Ethics Rules May Apply When Civil Practice Becomes Uncivil

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There has been much discussion in recent years about civility in the practice of law. Some have concluded that there are no limits on zealous advocacy and that litigation is the rough equivalent of a no-holds-barred barroom brawl. The analysis of litigation utilizing a game theory, where there are winners and losers, ultimately results in the conclusion that lawyers have an obligation to do whatever it takes to "win" on behalf of their client.

This misses the point of what we, as lawyers, should be doing. We are an integral part of a system of justice whose prime directive is to determine the truth as best we can and do justice. Because justice, not victory at any cost, is the goal of the system, there are limits placed upon what an attorney may do to advance his or her client's cause.

Some of these limits are fairly obvious. Rule 3.3, Minnesota Rules of Professional Conduct (MRPC), prohibits lying to the court and the submission of false evidence. Rule 3.4, MRPC, prohibits obstructing access to evidence and falsification or alteration of evidence. Rule 4.1, MRPC, prohibits a lawyer from making knowingly false statements on behalf of a client. All of these rules set some firm outside limits on a lawyer's behavior in representing a client.

There is, however, significant room for uncivil behavior within these outside limits. Rule 4.4, MRPC, attempts to address misconduct within this sphere. Rule 4.4 provides:

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

"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."

Comment—1985

"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."

Lawyers running afoul of this rule have been both publicly and privately disciplined. In In re Williams, 414 N.W.2d 394 (Minn. 1987), the lawyer involved was suspended for six months for, among other things, making egregiously offensive racial and religious remarks to opposing counsel during a deposition. This is

in accord with the Supreme Court's statement in In re Getty, 401 N.W.2d 668, 671 (Minn. 1987), that "Lawyers must be encouraged to represent their clients vigorously and we are hesitant in any way to interfere with an attorney's ability to do so; yet there is a line that should not be crossed . . . ."

An admonition was issued to a lawyer who crossed the line in pretrial settlement negotiations. Lawyer and opposing party appeared for trial and engaged in settlement discussions prior to trial. These discussions apparently did not go well and the lawyer concluded them with advice to the opposing party that would more appropriately come from a proctologist.

While the use of a colorful turn of the phrase has its place in society, because this exchange took place during the course of a judicial proceeding and had no purpose other than to embarrass or burden the opposing party, Rule 4.4 was violated and an admonition issued.

The application of Rule 4.4 is not limited to the use of foul and offensive language. The use or threatened use of embarrassing information against a party or witness may result in discipline if the revelation of that information would serve no other substantial purpose. Admonitions have been issued to lawyers for: improperly questioning an expert witness about her sexual orientation; writing to an unrepresented party criticizing the party's decision to consider retaining counsel; and threatening to cross-examine a witness about an alleged extra-marital affair in the trial of a dispute over fees owed for investigative services. In all of these cases, the communication from the lawyer involved matters not relevant to the merits of the case and served no purpose other than to embarrass or burden the witness.