

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 – 4.3

RULE 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**;

(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.

RULE 4.1 – COMMENT 1

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has **no affirmative duty to inform an opposing party of relevant facts.**

A **misrepresentation** can occur if the lawyer incorporates or affirms a statement of another person **that the lawyer knows is false.**

RULE 4.1 – COMMENT 2

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances.

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.

RULE 4.1 – COMMENT 2

Estimates of price or value placed on the subject of a transaction and a **party's intentions as to an acceptable settlement** of a claim are ordinarily in this category, and so is the **existence of an undisclosed principal** except where nondisclosure of the principal would constitute fraud.

RULE 4.1 – COMMENT 3

Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation.

RULE 4.1 – COMMENT 3

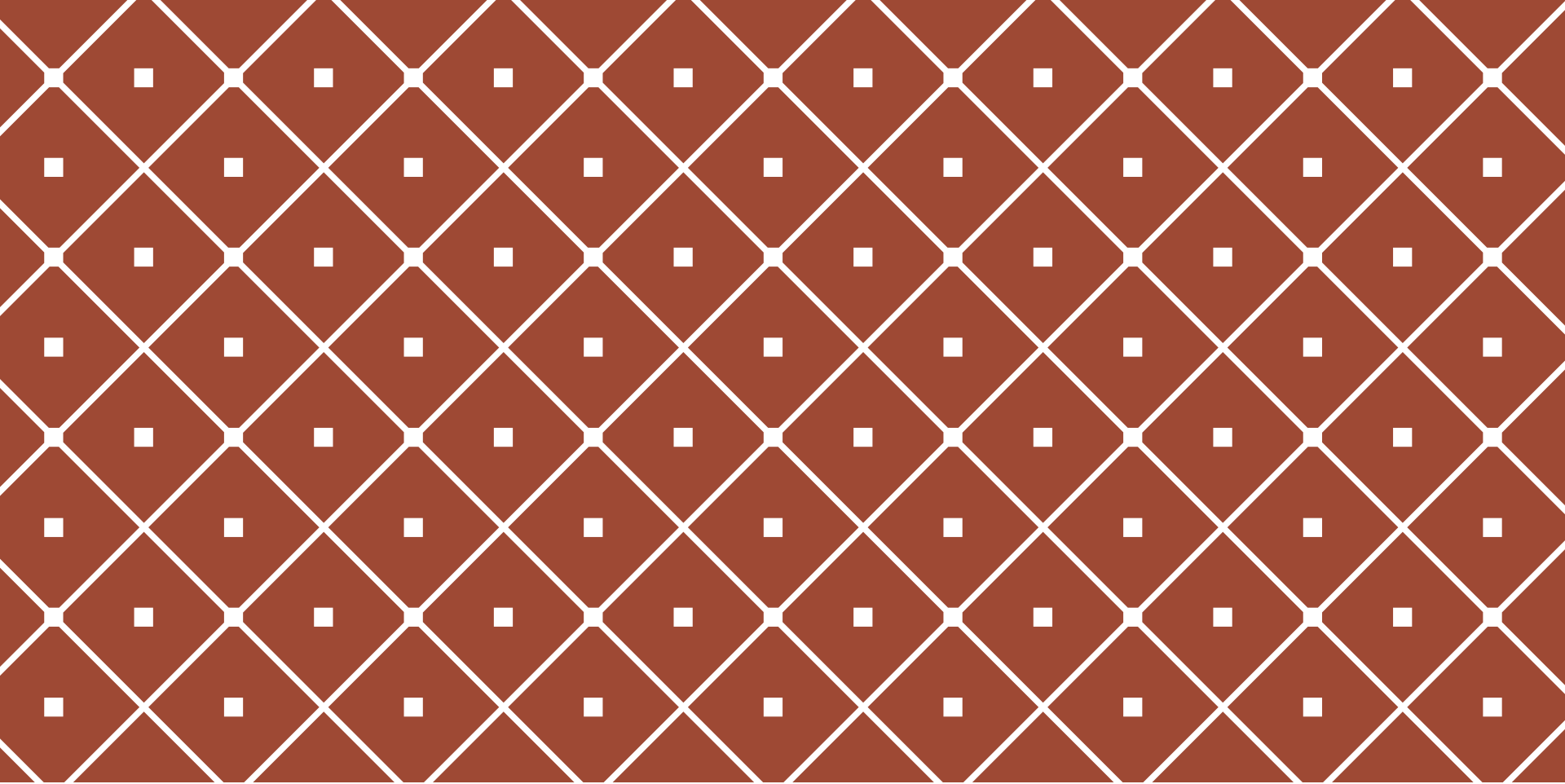
[3] . . . Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation.

Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like.

RULE 4.1 – COMMENT 3

[3] . . . In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud.

If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.



**COMMUNICATION WITH
PERSON REPRESENTED BY
COUNSEL**

Rule 4.2

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.

RULE 4.2 – COMMENT 3

[3] The Rule applies **even though the represented person initiates** or consents to the communication.

A lawyer must **immediately terminate** communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

RULE 4.2 – COMMENT 4

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.

For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.

RULE 4.2 – COMMENT 4

[4] ...Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.

A lawyer may not make a communication prohibited by this Rule through the acts of another.

RULE 4.2 – COMMENT 4

[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.

Also, a lawyer having **independent justification or legal authorization** for communicating with a represented person is permitted to do so.

RULE 4.2 – COMMENT 5

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.

Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.

RULE 4.2 – COMMENT 5

[5] ...When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused.

The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

RULE 4.2 – COMMENT 7

[7] In the case of a represented organization, this Rule **prohibits communications** with a **constituent** of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Consent of the organization's lawyer is **not required** for communication with a **former constituent**.

RULE 4.2 – COMMENT 7

[7] ...If a constituent of the organization is represented in the matter by his or her own counsel, the **consent by that counsel** to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

RULE 4.2 – COMMENT 8

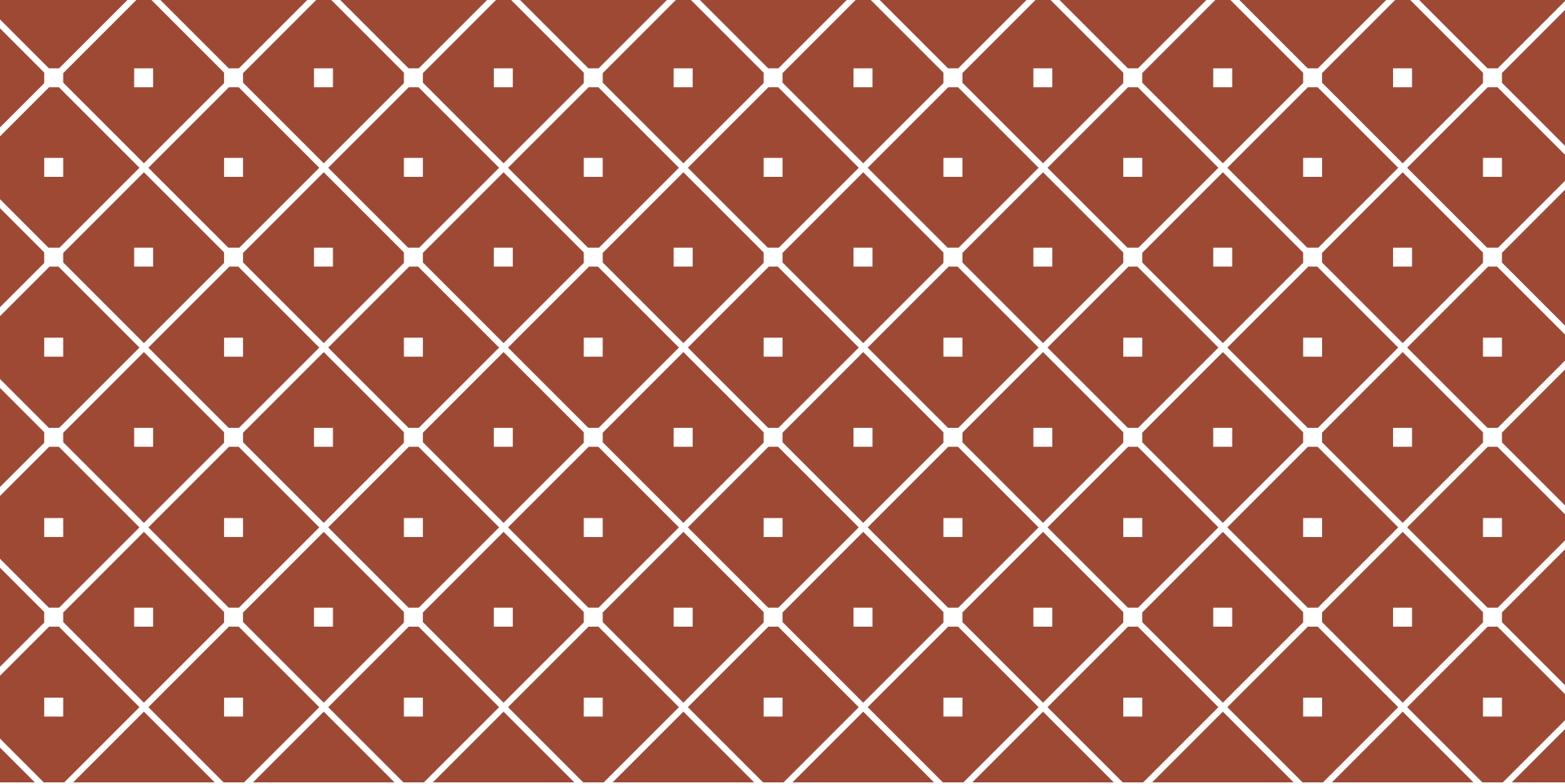
[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.

This means that the lawyer has **actual knowledge** of the fact of the representation; but such actual knowledge **may be inferred** from the circumstances.

RULE 4.2 – COMMENT 8

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.

This means that the lawyer has **actual knowledge** of the fact of the representation; but such actual knowledge **may be inferred** from the circumstances. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.



**DEALING WITH AN
UNREPRESENTED PERSON**

Rule 4.3

RULE 4.3 — DEALING WITH AN UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is **not** represented by counsel, a lawyer shall **not state or imply that the lawyer is disinterested.**

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding...

RULE 4.3 – DEALING WITH AN UNREPRESENTED PERSON

...The lawyer shall **not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.**

RULE 4.3 – COMMENT 2

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's.

In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is **so great** that the Rule **prohibits** the giving of **any** advice, apart from the advice to obtain counsel.

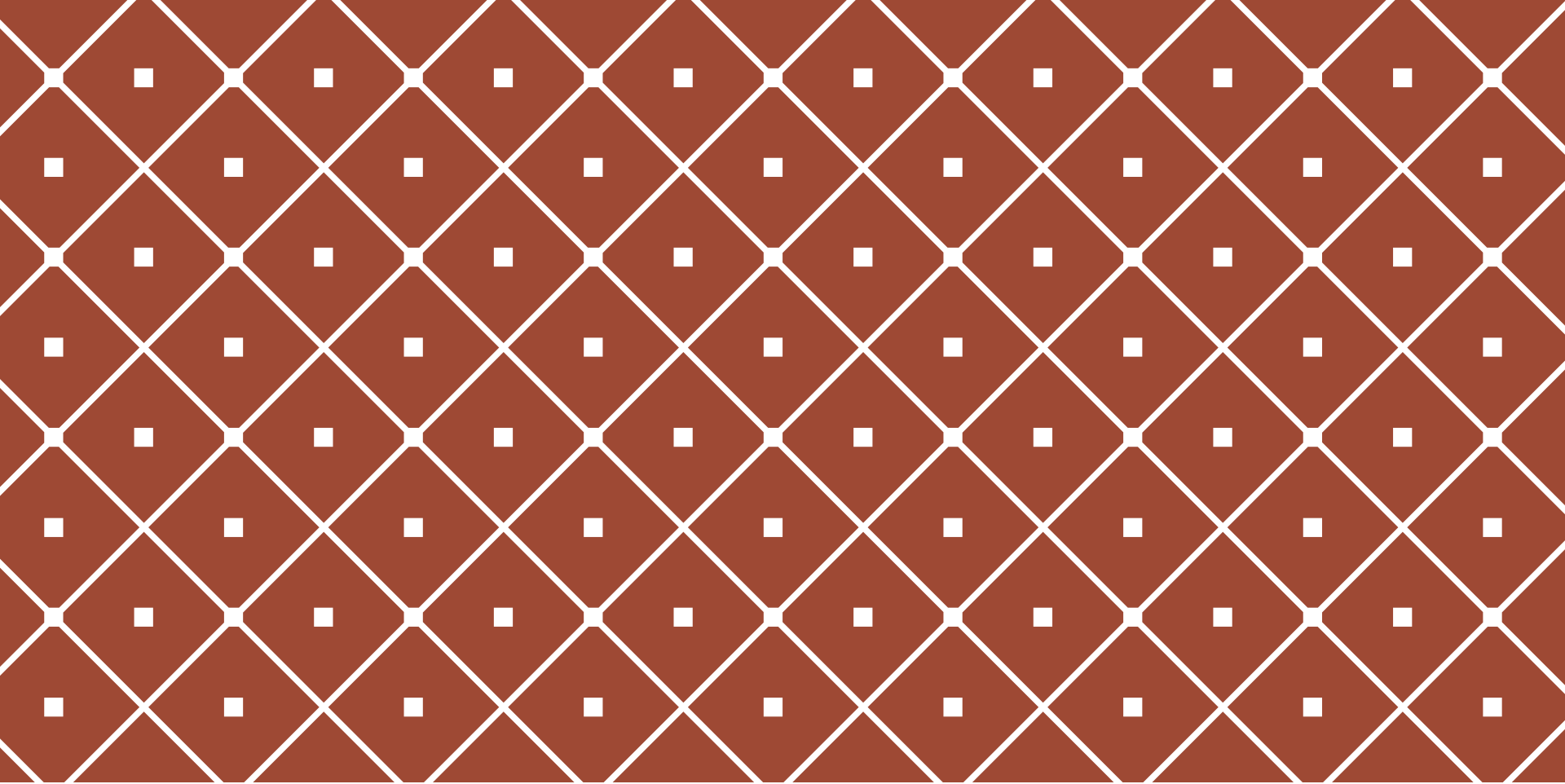
RULE 4.3 – COMMENT 2

Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.

This Rule does **not prohibit** a lawyer from **negotiating** the terms of a transaction or **settling** a dispute with an unrepresented person.

RULE 4.3 – COMMENT 2

So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer **may** inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, **prepare documents that require the person's signature** and **explain the lawyer's own view of the meaning of the document** or the lawyer's view of the underlying legal obligations.



**RESPECT FOR RIGHTS
OF THIRD PERSONS**

Rule 4.4

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.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

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

ABA FORMAL OP. 92-363

The Model Rules do **not** prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process.

ABA FORMAL OP. 92-363

The Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim, to refrain from presenting criminal charges against the opposing party as part of a settlement agreement, provided that such agreement does not violate applicable law.

ON THE OTHER HAND...

ABA Formal Op. 94-383 - A lawyer's use of the threat of filing a disciplinary complaint or report against opposing counsel, to obtain an advantage in a civil case, is constrained by the Model Rules, despite the absence of an express prohibition on the subject.

Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness or fitness as a lawyer, because in these circumstances, the lawyer is ethically required to report such misconduct.