BY DAVID D. DODGE

Boorishness Be Gone

Ban Bullying From Your Practice

A Phoenix lawyer's threatening letter recently unleashed a torrent of criticism against the writer—and the profession.

Called a "bully"—and even worse—the lawyer penned the correspondence to a teacher who had refused to allow a student to graduate with her high school class. The letter, written on behalf of a client's daughter, was published in the *Arizona Republic* as an example of how bad things have gotten. The missive threatened litigation against the teacher and stated that inquiries could be made concerning her personal life and other matters.

Let's leave that case aside and look at aggressive tactics generally. Those of us who have taken the Arizona Professionalism Course know that it is "unprofessional" not to respect the privacy of third parties and to avoid unnecessary disclosure of sensitive or personal information.[1] But how about the *ethical* considerations? Let's take a look at the Arizona Rules of Professional Conduct[2] and some of the reported cases on the subject.

ER 4.4 (Respect for Rights of Third Persons) provides, "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 person."

The key inquiry here is whether the lawyer's behavior has any "substantial purpose other than to embarrass, delay or burden a third person."

Also in this issue: **What To Do With Rude Lawyers** on p. 16

ER 4.4 deals only with third persons, including those who may be potential parties. There are rules for rudeness to an opposing party and counsel (ER 3.4) and to judges and witnesses (ER 3.5).

First, it is not unethical simply to threaten litigation.[3] Although, under certain circumstances, it may be illegal to threaten suit,[4] it is generally not considered unethical to threaten litigation to enforce a colorable claim for a client. And, if a substantial purpose can be found in the lawyer's action relating to an appropriate objective,

David D. Dodge is a partner in the Phoenix law firm Lieberman, Dodge, Gerding, Kothe & Anderson, Ltd. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court.

no ethical violation will be found.

Practice Example 1: A lawyer directed his client to pay child support into a Missouri court rather than to his former wife in California to force her to come into Missouri to litigate custody. This was deemed not a violation of ER 4.4 when it was shown that the mother had moved with the child to California without court permission and was avoiding service.[5]

Practice Example 2: A lawyer representing the seller of carpet went to the purchaser's home unannounced and uninvited and threatened and confronted her over a dispute she was having with his client. It was held that his "bullying" had no substantial purpose other than to embarrass the purchaser.[6]

The same lawyer, in another matter described in the same case, was found guilty of violating ER 4.4 when he wrote a letter to a Texas resident asking for the name of the man's insurance company and threatening to bring felony charges and to seek his extradition to Louisiana if he failed to provide the information sought. The court held that the lawyer could have used other means to determine insurance coverage and that the threat could therefore only be interpreted as intending to embarrass or burden a third party.

Practice Example 3: A lawyer who represented an insured whose claim had been denied by State Farm called the local representative seven to eight times a day for several days. He was rude to her on the phone, claiming "she did not know anything," and referred to her as "that bitch out there." Held: a violation of ER 4.4.[7]

Practice Example 4: A lawyer in a Wyoming case[8] became upset over the telephone when a justice of the peace refused to release his client. The lawyer threatened to sue the county, demand a jury trial and "cause everyone as much trouble and expense as he could." He was censured for violating ER 4.4.

There are no bright-line rules here. The best course if litigation must be threatened? State the fact simply. You will have made your point. In this day and age, one does not have to be a rocket scientist to know how unpleasant, costly and intrusive litigation can be.

endnotes

1. Professionalism Principle XVII: Respect For Privacy of Third Parties, Theme A (do not reveal embarrassing information) and Theme B (disclosure of personal information), Attorney's Relations With Clients.
2. Rule 42, Ariz.R.S.Ct.
3. *Attorney M v. Mississippi Bar*, 621 So. 2d 220 (Miss. 1992); ABA Committee on Ethics and Professional Responsibility, Informal Op. 83–1502 (1983).
4. *See* Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq*.; §§ 13-2802 (influencing a witness) and 13-2804 (tampering with a witness), Arizona Revised Statutes. And don't forget abuse of process. *See* McAuliffe, Arizona Legal Ethics Handbook, § 4.4:220 (2000).
5. *In re Wallingford*, 799 S.W.2d 76 (Mo. 1990).
6. *Louisiana State Bar Association v. Harrington*, 585 So. 2d 514 (La. 1990).
7. *In re Bechhold*, 771 P.2d 563 (Mont. 1988). He was suspended from practice for 18 months.
8. *Board of Professional Responsibility, Wyoming State Bar v. Jolley*, 805 P.2d 862 (Wyo. 1991).