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The Ethics & Malpractice Risk of "Zealous Representation"

April 18, 2023

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**THE ETHICS AND MALPRACTICE RISK OF
“ZEALOUS
REPRESENTATION”**

April 18, 2023

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**THE ETHICS AND MALPRACTICE RISK OF
“ZEALOUS REPRESENTATION”**



Agenda

- 8:30 A.M. Registration and Coffee
- 8:55 A.M. Welcome and Introduction
- 9:00 A.M. The QUIZ – A potpourri of the hottest topics in legal malpractice and ethics, and what you need to know to protect yourself from novel malpractice risks and ethics complaints
- 10:00 A.M. Break
- 10:30 A.M. A look at Indiana Rules of Professional Conduct
- 1.3. Diligence
 - 3.1. Meritorious Claims and Contentions,
 - 3.2. Expediting Litigation
 - 3.3. Candor Toward the Tribunal
 - 3.4. Fairness to Opposing Party and Counsel
 - 3.5. Impartiality and Decorum of the Tribunal
 - 4.1. Truthfulness in Statements to Others
 - 4.4. Respect for Rights of Third Persons
 - 8.4. Misconduct, and how these Rules constrain lawyers’ professional and personal conduct
- 11:10 A.M. Break
- 11:15 P.M. The Ethics and Malpractice Risk of “Zealous Representation”, continued, with an examination of real-world advocacy issues.
- 12:15 P.M. Lunch Break (on your own)

April 18, 2023

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**THE ETHICS AND MALPRACTICE RISK OF
“ZEALOUS REPRESENTATION”**



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Christian A Stiegemeyer is the Director of Risk Management for *The Bar Plan Mutual Insurance Company* and Executive Vice President of *The Bar Plan Foundation*. He annually conducts more than seventy Risk Management seminars, on a wide variety of ethical and legal malpractice issues, covering current issues concerning professionalism and providing practical solutions for dealing with malpractice and ethical concerns.

Mr. Stiegemeyer also directs The Bar Plan's Practice Management Program, providing on-site, personalized reviews of lawyers' law firm practices to help improve risk management and case handling procedures. In addition, Mr. Stiegemeyer responds to The Bar Plan's ethics and malpractice telephone "Hotline" to timely assist its insureds with issues that arise in their daily practice and has written numerous articles appearing in a variety of national, state and local bar association publications. He received his B.A. from *Southeast Missouri State University* and J.D. from *The Saint Louis University School of Law* in 1992.

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

- Christian A. Stiegemeyer | Director of Risk Management



A QUIZ

- Christian A. Stiegemeyer | Director of Risk Management

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 IRPC 8.4(c) as conduct involving dishonesty, fraud, deceit, or misrepresentation.

B. Does not violate IRPC 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 IRPC 8.4(c) because your answer, in context, is truthful.

D. Does not violate IRPC 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 IRPC 8.4 when he failed to reveal the quarter million dollar payment. Your ethics complaint:

A. Is proper because IRPC 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 1st Amendment expression.

D. Violate IRPC 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 IRPC 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 IRPC 7.3

B. Is permissible per IRPC 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 IRPC 7.3(b)(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 IRPC 1.6. Confidentiality of Information.

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

C. Do not violate IRPC 1.6. Confidentiality of Information 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 IRPC 8.4(d) as conduct that is prejudicial to the administration of justice.

D. Does not violate IRPC 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:

IRPC 8.4(g): MISCONDUCT

It is professional misconduct for a lawyer to engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection.

A. Shall report Adverse Counsel's comment per IRPC 8.4(g) and 8.3(a).

B. Shall report Adverse Counsel's comment per IRPC 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 IRPC 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 IRPC 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 an Indiana and Arizona law license. You would like to join an Arizona ABS law firm that would open an Indiana office location that you would manage. You would practice primarily in Indiana on Indiana cases. A portion of the fees earned on your Indiana 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 IRPC 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 Indiana.

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 IRPC 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.



The Ethics & Malpractice Risks of “Zealous Representation” Indiana

- Christian A. Stiegemeyer | Director of Risk Management

Former Chief Justice Warren E. Burger

**The Ethics &
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“Zealous
Representation”**

“As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers...The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.” *In re Moore*, 665 N.E.2d 40 (Ind. 1996), quoting *In re Snyder*, 472 U.S. 634, at 644-45, 105 S.Ct. 2880, at 2881 (1985).

The Ethics & Malpractice Risks of “Zealous Representation”

PREAMBLE: A LAWYER'S RESPONSIBILITIES

Indiana [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 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 intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

Model Rule [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.

Indiana [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 an **effective** advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

Model Rule [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.

The Ethics & Malpractice Risks of “Zealous Representation”

PREAMBLE: A LAWYER'S RESPONSIBILITIES

Indiana [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 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.

Model Rule [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”

IRPC 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 may 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.

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.

Model Rule 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.

**The Ethics &
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“Zealous
Representation”**

And yet...

Johnson v. State, 2023 Ind. App. LEXIS 16

Civil Commitment v. Health & Hosp., 199 N.E.3d 360 (Ind. 2022).

In re E.D., 196 N.E.3d 1234 (Ind. Ct. App. 2022).

Bertucci v. Bertucci, 177 N.E.3d 1211 (Ind. Ct. App. 2021).

Boonstra v. Corcoran, 171 N.E.3d 659 (Ind. Ct. App. 2021).

Davis v State, 163 N.E.3d 328 (Ind. Ct. App. 2020).

Ridley v. Kroger, 157 N.E.3d 1264 (Ind. Ct. App. 2020).

River Ridge Dev. Auth. v. Outfront Media, LLC, 146 N.E.3d 906 (Ind. Ct. App. 2020).

Arington v. Eaton's Trucking Serv., 146 N.E.3d 358 (Ind. Ct. App. 2020).

Staff Source, LLC v. Wallace, 143 N.E.3d 996 (Ind. Ct. App. 2020).

**The Ethics &
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And yet...

34-52-1-1. Costs — Attorney’s fees.

(a) In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.

(b) In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party:

(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;

(2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless;
or

(3) litigated the action in bad faith.

(c) The award of fees under subsection (b) does not prevent a prevailing party from bringing an action against another party for abuse of process arising in any part on the same facts. However, the prevailing party may not recover the same attorney’s fees twice.

The Ethics & Malpractice Risks of “Zealous Representation”

Bertucci v. Bertucci, 177
N.E.3d 1211 (Ind. Ct.
App. 2021).

And yet...

Grandmother and Grandfather were sued when granddaughter was bitten by dog . Because Grandfather did not have control of the property at the time of the bite he argued he owed no duty to the granddaughter, and his Attorney moved for summary judgment.

AC emailed Attorney that, based upon Grandfather's deposition testimony, Grandfather's summary judgment motion was baseless and that an attorney that continues to litigate a baseless matter without a good faith basis is subject to paying the responding party's attorney fees. AC stated he had filed for attorney fees in the past and included a copy of his most recent order on the subject entered. When Attorney did not withdraw SJM, AC filed a motion to dismiss and for attorney's fees sanctions motion. Attorney filed a response and across-motion for attorney's fees.

The trial found and the appellate court affirmed that AC had the materials supporting the good faith summary judgment motion. These supported a conclusion that the AC's motion for attorney fees and costs was groundless.

The Ethics & Malpractice Risks of “Zealous Representation”

Bertucci v. Bertucci, 177
N.E.3d 1211 (Ind. Ct.
App. 2021).

And yet...

At the outset, we note that “[p]rofessionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it.” *Wisner v. Laney*, 984 N.E.2d 1201, 1203 (Ind. 2012).

Filing a groundless request for attorney fees and costs is, in essence, a baseless accusation of unethical conduct aimed at a fellow lawyer. Indiana Rule of Professional Conduct 3.1 prohibits a lawyer from bringing a frivolous or groundless claim. Further, a frivolous or groundless claim may constitute conduct prejudicial to the administration of justice pursuant to Indiana Rule of Professional Conduct 8.4(d). *See In re Oliver*, 729 N.E.2d 582, 586 (Ind. 2000). *See also* Ind. R. Prof. Conduct 3.3 (requiring candor towards the tribunal).

Filing a groundless request for attorney fees and costs is, quite simply, an example of incivility, which is prohibited by the rules of professional conduct, and, as here, can result in fees being assessed against those asserting groundless claims.

The Ethics & Malpractice Risks of “Zealous Representation”

IRPC 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. [See further for criminal proceeding exception.]

And yet...

To be sure, application of the statutory authorization for recovery of attorney's fees . . . must leave breathing room for zealous advocacy and access to the courts to vindicate rights. Courts must be sensitive to these considerations and view claims of "frivolous, unreasonable, or groundless" claims or defenses with suspicion. *Staff Source, LLC v. Wallace*, 143 N.E.3d 996 (Ind.Ct.App. 2020) quoting *Kahn v. Cundiff*, 533 N.E.2d 164 (Ind.Ct.App. 1989).

Ind. Code § 34-52-1-1(b) "places an obligation on litigants to investigate the legal and factual basis of the claim when filing and to continuously evaluate the merits of claims and defenses asserted throughout litigation."

"A claim is 'frivolous' if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law."

"A claim is 'unreasonable' if, based on the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation."

"A claim is groundless if no facts exist which support the legal claim relied on and presented by the losing party."
“

However, the law is settled that a claim is neither groundless nor frivolous merely because a party loses on the merits." "Bad faith is demonstrated where the party presenting the claim is affirmatively operating with furtive design or ill will." *Id.* [Internal cites omitted.]

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A Look at Rules...

RULE 1.3. DILIGENCE

RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

RULE 3.3. CANDOR TOWARD THE TRIBUNAL

RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

RULE 8.4. MISCONDUCT

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

IRPC 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.

IRPC 3.2. EXPEDITING LITIGATION

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

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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*.

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In re Johnston, 520 P.3d
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IRPC 3.3. Candor Toward the Tribunal

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

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IRPC 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

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.

The [attorney] respondent 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.

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In re Johnston, 520 P.3d
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IRPC 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

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.

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IRPC 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)*.

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“The attorney was the lawyer for the wife in a divorce proceeding”

“The respondent represented the father in a custody matter.”

“[R]espondent filed an emergency petition seeking modification of support”

“[R]espondent represented the paternal grandparents of a child in custody proceedings”

IRPC 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.

In re Anonymous, 43 N.E.3d 568 (Ind. 2015) (“Respondent was hired by the maternal grandparents of a young child...”)

In re Cotton, 939 N.E.2d 619 (Ind. 2010). (“In a divorce proceeding...”)

In re Price, 899 N.E.2d 645 (Ind. 2009) (“Respondent represented a client in trying to establish his paternity of a child.”)

In re Robison, 856 N.e.2d 1202 (Ind. 2006). (“Respondent represented the husband...”)

In re Ettl, 851 N.E.2d 1258 (Ind. 2006). (“Lawyer’s filing of an emergency request for custody...”)

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In re Johnston, 520 P.3d
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(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. See exceptions in 3.6(b)(1)-(7).

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.”)

The Ethics & Malpractice Risks of “Zealous Representation”

Indiana Ethics Opinion #1-22 - Lawyers' Public Comments on Pending Matters, 3/22.

Summary - In an age of omnipresent social media and press, attorneys must be conscious of the Indiana Rules of Professional Conduct's provisions regarding extrajudicial statements. When an attorney participates in pretrial publicity and makes comments on social media about pending legal matters, the attorney must consider the ethical obligations the attorney owes to clients, third parties, and the legal system generally.

The Ethical Problems

Several rules guide attorneys on when, what, and how to address the public regarding the attorney's participation in ongoing adjudicative proceedings.

- 1 - Attorneys should not make extrajudicial comments without the consent of their client. IRPC 1.6(a).
- 2 - Attorneys should not make extrajudicial statements about cases in which they are participating (or had participated) that will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. IRPC 3.6(a);
- 3 - Attorneys may make extrajudicial statements that a reasonable attorney would conclude is [sic] necessary to combat negative publicity not initiated by the client, limited to only that which is needed to mitigate adverse publicity. IRPC 3.6(c)

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IRPC 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (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 paragraph (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.

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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.

(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.

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

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 prejudicial to the administration of justice), and

KRPC 8.4(g) (professional misconduct that adversely reflects on fitness to practice law).

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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).

IRPC 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.’”

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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)

IRPC 3.4. 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 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.

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IRPC 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

Rule 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 relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

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. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, “document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

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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)

IRPC 8.4. MISCONDUCT

Rule 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;
- (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) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

Attorney sent email to attorney for 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,”

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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)

IRPC 8.4. MISCONDUCT

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

While representing [Client] in a criminal matter, [Attorney] created two photocopies of a police lineup. In each, [Attorney] altered [Client's] picture. In one, he replaced [Client's] face with that of an individual other witnesses identified as the perpetrator. In the other, [Attorney] changed [Client's] hairstyle. The altered photocopies retained the victim's identification of [Client], including the victim's circle around what had been [Client's] picture and her signature at the bottom of the lineup, as well as a police officer's signature. Court held that it was undisputed [Attorney] knowingly and deliberately created the altered exhibits showed them to the victim at her deposition and that the exhibits were deceptive. Thus, [Attorney's] intent to create deceptive exhibits led to the conclusion that [Attorney] FRPC 4-8.4(c)

Held – The Court noted that the requirement to provide zealous representation, as contemplated under the ethical rules, did not excuse engaging in misconduct, irrespective of one's intent to benefit the client.

The Court 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 and that such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.



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Christian A. Stiegemeyer | Director of Risk Management

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In re Thonert, 733 N.E.2d
932 (Ind. 2000).

IRPC 3.3. Candor Toward the Tribunal

IRPC 3.3(a)(3) provides that a lawyer shall not knowingly fail to disclose to a 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. The concept underlying this requirement of disclosure is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. *Comment* Ind. Professional Conduct Rule 3.3.

The respondent's intimate familiarity with *Fletcher* is established by his having served as counsel to the defendant.

Accordingly, we find that the respondent violated the rule by failing to disclose *Fletcher* to the Court of Appeals in his legal arguments on behalf of the client.

IRPC 1.4(b) provides that a lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding a representation. A client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation. *Comment* [5].

By failing to advise his client of a ruling in the controlling jurisdiction that was adverse to the legal arguments contemplated for his client's case on appeal, and instead choosing only to advise the client of an earlier appellate decision favorable to his position, the respondent effectively divested his client of the opportunity to assess intelligently the legal environment in which his case would be argued and to make informed decisions regarding whether to go forward with it.

Accordingly, we find that the respondent violated Prof.Cond.R.1.4(b).

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Demoss v. State, 2022 WL
17245109, 11/28/2022.

IRPC 3.3. Candor Toward the Tribunal

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

[Defendant] also asserts that the trial court committed fundamental error when it did not sua sponte sever the State's charges against him. [Defendant's] appellate counsel has made this argument to our Court before, and we have rejected the argument in a published opinion. See *Norton v. State*, 137 N.E.3d 974, 982 (Ind. Ct. App. 2019), *trans. denied*. Nonetheless, appellate counsel neither cites nor discusses our precedent in *Norton* in her brief in this appeal... We remind counsel that she has an affirmative obligation to "not knowingly . . . 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" Ind. Professional Conduct Rule 3.3(a)(2).

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In re Cardwell, 50 P.3d 897
(Colo. 2002)

IRPC 3.3. Candor Toward the Tribunal

[Attorney], represented the client in two unrelated DUI cases, the first in County One and the second in County Two. In February client pleaded guilty, under a plea agreement, to DWAI in County One and to probation.

In May [Attorney] negotiated a plea agreement with the County Two D.A. [Attorney] did not inform the D.A. about the County One case. Both [Attorney] and client signed an agreement containing the condition that client had “[n]o prior or pending alcohol related driving offenses in this or any state.” [Attorney] knew when he signed the document his client had previously entered a guilty plea to DWAI in County One. The transcript of the May sentencing hearing provided:

COURT: ... [Your client] is going to be entering a plea of guilty today to a charge of driving while impaired, *first offense*, is that correct?

MR. CARDWELL: *That is correct your Honor.*

COURT: And all other charges would be dismissed?

MR. CARDWELL: That is correct. That is our understanding. I don't know if the Court is able to do this, *go for immediate sentencing or not?*

COURT: Have you ever had an alcohol driving offense before?

MR. CARDWELL: *No sir.*

COURT: [To the client] Okay, is that your representation ... ?

[CLIENT]: Yes sir.

COURT: Okay, never ever, at any time, any place?

[CLIENT]: No.

COURT: Okay. *We will be able to do that then.*

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In re Cardwell, 50 P.3d 897
(Colo. 2002)

IRPC 3.3. Candor Toward the Tribunal

[Attorney] was charged and pleaded guilty to attempting to influence a public servant, a class 4 felony, and perjury in the second degree, a class 1 misdemeanor, and received a deferred judgment and a four year sentence on the felony count. He was required to pay \$4000 in fines, attend ethics courses, and serve 200 hours of community service.

In response to grievance hearing [Attorney] argued that because he had already been criminally prosecuted for the conduct forming the basis of the grievance proceeding, and been punished for it, he may not be subsequently punished in a grievance proceeding. Court rejected this argument.

HELD - [W]e [the Colorado Supreme Court] have made it clear that the primary purpose of lawyer regulation proceedings is to ***protect the public***, not to ***punish*** the offending lawyer.

Protection or Punishment

E.g., *In re Smith*, 97 N.E.3d 621 (Ind. 2018). Respondent communicated to his wife a threat to murder her with an axe then immediately drove to her house with an axe. Was convicted of intimidation, a level 6 felony. The court held that Attorney violated IRPC 8.4(b) by committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer.

The court noted that it long emphasized that a license to practice law is a privilege, and that privilege is conditioned upon the faithful performance of the responsibilities imposed upon the attorney by the society that grants the privilege, citing *Matter of Keaton*, 29 N.E.3d 103, 110 (Ind. 2015).

The Ethics & Malpractice Risks of “Zealous Representation”

Protection or Punishment

We have long emphasized that a license to practice law is a privilege... conditioned upon the faithful performance of the responsibilities imposed upon the attorney by the society that grants the privilege. *In re Keaton*, 29 N.E.3d 103 (Ind. 2015), citing *Baker v. Keisker*. (Violation of 8.4(b), stalking, harassment, intimidation, determined sua sponte(?))

“The practice of law is a privilege rather than a natural or vested right.” *Baker v. Keisker*, 142 N.E.2d 432 (Ind. 1957), citing *Harrison*. (Disbarment action related to trust account violation.)

“The practice of law is a privilege rather than a natural or vested right.” *In re Harrison*, 109 N.E.2d 722 (Ind. 1953), citing *Hulbert*. (Disbarment action, violation of 8.4(b) commit a criminal act, perjury in connection with Trustee's final report)

“It is recognized in all of the cases...that...private individuals may not maintain an action to enjoin the violation of a statute requiring a license for the practice of a profession. *Hulbert v. Mybeck*, 44 N.E.2d 830 (Ind. 1942), citing *McDonald*. (Enjoining UPL by Clerk of the Court. Action brought by attorney, on behalf of himself and all of the members of the Gary Bar Assoc.)

“The Constitution of Indiana makes good moral character an essential qualification for admission to practice law in this state. Art. 7, 21...[repealed 1932]...It...follows that the practice of law in this state is not an unqualified constitutional or natural right. It should be termed a privilege which, when once lawfully acquired, continues during good behavior.” *In re McDonald*, 164 N.E. 261 (Ind. 1928). (Attorney failed to disclose disbarment in KY when apply pro hac in Ind.)

The Ethics & Malpractice Risks of “Zealous Representation”

In re Steele, 181 N.E. 3d
976 (Ind. 2022).

Pro Se Attorneys & “Zealous Representation”

A dispute arose between [Attorney] and a long-time friend ("Smith"), a Nevada resident, regarding an oral promise Smith allegedly had made to pay [Attorney's] costs toward an educational program. After [Attorney] emailed a demand letter to Smith and Smith's counsel ("Kealey"), Kealey replied with a directive that [Attorney] direct [Attorney's] communications to him and cease all communications with Smith. [Attorney] and Kealey then had a series of communications regarding [Attorney's] demand and threatened lawsuit. These communications were not fruitful, and [Attorney] filed a lawsuit against Smith in Marion Superior Court.

One week after that, Respondent sent a profanity-laced email to Smith threatening to visit Smith in person and demanding that Smith bypass Kealey and discuss the matter with Respondent directly:

*This is me writing you. I'm tired of talking to that d*****bag lawyer. Your birthday is in a few hours. I'm out west and gonna drive to Vegas. If you don't want to speak to me you'll have to tell your security people to turn me away. You have a choice. Send this to your dork of a lawyer who will try to make more stupid arguments, or have a bit of respect for 30 years of friendship and 7 years I have to your company and its wild success. Get the f***** lawyer out of this and talk to me like I'm the guy who's had your back for 32 years (and still counting).*

The Ethics & Malpractice Risks of “Zealous Representation”

For example, Rule 1.15 might...require a pro se lawyer to establish a separate IOLTA account for himself as a "client".

If the lawyer represents himself *gratis*, would Rule 6.1 allow him to count his pro se hours as pro bono hours.

The Rules treat client and lawyer as separate persons who may enter a representation relationship, and we should interpret Rule 4.2 consistent with the Rules' framework.

In re Steele, 181 N.E. 3d 976 (Ind. 2022).

Pro Se Attorneys & “Zealous Representation”

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 by law or a court order.

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.

[Attorney] argued he was entitled to send the email, claiming he was not “representing a client”, and second, COMMENT [4] allows parties to communicate directly.

HELD - The overarching purposes of the rule are "to prevent lawyers from taking advantage of laypersons and to preserve the integrity of the lawyer-client relationship[.]"...[W]e have explained that an attorney's attempt to bypass opposing counsel in order to pressure an opposing party to settle on less favorable terms "undermines the representative adversarial system." This is precisely what Respondent did here; and it makes little difference (nor should it) that he did so while representing himself and not someone else. (Internal cites omitted.)

The commentary to Rule 4.2 reinforces this conclusion, notwithstanding Respondent's reliance on one isolated clause within that commentary...Put simply, neither the clause Respondent cites out of context nor anything else in Comment 4 provides cover for an attorney to engage in conduct that violates the rule simply because the attorney is a party representing himself.

DISSENT - Under the Court's interpretation of this rule, "client" and "lawyer" may be one and the same person. But to treat them as the same person would twist our understanding of the client-lawyer relationship under our rules of professional conduct and stretch the word "client" beyond its plain meaning. It might also lead to counterintuitive outcomes.

The Ethics & Malpractice Risks of “Zealous Representation”

In re Steele, 181 N.E. 3d
976 (Ind. 2022). Decided;
March 4, 2022

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.”

IRPC 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 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”

In re Coleman, 67 N.E.
3d 629 (Ind. 2017).

Misdirected “Zealous Representation”

Client was charged with child molestation. Shortly thereafter [Attorney] mailed [Client] a letter soliciting employment, stating he could give the best possible representation for a reasonable fee, and falsely represented he was associated with "The [Johnnie] Cochran Firm,"

[Attorney] had minimal criminal law experience and none in child molestation cases. Client hired [Attorney] for a flat fee of \$4,000.

[Attorney]: 1) failed to keep Client informed; 2) failed to consult with Client; 3) failed to appear at a pretrial conference; 4) misinformed Client that prosecutor would not be shown polygraph results; 5) deceived Client into signing a new fee agreement; and 6) negotiated a plea agreement despite Client's prior instructions that he would not enter a plea agreement.

Client fired [Attorney] and hired new counsel. [Attorney] did not withdraw or forward a copy of Client's file to new counsel until after a show cause proceeding was initiated against him. The charge was ultimately dismissed.

[Attorney] billed Client and filed suit to collect, including interest close to 25%. The bill was inflated with activities for which [Attorney] performed minimal or no work or that had little or no value to Client's case.

[Attorney] sought sums for time and expenses allegedly incurred in withdrawing and filing suit against Client. Client filed a counterclaim. At a deposition of a witness [Attorney] named, he concealed that she was his wife. Judgment was entered for Client for \$11,000. [Attorney] appealed and filed a motion to compel the court reporter to complete the transcript, even though he had not made payment arrangements. His appeal was dismissed for failure to make payment arrangements.

The Ethics & Malpractice Risks of “Zealous Representation”

In re Coleman, 67 N.E.
3d 629 (Ind. 2017).

Misdirected “Zealous Representation”

The Court Held

Weighing in Attorney's favor:

- 1) His lack of prior discipline; and
- 2) Most of the misconduct at issue in this case involved a single client.

Weighing against Attorney:

- 1) Misconduct was wide-ranging, pervasive, retaliatory, and deceptive at multiple junctures;
- 2) Wife was used to deceive Client in subsequent litigation;
- 3) Systemic malfeasance in connection with his representation;
- 4) Criminal conduct; and
- 5) His less-than-effective self-representation during most of the disciplinary proceedings:

ALL

Reflect exceedingly poorly on his fitness to practice law.

The Ethics & Malpractice Risks of “Zealous Representation”

7.2(b): Public communication-
false/fraudulent/misleading/deceptive/s
elf-laudatory/unfair.

7.2(c)(3) (2007): Making a statement
likely to create unjustified expectation.

7.3(c) (2007): Solicitation w/o the
words "Advertising Material."

8.4(b): Criminal act reflecting adversely
on honesty, trustworthiness, or fitness.

8.4(c): Conduct involving dishonesty,
fraud, deceit, or misrepresentation.

8.4(d): Conduct prejudicial to the
administration of justice.

Misdirected “Zealous Representation”

1.1: Failing to provide competent representation.

1.2(a): Failing to abide by client's decisions concerning representation.

1.3: Failing to act with reasonable diligence and promptness.

1.4(a)(3): Failing to keep client reasonably informed about status of a matter.

1.4(b): Failing to explain a matter to the extent necessary for client to make informed decisions.

1.5(a): Making an agreement for, charging, or collecting an unreasonable fee.

1.5(b): Failing to communicate the basis or rate of the fee and expenses for which a client will be responsible before or within a reasonable time after commencing the representation.

1.8(a): Entering into a business transaction with a client (a revised fee agreement) unless...

1.16(d): After the termination failing to protect client's interests and promptly to return case file.

3.1: Asserting a position for which there is no non-frivolous basis in law or fact.

3.2: Failing to expedite litigation consistent with the interests of a client.

3.3(a)(3): Offering evidence the lawyer knows to be false, and failing to take remedial efforts.

3.4(c): Knowingly disobeying an obligation under the rules of a tribunal.

4.1(a): Knowingly making a false statement of material fact to a third person.

The Ethics & Malpractice Risks of “Zealous Representation”

In re Smith, 181 N.E.3d 970
(Ind. 2022)

IRPC 8.2. JUDICIAL AND LEGAL OFFICIALS

(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.

Attorney filed a brief appealing the trial court’s granting of injunctive relief against Client in which Attorney described the conduct of the trial court as:

- 1) Demonstrating extreme bias and prejudice;
- 2) Submissive interactions with AC;
- 3) Creating the appearance of doing the bidding of AC dutifully and without question;
- 4) Proactively assisting in the elimination of Client’s due process.“
- 5) Intentionally misleading Attorney;
- 6) Among others.

The hearing officer's report comprehensively debunked the factual assertions made by Attorney the brief.

Attorney argued that the court had previously recognized the need for wide latitude in engaging robust and effective advocacy on behalf of clients. The court noted that "wide latitude" is not a blank check and is tempered by good faith professional advocacy.

“Put simply, [Attorney] has not offered any support for his statements about [Judge’s] integrity beyond assertions that are belied by the record.”

The court also noted Attorney had not filed a grievance against the judge as would be required by IRPC 8.3(b) which requires an attorney who "knows" that a judge has violated the rules of judicial conduct in a manner raising a substantial question as to the judge's fitness for office to inform the appropriate authority. Even short of such actual knowledge, a lawyer may still file a grievance if he has reason to believe a violation may have occurred, citing *Matter of Becker*, 620 N.E.2d 691, 694 (Ind. 1993). “While these facts do not approach judicial misconduct, when an attorney is confronted with what appears to be judicial misconduct, the appropriate avenue is the judicial disciplinary process available through the Indiana Commission on Judicial Qualifications.”

The Ethics & Malpractice Risks of “Zealous Representation”

IRPC 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 relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Attorney obtained a judgment for client Bank that became a lien on Homeowners' property. The lien judgment was later discharged in bankruptcy. When attempting to refinance, Homeowners discovered lien, contacted Attorney, and requested he release the lien. By written response, the respondent advised that, "[t]he lien of the [bank] was apparently not avoided in [the couple's] bankruptcy even though it might have been," and that, "[the bank] will release the judicial lien it now apparently holds against the real estate. . . upon receipt of the sum of \$1,000.00." At that time, Attorney's file was in storage and he did not specifically recall the circumstances of the case. Homeowners paid the \$1,000 to secure the release. Attorney retained \$333.33 of the payment as his contingent fee.

Attorney argued:

- 1) The hearing officer found that the assertion that the lien had [not][sic] been avoided was not material because the couple would have paid the \$1,000 to have the record released regardless of [Attorney's] statement;
- 2) Homeowners' lender had a copy of the B. court's avoidance order; and
- 3) He should not be punished just because the couple chose to use an "overly fastidious" title company and lender who, despite the avoidance of the lien in bankruptcy, required formal release of record.

The Ethics & Malpractice Risks of “Zealous Representation”

In re Wagner, 744 N.E.2d 422
(Ind. 2001).

By this opinion today, we do not hold that a legal fee can never be collected for releasing a lien where that lien has been avoided in bankruptcy. A legal fee may be appropriate, for example, where the original creditor has some lien right above the allowed exemptions, where the cost of procuring the release justifies the fee, or where some other circumstance supports a fee.

IRPC 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or.

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

HELD – As to IRPC 4.1, had Attorney reviewed the closed case file, his actions in objecting to and then dismissing objection to the discharge would have been apparent. Instead, Attorney advised Homeowners and lender that the lien had "apparently" not been avoided, just prior to informing them that formal release would require payment of \$1,000. Violation of IRPC 4.1(a) requires a lawyer's "knowing" false statement of material fact or law to a third person. "Knowingly," denotes actual knowledge of the fact in question, but a person's knowledge may be inferred from circumstances. *Preamble, IRPC*. Misrepresentation can occur by failure to act. *Comment* to IRPC.

As to IRPC 4.4, there was no evidence that the \$1,000 fee bore any relation to any residual lien right the Bank had, and, Attorney's withdrawal of his objection suggests that he concluded no such lien right existed. Further, Attorney provided no evidence that releasing the lien required \$1,000 or even \$333 worth of services. Viewed in its totality, the sequence of events depicts a lawyer who realized that a former bankruptcy debtor's unfortunate predicament provided an opportunity to extract a fee for a simple release of a lien that had already been avoided in bankruptcy, without regard to the underlying merits of the matter.

The Ethics & Malpractice Risks of “Zealous Representation”

In re Johnson, 778
N.E.2d 805 (Ind. 2002).

Silence & “Zealous Representation”

Rule 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.
- (d) engage in conduct intended to disrupt a tribunal.

[Attorney] failed to advise the court that a witness adverse to his client, who the court thought had failed to appear for trial, was in fact present and waiting outside the courtroom to be called to testify. [Attorney] then solicited a court reporter to alter a transcript of court proceedings in which [Attorney] acknowledged his failure to advise the court of the witness's presence.

[Attorney] was charged with one count of Obstruction of Justice and one count of Attempted Obstruction of Justice as class D felonies.

HELD – [Attorney] violated IRPC 3.5(c)[current(d)], which prohibits an attorney from engaging in conduct that disrupts a tribunal; IRPC 8.4(b), which forbids an attorney from committing a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer; and IRPC 8.4(d), which bars an attorney from engaging in conduct prejudicial to the administration of justice.

The Ethics & Malpractice Risks of “Zealous Representation”

As noted in the *Comment* to this rule, "although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice." There must be a nexus between the criminal act and one of the three personal qualities set forth in *Prof. Cond.R. 8.4(b)*, to-wit: honesty, trustworthiness, or fitness as an attorney. We find no difficulty in concluding that the requisite nexus is present. The respondent's conduct clearly and unequivocally reflected adversely on his fitness as an attorney.

In re Moore, 665 N.E.2d
40 (Ind. 1996) - Former Chief
Justice Burger quote.

“Violence” & “Zealous Representation”

Rule 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.
- (d) engage in conduct intended to disrupt a tribunal.

[Attorney] appeared for a hearing in visitation matter. Prior to the hearing, [Attorney] and AC met with the judge in chambers to discuss the resolution of issues during which AC suggested [Attorney] was not being truthful. As they were leaving chambers, [Attorney] told AC he was offended by his comment and took AC's tie in his hand. After [Attorney] released the tie, AC cursed [Attorney]. [Attorney] then struck AC with one blow causing him to fall back onto a table in the judge's chambers.

HELD – The Court found little merit to the arguments offered by the [Attorney], who attempted to diminish the totality of the circumstances by artfully isolating the components. The Court refused this approach in disciplinary matters, noting that it would assess disciplinary misconduct on the totality of the circumstances found in the case and concluded that [Attorney's] conduct violated IRPCs 3.5(c) [current (d)] and 8.4(b).

“Violence” & “Zealous Representation”

And see...

“Lawyer is suspended for flashing gun at deposition, other 'appalling' behavior.” - ABA Journal, 9/13/2018.

The Ethics & Malpractice Risks of “Zealous Representation”

During a deposition [Attorney] used vulgarities, called the deponent derogatory names, aggressively interrupted the deponent and opposing counsel, answered questions for the deponent, and repeatedly made inappropriate statements on the record.

At one point [Attorney] asked the deponent if he was “ready for it” while positioning his hand near his hip. The deponent briefly left the room, but when he returned [Attorney] displayed a firearm he had holstered on his hip to the deponent and opposing counsel. As a result, the deposition was terminated and the underlying defamation litigation was put on hold pursuant to an order by the discovery commissioner. The discovery commissioner also sanctioned [Attorney] for his conduct.

Violation of 8.4(d) - IN RE:
DISCIPLINE OF James W.
PENGILLY 9/7/2018

Thank You

**The Bar Plan Mutual
Insurance Company**

Christian A. Stiegemeyer
Director of Risk Management