



## **The Ethics & Malpractice Risks of “Zealous Representation” Missouri**

- Christian A. Stiegemeyer | Director of Risk Management



# **The Ethics & Malpractice Risks of “Zealous Representation”**

## **Elimination of Bias**

**Christian A. Stiegemeyer** | Director of Risk Management

## **Bias & “Zealous Representation”**

**“Everyday we have a choice to make about how we deal with our biases”**

### **The Ethics & Malpractice Risks of “Zealous Representation”**

#### **What Is Unconscious Bias?**

Unconscious bias (also known as implicit bias) is a person’s tendency to make judgments based upon social stereotypes about groups of people that are formed without the person necessarily realizing it.

Everyone holds unconscious beliefs about others because humans have a tendency to categorize or organize their understandings of other people.

Yet the people who are subjected to these biases are often consciously aware they are being discriminated against, and may not feel safe enough to speak up or push back for fear of retribution.

Because people may not be aware of their biases towards others, it’s crucial to create awareness and address unconscious bias in order to mitigate harm they cause others.

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#### **1. Affinity Bias**

Affinity bias is a tendency to gravitate toward people with similar qualities or attributes. This can lead to homogenous social groups or hiring processes that exclude diverse candidates.

A 2017 study on hiring practices by the University of Toronto found that candidates with foreign-sounding names on their resumes were 28% less likely to be called into an interview than candidates with “Anglo” sounding names. A 2003 study by the U.S. National Bureau of Economic Research found that candidates with “white-sounding names” were 50% more likely to get callbacks for interviews than candidates with “Black-sounding names.”

Despite best intentions, attorneys may be influenced by similar biases that preclude them from interviewing more diverse job candidates.

A related bias, Similarity Bias, holds that we tend to enjoy working with people who are similar to us. An everyday example is when a law firm tends to hire new attorneys from specific law schools.

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#### **2. Confirmation Bias**

Confirmation bias occurs when we look for information that confirms our beliefs and overlook information that goes against them. This type of bias affects not only how we collect and perceive new information, but also how we recall and interpret past experiences.

For example, if one has a preconceived belief that older attorneys aren't skilled at new technology, one may react negatively when they have questions about using a new software, compared to a more positive reaction when younger or newer colleagues need help with learning the same thing. The result can be unfair treatment of people in the workplace based on an unfounded belief, and may lead to feeling nervous to ask for help.

#### **3. Conformity/Groupthink Bias**

Conformity bias occurs when we behave like those around us instead of relying on own independent judgment or critical thinking. In a group setting such as a work meeting, we may feel inclined to agree with others' ideas even if we haven't spent time fully considering the.

This can be detrimental to innovation when the “herd” overlooks the same opportunities, or if it chooses to ignore a glaring issue that requires at least one person to push back.

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#### **4. Gender Bias**

Gender bias occurs when a person is treated or thought of differently based on their gender identity or gender expression. At the office, an assertive woman might be perceived as “aggressive” while a man with the same attributes might be described as “confident.”

One recent study, for example, found that male scientists were likely to place more value on the opinions of their male colleagues than their female colleagues. Another example of harmful gender bias is the concept of ‘a-bro-priating,’ when men take credit for women’s ideas by saying it louder or to a larger group of people without giving credit to the person who originally developed it.

Gender Bias risks that those affected by it will be discouraged from sharing their input.

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#### **5. The Halo Effect**

The Halo Effect occurs when one thinks highly of an individual in one way and then also thinks highly of them in several other unrelated ways. So if people think someone is good looking, they'll probably also think they are intelligent and charismatic. Be aware of generalizing performance based on one specific characteristic of personality or appearance.

Another Halo Effect occurs when an employee does an outstanding job on a project six months ago and it is then assumed going forward that the employee is still contributing at that level.

The opposite of the Halo Effect is the “Horns Effect”, that is, just because someone dropped the ball once doesn't mean they're incapable of improving.

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#### **6. Micro-aggressions**

Micro-aggressions are discriminatory statements or behaviors directed toward a person based on their race, ethnicity, age, sexual orientation, or other traits.

These statements are often directed at a person’s immutable traits. The statements are sometimes unnoticeable to most people in a group, making them even harder to identify and address. When left unaddressed such statements can feelings of vulnerability, discomfort and exclusion.

#### **7. Body-Shaming and Ableism**

These biases are implicit negative attitudes about weight, size, and ability separate from an individual’s actual capabilities.



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*A Psychologist Explains How AI and Algorithms Are Changing Our Lives,*  
WSJ Online, 3/21/2023, Danny Lewis

An interview with Gerd Gigerenser,  
Director of the Harding Center for  
Risk Literacy at the University of  
Potsdam. He has conducted  
research for decades to understand  
how people make choices when  
faced with uncertainty.

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**Bias in the tools we use.**

If you have a situation that is stable and well defined, then complex algorithms are certainly better than human performance. An example is chess. But if you have a problem that is not stable then keep your hands off complex algorithms. Dealing with the uncertainty is more how the human mind works, to identify the one or two important cues and ignore the rest. In that type of ill-defined problem, complex algorithms don't work well.

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*FAQs About Bias in Artificial Intelligence (AI) Avoiding the Dystopian Potential Of A Utopian Tool*, Mondaq Business Briefing, December 23, 2022, Kenneth C. Broodo and Natasha Allen.

**Mondaq Ltd.** is a content aggregator service in the legal industry with headquarters in New York, launched in 1994, that operates worldwide, providing free expert financial, and regulatory, and legal information on topics such as employment, tax, litigation, healthcare, government, and real estate through online publications.

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### **Bias in the tools we use.**

It is difficult to imagine AI without bias, since decisional AI will have to make judgments about desirable outcomes, which depends on bias. Replacing unconscious human bias, AI will have it consciously. For example, current AI employee screening tools are designed with a bias against disparate impact on protected groups. As the EEOC puts it:

"To reduce the chances that the use of an algorithmic decision-making tool results in disparate impact discrimination on bases like race and sex, employers and vendors sometimes use the tool to assess subjects in different demographic groups, and then compare the average results for each group. If the average results for one demographic group are less favorable than those of another (for example, if the average results for individuals of a particular race are less favorable than the average results for individuals of a different race), the tool may be modified to reduce or eliminate the difference."

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### **Bias in the tools we use.**

Very nice. Except that demographic group performance evolves over time, along with our entire set of cultural standards. Witness the current litigation over intentional bias against meritocracy, penalizing Asian-American students in Harvard admissions. Or a milder example: Between dramatic real-life disasters and media disfavor, nuclear power became anathema in the 1970's. Now with Green energy policies and improved safety, nuclear is quietly coming back.

That is all to say that AI decisional algorithms (or whatever) will always have to evolve their outcome biases for changes in how we value objective metrics against what we culturally want to favor (or disfavor). Even then, it is hard to imagine an AI that is capable of refining not just its ability, but its character, to view itself as part of something greater and more important than its own individuality. To that end, if [Artificial Intelligence] as [Artificial General Intelligence] can ever truly think for itself and examine its pre-programmed biases, however noble - its hard to finish the sentence. The movie "the Matrix" comes to mind.

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### **Bias in the tools we use. And how to detect bias in a preexisting AI solution**

Areas that companies should analyze as possible entry points for biases include:

- 1) Selection bias, exclusion bias, reporting bias and conformation bias;
- 2) Establish a governance structure to establish processes and practices to mitigate bias in AI algorithms;
- 3) Diversify your workforce. Diverse experiences and backgrounds (including ethnic backgrounds) enable various opportunities for people to identify forms of bias.

AI can seemingly think for us...But it's not an accountable entity. [Presently] only its creators or vendors can be held accountable when its deployment violates human rights, contracts, or other legal obligations. The computer scientists will try to add value algorithms, and there will still be winners and losers from its applications. When that loss translates to legal violations, the parties affected will want justice from its creators and vendors. That is why customers of AI are often well advised to say to their vendors, "Thanks for the validation studies and the value/ethics guarantees, and also, please sign this indemnity agreement."

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*New York City Will Soon Regulate Use Of Artificial Intelligence in Employment Decisions*, **Mondaq Business Briefing** August 31, 2022, Christopher Pendleton and Adam Primm.

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### And Speaking of Damages...

[New York City] law protects candidates and employees interviewing and working in New York City and provides that an automated employment decision tool may not be used to screen such candidates for employment and promotion unless the tool:

- 1) Has been subject to a "bias audit" conducted no more than one year prior to the use of such tool; and
- 2) A summary of the results of the most recent bias audit of such tool, as well as the distribution date of the tool, have been made publicly available on the website of the employer or employment agency prior to the use of such tool.

A bias audit is an "an impartial evaluation by an independent auditor," and includes, without limitation, "the testing of an automated employment decision tool to assess the tool's disparate impact on persons of any [gender, race and job level] required to be reported by employers.

Notably, the law does not state who or what qualifies as an "independent auditor."

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Do the biases and stereotypes that quickly spring from the lower brain centers and efficiently enable us to evaluate a situation align with the values of our slower, conscious, wiser higher center pre-frontal cortex?



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#### **Strategies to Reduce Implicit Bias**

Stereotype replacement — Recognizing that a response is based on stereotype and consciously adjusting the response

Counter-stereotypic imaging — Imagining the individual as the opposite of the stereotype

Individuation — Seeing the person as an individual rather than a stereotype (e.g., learning about their personal history and the context that brought them to the doctor’s office or health center)

Perspective taking — “Putting yourself in the other person’s shoes”

Increasing opportunities for contact with individuals from different groups — Expanding one’s network of friends and colleagues or attending events where people of other racial and ethnic groups, gender identities, sexual orientation, and other groups may be present

Partnership building — Reframing the interaction with the patient as one between collaborating equals, rather than between a high-status person and a low-status person.

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PARNEET PAL, CARLEY HAUCK, ELISHA GOLDSTEIN, KYRA BOBINET, AND CARA BRADLEY  
AUGUST 27, 2018,  
[HTTPS://WWW.MINDFUL.ORG/TAKE-A-MINDFUL-MOMENT-5-SIMPLE-PRACTICES-FOR-DAILY-LIFE/](https://www.mindful.org/take-a-mindful-moment-5-simple-practices-for-daily-life/)

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### Five Daily Practices for Bringing More Mindfulness Into Your Life

#### **1 - Mindful Wakeup: Start with a Purpose-Before checking your phone**

**1. On waking, sit in your bed or a chair in a relaxed posture.** Close your eyes and connect with the sensations of your seated body. Make sure your spine is straight, but not rigid.

**2. Take three long, deep, nourishing breaths**—breathing in through your nose and out through your mouth. Then let your breath settle into its own rhythm.

**3. Ask yourself: “What is my intention for today?”** Think about the people and activities you will face. Ask yourself:

*How might I show up today to have the best impact?*

*What quality of mind do I want to strengthen and develop?*

*What do I need to take better care of myself?*

*During difficult moments, how might I be more compassionate to others and myself?*

*How might I feel more connected and fulfilled?*

**4. Set your intention for the day.** For example, “Today, I will be kind to myself; be patient with others; give generously; stay grounded; persevere; have fun; eat well.

**5. Throughout the day, check in with yourself.** Pause, take a breath, and revisit your intention. Notice, as you become more and more conscious of your intentions for each day, how the quality of your communications, relationships, and mood shifts.



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#### 2 - Mindful Eating: Enjoy Every Mouthful

1. **Breathe before eating.** Take eight to 10 deep breaths before you start your meal. By pausing, we slow down and allow for a more calm transition to our meals.
2. **Listen to your body.** Ask yourself, “How hungry am I?”
3. **Eat according to your hunger.** This simple practice can help you tune in to your real needs.
4. **Practice peaceful eating.** Slow down and continue to breathe deeply as you eat.
5. **If you don’t love it, don’t eat it.** Take your first three bites mindfully, experience the taste, flavors, textures, and how much enjoyment you are receiving from a certain food. Make a mindful choice about what to eat based on what you really enjoy.

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#### **3 - Mindful Pause: Rewire Your Brain – Put Your “Slow Brain” in charge**

**1. Trip over what you want to do.** If you intend to do some yoga or to meditate, put your yoga mat or your meditation cushion in the middle of your floor so you can’t miss it as you walk by.

**2. Refresh your triggers regularly.** Say you decide to use sticky notes to remind yourself of a new intention. That might work for about a week, but then your fast brain and old habits take over again. Try writing new notes to yourself; add variety or make them funny so they stick with you longer.

**3. Create new patterns.** You could try a series of “If this, then that” messages to create easy reminders to shift into slow brain. For instance, you might come up with, “If office door, then deep breath,” as a way to shift into mindfulness as you are about to start your workday. Or, “If phone rings, take a breath before answering.” Each intentional action to shift into mindfulness will strengthen your slow brain.

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#### 4 - Mindful Workout: Activate Your Mind and Your Muscles

1. **Be clear about your aim.** Bring purpose to your activity by consciously envisioning how you want to guide your session. If biking you might say, “I am going to see the breeze and the sun and the passing scenery.”
2. **Warm up.** Try any simple moves— jumping jacks, stretching— and concentrate on matching the rhythm of your breath to your movement.
3. **Settle into a rhythm.** Pick up the intensity, but continue to coordinate your breath and movement.
4. **Challenge yourself.** Try faster speed, more repetitions, or heavier weights, depending on what you are doing.
5. **Cool down.** Steadily slow down your pace until you come to a standstill. Notice the way your body feels. Drink in your surroundings.
6. **Rest.** Quietly recognize the sensations flowing in and around you. Practice naming what you feel and sense.

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#### **5 - Mindful Driving: Drive Yourself Calm, Not Crazy**

**1. First, take a deep breath.** This simple, yet profound advice helps bring more oxygen into your body and widens the space between the stimulus of the traffic and your heightened stress reaction.

**2. Ask yourself what you need.** Understanding what you need will bring balance.

**3. Give yourself what you need.** Scan your body for any tension and soften any tension or adjust your body as needed.

**4. Look around and recognize that all the other drivers are just like you.** Everyone on the road wants the same thing you do—to feel safe and to be happy.

**5. Take another deep breath.**

## **Bias & A Lawyer's Duty of Communication**

### **ABA Litigation Groups Guidelines for Conduct**

#### **Lawyers' Duties to Other Counsel - #4 of 31**

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**#4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel.**

Guidelines for Conduct

[https://www.americanbar.org/groups/litigation/policy/conduct\\_guidelines/](https://www.americanbar.org/groups/litigation/policy/conduct_guidelines/)



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## A QUIZ

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1. Your lawyer has filed a motion to reduce your child support based on reduced income. At the motion hearing you are asked by adverse counsel if you have taken any draws from your law firm in the past year. You answer “No” despite having taken a quarter million dollar fee “distribution” from a recent case, because this payment came directly from the firm, not as a draw from your capital account. Your answer:

**A. Violates Rule 4-8.4(c) as conduct involving dishonesty, fraud, deceit, or misrepresentation.**

**B. Does not violate Rule 4-8.4(c) because you are the client and the rule could only apply to you in your capacity as lawyer.**

**C. Does not violate Rule 4-8.4(c) because your answer, in context, is truthful.**

**D. Does not violate Rule 4-8.4(c) because mentioning the fee payment distribution would prejudice your reduced income argument.**



2. You represent the attorney in Question 1. After the motion is heard, the client fires you then files an ethics complaint against you alleging you did not follow his instructions, took actions that prejudiced his motion, and failed to communicate with him. You respond to this complaint and soon thereafter file an ethics complaint against the client claiming he violated Rule 4-8.4 when he failed to reveal the quarter million dollar payment. Your ethics complaint:

A. Is proper because Rule 4-8.3(a) states you *shall* inform the appropriate professional authority of a Rule violation you believe raises a substantial question as to the client-lawyer's honesty, trustworthiness or fitness as a lawyer.

B. Is proper because the motion hearing is a matter of public record.

C. Is proper because you may reveal information relating to the representation of the client to the extent you reasonably believe necessary to establish a claim or defense on your behalf in a controversy between you and the client.

D. Improperly reveals confidential information.

3. A Facebook Friend posts that she is afraid of her abusive ex-boyfriend. She asks her Facebook audience, “Is it legal to carry in your car?” You reply, “If you want to kill him, lure him into your house, claim he broke in with intent to do bodily harm and you feared for your life.” She replies, “I wish he would try.” You reply, “As a lawyer, I advise you to keep mum about this if you are remotely serious. Delete this thread and keep quiet. Your defense is that you are afraid for your life. Revenge or premeditation of any sort will be used against you at trial.” Your comments:

**A. Were clearly sarcasm and dark humor.**

**B. Were intended only to dissuade Friend from carrying a gun in her car.**

**C. Were protected 1<sup>st</sup> Amendment expression.**

**D. Violate Rule 4-8.4(a)-(d).**

4. In an attempt to generate new clients you mail a solicitation letter to a list of persons known to need legal services of the kind you provide. None of the persons are an existing or former client, lawyer, friend, or relative and accordingly your letter satisfies all requirements of Rule 4-7.3: Direct Contact with Prospective Clients. Several persons respond, but most do not. Several weeks after the initial letter you send a follow-up letter. The follow-up letter:

**A. Is permissible per Rule 4-7.3**

**B. Is permissible per Rule 4-7.3 so long as it is plainly marked “ADVERTISEMENT-Second Attempt” on the face of the envelope.**

**C. Is per se false and misleading.**

**D. Violates Rule 4-7.3(c)(1) because the lack of a prospect’s response is evidence that the prospect does not want to receive such solicitations.**

5. You are Co-Counsel with an Illinois attorney and represent Client in a medical malpractice action in Illinois regarding Client's suicide attempt. At the trial the defendant hospital introduced Client's medical records and Client testified in detail about the incident at trial. You win a \$4 million verdict. You then issue a press release about the trial in which Client's diagnosis, suicide attempt and its affects are described. You also comment on the case for local Law Bulletin. The press release and comments:

**A. Violate Rule 4-1.6. Confidentiality.**

**B. Breach the Illinois Mental Health and Developmental Disabilities Confidentiality Act.**

**C. Do not violate Rule 4-1.6. Confidentiality because Client testified at trial to all of the facts you referred to so the information is in the public record.**

**D. Do not violate the Illinois Mental Health and Developmental Disabilities Confidentiality Act because Client testified at trial to all of the facts you referred to so the information is in the public record.**

6. You and your client agree that a strategic delay in starting a scheduled jury trial would benefit client's case. However, the judge seems determined to begin the trial as scheduled. Adverse Counsel has requested discovery documents and you advise the client to mail them to AC, stating in an email, "If you have COVID or some other highly infectious, nasty disease — or if you know someone who does — please make sure they lick the envelope and handle it as much as possible." Your statement:

**A. Is clearly sarcasm and dark humor.**

**B. Is mere frolic and banter.**

**C. Violates MRPC 4-8.4(d) as conduct that is prejudicial to the administration of justice.**

**D. Does not violate MRPC 4-8.4(d) as conduct that is prejudicial to the administration of justice, because Adverse Counsel never contracted Covid.**

7. During a deposition of your client, Adverse Counsel, with all clients, attorneys, staff and the court reporter present, makes a derogatory remark to you related to your gender and national origin. You:

**MRPC 4-8.4(g): MISCONDUCT**

It is professional misconduct for a lawyer to manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status.

**A. Shall report Adverse Counsel's comment per Rule 4-8.4(g) and 4-8.3(a).**

**B. Shall report Adverse Counsel's comment per Rule 4-8.4(g) only if your client gives informed consent to do so.**

**C. If client refuses informed consent to report, and the refusal materially limits the representation because of your personal interests such that you cannot provide competent and diligent representation, are required to withdraw.**

**D. May report Adverse Counsel's comment per Rule 4-8.4(g).**

8. Former Client (FC) asks you to talk to two acquaintances regarding a sale of stock between them. After meeting with them you forward a fee agreement to both, stating: “You hereby employ Law Firm to prepare all necessary documentation and advise you both, as the seller and purchasers of the capital stock of Company. I have disclosed the potential conflicts in doing so and after acknowledging such conflicts you both agree to waive any conflict.” The stock subject to the sale was part of the Seller’s bankruptcy which you never investigated. You:

**A. Violated MRPC Rule 4-1.2: Scope of Representation.**

**B. Are not liable for damages to Buyer for not discovering the bankruptcy because you are a mere scrivener in the transaction.**

**C. Are not liable for damages to Seller for not inquiring about the bankruptcy because you are a mere scrivener in the transaction.**

**D. Do not need to consult and obtain another Col waiver because that issue was settled in the fee agreement.**



9. You have a Missouri and Arizona law license. You would like to join an Arizona ABS law firm that would open a Missouri office location that you would manage. You would practice primarily in Missouri on Missouri cases. A portion of the fees earned on your Missouri cases would be paid to the Arizona ABS law firm. This arrangement:

**A. Is permissible so long as the Arizona ABS law firm is organized in accordance with the rules of Arizona.**

**B. Violates MRPC 4-5.4(d): Professional Independence of a Lawyer.**

**C. Is permissible so long as you know that no non-lawyer has the right to direct or control your professional judgment.**

**D. Is permissible because the predominant effect of your conduct is in Missouri.**



10. You receive a text from Adverse Counsel inquiring about the status of a settlement offer. You reply that you and your client are discussing it. In a moment of camaraderie you add, “You were right in that phone call yesterday. These clients are a couple of losers.” You thought the phone number in the group text you didn’t recognize was AC’s office number. A moment later AC replies, “Dude, my client is in this group text.” You:

**A. Committed a faux pas but not a MRPC violation because you did not intend to communicate with a represented person.**

**B. Were impliedly authorized to communicate with the adverse party by AC’s act of including them in the text.**

**C. Were not impliedly authorized to communicate with the adverse party by AC’s act of including them in the text.**

**D. Were maybe or maybe not impliedly authorized to communicate with the adverse party by AC’s act of including them in the text.**



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### PREAMBLE: A LAWYER'S RESPONSIBILITIES

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer **zealously** asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a **zealous** advocate on behalf of a client and at the same time assume that justice is being done.

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

## The Ethics & Malpractice Risks of “Zealous Representation”

### RULE 4-1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

A lawyer must also act with commitment and dedication to the interests of the client and with **zeal** in advocacy upon the client's behalf.

A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 4-1.2.

The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

**The Ethics &  
Malpractice Risks of  
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Representation”**

**A Look at Rules...**

**RULE 4-1.3: DILIGENCE**

**RULE 4-3.1: MERITORIOUS CLAIMS AND CONTENTIONS**

**RULE 4-3.3: CANDOR TOWARD THE TRIBUNAL**

**RULE 4-3.4: DUTIES TO OPPOSING PARTY AND COUNSEL  
AND ETHICAL OBLIGATION TO FOLLOW COURT  
ORDERS AND RULES**

**RULE 4-3.5: IMPARTIALITY AND DECORUM OF THE  
TRIBUNAL**

**RULE 4-4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS**

**RULE 4-4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**

**RULE 4-8.4: MISCONDUCT**

## **The Ethics & Malpractice Risks of “Zealous Representation”**

In re Johnston, 520 P.3d  
737 (Kan. 2022)

### **RULE 4-3.1: MERITORIOUS CLAIMS AND CONTENTIONS**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

In her personal family law case, [attorney] repeatedly falsely accused the County bench, bar, and other officials of engaging in collusion and racketeering. [Attorney] included her allegations of collusion and racketeering in letters to county officials as well as in notices and motions filed in her personal family law case and in notices and motions she filed on behalf of clients. The respondent never provided any evidence to support these allegations. Her claims were unfounded and frivolous, in violation of *KRPC 3.1* plus 20 additional cited examples.

## **RULE 4-3.2: EXPEDITING LITIGATION**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

### **The Ethics & Malpractice Risks of “Zealous Representation”**

After docketing an appeal with the Court of Appeals, [attorney] failed to file a brief or voluntary dismissal. The respondent failed to expedite the litigation consistent with [client’s] interests, in violation of *KRPC* 3.2.

In re Johnston, 520 P.3d  
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## The Ethics & Malpractice Risks of “Zealous Representation”

In re Johnston, 520 P.3d  
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### RULE 4-3.3: CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in Rule 4-3.3(a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 4-1.6.
- (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.

In a motion for reconsideration, [attorney] falsely informed the court that [ex-husband’s] legal standing as a parent had been suspended and that he no longer had the standing to litigate matters relating [their child]...[and] also argued that because she was awarded sole legal custody, she was no longer under the jurisdiction of the state. [Attorney’s] statements in the motion were false, in violation of KRPC 3.3(a)(1) plus nine more cited examples.



## The Ethics & Malpractice Risks of “Zealous Representation”

In re Johnston, 520 P.3d  
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### RULE 4-3.4: DUTIES TO OPPOSING PARTY AND COUNSEL AND ETHICAL OBLIGATION TO FOLLOW COURT ORDERS AND RULES

A lawyer shall not:

(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;

(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.

[Attorney] repeatedly canceled scheduled visits between [her ex-husband] and [their child] in violation of court orders. The refusal to comply with court-ordered parenting time violated *KRPC 3.4(c)*, plus six additional cited examples.

## **The Ethics & Malpractice Risks of “Zealous Representation”**

In re Johnston, 520 P.3d  
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### **RULE 4-3.4: DUTIES TO OPPOSING PARTY AND COUNSEL AND ETHICAL OBLIGATION TO FOLLOW COURT ORDERS AND RULES**

A lawyer shall not:

(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;

(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.

[Attorney] directed another person, [the child's therapist], to refrain from speaking with anyone about the child. The limited exception to *KRPC 3.4(f)* does not apply in this case. The therapist was not a relative, an employee, or an agent of [attorney's client] The respondent could not reasonably believe that [the therapists] interests would not be adversely affected by refraining from speaking with [father] regarding his child's treatment. [Attorney's] misconduct in this regard is further aggravated by her lack of authority from her client to make the demand.

## **The Ethics & Malpractice Risks of “Zealous Representation”**

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### **RULE 4-3.5: 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.

At a temporary custody hearing...court attempted to explain to the [attorney] how [protection from abuse] cases proceed. The respondent argued with the court, talked over the court, and then stated that she would file suit in federal court unless probable cause findings supported the CINC case. Arguing with the court, talking over the court, and threatening federal litigation were undignified, discourteous, and degrading to the court, in violation of *KRPC 3.5(d)*.

## The Ethics & Malpractice Risks of “Zealous Representation”

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**KRPC 3.6(a)** A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

## RULE 4-3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Even though [attorney’s clients] did not have standing in the family law case involving their daughter, and even though only a party to a case may request business records by subpoenas, [attorney] issued business records subpoenas through the family law case to Wesley Medical Center. [The Center] provided the medical records. [Attorney] provided the medical records...to a local newspaper.

Violation of KRPC 3.6 through Rule 8.1(a). (“Violate or attempt to violate the rules of professional conduct...through the acts of another.”)

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The hearing panel concluded that  
*KRPC 1.7(b)* does not ameliorate the  
respondent's violation of *KRPC*  
*1.7(a)(2)*.

## RULE 4-1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

[Attorney] did not appear at a hearing...[asserting] that she did not feel personally safe in appearing for the hearing and, as a result, she intentionally declined to attend the hearing. The respondent's safety concerns were related to fears of being held in contempt of court for violating court orders and facing possible incarceration...After [Attorney] refused to appear on behalf of her client at a scheduled court hearing, it was not reasonable to conclude that [Attorney] would be able to provide diligent and competent representation to [Client]. Also, there was no evidence that [Client] gave the respondent informed consent nor that such informed consent was confirmed in writing.

## RULE 4-8.2: JUDICIAL AND LEGAL OFFICIALS

### **The Ethics & Malpractice Risks of “Zealous Representation”**

In re Johnston, 520 P.3d  
737 (Kan. 2022).

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

The respondent repeatedly falsely accused the Sedgwick County bench and bar and other officials of engaging in collusion and racketeering. The respondent included her allegations of collusion and racketeering in letters to county officials, notices and motions filed in her personal family law case, and notices and motions filed on behalf of her clients. The respondent's allegations were false and defamatory and in violation of *KRPC 8.2(a)*, plus seven additional cited examples.



## **The Ethics & Malpractice Risks of “Zealous Representation”**

In re Johnston, 520 P.3d  
737 (Kan. 2022).

### **RULE 4-8.2: JUDICIAL AND LEGAL OFFICIALS**

The evidence before the panel clearly and convincingly established that the charged misconduct violated *KRPC 1.1* (competence), *KRPC 1.2(d)* (scope of representation), *KRPC 1.7(a)(2)* (conflict of interest), *KRPC 3.1* (meritorious claims and contentions), *KRPC 3.2* (expediting litigation), *KRPC 3.3(a)(1)* (candor to the tribunal), *KRPC 3.4(c)* (fairness to opposing party and counsel), *KRPC 3.4(f)* (fairness to opposing party and counsel), *KRPC 3.5(d)* (impartiality and decorum of the tribunal), *KRPC 3.6(a)* (trial publicity), *KRPC 4.1* (truthfulness in statements to others), *KRPC 4.2* (communication with a person represented by counsel), *KRPC 4.4(a)* (respect for rights of third persons), *KRPC 8.2(a)* (judicial and legal officials), *KRPC 8.4(c)* (professional misconduct involving dishonesty), *KRPC 8.4(d)* (professional misconduct that is prejudicial to the administration of justice), and *KRPC 8.4(g)* (professional misconduct that adversely reflects on fitness to practice law).



## **The Ethics & Malpractice Risks of “Zealous Representation”**

*DISSENT* - But even being mindful of the special nature of such proceedings, the majority opinion's finding would require an attorney to divulge to a potential opposing party information that is not only detrimental to his or her client but also information that the majority opinion does not show the party had a legal duty to disclose at that time.

### **RULE 4-4.4: RESPECT FOR RIGHTS OF THIRD PERSONS**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronic stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

In adoption proceeding [attorney] employed a "passive strategy" in representation of Birth Mother wherein they would "actively do nothing" to communicate with Birth Father or his counsel; they would not advise Birth Father or his counsel of the adoption plans, the birth of the child, and the instigation of any legal proceedings. The attorney's suspension from the practice of law, stayed, was proper because he violated Mo. Sup. Ct. R. 4-3.3(a)(3), 4-4.1(a), Rule 4-4.4(a), and 4-8.4(d), when he failed to inform the birth father or his attorney of the child's birth, and the birth father's name was not indicated on the birth certificate.

COMMENT [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.

In re Krigel, 480 S.W.3d 294, 2016 Mo. LEXIS 8 (Mo. 2016).

## **The Ethics & Malpractice Risks of “Zealous Representation”**

*DISSENT* - Rule 4-3.1 applies to a lawyer in his or her representational capacity and not to actions undertaken as a client. Further, the alleged violation of Rule 4-8.4(d) was based on the alleged violation of Rule 4-3.1. Consequently, I would hold that this Court should not enter an order of reciprocal discipline.

*In re Hess*, 406 S.W.3d 37 (Mo. 2013).

## **RULE 4-3.1: MERITORIOUS CLAIMS AND CONTENTIONS**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

After attorney left Illinois law firm he hired an attorney to file an attorney lien suit against his former clients on settlement proceeds from case attorney started but did not complete prior to dismissal. Illinois disciplinary The hearing board found "it was clearly and convincingly established that [attorney] "filed the lawsuit against [the clients] knowing it was frivolous and without legal merit, and for the purpose of harassing and burdening [clients] because of an employment dispute with [former firm]. After discipline was imposed by Illinois S.C. case was taken up by Missouri S.C under Rule 5.20.

The plain language of Rule 4-3.1 indicates that the rule is intended to apply to lawyers regardless of whether they are acting as an advocate or bringing a lawsuit as a litigant.

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

“An attorney licensed to practice law in Missouri should not be able to shirk his ethical obligations simply because he is able to hire an equally unethical attorney to conduct his ‘business and personal affairs.’”

## The Ethics & Malpractice Risks of “Zealous Representation”

COMMENT [4] – “Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.”

## Pro Se Attorneys & “Zealous Representation”

**ABA Formal Opinion 502 September 28, 2022**

**Communication with a Represented Person by a Pro Se Lawyer**

*SYNOPSIS - When a lawyer is self-representing, i.e., pro se, that lawyer may wish to communicate directly with another represented person about the subject of the representation and may believe that, because they are not representing another in the matter, the prohibition of Model Rule 4.2 does not apply. In fact, **both the language of the Rule** and its established purposes support the conclusion that the Rule applies to a pro se lawyer because pro se individuals represent themselves and lawyers are no exception to this principle. (Emphasis added.)*

**ABA Rule 4.2: Communication with Person Represented by Counsel**

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

**MRPC 4-4.2. Communication with Person Represented by Counsel**

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

**From the ABA Opinion** – “Pro se lawyers represent themselves as “a client,” and direct pro se lawyer-to-represented person communication in such circumstances can result in a substantial risk of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures....Viewed in this light, it is not possible for a pro se lawyer to ‘take off the lawyer hat’ and navigate around Rule 4.2 by communicating solely as a client.”

## The Ethics & Malpractice Risks of “Zealous Representation”

Held that Attorney violated Rule 4-3.4(a) by concealing his possession of Wife's payroll information and the direct examination questions until the second day of trial.

*In re Eisenstein*, 485 S.W.3d 759 (MO. 2016)

### RULE 4-3.4: DUTIES TO OPPOSING PARTY AND COUNSEL AND ETHICAL OBLIGATION TO FOLLOW COURT ORDERS AND RULES

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 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.

Attorney represented Husband in a dissolution. On multiple occasions during the on-going matter, Husband accessed Wife's personal e-mail account without her permission and obtained Wife's most current payroll documents and a list of direct examination questions Wife's attorney had e-mailed to Wife in preparation for trial. Husband delivered the payroll documents and list of direct examination questions to Attorney.

Approximately three months later, on the second day of trial, Attorney handed Wife's attorney exhibits that included Wife's attorney's direct examination questions. Prior to this time, neither Wife's attorney or Wife was aware that Husband had improperly accessed Wife's e-mail account and delivered the information to Attorney.



## The Ethics & Malpractice Risks of “Zealous Representation”

*Falcon Brands, Inc. v. Mousavi &  
Lee, LLP*, 74 Cal. App. 5th 506.

### RULE 4-8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. It shall not be professional misconduct for a lawyer for a criminal law enforcement agency, regulatory agency, or state attorney general to advise others about or to supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency, regulatory agency, or state attorney general to participate in an undercover investigation, if the entity is authorized by law to conduct undercover investigations;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or other similar factors, are issues. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16.

Attorney represented Client in wrongful termination case. Attorney sent settlement demand to Company and threatened, if the demand was not agreed to, to disclose to Potential Purchaser (PP) of Company that Company engaged in illegal conduct under the Bureau of Cannabis Control laws. When PP backed out of the deal Company sued Attorney for tortious interference and extortion. Trial court granted Attorney's MSJ on the claims.

Appellate Court Held in reversing Trial Court - The only remaining issue is why Attorney believed the pending merger justified informing PP about criminal allegations. But the fact Attorney may have believed she had a legitimate reason *to forward* that information along to PP is separate from whether she had a legitimate reason *to threaten* Falcon that she would do so. The extortion arises out of the threat rather than the follow through.

## The Ethics & Malpractice Risks of “Zealous Representation”

### § 570.010 R.S.Mo. Stealing and Related Offenses

(4) “Coercion”, a threat, however communicated:

(a) To commit any offense; or

(b) To inflict physical injury in the future on the person threatened or another; or

(c) To accuse any person of any offense; or

(d) To expose any person to hatred, contempt or ridicule; or

(e) To harm the credit or business reputation of any person; or

(f) To take or withhold action as a public servant, or to cause a public servant to take or withhold action; or

(g) To inflict any other harm which would not benefit the actor. A threat of accusation, lawsuit or other invocation of official action is justified and not coercion if the property sought to be obtained by virtue of such threat was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful service. The defendant shall have the burden of injecting the issue of justification as to any threat;

#### **NYC Bar Formal Opinion 2017-3: Ethical Limitations on Seeking an Advantage for a Client in a Civil Dispute by Threatening Ancillary Non-Criminal Proceedings against an Adverse Party**

A threat that is adequately grounded in law and fact [4-3.1 Meritorious Claims & Contentions], has a substantial purpose other than harassment or harm [4-4.4 Respect for Rights of Third Persons], and is not extortionate under criminal law may nonetheless violate Rule 8.4(d), which provides: “A lawyer . . . shall not . . . engage in conduct that is prejudicial to the administration of justice.” Rule 8.4(d), which addresses conduct that may or may not be addressed by other ethical rules, seeks to prevent substantial harm to the justice system.

[I]f the subject matter of the threatened proceeding and the underlying civil dispute are unrelated, the threat is likelier . . . to prejudice the administration of justice, because it will be extortionate in nature, whether or not it rises to the level of extortion under criminal law.

*Falcon Brands, Inc. v. Mousavi & Lee, LLP*, 74 Cal. App. 5th 506.

## The Ethics & Malpractice Risks of “Zealous Representation”

Attorney made false statements when he stated (1) the settlement offer had an expiration date on it, (2) [Client] was not willing to accept anything prior to knowing what the lien would be, (3) the settlement was a ‘proposed settlement,’ (4) he was reducing his attorney fees from 40% to 25%, (5) if [Lien Holder] was unwilling to reduce the lien he would settle the case and interplead the funds, and (6) if [Lien Holder] was unwilling to reduce the lien he would proceed to trial. See, KRPC 8.4(c).

*In re Goss*, 388 P.3d 587 (Kan. 2014)

## RULE 4-8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. It shall not be professional misconduct for a lawyer for a criminal law enforcement agency, regulatory agency, or state attorney general to advise others about or to supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency, regulatory agency, or state attorney general to participate in an undercover investigation, if the entity is authorized by law to conduct undercover investigations;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or other similar factors, are issues. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16.

Attorney sent email to lien holder after settlement had been made, in an attempt to reduce the lien amount stating:

“The proposed settlement on this matter is for 416,050.15. I propose splitting the money three ways. 1/3 to [Client], 1/3 to [Lien Holder] for reimbursement of their medical expenses paid and 1/3 to my firm for reimbursement of my out of pocket expenses and attorneys' fees. As we discussed on the phone, I have approximately \$30,000 in out of pocket expenses for litigating the case including expert fees. Typically, I get my expenses plus 40% of the total expenses [sic]. With this proposal, I am reducing my fee to 25%, which is more than fair in this scenario. I ask that [Lien Holder] make this concession to get the case resolved. Please let me know as soon as possible. Thanks,”



## The Ethics & Malpractice Risks of “Zealous Representation”

None - First, we held that the referee "improperly focused upon Schwartz's asserted motive" to provide constitutionally effective assistance of counsel.

90 Day - The referee distinguished these cases, relying on factual differences. However, in each case, as with Schwartz's conduct, the lawyers acted dishonestly.

Three Years

*Fla. Bar v. Schwartz*, 334 So. 3d 298 (Fla. 2022)

## RULE 4-8.4: MISCONDUCT

It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation...

While representing the defendant in a criminal matter, Attorney created two black and white photocopies of a police lineup. In each, Attorney altered the defendant's picture. In one exhibit, he replaced the defendant's face with that of an individual whom witnesses other than the robbery victim had identified as the perpetrator. In the other, Attorney changed the defendant's hairstyle. However, the altered photocopies used at the deposition retained the victim's identification of the defendant, including both her circle around what had been the defendant's picture and her signature at the bottom of the lineup, as well as a police officer's signature. Court held that it was an undisputed fact that Attorney knowingly and deliberately created the exhibits by altering photocopies of the police lineups and showing them to the victim at the deposition and that the exhibits were deceptive on their face, thus intent to create what were deceptive exhibits in themselves led to the inescapable conclusion that Attorney violated FlaRulePC 4-8.4(c)

Finally, we reiterate that the requirement to provide **zealous representation**, as contemplated under our ethical rules, *see Florida Bar v. Roberts*, 689 So. 2d 1049, 1051 (Fla. 1997) ("Failing to represent one's client zealously, failing to communicate effectively with one's client, and failing to provide competent representation are all serious deficiencies, even when there is no evidence of intentional misrepresentation or fraud."), does not excuse engaging in misconduct, irrespective of one's intent to benefit the client. As we have previously observed, "[w]e must never permit a cloak of purported zealous advocacy to conceal unethical behavior." *Fla. Bar v. Buckle*, 771 So. 2d 1131, 1133 (Fla. 2000). At the same time, we have recognized that "ethical problems may arise from conflicts between a lawyer's responsibility to a client and the lawyer's special obligations to society and the legal system. . . . 'Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.'" *Id.* at 1133-34 (quoting *Fla. Bar v. Machini*, 635 So. 2d 938, 940 (Fla. 1994)). In the instant case, we are of the opinion, in light of [Attorney's] history of repeated transgressions and the increasing egregiousness of each infraction, that he has been an **overzealous** advocate incapable of seeing the forest for the trees.

# Thank You

**The Bar Plan Mutual  
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