

Litigation Ethics and Sanctions Law

October 6, 2026

MO Bar CLE #799497

KS Activity #240367

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"Chapters" of Ethics Rules

4-1.0	Terminology	
4-1.X	Client-Lawyer Relationship (21 rules)	
4-2.X	Counselor (3 rules)	
4-3.X	Advocate (9 rules)	
4-4.X	Transactions with Persons Other than Clients	(4 rules)
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4-3.X Rules

- 4-3.1 Meritorious Claims and Contentions
- 4-3.2 Expediting Litigation
- 4-3.3 Candor toward the Tribunal
- 4-3.4 Fairness to Opposing Party and Counsel
- 4-3.5 Impartiality and Decorum of the Tribunal
- 4-3.6 Trial Publicity
- 4-3.7 Lawyer as Witness
- 4-3.8 Special Responsibilities of a Prosecutor
- 4-3.9 Advocate in Nonadjudicative Proceedings

What Is a Tribunal?

Rule 4-1.0(m) "Tribunal" denotes a **court**, an arbitrator in a **binding arbitration** proceeding or a legislative body, administrative agency or other body acting in an **adjudicative capacity**. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

"Tribunal" Under Rule 4-3.3

Rule 4-3.3 cmt [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 4-1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an **ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition**. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

Rule 4-3.1: Meritorious Claims

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.

Rule 4-3.2: Expediting Litigation

Expediting Litigation – Rule 4-3.2

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

Rule 4-3.3 (and more): Rules of Candor

Candor – Rule 4-3.3(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.

Remediation – Rule 4-3.3(b) & (c)

- 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 4-1.6**.

Candor Outside Court – Rule 4-4.1

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 when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6.

Candor Catch-All – Rule 4-8.4(c)

Rule 4-8.4 (catch-all)

It is **professional misconduct for a lawyer** to:

...

(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**; ...

Presenting False Evidence – Rule 4-3.4

Rule 4-3.4 A lawyer shall not:

...

- (b) **falsify evidence**, counsel or assist a witness **to testify falsely**, or offer an inducement to a witness that is prohibited by law;

...

- (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

Missouri Rule 55.03

(a) Signature Required. Every pleading, motion and other filing shall be signed by at least one attorney of record in the attorney's individual name or by the self-represented party. An attorney who assists in the preparation of a pleading, motion, or other filing for an otherwise self-represented person is not required to sign the document.

Below the signature shall be printed the signer's name, Missouri bar number (if applicable), address, telephone number, facsimile number, and electronic mail address, if any.

An unsigned filing shall be stricken unless the omission is corrected promptly after being called to the attention of the attorney or party filing same.

(b) Representation to the Court. By presenting and maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, or other paper filed with or submitted to the court, an attorney or party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

(1) The claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. An attorney providing drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney knows that such representations are false; and

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Missouri Rule 55.03(c)

Sanctions. If after notice and a reasonable opportunity to respond the court finds that Rule 55.03(b) has been violated, the court, subject to the conditions below, may impose an appropriate sanction upon the lawyers, law firms, or parties that have committed or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this Rule 55.03 shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate Rule 55.03(b). The motion shall be served as provided in Rule 43.01. The motion shall not be filed with or presented to the court unless, within 30 days after service of the motion, the challenged claim, defense, request, demand, objection, contention, or argument is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in representing or opposing the motion. Absent exceptional circumstances a law firm shall be held jointly responsible for violations committed by its partners, associates, or employees.

(B) On Court's Initiative. On its own initiative the court may enter an order describing the specific conduct that appears to violate Rule 55.03(b) and directing a lawyer, law firm or party to withdraw or correct the questioned claim, defense, request, demand, objection, contention or argument or to show cause why it has not violated the rule with respect thereto.

Missouri Rule 55.03(c)(2)

(2) Nature of Sanction - Limitations. A sanction imposed for violation of this Rule 55.03 shall be limited to that which is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. Subject to the limitations in Rule 55.03(c)(1), the sanction may consist of or include directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions shall not be awarded against a represented party for a violation of Rule 55.03(b)(2).

(B) Monetary sanctions shall not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose lawyers are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this Rule 55.03 and explain the basis for the sanction imposed.

Missouri Rule 55.03(d) and (e)

(d) Inapplicability to Discovery. This Rule 55.03 does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 56 to 61.

(e) Sanctions for Conduct in Prior Action. If conduct constituting a violation of Rule 55.03(b) occurs but the civil action is dismissed and if a civil action based upon or including the same claim against the same party is thereafter filed, the court, on its own motion or on motion of a party to the first action, may impose an appropriate sanction in the second action for the violation of Rule 55.03(b). The sanction shall be imposed in the manner provided by Rule 55.03(c). In determining the sanction to impose, the court shall consider the costs and expenses incurred in the action previously dismissed, including the reasonable attorney's fees incurred in the first action.

FRCP 11

(a) Signature.

Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

FRCP 11

(b) Representations to the Court.

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FRCP 11

(c) *Sanctions.*

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under [Rule 5](#), but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

FRCP 11

(d) Inapplicability to Discovery.

This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

No Falsehoods before Tribunals

Source	Conduct Regulated	Potential Sanctions	Other
Rule 4-3.1	No knowingly false or frivolous claims, defenses, or arguments	Discipline of attorney	
Rule 4-3.3	No false statements of law or fact to tribunal Need to disclose controlling, directly adverse authority not disclosed by opponent	Discipline of attorney	Duty overrides duty of confidentiality Duty to remedy misstated law or material fact continues to end of case
Rule 4-3.4	Cannot destroy or conceal evidence, falsify evidence, make frivolous discovery requests	Discipline of attorney	
Rule 4-8.4	Prohibits any conduct involving dishonesty, fraud, deceit, or misrepresentation	Discipline of attorney	

Source	Conduct Regulated	Potential Sanctions	Other
FRCP 11/MO Rule 55.03	Signature on pleadings shows non frivolous basis in fact and law, not for improper purpose	Monetary or non-momentary on lawyer, firm, and possibly client	21-day (MO – 30 day) safe harbor for motion (but not court sua sponte action)
FRCP 37/MO Rule 61.01	Incomplete, evasive, or unanswered discovery	Contempt of court, fees, compelled response or protective order, fees and costs	Fees required unless justified or no attempt to resolve
28 U.S.C. § 1927 § 514.205 RSMo.	Unreasonable or vexatious multiplication of proceedings	Award of extra fees and costs	Permissive award No safe harbor
Inherent power of the court	Power of court to punish and maintain order	Monetary and non-monetary powers	Very flexible Most concerns relate to "due process"

In re Krigel (Mo. 2016)

- Krigel had violated Rule 4-3.3 by soliciting false testimony, in that Krigel knew the testimony omitted essential information (that father wanted to claim parental rights but was unaware of birth)
- Krigel received a one-year "stayed suspension" with two years of probation

Precision Specialty Metals v. United States (Fed Cir. 2003)

- Court denied extension and ordered US to file response "forthwith"
- Government waited 12 days to file response
- Government argued "forthwith" allowed filing within 12 days

Precision Special Metals v. U.S.

(Fed Circuit 2003)

Court denied motion for extension of time and ordered US to file its response to a motion for summary judgment "forthwith." This started a fight as to what "forthwith" meant.

Filings

See City of New York v. McAllister Brothers, Inc., 278 F.2d 708, 710 (1960) ("Forthwith" means immediately, without delay, or as soon as the object may be accomplished by reasonable exertion." Emphasis added.)

Case Law

"Forthwith" means immediately, without delay, or as soon as the object may be accomplished by reasonable exertion. **The Supreme Court has said of the word that "in matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours."** *Dickerman v. Northern Trust Co.*, 1900 176 U.S. 181, 193, 20 S. Ct. 311, 315, 44 L. Ed. 423. *McAllister*, 278 F.2d at 710.

Filings

While we did not review the Supreme Court's decision in *Henderson v. United States*, 517 U.S. 654, 680 (1996), in interpreting the meaning of "forthwith," it is noteworthy that in his dissenting opinion, Justice Thomas, with whom The Chief Justice and Justice O'Connor joined, citing *Amella v. United States*, 732 F.2d 711, 713 (C.A. 1984), stated that "[a]lthough we have never undertaken to define 'forthwith' . . . , it is clear that the term 'connotes action which is immediate, without delay, prompt, and with reasonable dispatch.'")

Case Law

Although we have never undertaken to define "forthwith" **as it is used in the SAA**, it is clear that the term "connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella v. United States*, 732 F.2d 711, 713 (C.A.9 1984) (citing Black's Law Dictionary 588 (5th ed. 1979)). See also ***Dickerman v. Northern Trust Co.***, 176 U.S. 181, 192-193, 20 S.Ct. 311, 315, 44 L. Ed. 423 (1900). *Henderson*, 517 U.S. at 680 (Thomas, J., dissenting).

Ex Parte Proceedings – Rule 4-3.3

(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.

Bronston v. United States (US 1973)

- Bronston had personal Swiss bank account
- Bronston filed for bankruptcy – closed account right before bankruptcy
- Bronston's responses about Swiss bank accounts:
 - Do you have a Swiss bank account?
 - A: No sir
 - Have you ever?
 - A: The company had an account there for about six months
 -

Withdrawal in Light of False Testimony

- The lawyer may . . . be required by Rule 4-1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with Rule 4-3.3's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client.
- In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with Rule 4-3.3 or as otherwise permitted by Rule 4-1.6

Southland Homes v. Lam

(Cal. App. 2026)

- Attorney #1 prepared and signed a pleading that contained AI hallucinations, admitted the misconduct, and was sanctioned \$1500.
- Attorney #2 — the name partner of the firm — had his name on the pleading and testified he reviewed the pleading before filing. But he admitted he did not check, and argued he had no duty to check, the citations in a pleading he did not sign but upon which his name appeared.
- The California appellate court sanctioned Attorney #2 \$2500, stating Attorney #2 "offers no meaningful acceptance of responsibility and presses an unconvincing argument he bore no obligation to ensure the accuracy of the citations relied upon."

Impossible Foods Inc. v. Motif Foodworks (D. Del. 2023)

- Investigators set up fake company and engaged in communications seeking information about Motif's non-meat products as potential business-to-business customers
- The only misrepresentations made by the investigators were as to their identities and purpose, and there is no evidence that they "conduct[ed] interviews" or attempted to trick Motif's employees "into making statements they otherwise would not have made."

Holding of *Impossible Foods*

- In summary, [Wilson Sonsini] has not violated the Rules of Professional Conduct by directing private investigators to obtain samples of Motif's products.
- Nor is the court persuaded that Impossible has obtained any unfair benefit as a result of the investigators' activities.
- In addition, Impossible has represented that "the relevant investigation ceased prior to [Motif's letter to Impossible objecting to the investigation] and prior to Motif's request for relief, and will not resume."
- Accordingly, Motif is not entitled to any sanctions for violations of the Rules of Professional Conduct; there is no justification for a protective order prohibiting any such investigative measures in the future; and there is no need for the court to order additional discovery regarding Impossible's (and its counsel's) interactions with the investigators.
- Of course, if Motif believes that the investigators are in possession of information that is relevant to the merits of this case, this order does not preclude Motif from seeking that information in the normal course of fact discovery.

Rule 4-3.4 – Duties to Opposing Party and Counsel and Following Court Orders

Unlawful Obstruction of Discovery

Rule 4-3.4: 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;

Discourage Witness Testimony

Rule 4-3.4: A lawyer shall not:

...

(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.

Falsify Evidence or Induce False Testimony

Rule 4-3.4: A lawyer shall not:

. . .

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

. . .

Disobeying Rules and Court Orders

Rule 4-3.4: 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;

Pretrial Discovery

Rule 4-3.4: A lawyer shall not:

...

(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;

...

Trial – Alluding to Inadmissible Evidence

Rule 4-3.4: A lawyer shall not:

...

(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

...

Discovery Sanctions

Source	Conduct Regulated	Potential Sanctions	Other
Rule 4-3.4	Cannot destroy or conceal evidence, falsify evidence, make frivolous discovery requests	Discipline of attorney	
Rule 4-8.4	Prohibits any conduct involving dishonesty, fraud, deceit, or misrepresentation	Discipline of attorney	
FRCP 37/MO Rule 61.01	Incomplete, evasive, or unanswered discovery	Contempt of court, fees, compelled response or protective order, fees and costs	Fees required unless justified or no attempt to resolve
Inherent power of the court	Power of court to punish and maintain order	Monetary and non-monetary powers	Very flexible Most concerns relate to "due process"

Spoliation in Missouri

- Spoliation refers to "the **destruction or significant alteration of evidence.**"
- "A party who intentionally spoliates evidence is subject to an adverse evidentiary inference."
- The spoliation doctrine is a harsh rule, thus, it requires "**evidence showing intentional destruction of the item**, and also such destruction must occur under circumstances which **give rise to an inference of fraud and a desire to suppress the truth**. In such cases, **it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a duty, to preserve the evidence.**"
- Destruction of evidence without a satisfactory explanation gives rise to the negative inference against the spoliator.

Carroll v. Kelsey, 234 S.W.3d 559, 565-66 (Mo. App. W.D. 2007)

FRCP 37(e)

Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon **finding prejudice** to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) **only upon finding that the party acted with the intent** to deprive another party of the information's use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

US ex rel Staggers v. Medtronic

(D.D.C. 2026)

- Medtronic sued for alleged false Medicare claims relating to device used to treat incontinence
- During litigation, Medtronic transitioned from Enterprise Vault to Microsoft Exchange Server
- Court found Medtronic took reasonable steps to preserve information during migration but had not timely added certain persons to legal holds

"The mere fact that relevant data was lost does not mean that the party holding such data failed to take reasonable steps to preserve it."

Stays in litigation caused delays in identifying issues

Court found basis to impose curative measure sanctions

Bonilla v. Gerlach (W.D. Okla. 2025)

- Case involved claim inmate received inadequate medical care after fall
- Claim of spoliation for failure to preserve videos showing degradation of condition
- Court found defendant failed to preserve videos, but also found no intent to deprive
- Court allowed plaintiff to present evidence that there were additional videos that defendant failed to preserve

Evasive or Incomplete Answers – Rule 61.01(a)

Failure to Act - Evasive or Incomplete Answers. Any failure to act described in this Rule 61 may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has served timely objections to the discovery request or has applied for a protective order as provided by Rule 56.01(c).

For the purpose of this Rule 61, an evasive or incomplete answer is to be treated as a failure to answer.

Goodsell v. Noland (Mo. App. WD 2018)

- Court struck pleadings of father in paternity action for failure to comply with discovery
- Father could only testify and cross-examine: he could offer no evidence

Rule 61.01(b) – Interrogatories

Failure to Answer Interrogatories. If a party fails to answer interrogatories or serve objections thereto within the time provided by law, or if objections are served thereto that are thereafter overruled and the interrogatories are not timely answered, the court may, upon motion and reasonable notice to other parties, take such action in regard to the failure as are just and among others the following:

- (1) Enter an order **striking pleadings** or parts thereof or dismissing the action or proceeding or any part thereof or render a judgment by default against the disobedient party;
- (2) Upon the showing of reasonable excuse, **grant the party failing to answer the interrogatories additional time to serve answers**, but such order shall provide that if the party fails to answer the interrogatories within the additional time allowed, the pleadings of such party shall be stricken or the action shall be dismissed or that a default judgment shall be rendered against the disobedient party.

Rule 61.01(c) – Requests for Admission

Failure to Answer Request for Admissions. If a party, after being served with a request to admit the genuineness of any relevant documents or the truth of any relevant and material matters of fact, fails to serve answers or objections thereto, as required by Rule 59.01, the genuineness of any relevant documents or the truth of any relevant and material matters of fact contained in the request for admissions **shall be taken as admitted**. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 59.01, and **if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof**, including reasonable attorney fees. The court **shall make the order unless it finds** that:

- (1) The request was held objectionable pursuant to Rule 59.01;
- (2) The admission sought was of no substantial importance;
- (3) The party failing to admit had reasonable grounds to believe that such party might prevail on the matter; or
- (4) There was other good reason for the failure to admit.

Rule 61.01(d) – Requests to Produce

Failure to Produce Documents, and Things or to Permit Inspection. If a party fails to respond that inspection will be permitted as requested, fails to permit inspection, or fails to produce documents and tangible things as requested under Rule 58.01, or timely serves objections thereto that are thereafter overruled and the documents and things are not timely produced or inspection thereafter is not timely permitted, the court may, upon motion and reasonable notice to other parties, take such action in regard to the failure as are just and among others the following:

- (1) Enter an order **refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting the disobedient party from introducing designated matters in evidence**;
- (2) Enter an order **striking pleadings** or parts thereof or staying further proceedings until the order is obeyed or dismissing the action or proceeding or any part thereof or render a judgment by default against the disobedient party;
- (3) Enter an order **treating as a contempt of court the failure to obey**; or
- (4) Enter an order requiring the party failing to obey the order or the attorney advising the party or both **to pay the reasonable expenses, including attorney fees**, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 61.01(e) – Physical Examination

Failure to Appear for Physical Examination. If a party fails to obey an order directing a physical or mental or blood examination under Rule 60.01, the court may, upon motion and reasonable notice to the other parties and all persons affected thereby, make such orders in regard to the failure as are just, and among others, it may take any action authorized under Rules 61.01(d)(1), (2) and (4). Where a party has failed to comply with an order requiring the production of another for examination, the court may enter such orders as are authorized by this Rule 61.01, unless the party failing to comply shows an inability to produce such person for examination.

In re BS-S by next friend Snowden v. Callahan (Mo. App. W.D. 2020)

- Mother sanctioned under Rule 61.01(e) for failure to submit to nail drug test
- Court struck pleadings and prevented her from presenting evidence
- Appellate court allowed trial court to rely on father's evidence to determine best interests of child

Rule 61.01(f) & (g) Deposition

(f) **Failure to Attend Own Deposition.** If a party or an officer, director or managing agent of a party or a person designated under Rules 57.03(b)(4) and 57.04(a), to testify on behalf of a party, fails to appear before the officer who is to take his deposition, after being served with notice, the court may, upon motion and reasonable notice to the other parties and all persons affected thereby, make such orders in regard to the failure as are just and among others, it may **take any action authorized under paragraphs (1), (2), (3) and (4) of subdivision (d)** of this Rule.

(g) **Failure to Answer Questions on Deposition.** If a witness fails or refuses to testify in response to questions propounded on deposition, **the proponent of the question may move for an order compelling an answer.** **The proponent of the question may complete or adjourn the deposition examination** before applying for an order. In ruling upon the motion, the court may make such protective order as it would have been empowered to make on a motion pursuant to Rule 56.01(c).

Rule 61.01(g) – Impact of Ruling

- If the motion is **granted**, the court, after opportunity for hearing, shall require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
- If the motion is **denied**, the court, after opportunity for hearing, shall require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.
- If the motion is **granted in part and denied in part**, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.
- If the motion is granted and if the persons ordered to respond fail to comply with the court's order, the court, upon motion and reasonable notice to the other parties and all persons affected thereby, may make such orders in regard to the failure as are just, and among others, it may take any action authorized under Rule 61.01 (d).

Rule 61.01(h) – Approved Discovery

Objections to Approved Discovery. If objections to Rule 56.01(b)(6) approved interrogatories or requests for production are overruled, the court may assess against such objecting party, attorney, or attorney's law firm, or all of them, the attorney's fees reasonably incurred in having such objection overruled.

If such fees are not paid within sixty days, the court may enter such other appropriate orders against the disobedient party, including an order striking pleadings, dismissing the action, or entering a judgment by default.

ABA Formal Opinion 508

"[L]awyers 'must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.' There is, in general, a distinction between manipulative conduct during client/witness preparation and active interference with or attempts to influence testimony while a witness is testifying."

Ethical Preparations for Testimony

- Remind the witness that they will be under oath
- Emphasize the importance of telling the truth
- Explain that telling the truth can include a truthful answer of "I do not recall"
- Explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- Suggest proper attire and appropriate demeanor and decorum
- Provide context for the witness's testimony
- Inquire into the witness's probable testimony and recollection
- Identify other testimony that is expected to be presented and explore the witness's version of events in light of that testimony
- Review documents or physical evidence with the witness, including using documents to
- Refresh a witness's recollection of the facts
- Identify lines of questioning and potential cross-examination
- Suggest choice of words that might be employed to make the witness's meaning clear
- Tell the witness not to answer a question until it has been completely asked
- Emphasize the importance of remaining calm and not arguing with the questioning lawyer
- Tell the witness to testify only about what they know and remember and not to guess or speculate
- Familiarize the witness with the idea of focusing on answering the question, i.e., not volunteering information

Unethical Preparations

- Counseling a witness to give false testimony
 - Assisting a witness in offering false testimony
 - Advising a client or witness to disobey a court order
 - Regulating discovery or trial process
 - Offering an unlawful inducement to a witness
 - Procuring a witness's absence from a proceeding
-
- Instigating a witness to lie can occur in ways beyond an outright instruction to fabricate testimony. For example, it is unethical to tell a witness to "downplay" the number of times a witness and a lawyer met to prepare for trial or to encourage a client to misrepresent a location of a slip and fall accident to have a viable claim. Other representative examples of unacceptable witness coaching and influencing behaviors include programming a witness's testimony, knowingly violating sequestration orders, and encouraging a witness to present fabricated testimony.

Unethical Pre-Testimony Conduct

- Compensating a lay witness for the substance of their testimony or to condition such payment on the content of the witness's testimony, even if that payment is for "truthful" testimony.
- Donating money to a witness's favorite charity was held to be an improper attempt to influence testimony.
- Offering a witness money or other incentives *not* to testify is a species of witness tampering and flatly prohibited by the Model Rules.²⁶

Unethical Conduct During Testimony

- Winking at a witness during trial testimony
- Kicking a deponent under the table
- Passing notes or whispering to a witness mid-testimony
- "Speaking objection," or "suggestive objection" that are intended—or at least suspected of being intended—to coach the witness and impede the deposing attorney's discovery.

Although there is no express ethical prohibition on communications between witness and counsel during a break in testimony, adjudicative officers have, at times, exercised control over these circumstances, including entering specific orders and imposing deposition guidelines and/or sanctions.

Suggestions to Protect Against Unethical (Remote) Coaching

- Skillful cross-examination
- Court orders directing uninterrupted testimony
- Motions to terminate or limit a deposition or for sanctions
- Inclusion of protocols in remote deposition orders, scheduling orders, and proposed discovery plans
- Administrative orders governing the conduct of remote depositions
- Inclusion of remote protocols in trial plans and pretrial orders⁴⁷
- Development of guidelines and best practices for conduct in remote proceedings
- Professionalism/Civility/Courtesy Codes

Bar Counsel v. Rosin

Ma. Board of Bar Overseers, No. 2023-12 (Nov. 6, 2023)

- [Attorney] was overheard by the plaintiff's counsel feeding an answer to a witness during a remote deposition in *Barksdale School Portraits LLC v. Williams* in 2021.
- A closer review of a recording of the deposition revealed 50 other instances in which the off-camera Rosin had provided answers to the witness.

Consequence – Reprimand

- Lawyer suspended in similar cases
- Mitigation here
 - Immediate and candid acknowledgement of his misconduct
 - his remorse
 - his motivation to protect a vulnerable client
 - the abusive and uncivil nature of opposing counsel's questions

"We also recognize that the misconduct was not premeditated but arose in the moment as an emotional (albeit inappropriate) aspiration to protect his client."

Lawyer Not on Camera

Agnone v. Agnone (Cal. App., 2d Dist. Jan. 2024)

- Lawyer was present with client during virtual deposition
- Lawyer refused to be on camera
- Notice required lawyer and witness to have computers "with webcams"
- Court held entry of sanctions against lawyer was improper because lawyer did not violate any court order

"I have no interest in ever being on camera. Ever," he says.

"No lawyer has to be on camera," he says. "It's completely inappropriate to demand it. If they were worried about seeing me, they could have taken the deposition in person."

Rule 4-3.5:

Ex Parte Communications

Rule 4-3.5 – *Ex parte*/Improper Communications

Rule 4-3.5: 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; . . .

Missouri Judicial Canon 2-2.9

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

- (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided: (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
- (2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.
- (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
- (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
- (5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication that the judge considers bears upon the substance of a matter, the judge shall take appropriate action.

Disruption of the Tribunal

Rule 4-3.5: A lawyer shall not:

...

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

Rule 4-3.6: Extrajudicial (Media) Communications

Rule 4-3.6(a) Parsed

- 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.

"Imputation" of Prohibition

Rule 4-3.6(d): No lawyer **associated in a firm or government agency** with a lawyer subject to Rule 4-3.6(a) shall make a statement prohibited by Rule 4-3.6(a).

Permissible Communications

Rule 4-3.6(b): Notwithstanding Rule 4-3.6(a), a lawyer may state:

- (1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to Rule 4-3.6(b)(1) to (b)(6):
 - (i) the identity, residence, occupation, and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Rule 4-3.6 Comment [5]-[6]

Subjects likely to cause prejudice

- (1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Another relevant factor in determining prejudice is the nature of the proceeding involved.

- Criminal jury trials more sensitive than civil trials
- Jury trials more sensitive than non-jury hearings and arbitration proceedings

Limit on Prosecutors – Rule 4-3.8(d)

- [E]xcept for statements that are **necessary to inform the public** of the **nature and extent of the prosecutor's action** and that **serve a legitimate law enforcement purpose**,
- [Prosecutors shall]
 - **refrain from making extrajudicial comments** that have a **substantial likelihood of heightening public condemnation of the accused**, and
 - exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case **from making an extrajudicial statement** that the prosecutor would be prohibited from making under Rule 4-3.6 or this Rule 4-3.8.

Right of Reply

Rule 4-3.6(c): Notwithstanding Rule 4-3.6(a), a lawyer may make a statement that a reasonable lawyer would believe is **required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.** A statement made pursuant to this Rule 4-3.6(c) shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Rule 4-3.7: Advocate-Witness Rule

Lawyer As Witness

Rule 4-3.7(a): A lawyer shall not **act as advocate** at a trial in which the **lawyer is likely to be a necessary witness** unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer **may act as advocate** in a trial **in which another lawyer in the lawyer's firm is likely to be called as a witness** unless precluded from doing so by Rule 4-1.7 or Rule 4-1.9.

Rule 4-4.2 and Communicating With Witnesses and Parties

Rule 4-4.2

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.

Rule 4-4.2

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.

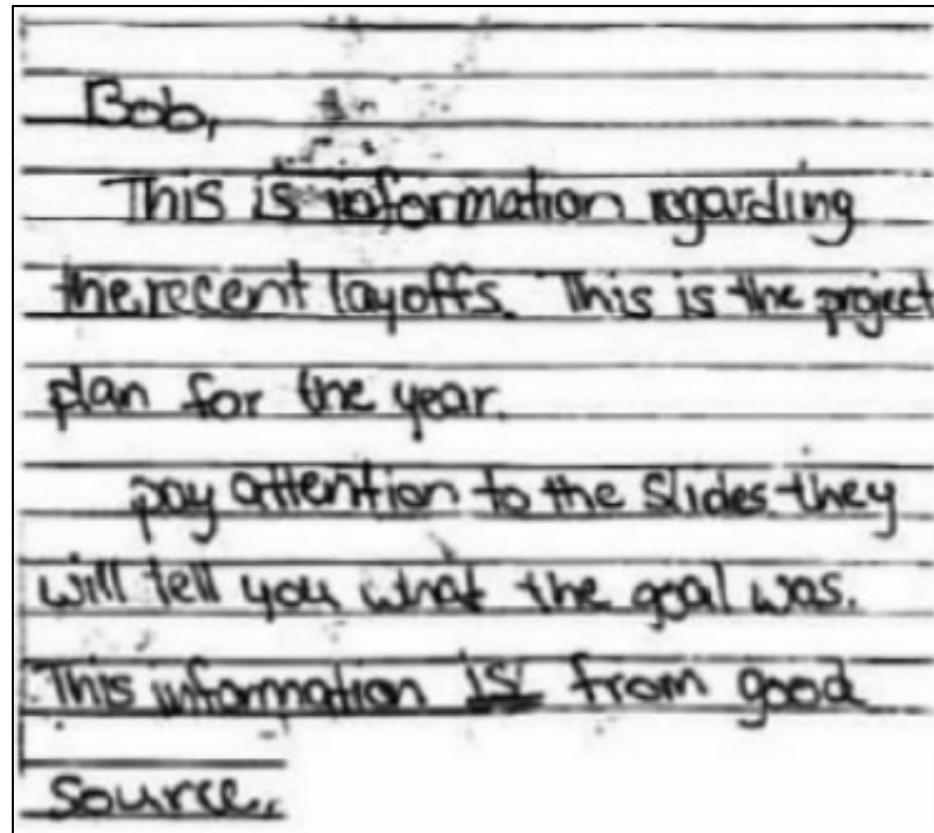
Rule 4-4.4 and Inadvertent Productions

Scenario

Lawyer receives possibly privileged information of Opposing Party from unusual source (such as client or anonymous provider)

Lawyer wants digital information stored behind privacy wall. Can Client get it through hacking or guessing password?

Raymond v. Spirit Aerosystems Holdings (D. Kan. 2017)



Bob,

This is information regarding the recent layoffs. This is the project plan for the year.

pay attention to the slides they will tell you what the goal was.

This information is from good source.

Questions to Consider

1. How was the information obtained?
2. What type of information was received?
3. How did the lawyer receive it?

How Was the Information Obtained?

- Did Opposing Party produce it deliberately, inadvertently, or have it stolen?
- Was the information obtained lawfully?
 - "Gray area" conduct – e.g., guessing opposing party's password

What Type of Information Was Obtained?

- Attorney-client privileged information
- Opposing party's work product
- Other (protected) confidential information, such as sensitive medical records

How Did Lawyer Obtain It?

- Agent of Lawyer
- Client provides to Lawyer (without lawyer's request)
- Someone else provides to Lawyer

Rule 4-4.4(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.

What to Do If Given "Hacked" Information

In re Joel Eisenstein (Mo. 2016)

- Eisenstein represented Husband in divorce
- Husband accessed Wife's email "improperly," and gave Eisenstein documents including questions Wife's attorney had prepared for direct examination
- Eisenstein did not produce the documents received from Wife's email, until giving them to opposing counsel as exhibits during trial

Consequences in *Eisenstein*

- Eisenstein was found to have used improperly obtained information (violating Rule 4-4.4) and concealing documents with evidentiary value (violating Rule 4-3.4)
- Eisenstein received an indefinite (minimum 6 month) suspension

Duty to Notify? Rule 4-4.4(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**.

Rule 56.01(b)(9)(A)

(9) Claiming Privilege or Protecting Trial Preparation Materials.

(A) Information produced.

(i) If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(ii) An attorney who receives information that contains privileged communications involving an adverse or third party and who has reasonable cause to believe that the information was incorrectly received shall not read the information or, if he or she has begun to do so, shall stop reading it. The receiving attorney shall promptly notify the sending attorney of such receipt; promptly return the information to the sending attorney; sequester, delete, or destroy the information and any copies thereof; and take reasonable measures to assure that the information is inaccessible. A sending attorney who has been notified about information containing privileged communications has the obligation to preserve the information.

Missouri Informal Opinion 2021-13

- **Question 1:** Does Attorney have an ethical obligation regarding metadata in electronic documents sent by an opposing party or counsel **to inform the sender** that the document contains metadata of which the sender may or may not be aware?
- **Answer 1:** Metadata embedded in an electronic document received by Attorney may constitute a document inadvertently sent, governed by Rule 4-4.4(b). Whether a lawyer "knows or reasonably should know" the inclusion of the metadata was inadvertent will depend on the facts and circumstances surrounding each transmission. If Attorney believes the metadata was inadvertently sent, Rule 4- 4.4(b) requires Attorney to promptly notify the sender.
- **Question 2:** Does Attorney have an ethical obligation regarding metadata in electronic documents sent by an opposing party or counsel **to refrain from mining or reviewing** and/or using the metadata?
- **Answer 2:** According to Comment [3] to Rule 4-4.4, effective December 1, 2021, lawyers should see Rule 56.01(b)(9)(A)(ii). Interpretation of Rule 56.01(b)(9)(A)(ii) is a question of law and beyond the scope of this informal opinion.

Missouri Informal Opinion 2021-13

(Continued)

- **Question 3:** Does Attorney have an ethical obligation to make good faith efforts to prevent the inadvertent electronic transmission of embedded metadata to opposing party or counsel in the context of litigation?
- **Answer 3:** Pursuant to Rule 4-1.6, Attorney must use reasonable care to ensure no information related to the representation of Attorney's client is revealed without client consent, and this obligation requires Attorney to use reasonable care to ensure no confidential information is contained in embedded metadata. This may require "scrubbing" documents before transmitting them or using alternative methods of transmission. Efforts to protect confidential information must be exercised in light of Attorney's obligation pursuant to Rule 4-3.4(a) not to unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal evidence. Removing metadata with evidentiary value before transmitting certain documents may constitute a violation of laws governing discovery and therefore violate Rule 4-3.4(a). This informal opinion does not render an opinion about the existence of discoverable evidence in particular metadata or about the effect on substantive legal privileges of the pre- transmission removal or lack of removal of metadata.

Conclusory Matters

Questions – If you have questions after the program, please email them to Paige Tungate at ptungate@DowneyLawGroup.com

Post-Program Survey – A survey will be emailed to you about 30 minutes after this program. Also, here is the survey link:

<https://www.surveymonkey.com/r/trust0926>

Certificate of Completion – Available through the Post-Program Survey

Kansas Credit – If you are seeking Kansas credit, you need to enter the **two Attendance Verification Words** and your Kansas information into the Post-Program Survey. *Please complete this information in the survey **this week** (if possible), so we can ensure you receive proper credit*



<https://www.surveymonkey.com/r/sanctions1026>

Future Programs

October 21, 2026 – Wednesday at 12:00 Noon CT - **Encouraging Inclusivity Through Firm Management and Mentoring**

November 4, 2026 – Wednesday at 12:00 Noon CT - **Ending Client Relationships — Risks and Rules**

November 17, 2026 – Tuesday at 12:00 Noon CT - **Legal Ethics and New Firm Business Models (including MSOs)**

December 2, 2026 – Wednesday at 12:00 Noon CT - **Managing Your Lawyer Trust Account**

December 17, 2026 – Thursday at 12:00 Noon CT - **Legal Ethics and Dealing with Non-Clients - the "Chapter 4" Rules**

www.DowneyEthicsCLE.com

Timed Agenda

3:00-05 Introduction

3:05-55 Compare and contrast legal ethics and sanctions law

Thank you



Downey Law Group LLC
(314) 961-6644
(844) 961-6644 toll free
info@DowneyLawGroup.com



<https://www.surveymonkey.com/r/sanctions1026>