

RESPECT FOR OTHERS

BY: SHARON WEEDIN

ONE OF THE LESS FREQUENTLY LITIGATED ETHICS RULES APPEARS IN BOTH OF THE SUPREME COURT OF MISSOURI'S RECENT ATTORNEY DISCIPLINE OPINIONS. UNDER THE HEADING "RESPECT FOR RIGHTS OF THIRD PERSONS," RULE 4-4.4(A) PROVIDES AS FOLLOWS:

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 4-4.4 sets a limit beyond which a lawyer ethically cannot go in zealously asserting a client's position. As the Comment to the rules notes, a lawyer must subordinate the interest of others to the client's interest, but may not ethically disregard the rights of non-clients. The Supreme Court of Missouri cases provide examples of conduct that violated the rule.

The attorney in *In re Krigel*, 480 S.W.3d 294 (Mo. banc 2016), represented a young, pregnant client who wished to terminate her parental rights after the baby's birth. His client did not want the baby's biological father to raise the child, as the father had expressed an intention to do. Mr. Krigel knew that the biological father intended to assert his paternal rights upon the baby's birth and represented to the biological father's attorney that the baby would not be adopted (in accordance with his client's wishes) without the biological father's consent.

The Court concluded that Krigel violated Rule 4-4.4(a) by "actively concealing factual information" from the birth father and his attorney. Krigel advised his client and the father, before the birth, to obtain counseling from a social worker. The social worker, however, was already working with Krigel and his client to place the unborn child with a couple for adoption. He advised his client and her family not to communicate with the father regarding the birth of the child. The father apparently learned of the child's birth about a month after the fact from a Facebook posting. A hearing to terminate the mother's parental rights had already been conducted in Jackson County, Missouri, before the father learned of his child's birth.

In concluding that a violation of Rule 4-4.4(a) had occurred, the Court noted that, despite actual knowledge of the father's desire to raise the child, Krigel "pursued a course of action that

disregarded the parental rights of Birth Father and the best interest of the child in remaining with a natural parent." 480 S.W.3d at 300. The Court also observed that the attorney's actions "served no substantial purpose other than to impair and delay" the father's assertion of his parental rights.

Rule 4-4.4(a) encapsulates two courses of conduct through which an attorney can unethically violate third parties' rights. Krigel's conduct had "no substantial purpose other than to embarrass, delay, or burden a third person." The other way in which the rule can be violated is by using methods of obtaining evidence that violate the legal rights of a third party. The latter scenario formed the basis of the attorney's violation of the rule in *In re Eisenstein*, No. SC95331 (Mo. banc Apr. 5, 2016). In *Eisenstein*, the attorney's client accessed his soon-to-be ex-wife's personal e-mail account without her permission. In this manner the client obtained his wife's current payroll documents and a list of direct examination questions that had been prepared by his wife's attorney for use in an upcoming dissolution hearing. Approximately three months before the hearing, Eisenstein's client turned the payroll document and his opposing counsel's anticipated direct exam questions over to Eisenstein. Opposing counsel did not learn of the evidence breach, however, until the second day of the dissolution trial, when the examination questions were found in a stack of exhibits Eisenstein handed to opposing counsel. It was subsequently determined that Eisenstein had used information from the payroll document in a pre-trial settlement conference.

The Court rejected Eisenstein's argument that he did not use improper means to obtain the evidence because it was his client, not him, who had done so. Referring to language in subpart (b) of the rule, the Court concluded that Respondent had a duty to promptly notify opposing counsel about receipt of the documents so she could take appropriate protective measures. Eisenstein's failure promptly to notify opposing counsel that he had the documents and his use of information found in the documents constituted a violation of the rule.

Reported decisions from other jurisdictions involving violations of those states' versions of Model Rule 4.4 are not numerous, but are notable for their colorfulness. A sampling follows.

The lawyer in *Barrett v. Virginia State Bar*, 634 S.E.2d 341 (Va. 2006), procured a witness subpoena for an attorney with whom he was formerly associated to require the attorney to appear at Barrett's divorce trial. The theory he gave for needing the subpoena was that the attorney had once employed his wife (for 30 hours) and could offer evidence as to her earning capacity. Before the trial, Barrett wrote the attorney a letter offering to release him from the subpoena if the attorney would withdraw a claim for an attorney's lien that the attorney had filed against Barrett.

The Virginia Supreme Court rejected Barrett's argument that the rule did not apply to him because he was not representing a client (he was pro se), noting that an attorney who represents himself acts as both lawyer and client. The court concluded that the clear intent of Barrett's letter was to harass his former employer, the attorney, and compel him to waive the lien, a violation of rule 4.4.

A prosecuting attorney and her deputy were found to have violated rule 4.4 by obtaining evidence that violated a defendant's rights in *In re Winkler and Goode*, 834 N.E.2d 85 (Ind. 2005). During a pause in a deposition being taken in a criminal proceeding, after the defendant and his attorney left the room, the deputy prosecutor tore a page from a legal pad on which the defendant had written some notes. The deputy wanted to use the notes as a handwriting exemplar. The page was then concealed in a stack of files, although the prosecutors acknowledged what they had done when the defendant saw the sheet protruding from the files.

An Idaho prosecutor was found to have violated the rule in *Idaho State Bar v. Warrick*, 137 Idaho 86, 44 P.3d 1141 (2002). While an individual the attorney had prosecuted was housed in the county jail, Warrick wrote the words "waste of sperm" and "scum bag" next to the man's name on an inmate control board

located in the jail. The court concluded the prosecutor violated the rule, as the only purpose for writing the offensive words was to demean and embarrass the man.

Finally, in *In re Royer*, 276 Kan. 643, 78 P.3d 449 (2003), Royer represented a couple who owned a building located in downtown Abilene. The building had been badly damaged in a storm. The city communicated to Royer's clients that the building needed to be restored or demolished. Instead, Respondent prepared the necessary documents for his clients to "sell" the building for one dollar to a local man, well-known in Abilene for being homeless and an alcoholic. The new owner, of course, could not pay for the necessary work, which then fell to the city and its citizens. Royer was found to have violated rule 4.4 because even though his action benefited his clients, it had no substantial purpose other than to burden the homeless man and the city of Abilene.

Supreme Court Rule 4-4.4 serves as a reminder that lawyers must respect the rights of third parties while advocating for the rights of clients.

Sharon Weedon is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.