

## Truthfulness in Statement to Others - Rule 4-4.1



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Rule 4-4.1 of the Missouri Rules of Professional Conduct deals with truthfulness in statement to others. The Rule provides that "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; or (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 4-4.1 is patterned after Model Rule 4.1 which has been adopted by most states.

Understanding Rule 4.1 involves an awareness of how courts applying the rule have interpreted key terms within the rule including "knowledge," "materiality" and "third persons." According to the Annotated Model Rules of Professional Conduct, the rule only applies "to false statements that are knowingly made and facts knowingly withheld. Annotated Model Rules of Professional Conduct 3d Ed.

("MRPC") at 390. The MRPC cites as an example a case where an attorney did not have an obligation to correct a factual error under Rule 4-1 where the lawyer did not actually know but simply believed it was probable that a plaintiff and her lawyer incorrectly calculated damages in a case. *Brown v. Genesee County*, 872 F.2d 169 (6th Circuit 1989).

In the everyday world lawyers often struggle with what constitutes "actual knowledge" of a falsity. Actual knowledge can be "inferred from circumstances." MRPC at 390. Careless and recklessly negligent conduct can amount to actual knowledge. One example of this cited in the Annotated Model Rules involved a lawyer who stipulated that "to the best of his knowledge" there was no excess insurance coverage available to his client even though the lawyer had in his possession his client's file which contained letters from excess carriers. MRPC at 390, citing *Sloikin v. Citizens Cas. Co.*, 614 F.2d 301 (2d Cir. 1979).

Only "material facts" fall within the rule. Generally, this refers to information that has a potential to mislead. Examples include a lawyer who settled a personal injury case without informing the other side his client had died and a lawyer for a property seller who violated the rule after he provided the buyers with incomplete copies of soil percolation

tests. MRPC at 390-391, citing *Kentucky Bar Ass'n v. Geisler*, 938 S.W.2d 578 (Ky. 1997) and *Petillo v. Bachenberg*, 655 A.2d 1364 (N.J. 1995). Often, interpretation of the rule requires the balancing between a lawyer's duty to his client and his duty under Rule 4-4.1 not to mislead a third party, including a client's opponent.

Rule 4-1 applies to statements or omissions to "third persons". Usually, the "third person" involved in a Rule 4-1 violation is an adverse party, a government or court official or opposing counsel.

There are many examples of cases where a Rule 4-1 violation involves a statement to an adverse party. These include a lawyer's statement to a client's debtor that the debtor would lose his license if the account was not paid [In *Re. Eliassen*, 913 P.2d 1163 (Idaho 1996)]; a law firm that assured an expert witness that his fees would be paid within a set period of time [Copp v. Breskin, 782 P.2d 1104 (Wash. Ct. App. 1989)]; a lawyer's statement to an opposing counsel that funds would be remitted from an escrow account that had already been closed [In *Re. Files*, 421 N.W. 2d 321 (Minn. 1988)]; and a lawyer's false assurance to an interested party in a real estate transaction that deeds had been sent to the county recorder's office [In *Re*

*Graham*, 395 N.W. 2d 80 (Mi. 1986)]. See, MRPC at 391.

Government officials are also "third persons" under the rule. Examples include I.R.S. representatives, law enforcement officers, parole hear officers and court personnel. According to the MRPC, a Maryland attorney violated Maryland's equivalent of Rule 4-1 when he remained silent while his client lied to par agents and a New Jersey lawyer violated the rule when he tried to hold his client's eviction by telling the court that his client had obtained a stay. See, MRPC at 392.

Clearly, opposing counsel are considered third persons under Rule 4-1. Examples cited in the Annotated Model Rules include misrepresentations about a client's ability to make cash mortgage payments, misrepresentations to the court about opposing counsel's availability to attend a hearing and failing to tell defense counsel about a personal injury or child death before an offer is accepted. See, MRPC at 392.

Rule 4-4.1 also deals with lawyer's affirmative duty to disclose material facts to third persons. It is covered under section (b) of the rule. Generally, this arises when disclosure is necessary to avoid the client committing a fraudulent or criminal act. However, as a practical matter, of

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the information which the lawyer obtains regarding the client is itself confidential. Where that is the case, the lawyer has no duty to disclose if the information is considered confidential within the meaning of Rule 4-1.6.

Most states applying Model Rule 4.1 have retained the client confidentiality exception to model Rule 4.1, although at least two states, Maryland and New Jersey, don't recognize the confidentiality exception and require the lawyer to disclose information otherwise protected by the confidentiality rule if it is necessary to avoid assisting the client's criminal or fraudulent conduct.

Another issue is how Model Rule 1.2(d) impacts application of Rule 4.1 in light of Rule 1.6. Rule 1.2(d) prohibits the lawyer from assisting a client in conduct that the lawyer knows is criminal or fraudulent. Rule 4.1 prohibits a lawyer from failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, unless disclosure is prohibited by the confidentiality rules of Rule 1.6. But Rule 1.2(d) does not contain a confidentiality rule exception; it simply provides that a lawyer shall not counsel a client to engage or assist a client in conduct that the lawyer knows is criminal or fraudulent.

According to the Annotated Model Rules of Professional Conduct, some commentators have suggested that Rule 1.2(d)'s prohibition on assisting a client with fraudulent or criminal

conduct provides a "required by law" exception to the general confidentiality rule of Rule 1.6. If this is correct, then the exception to Rule 4.1 (b), which prohibits a lawyer from knowingly failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless Rule 1.6 confidentiality rules apply would not prohibit the lawyer from revealing information when silence would amount to assistance. See, MRPC at 394, referencing Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, Sec. 4.1:303, at 721 (2d ed. 1990).

It is hardly surprising that lawyers can be disciplined under Rule 4-1(a) for knowingly making false statements of material fact or law to third persons while representing a client. Rule 4-1(b)'s affirmative mandate that lawyers disclose material facts "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client..." is more difficult to apply given the interplay with confidentiality rules within Rule 1.6. An attorney faced with a possible Rule 4-1(b) issue should carefully consider the requirements of the rule and its interplay with the client confidentiality requirements of Rule 1.6 before revealing confidential client information.

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