

## “UNCIVIL” PRACTICE

By

Marcia A. Johnson, Director  
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (April 1994)

Every client needs a “tough” lawyer. Someone to do “battle” for them. Someone to protect them. That’s our job, isn’t it? But lawyers and clients sometimes confuse being “tough” (which requires a lawyer who is smart, well-prepared, skilled in negotiating and strategy – *i.e.*, a zealous advocate), with being an “S.O.B.” or ill-mannered boor.

This confusion between zealous advocacy and boorishness can be insidious. If the lawyer representing one side of a conflict is reputed to be an “S.O.B.,” then it’s extremely difficult for the client on the other side not to worry if they don’t have a lawyer with a similar reputation, just for protection. But let there be no confusion here. Zealous advocacy is a goal. It is an art, when done well. But the pursuit of zealous advocacy does not include conduct that has no substantial purpose other than to be rude, oppressive, or embarrassing to others. Such conduct is unethical.

No specific mandatory provision of the Minnesota Rules of Professional Conduct (“MRPC”) says that a lawyer must act with civility in dealing professionally with opposing counsel or others. Rule 4.4, MRPC, however, provides that:

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 has been vigorously enforced in Minnesota over the years. While lawyers have been publicly disciplined in extreme cases, (*e.g.*, *In re James Malcolm Williams*, 414 N.W.2d 394 (Minn. 1987)), private discipline has been used primarily. Here are some examples.

### RULE 4.4 VIOLATIONS

■ **WHOOOPS!** A young lawyer representing a defendant in multiparty litigation became frustrated in responding to plaintiff’s deposition scheduling request, as he saw that certain of the witnesses had already been deposed or otherwise dealt with by agreement. The lawyer wrote comments, including the words “stupid bitch” in four instances, on his copy of the scheduling request, and placed the copy in his personal correspondence file concerning witnesses. The annotated copy of the letter was later inadvertently included as an exhibit to a discovery motion, filed with the court and served on the other 26 counsel involved in the lawsuit.

While the lawyer did not intend to publicize his comments about opposing counsel in this particular manner, the lawyer had no substantial purpose for writing the offensive gender-based comments. Even if the document had not left the firm, other people within the firm could have been unnecessarily embarrassed or burdened by the offensive comments.

■ **IT’S MY PARTY.** During the course of a criminal trial, defense counsel made inappropriate remarks,

including referring to the prosecutor during voir dire as a “persecutor.” After the close of the five-day trial, the jury began deliberations at 4:00 p.m. At about 7:00 the same evening, counsel were summoned back to court to be present when the court responded to a question by the jury. The defense counsel had to leave his wife’s 50<sup>th</sup> birthday party to return to court. The judge then asked counsel to remain for a short period in case the jury returned with a verdict. The judge then asked if the defendant was willing to waive his right to have the jury sequestered and if the parties were willing to waive their right to be present when the judge instructed the jury at the end of the day’s deliberations. Defense counsel indicated that his client was willing to waive these matters. The prosecutor chose not to waive the right to be present for jury instruction. Defense counsel then said that he would also be present even though it would mean again leaving his wife’s party to be present.

At the close of the hearing as the judge was leaving the bench, defense counsel turned to the prosecutor and said, “You bitch.” While defense counsel believed the prosecutor’s refusal to waive her right to be present was malicious, and arose out of a personality conflict between them, these factors did not justify his comments, which were embarrassing to the prosecutor and a burden to the judge.

■ **MUSICAL CHAIRS.** A lawyer represented the exhusband in post-decree child support and custody matters. Pursuant to a discovery order, personal and financial documents belonging to the lawyer’s client were to be reviewed by opposing counsel at the lawyer’s office. The lawyer placed a table in the reception area to serve as a work space for the document review. There were two chairs in the reception area. The lawyer was unaware that the exwife would be attending the meeting with opposing counsel. Upon learning that the exwife had arrived, before her counsel, the lawyer removed the second chair from the reception area because the lawyer did not think it fair for the exwife to be present. The lawyer refused to return the chair upon request of opposing counsel. After a short time, opposing counsel and the exwife left without completing the document review. The lawyer’s conduct in removing the second chair and then refusing to provide one when asked had no purpose other than to delay or burden the adverse party and counsel.

■ **YOU WANT COUNSEL, TOO?** A lawyer successfully represented the plaintiff in a lawsuit, obtaining a judgment against defendant. Collection efforts ensued. Defendant’s counsel subsequently withdrew. The deposition of defendant was rescheduled, not quite an hour before it was to commence, at the request of the defendant’s former counsel who believed he would soon be retained. The same day, plaintiff’s lawyer wrote defendant criticizing him for considering retaining counsel and stating that if he “had only offered to pay the [plaintiff] the amounts [he] had wasted on attorney’s fees in the past, and the amount [he] will waste in the future, then [he] probably could have settled this matter.”

Criticizing an unrepresented party’s decision to consider retaining counsel could have no substantial purpose other than to burden the party by dissuading him or her from seeking counsel.

■ **I KNOW SOMETHING YOU DON’T.** In a domestic assault case, the defendant’s lawyer personally served a subpoena duces tecum upon the medical records custodian at plaintiff’s clinic, requiring the attendance of the custodian at a hearing scheduled that afternoon. The defense counsel did not notify the plaintiff or plaintiff’s attorney prior to serving the subpoena. In lieu of appearing at the hearing, the records custodian released the records directly to the defense counsel. The defense counsel did not inform the custodian that such release of information was not necessary or possibly in violation of plaintiff’s rights. Neither did defense counsel inform plaintiff’s counsel that she had the records. The hearing was

continued that afternoon. Subsequently, defense counsel filed a petition to the Court of Appeals for a writ of prohibition, and attached copies of plaintiff's medical records, although they were not a part of any record in the case at that time.

Rule 4.4 states that a lawyer shall not use methods for obtaining evidence that violate a third person's rights. While the plaintiff had placed one aspect of the medical condition in issue, defense counsel did not know what information was contained in the medical records when they were obtained, and denied plaintiff any opportunity to object to the release of any portion of the records. Rule 4.4 was violated once defense counsel accepted documents to which she was not then entitled. An attorney may not discover documents by subpoena on an *ex parte* basis. (See *Sandberg v. Commissioner of Revenue*, 383 N.W.2d 277 (Minn. 1986)). The violation was compounded when the records were used in a publicly filed petition.

■ **SHE WON'T MIND.** In a dissolution matter, an attorney advised the husband to endorse his and his wife's name to tax refund checks, without her consent. While there apparently was no intent to deprive the wife of her money permanently, the lawyer's conduct disregarded the wife's rights to the fund. The lawyer's explanation that spouses may be agents of one another and thus able to endorse checks as agents falls short when the action is taken in the middle of a contested divorce.

■ **CHURCH AND STATE.** A minister testified that the state's star witness, who was a member of his own church, was a chronic liar. After trial, the prosecutor called the minister and criticized him, on religious grounds, for betraying his own congregant. The prosecutor also suggested that other ministers would be told about the minister's action. In his defense the prosecutor claimed that he called because he believed that the minister had violated his sacred duty to his parishioner. What he could not explain, however, was why, as a prosecutor, he was compelled to *share* these particular views with the witness, or what purpose that served other than to oppress or embarrass.

■ **COVERING ALL THE BASES.** In a dissolution matter, an attorney cross-examining an expert witness on custody and visitation asked, "Are you gay?" In his offer of proof the attorney stated: "People in her office are gay; she is gay... ." The attorney claimed that he was "attempting to determine or, in the alternative, eliminate a possible basis for bias" on the part of the witness. Evidence of the witness's sexual preference, however, was not relevant to possible bias.

## CONCLUSION

Rule 4.4 does not provide the answer to those who lament the erosion of civility in the practice of law. Rule 4.4 does help draw the line, however, between actions that are acceptable and ethical as a zealous advocate and those that are not. A word of caution seems advisable. The Lawyers Board is not a forum to resolve "personality disputes" among counsel. Being a lawyer does not mean never having to say you're sorry, if tempers have flared in the heat of "battle." Lawyers considering filing a complaint with the Director's Office about some offensive comment or tactic of opposing counsel should pause to first consider whether their own hands are clean.