systems and organizations; when the nonfederal organization is not collecting or maintaining information on behalf of a federal agency or using or operating a system on behalf of an agency; and where there are no specific safeguarding requirements for

protecting the confidentiality of CUI prescribed by the authorizing law, regulation, or governmentwide policy for the CUI category or subcategory listed in the CUI Registry.”³²

○ **Takeaways:**

- The CUI Rule is **NOT** self-executing; thus, be sure to review agreements (*e.g.*, data sharing, grant documentation) to see if they impose NIST 800-171, or require compliance with CUI Rule and thereby NIST 800-171, r. 1.
- Non-Federal Entities (includes State and Local Governments) receiving CUI will increasingly be required to sign data-sharing or other like agreements imposing NIST 800-171, r. 1 as a condition of receipt of federal data/information.
- Become familiar with NIST 800-171, r.1, implement a security program to ensure compliance, and flow-down requirements to Vendors/other entities that store or process information on your organization’s behalf.
- Remember that NIST 800-171, r. 1, is a ***BASELINE*** standard, meaning applicable laws, regulations, or Government-wide policies may impose additional/more specific safeguarding requirements. Check out the CUI Registry,³³ for a catalogue of CUI types and corresponding laws, regulations, and policies that may apply to the information your organization receives.
- Consider requiring NIST 800-171, r. 1 of entities with which your organization shares information.

If I want to start an evaluation of what my organization’s cybersecurity risks, where can I start?

- **Risk Assessment:**

- Establish a committee of diverse participants who each bring different perspectives/knowledge of risks, both organizational and technical.
- Inventory and Map Data--where information enters, is stored or processed.
- Assess what legal obligations apply based on the type/origin of data and where it is processed/stored.
- Consider potential threats based on sensitivity of information, where/how information is stored/processed/transmitted, and threat/vulnerability analysis. Consider leveraging centralized active-threat monitoring services, such as US CyberCom, Multi-State Information Sharing and Analysis Center (“MS-ISAC”), or OCIO’s SOC.
 - The SOC is the State’s centralized Information Security and Analysis Center. It provides Information Security services, cities, counties, and school districts (71 total participating) and state agencies in Iowa at no charge (except to state agencies) through a federal grant.³⁴ The SOC combines information from state and federal monitoring systems, cyber intelligence sources, and other sources to facilitate real-time, data-driven decision making.
- **Conduct a Gap Analysis:**
 - Determine the physical, technical, and administrative safeguards/controls that *should* be in place in light of legal/compliance obligations, sensitivity of the information, where information is stored/processed/transmitted, and threat/vulnerability analysis.
 - Assess the physical, technical, and administrative safeguards/controls currently in place.
 - Close gaps by implementing cost-effective safeguards/controls; prioritize safeguards that will produce the greatest results at the lowest cost.
 - Document reasons for selecting (or not selecting) certain safeguards/controls.
 - Repeat this process on an ongoing basis and continually refine your approach to security.
- After identifying gaps and attempting to close them, identify key risk areas that need enhanced coverage from insurance:
 - First party loss including loss of funds.
 - Third party loss including loss of information.
 - **Compare:**
 - **Iowa Code § 670.7(2) (Municipal Tort Claims Act):** “The procurement of this insurance constitutes a waiver of the defense of governmental immunity as to those

exceptions listed in section 670.4 to the extent stated in the policy but shall have no further effect on the liability of the municipality beyond the scope of this chapter, but if a municipality adopts a self-insurance program or joins and pays funds into a local government risk pool the action does not constitute a waiver of the defense of governmental immunity as to the exceptions listed in section 670.4.” **With,**

- **Iowa Code § 669.20 (State Tort Claims Act):** “If a claim or suit against the state is covered by liability insurance, the provisions of the liability insurance policy on defense and settlement shall be applicable notwithstanding any inconsistent provisions of this chapter. The attorney general shall cooperate with the insurance company” *Swanger v. State*, 445 N.W.2d 344, 349 (Iowa 1989) (“We conclude that section 25A.20 does not allow the terms of the State's insurance policy to supersede the administrative process or increase the district court's limited jurisdiction over tort claims against the State.”).

- **Risk Assessment Resources:**

- HIPAA Risk Assessment Tool:

- Covered Entities and Business Associates are required by HIPAA to “[c]onduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information held by the covered entity or business associate.”³⁵
- The Office of the National Coordinator for Health Information Technology and HHS created a tool to assist Covered Entities and Business Associates conduct a risk analysis. The Security Risk Assessment Tool can be found here: <https://www.healthit.gov/topic/privacy-security-and-hipaa/security-risk-assessment>.

- Federal Financial Institutions Examination Council (“FFIEC”) Risk Assessment Tool: <https://www.ffiec.gov/cyberassessmenttool.htm>.

- Evaluates organization’s level of inherent risk and compares it to the level of cybersecurity maturity.
- Primarily designed for financial institutions, but it provides a useful starting point for organizations of all kinds to determine the level of risk and whether an organization needs to enhance its security controls and processes.

- **Important Steps/Controls to Consider:**

- Limit collection/retention of data in accordance with applicable records-retention schedules/obligations. The less information you have, the less exposure you face.
- Limit access to only those who need it (and protect with NDA/Confidentiality Agreements). This can be done through a variety of means:

- Physical/technical restrictions to areas or systems housing sensitive information. For example, if Information Technology staff is helping you design a new system, push changes from a test environment that does not contain sensitive information to a production environment that is only accessible to individuals with permission to access that information.
 - Policies and procedures applicable to employees, contractors, and agents who may have access to sensitive information.
- Segregate sensitive information and systems.
- If employees/contractors are using personal devices to access sensitive information, at a minimum, have a “Bring Your Own Device” (“**BYOD**”) policy establishing minimum security requirements.
- Ensure strong passwords.
 - Don’t write down.
 - Don’t share.
 - Use different passwords for different accounts.
 - If suspected compromise, change immediately.
 - **Note:** New NIST Guidelines encourage long, personalized passphrases, rather than complex passwords/strings of characters. Easier to remember, less need to write down, longer and therefore harder to crack.³⁶
- Implement Multi-Factor Authentication.
- Explore encryption solutions. Encryption can be costly so, to the extent feasible, focus on encrypting information that would trigger a breach under applicable law, *e.g.* data elements that comprise “Personal Information.” This is especially important, as many data breach notification statutes do not require notification when data is encrypted.³⁷
- Install remote wipe software on devices that will store sensitive information. If a device is lost or stolen, quickly wiping them can help you establish data was not inappropriately accessed by unauthorized individuals.
- Intrusion detection/active monitoring. Actively monitoring your network and all connected devices can help you identify and address incidents before they turn into breaches.
- System Maintenance: follow manufacturer instructions, patch and error-correct immediately. Equifax!
- Train employees on security best practices. Create a culture of awareness where reporting incidents is valued, not punished.
 - Consider creative training opportunities. For example, there are a number of phishing test tools, such as KnowBe4, that you can use to simulate a phishing attack, then track

which employees interact with the email, and use the information for training opportunities.

- Perform background checks.
- **Don't forget about third parties!**
 - Source selection matters. Choose trusted partners with proven track records of success.
 - Assess third-party information security-practices.
 - Review/update contracts/data-sharing agreements to include robust data security/privacy protections; ensure compliance with applicable law, rules, and regulations; and shift risk to providers to ensure they have skin in the game.
 - Require a third party certificate-of-audit demonstrating compliance with industry standards (e.g., NIST 800-171, NIST 800-53, ISO 27001). If a third party states on their website, or in other marketing literature, that they comply with certain standards, make it a contractual obligation.
 - Permit access to information only for purposes of providing services under the agreement, or as otherwise required by law, and restrict access only to those who need it for such purposes.
 - Ensure your organization retains all rights to your information.
 - Ensure your organization has a way to get the information back at the end of any engagement, *e.g.*, export/transition assistance, and ensure providers are required to permanently delete all of your data such that is not recoverable and in accordance with industry standards.
 - Require that your organization be immediately notified and kept up to date about major cyber incidents or data breaches adversely affecting your information.
 - Shift risk of data-security breach through indemnification provisions. Be specific about the types of costs/expenses you intend to recoup, *e.g.*, root cause assessment, forensic audit, consumer notification, reporting to regulators, staff time, remediation, and legal fees.
 - Be on the lookout for provisions that purport to limit the liability of third parties or provide for sole and exclusive remedies. These provisions often attempt limit liability by a multiplier of contract value and/or for consequential, incidental, indirect, special, or punitive damages. Seek to raise the monetary cap to a higher multiplier (2x, 3x, 4x), refuse to limit Vendor's liability as it relates to consequential, incidental, indirect, special, or punitive damages, and/or include additional "carve outs" to remove certain damages categories as it relates to anticipated or unacceptable risks, such as security breach and breaches of confidentiality or privacy.³⁸

- Require third parties to maintain Technology Errors and Omissions and Cyber Liability insurance policies and that you be named as an additional insured.
- Consider whether there are any ancillary agreements required by applicable law. For example, HIPAA: Business Associate Agreements
 - Covered entities are required to obtain satisfactory assurances, in the form of a Business Associate Agreement, that a Business Associate will appropriately safeguard the information before the Business Associate “create[s], receive[s], maintain[s], or transmit[s] electronic protected health information on the covered entity’s behalf[.]”³⁹ Business Associates are also required to obtain the same satisfactory assurances from subcontractors.”⁴⁰
 - Examples of Business Associates⁴¹ include cloud storage companies that store Protected Health Information, accounting firms that audit data that might include Protected Health Information, and lawyers that require access to Protected Health Information in order to provide legal counsel.
 - Business associate agreements must contain specific elements specified in 45 C.F.R. § 164.504(e).
- Enforce!

With all of the security incidents from the Office of Personnel Management, Target, Home Depot, the election, Equifax, and Facebook, odds are that you may be involved in or impacted by a security breach at some point. If that happens, what are the next steps?

- **Don't wait until it happens. Develop a written Incident Response Plan:**

- Identify and document who is on your incident response team and what their duties and responsibilities are, to include doing everything possible to prevent further exposure, preserve evidence, gather facts, and, if required, notify/report to required persons, and entities, and the media.
- Establish communication protocols with legal counsel to protect confidentiality under the attorney-client privilege and work product doctrine.
- Develop procedures to secure/preserve physical and digital evidence, including sending preservation letters to cloud providers.
- Develop procedures to interview individuals with knowledge of the incident.
- HIPAA Specific Guidance for Breaches:
 - A Breach is presumed and must be reported unless the Covered Entity or Business Associate can demonstrate “there is a low probability that the protected health information has been compromised based on a risk assessment.”⁴² The risk assessment must contain at least the following four factors:
 - (i) The nature and extent of the protected health information involved, including the types of identifiers and the likelihood of re-identification;
 - (ii) The unauthorized person who used the protected health information or to whom the disclosure was made;
 - (iii) Whether the protected health information was actually acquired or viewed; and
 - (iv) The extent to which the risk to the protected health information has been mitigated.⁴³
- Document the incident. Develop tools to help quickly identify key facts:
 - Data type(s) (*e.g.*, personal information) and origin (*e.g.*, federal government)?
 - Who accessed or acquired?
 - How and to what extent was information accessed or acquired?
 - Where do those affected reside?
 - Steps taken to identify scope and cause?
 - Evidence of acquisition or access?
 - System access logs?

- Is the information in the physical possession and control of an unauthorized person? Lost or stolen laptop?
- Has the information been downloaded or copied?
- Has the information been used by an unauthorized person? Fraudulent accounts opened or instances of identity theft reported?
- Was data encrypted, redacted, or otherwise altered so as to render it unreadable?
- Magnitude of/evidence of harm?
- **Helpful Resources:**
 - See Sample Information Security Data Breach Incident Report for HIPAA Incident (Iowa DHS): <https://drive.google.com/open?id=1o70TKfFqjEAHLkpuNTy587BT09FjIqBD>.
 - See Sample Breach Notification Risk Assessment Tool for HIPAA Breach (Iowa DHS): <https://drive.google.com/open?id=1o70TKfFqjEAHLkpuNTy587BT09FjIqBD>.
- Define when and under what circumstances to report to law enforcement and credit and identify which specific law enforcement agencies and under what circumstances.
 - If money is involved, immediately report to the FBI's IC3 website: <https://complaint.ic3.gov/default.aspx>.
 - The FBI may be able to stop a wire transaction that is in process if information is promptly reported.
 - FBI will collect information and may open an investigation.
 - Consider contacting FBI in the event of a debilitating attack, such as ransomware, because they may have resources to help respond.
 - Law enforcement may direct you to delay sending out the notice if it is conducting an investigation.
- Define when and under what circumstances to contact credit reporting agencies.
- Identify and document when an incident becomes a breach, *i.e.*, information/thresholds trigger notification/reporting requirements—may vary based on type of organization, type of information, where it resides, how it's protected, and whether it was acquired or merely accessed. Specifically identify when to:
 - Report to federal and state agencies.
 - Notify consumers pursuant to various federal and state laws, rules, and regulations.
 - Notify the media.
- Develop template breach notices drafted to be customized depending on the facts.

- **When it happens:**

- **Do:** Follow your plan.

- **Don't:**

- Delay in providing notices when they are required or advisable.

- Communicate with the public about the breach until you know the fundamental facts.

Endnotes:

¹See Iowa Code § 715C.1(11) (defining personal information).

²See Health & Human Services, *HIPAA for Professionals*, HHS.GOV (last updated June 16, 2017), <https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html>.

³See Internal Revenue Service, PUBLICATION 1075: TAX INFORMATION SECURITY GUIDELINES FOR FEDERAL, STATE AND LOCAL AGENCIES, I.R.S. PUB NO. 1075 (September 30, 2016), <https://www.irs.gov/pub/irs-pdf/p1075.pdf>.

⁴See Criminal Justice Information Services Division, U.S. Dep't of Justice, CRIMINAL JUSTICE INFORMATION SERVICES (CJIS) SECURITY POLICY (June 5, 2017), <https://www.fbi.gov/services/cjis/cjis-security-policy-resource-center>.

⁵See, e.g., Iowa Code § 272C.6(4)(a) (classifying complaint files, investigation files, other investigation reports and other investigative information in the possession of a licensing board or [its agents] which relates to licensee discipline [as] privileged and confidential).

⁶See Iowa Code § 22.7(3).

⁷Statistics in this section were taken from the Verizon, 2018 DATA BREACH INVESTIGATION REPORT (11th ed.), https://www.verizonenterprise.com/resources/reports/rp_DBIR_2018_Report_en_xg.pdf.

⁸An “Incident” means a “security event that compromises the integrity, confidentiality or availability of an information asset.”

⁹A “Breach” means an “incident that results in the confirmed disclosure— not just potential exposure—of data to an unauthorized party.”

¹⁰William Petroski, *IPERS: Pension thefts may be linked to Iowa state employees' salary database*, Des Moines Register (Mar. 5, 2018), <https://www.desmoinesregister.com/story/news/politics/2018/03/05/ipers-pension-thefts-linked-iowa-state-employees-salary-database/394636002/>.

¹¹Jason Clayworth, *Iowa governments vulnerable to Johnston-like cyber attacks*, Des Moines Register (Oct. 6, 2017), <https://www.desmoinesregister.com/story/news/2017/10/06/iowa-governments-vulnerable-johnston-like-cyber-attacks/741025001/>.

¹²Statistics/information in this section were taken from the Ponemon Institute, 2017 COST OF DATA BREACH STUDY (June 2017), <https://www-01.ibm.com/common/ssi/cgi-bin/ssialias?htmlfid=SEL03130WWEN>.

¹³ABA COMMISSION ON ETHICS 20/20 REPORT 105 A (Aug. 2012).

¹⁴ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 477 (2017) (quoting JILL D. RHODES & VINCENT I. POLLEY, *THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS* 48-49 (2013). See also IOWA STATE BAR ASS'N COMM. ON ETHICS AND PRACTICE GUIDELINES, IA Ethics Op. 14-01 Computer Security (Mar. 10, 2014), http://c.ymedn.com/sites/iowabar.site-ym.com/resource/resmgr/IA_Lawyer_Weekly/IA_Ethics_Op_14-01.pdf (“Some may elect to modify their existing operating systems, others may determine that their existing systems can be patched or otherwise modified, yet others may determine that no modifications are necessary. Rule 32:1.6 and IA Ethics Opinion 11-01 require only a due diligence process, not a specific result.”); IOWA STATE BAR ASS'N COMM. ON ETHICS AND PRACTICE GUIDELINES, Ethics Opinion 11-01 Use of Software as a Service – Cloud Computing (Mar. 10, 2014), [http://205.209.45.153/iabar/IowaEthicsOpinions.nsf/b6868944e3311dd0872581100042934f/a092fcd35bb508e0872581100042b927/\\$FILE/Ethics%20Opinion%2011-01%20--%20Software%20as%20a%20Service%20-%20Cloud%20Computing.pdf](http://205.209.45.153/iabar/IowaEthicsOpinions.nsf/b6868944e3311dd0872581100042934f/a092fcd35bb508e0872581100042b927/$FILE/Ethics%20Opinion%2011-01%20--%20Software%20as%20a%20Service%20-%20Cloud%20Computing.pdf) (“We believe the Rule establishes a reasonable and flexible approach to guide a lawyer’s use of ever-changing technology.”).

¹⁵*Miller v. Zara USA, Inc.*, 56 N.Y.S.3d 302, 303 (N.Y. App. Div. 1st Dept. 2017).

¹⁶Do not forget to check data breach laws in other states, especially if a breach impacts non-residents. See Foley & Lardner LLP, STATE DATA BREACH NOTIFICATION LAWS (last updated Jan. 1, 2018), available at <https://www.foley.com/files/Publication/c31703ac-ee93-40a5-b295-7e1d9fe45814/Presentation/PublicationAttachment/d6373e89-f460-44fa-afec-a2cbe9fa23fd/17.MC5826%20Data%20Breach%20Chart%200817%20R1.pdf> (chart summarizing data breach notification laws in other jurisdictions).

¹⁷Amended in 2018 to incorporate “accepted industry standards” into definition of “**Encryption.**” S.F. 2177, 87th G.A., 2d. Sess. § 8 (Iowa 2018).

¹⁸Amended in 2018 to expressly exclude HIPAA. S.F. 2177, 87th G.A., 2d. Sess. § 9 (Iowa 2018).

¹⁹45 C.F.R. § 160.103.

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³45 C.F.R. § 164.402.

²⁴*Id.*

²⁵45 C.F.R. § 164.404.

²⁶45 C.F.R. § 164.406.

²⁷45 C.F.R. § 164.408(b).

²⁸45 C.F.R. § 164.408(c).

²⁹45 C.F.R. § 160.103.

³⁰32 C.F.R. § 2002.14(h)(2).

³¹32 C.F.R. § 2002.4(h).

³²*See* Nat’l Inst. of Standards and Tech., U.S. Dep’t of Commerce, PROTECTING CONTROLLED UNCLASSIFIED INFORMATION IN NONFEDERAL SYSTEMS AND ORGANIZATIONS, NIST SPECIAL PUBLICATION 800-171, r. 1 (December 2016), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-171r1.pdf>.

³³*See* U.S. Nat’l Archives & Records Administration, *Cui Categories*, ARCHIVES.GOV (last updated April 2, 2018), <https://www.archives.gov/cui/registry/category-list>.

³⁴For more information about the SOC and the services it provides, *see* <https://www.iowacounties.org/wp-content/uploads/2016/05/ISAC-Smart-Connections-Conference-State-of-Iowa-Initiatives-Jeff-Franklin-4.28.16.pptx>.

³⁵45 C.F.R. § 164.308(a)(1)(ii)(A).

³⁶*See* Nat’l Inst. of Standards and Tech., U.S. Dep’t of Commerce, DIGITAL IDENTITY GUIDELINES: AUTHENTICATION AND LIFECYCLE MANAGEMENT, NIST SPECIAL PUBLICATION 800-63B (June 2017), <https://pages.nist.gov/800-63-3/sp800-63b.html>.

³⁷*See* Foley & Lardner LLP, STATE DATA BREACH NOTIFICATION LAWS (last updated Jan. 1, 2018), *available at* <https://www.foley.com/files/Publication/c31703ac-ee93-40a5-b295-7e1d9fe45814/Presentation/PublicationAttachment/d6373e89-f460-44fa-afec-a2cbe9fa23fd/17.MC5826%20Data%20Breach%20Chart%200817%20R1.pdf> (chart summarizing data breach notification laws in other jurisdictions).

³⁸*See* Iowa Administrative Code rule 11—120.5 for list of damages categories Iowa Executive Branch Agencies are required to carve out of limitation-of-liability provisions as it relates to information-technology contracts.

³⁹45 C.F.R. § 164.308(b)(1).

⁴⁰45 C.F.R. § 164.308(b)(2).

⁴¹*See* 45 C.F.R. § 160.103.

⁴²45 C.F.R. § 164.402(2).

⁴³*Id.*

2018 Government Practice Seminar

SEXUAL HARASSMENT IN THE WORKPLACE: IT'S ON US

1:00 p.m. - 2:00 p.m.

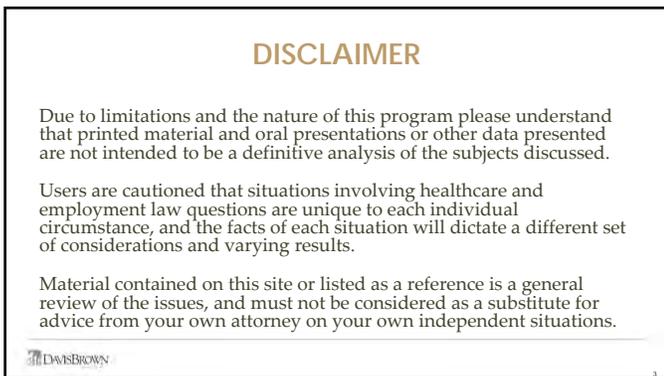


Presented by
Margaret Hanson
Davis Brown Law Firm
215 10th St., Suite 1300
Des Moines, IA 50309
Phone: 515-246-7957

FRIDAY, MAY 4, 2018







Maggie A. Hanson

Maggie is an attorney at the Davis Brown Law Firm.

Ms. Hanson's areas of practice include:

- Litigation
- Employment & Labor Relations
- Insurance Defense

MaggieHanson@davisbrownlaw.com



4 Keys to Preventing Sexual Harassment Complaints

- Understand the Law
- Train Your Employees
- Investigate Complaints
- Take Appropriate Action



Training Purposes

- Take a stand against unprofessional and demeaning behaviors
- Promote a respectful workplace
- Ensure fair treatment
- Policy reminder
- Encourage and foster healthy communication



Why Training Doesn't Work

- Reinforces gender stereotypes
- "Identity Threat Reaction"
- Politics
- Aimed at Liability



IT'S ON US!

Discrimination/Harassment

- Harassment is a form of employment discrimination
- Cannot discriminate/harass on basis of:

Race	Sex	Age
Creed	Sexual Orientation	Disability
Color	Gender Identity	Veteran Status
Religion	National Origin	Genetic Information

Sexual Harassment - The Basics

- Sexual Harassment is a form of discrimination



- Unlawful sexual harassment can be initiated by a supervisor, co-worker, volunteer, vendor, or patient

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True or False?

1. As compared to a year ago, there has been a decrease in internal complaints regarding sexual misconduct in the workplace.
2. Since fiscal year 2010, roughly 30% of the approximately 90,000 EEOC discrimination charges involve sex-based discrimination.
3. It is estimated that 45% of American females will experience some form of sexual harassment during their academic or working lives. Yet, just 25% ever tell anyone.

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True or False?



1. Only the individual being sexually harassed is considered affected.
2. Sexual harassment leads to lost productivity, sick leave, and worker replacement.
3. In 2017, more than 1/3 of managers and bosses surveyed indicated an increased discomfort at having meetings one-on-one with an employee of the opposite sex.

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"I shall not attempt [] to
 define [it] . . . But I know it
 when I see it."
 – Justice Stewart, United
 States Supreme Court

How does the *New York Times* define it?

- Sexual harassment in the workplace is an umbrella term that encompasses a *range of unwanted behaviors*. This includes nonphysical harassment, including suggestive remarks and gestures, or requests for sexual favors. Physical harassment includes touches, hugs, kisses, and coerced sex acts.
- It can be perpetrated by anyone — a manager, a colleague, a client. The perpetrator or the recipient may be male or female. It does not need to occur inside the office.

Sample Employee Policy

Sexual Harassment Defined

- **Unwelcome** sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 - Submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment; or
 - Submission to or rejection of such conduct by an individual is used as the basis of employment decisions affecting such individual; or
 - Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment

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Verbal Conduct

- Raw and crude language
- Sexual jokes
- Verbal flirtation
- Discussion of inappropriate subjects
- Persistent requests for dates



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Non-Verbal Conduct

- Accessing inappropriate material on the internet or other media
- Standing too close
- Inappropriate gestures
- Staring at someone or following someone
- Giving elaborate personal gifts or cards
- Hugging, kissing, massaging



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Hypothetical

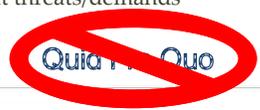
Beyonce asked her supervisor, Jay-Z, for a small raise.

Since Beyonce asked for the raise, Jay-Z has been behaving differently. Sometimes he blocks her way and gets very close when she tries to pass; other times he tells her she's a "good worker" and rubs her back or shoulders.

One day he pulls Beyonce into his office and tells her that she isn't due for a promotion yet; however, if she agrees to go out on a date with him, he could pull a few strings to get her a raise anyway.

"Quid Pro Quo"

- Occurs when the harasser conditions an educational or job opportunity, academic advantage, job benefit, or absence of a detriment upon the victim's compliance with sexual demands
- Includes implicit and explicit threats/demands



Hostile Work Environment

- Occurs when sexual harassment is a persistent condition of school or work, which results in an intimidating, offensive, abusive, or hostile atmosphere
- Includes intimidation, ridicule, jokes, insults that permeate the work place



Hypothetical

You are talking to an employee in the backroom of the building away from any customers and you overhear two of your co-workers sharing a series of "dumb blonde" jokes. A fellow employee, a blonde female, grimaces as she overhears. She does not ask the co-workers to stop making the jokes about blondes.

What do you do?

Hypothetical

Four months ago, Marcia filed an EEO complaint alleging her supervisor discriminated against her based on her sex (which is now in investigation).

After filing the of the complaint, Marcia began to feel alienated; her co-workers started limiting their contact with Marcia and she believed she was not receiving any prime assignments.

This week she received her performance evaluation which rated her as satisfactory. Over the past 3 years, her rating has been twice at the highly effective level, and once at the outstanding level.

Her supervisor's justification for the rating: she was not performing work expected of employees at her level, and she was not working well within the team.

No Retaliation

- Opposed sexual harassment or conduct that could reasonably be construed as a sexual harassment
- Reported, testified, assisted or participated in any manner with an investigation, proceeding or hearing involving sexual harassment



Hypothetical

The Christmas party was a howling success and a large group decided to continue the festivities at a local restaurant where there was a Latino band playing. A newly hired and attractive employee was discovered to be a very provocative and expert salsa dancer. Many at the party eagerly took their turns to be her dance partner.

Five days later, she confides to you that she has little recollection of the celebration and she can't understand why people are looking at her, smiling and chuckling as she walks through the halls. This has made her very uncomfortable.

What do you do?

Where is Harassment Prohibited?

- Prohibited workplace harassment and discrimination is unacceptable in the workplace, in any work-related setting outside the workplace and when using company owned electronic devices (computers, telephones, photocopiers, and faxes.)
- It can happen in or out of the formal workplace. It can happen at a company event like picnic or a party. It usually depends upon your relationship with the harasser and your situation at the time of the offense.

Does intent matter?

- Harassment does *not* have to be intentional
- Harassment does *not* have to be "targeted" at an individual
- The victim can actually engage in some of the same conduct or behavior and still have a claim
- The conduct or behavior does not have to be "sexual" or "racial," etc., in nature, if it is directed at someone because of membership in a protected class

THE REALITIES OF SEXUAL HARASSMENT



Excuses

- That's how I talk to and treat everyone
- She/he is complaining to get attention
- I know my audience
- He/she started it
- He/she liked it
- It was just a joke – everyone should just lighten up
- What? That's not harassment?




Why Complaints Aren't Made

- Embarrassment
- Self blame and guilt
- Concern for the harasser: "I don't want to get anyone in trouble."
- Unaware of policy and practice
- Fear of acquiring a bad reputation and/or the reputation of being "not one of the guys."
- Fear of retaliation




Employer Liability

- Employer is **automatically liable** for harassment by a supervisor that results in adverse employment action.
- If supervisor's harassment results in hostile work environment, employer **can avoid liability** if:
 1. reasonably tried to prevent and promptly correct the harassing behavior
 2. employee unreasonably failed to take advantage of preventive or corrective opportunities provided by employer
- For harassment by **non-supervisory employees or non-employees**, employer liable if:
 - Knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

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Hypothetical

You and your co-worker have been best friends for years and have known each other since you were children. You regularly get together at her place and share stories about various dates and romantic situations.

Sometimes you talk about these topics when work is slow and there are not any customers in earshot.

It is OK to talk about this at work? We both know we are not offended and talk like this all the time, outside of work.

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Hypothetical

Mary dreads each time her office color photocopier breaks down because the repair person assigned to her office always leers at her and makes sexually suggestive comments.

She has fears that if she complains, nothing will be done about it because the agency does not have control over repair person because he is an employee of the photocopier service company.

The supervisor does relay Mary's complaints to the service company, but no action is taken.

Analyze the supervisor's response. Appropriate?

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How can we prevent?

- Promote an **inclusive culture** in the workplace by fostering an environment of professionalism and respect for personal differences.
- Implement a **strong EEO policy** that is **embraced at the top levels** of the organization. Train managers, supervisors and employees on its contents, enforce it, and hold them accountable.
- **Train** Human Resources managers and all employees on the concepts of **Civility, Respect, Equality**.
- **Foster open communication** and early dispute resolution.
 - INVESTIGATE



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"I hope we talk about *culture* as much as we talk about individuals, and recognize that while the Weinsteins of the world are extreme, the messages we learn about sex, and power, and courtship, and consent, are deeply ingrained and start young — and will take far more than a workplace sexual harassment training to unlearn."

- Jessica Bennett, *NY Times*



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QUESTIONS?

maggiehanson@davisbrownlaw.com

515-288-2500

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