



*Legal insight. Trusted counsel.*

# Creighton University Law School – Omaha Bar Association Seventh Annual Seminar on Ethics and Professionalism

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April 19, 2013

# Today we will answer the following questions:

1. What is an “unjustified expectation” in lawyer advertising?
2. Is it a good idea to try to get a judge to sign an order in a case that has been dismissed?
3. How effective are attorney liens on former client files?

4. Is it a conflict of interest to represent your wife in a lawsuit against your mistress?
5. Suing former clients: Just what constitutes a “substantially related matter?”
6. Badges? Do we need any stinking badges?

# Overview of Advertising Rules

## Iowa Rules of Professional Conduct relating to advertising in general

- Effective Date January 1, 2013
- *Bates v. State Bar of Arizona* (lawyer advertising is commercial speech; First Amendment applies but speech subject to regulation)
- Potentially misleading communications can be regulated

# Iowa Rule 32.7.1 and Nebraska Rule 3-507.1 are the same:

- No false or misleading statements.
- Cannot misrepresent a fact or omit a fact needed to make statement considered as a whole not misleading.

Bottom line: Do not create an unjustified expectation

In Iowa, former Rule 7.1(b) has been deleted.

- A lawyer shall not communicate with the public using statements that are unverifiable or that “rely on emotional appeal or unsubstantiated claims relating to the quality of the lawyer’s legal services.”
- Concern that it was not constitutional.





# TERRIBLE INJURIES?

Utilization - All cases vary.  
Results not guaranteed.

Lowell "The Hammer" Stanley  
**CALL 459-CASH**

Peninsula 245-CASH

If you want to:

- advertise verdicts or settlements
- engage in fee comparisons between law firms
- claim that your firm provides better service than some other firm

be prepared to provide adequate explanation, substantiate your claim and where necessary, issue a disclaimer.

## Iowa Rule 32:7.2(b)(4) and Nebraska Rule 3-507.2(b)(4) are the same.

- Allows reciprocal referral agreements with CPA's.
- Inform client of the referral agreement.
- The referral agreement cannot be exclusive.
- Lawyer to lawyer referrals are still okay.

## Rule 32.7.3 – “Solicitation of Clients” and Nebraska Rule 3-507.3 “Direct Contact with Prospective Clients”

- Minor variations
- Cannot solicit a client in person, over the phone or by email unless the person contacted:
  - is a lawyer or
  - “has a family, close personal, or prior professional relationship with the lawyer”
  - No one on one or small group meetings for purposes of solicitation

# Permitted Practices:

- Educational seminars permitted as long as no direct solicitation.
- Announcements are okay.
- Use of term “Advertising Material” (Iowa) or “This is an Advertisement” (Nebraska) required.

# Rule 32:7.4 – Communication of Specialization and Nebraska Rule 3-507.4

- You can use the term “specialist” if you can prove that you are one.
  - “Certification” required by organization with “objective and consistently applied standards” (Iowa)
    - Note: Nebraska is more general (state authority or ABA)
  - Certifying organization no longer must be approved by the Supreme Court (Iowa only).

# Additional Iowa Requirements:

- Communication must state: “Iowa Supreme Court does not certify specialists.” and,
- Specification is not a requirement to practice.

# Iowa Rule 32:7.5 and Nebraska Rule 3-507.5 - Firm Names and Letterheads

- The rules are different in Iowa and Nebraska.
- Iowa specifically references use of URL's ("confirm resource locators").
- Consult rules for questions.





# Nebraska Ethics Advisory Opinion 12-04

What are the current ethical standards regarding use of testimonials and advertising by lawyers?

## Neb. Op. 12-04:

- Cannot be false or inherently misleading
- No suggestion of future results based on past performance
- Unverifiable statements are not per se prohibited unless there is proof public will be harmed
- Disclaimers may be necessary

# Speaking of attorney deception:

## *State v. Walocha*

“Oh what a tangled web we weave, when first we practice to deceive.”

- Sir Walter Scott

Walocha's license was suspended for failure to pay his bar dues on June 21, 1996, and was never reinstated.

Beginning in 1988 and continuing through 2011, Walocha engaged in the practice of law by entering appearances in at least 65 criminal cases in Douglas County, Nebraska.

Walocha provided legal advice and charged his clients fees for his appearances. In pleadings he represented himself to be a licensed attorney.

But, if you are suspended you cannot practice law.

Walocha was convicted of violating Neb. Rev. Stat. § 7-101 and was sentenced to 30 days in jail.

Walocha was also disbarred.



What effect does this deception have on public perception of the bar?

# Recent Iowa Ethics Decisions

*Iowa Supreme Court Attorney Disciplinary Board v. Smith, 2011-399, (filed 6-21-12)*

- Lack of diligence and misrepresentation
- Attempting to have a judge sign a decree of dissolution of marriage after the case had been dismissed.

*Iowa Supreme Court Attorney Disciplinary Board v. Robak, 2010-249, (filed 2-24-12)*

- Conflict of interest.
- Attorney sues ex-mistress for sending harassing emails representing his wife.

# Nebraska Ethics Opinion No. 12-10

Conflict with a former client?

Application of substantial relationship test.

# Neb. Ct. R. of Prof. Cond. § 3-501.9.

## Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client gives informed consent in writing.

*State ex rel. Wal-Mart Stores, Inc. v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997)

- The *Wal-Mart* opinion was written eight years before the Nebraska Rules of Professional Conduct.
- Wal-Mart was sued for personal injuries by a lady that fell when she stepped into a hole in the Wal-Mart parking lot.

- The injured lady's attorney had represented Wal-Mart four times before filing this case against Wal-Mart.
- One case involved a fall inside the store.
- Another case was for an assault that happened inside the store.



- While defending Wal-Mart, the plaintiff's lawyer had become familiar with Wal-Mart's general defense strategies and internal policies. He also had access to Wal-Mart procedure manuals, lists, and sales information.

- Many factors may be used to discern if two matters are substantially related.
- A slip and fall inside the store and the slip and fall in a hole in the parking lot were similar.
- But that did not make the two cases substantially related.

- Wal-Mart policies, procedures, and practices in litigation did not include any trade secrets or things that were not discoverable.
- Defense strategies were commonplace and routine.

## Opinion No. 12-10:

- Requesting attorney had to discuss with the developer (the former client) the enforceability of the certain covenants during his representation.

- The requesting attorney advised the developer that the covenants were *unenforceable* because they were not recorded.
- Statements by the developer about the enforceability of the covenants relevant in the pending litigation where sought to enforce covenants against the developer.

- Now, in pending litigation, the attorney is trying to establish that the covenants *are* enforceable *against* the developer.

# Conclusion

- Committee concluded the matters were substantially related.
- The requesting attorney's duties to his former client did not allow continued representation of present clients in the lawsuit against the developer (former client).

## Another Question in Same Opinion:

- Could the attorney represent property owners against developer only in settlement negotiations?



# Fastest Five Minutes In Ethics

## New Iowa CLE Requirements per Rule 41.3(2):

- You now need three hours of ethics every two years.

## Rule 45.2(3): Trust Account Changes

Changes to Iowa Rule of Court 45.2(3) relating to attorney trust accounts: Lists the records that must be maintained for six years

# Attention Bankruptcy Lawyers:

## Neb. Advisory Opinion No. 12-06

Excellent opinion addresses ethical duties of debtor's attorneys with knowledge of attempts by debtors to hide assets.

- Disclosure of inheritance within 180 day reporting period.
- Failure to disclose ownership of historical antique on schedules.

# Use Caution In Dealing with the Media

Example: Jerry Sandusky's lawyer.

After appearance in court where he waived a preliminary hearing

- Talked to press for almost an hour.
- Critical of those claimed to have seen assault but did nothing.
- “If you believe that, I suggest you dial 1-800-Reality.”

# Nebraska Advisory Opinion No. 12-09

- Client relationship is terminated.
- Balance due on client's account.
- Retainer agreement provides for a lien on client's file.
- Former client requests file.
- What do you do?

In circumstances where the clients continued representation would be in jeopardy, the lawyer's ethical obligation to the client overrides any lien rights the lawyer may have otherwise obtained by statute or agreement.

# A client is entitled to scanned or hard copy of:

1. All documents provided to the attorney;
2. All documents or responses acquired by counsel through the discovery process;
3. All correspondence in pursuit of the clients interests;



4. All notes, memoranda, briefs, memos, and other matters generated by counsel bearing on the client's business and resulting from the employment of counsel.
5. Original client documents.

Counsel may retain copies of the file, but such copies must be made at counsel's expense.

# “Badges”

A Commentary.

# Iowa Ethics Opinion No. 07-04

- Peer review lists would assist public in making an informed choice about legal representation.
- Ratings of Martindale Hubbell and Chambers may be included lawyer advertising.

# Criteria:

- Independent organizations.
- Need not subscribe or pay a fee to be rated.
- Open to all Iowa lawyers.
- Ratings from a significant part of the bar familiar with the lawyer's work.

# Iowa Ethics Opinion 07-09

- Approval given to use of Best Lawyers and Super Lawyers in advertising.
- They satisfy the same criteria as did in Martindale and Chambers.



*"Best Law Firms" Badge*









# What have we learned?

Don't create unjustified expectations.