

IN THE SUPREME COURT

STATE OF MISSOURI

IN RE:

SANFORD P. KRIGEL,

Respondent.

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Supreme Court No. SC95098

BRIEF OF AMICI CURIAE LAW PROFESSORS AND PRACTITIONERS OF
PROFESSIONAL RESPONSIBILITY AND FAMILY LAW

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POINTS AND AUTHORITIES

**I. MISSOURI SUPREME COURT RULES 4-1.1, 4-1.2, AND 4-1.3
AND LONG-STANDING PRINCIPLES OF FIDUCIARY DUTY IN
AN ADVERSARIAL SYSTEM OF JUSTICE REQUIRE THAT
ATTORNEYS FULLY INFORM THEIR CLIENTS REGARDING
THEIR LEGAL RIGHTS AND OPTIONS AND ASSIST THESE
CLIENTS IN PURSUING LAWFUL OBJECTIVES, EVEN IF
DOING SO INTERFERES WITH OR DENIES A THIRD PARTY'S
ASSERTION OF HIS OR HER RIGHTS.**

Missouri Rule of Professional Conduct 4-1.2

Missouri Rule of Professional Conduct 4-1.4

Missouri Rule of Professional Conduct 4-3.4(f)

Missouri Rule of Professional Conduct 4-4.2

Missouri Rule of Professional Conduct 4-4.4

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 889
(1992).

II. IMPLYING A DUTY UNDER RULE 4-4.4(a) FOR AN ATTORNEY TO PROVIDE NOTICE TO A THIRD PARTY TO FACILITATE THAT PARTY’S ABILITY TO SECURE LEGAL RIGHTS IN OPPOSITION TO A CLIENT, WHEN THE LAW DOES NOT MANDATE THIS NOTICE, WOULD PLACE ATTORNEYS AT RISK OF LIABILITY FOR VIOLATING THEIR FIDUCIARY DUTIES TO PROTECT A CLIENT’S RIGHT TO CONFIDENTIAL AND CONFLICT-FREE REPRESENTATION.

Missouri Rule of Professional Conduct 1.6

Missouri Rule of Professional Conduct 1.7

Missouri Rule of Professional Conduct 4.3

Missouri Rule of Professional Conduct 4-4.4

In re Wallingford, 799 S.W.2d 76 (Mo. banc 1990).

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III. RESPONDENT IS NOT SUBJECT TO DISCIPLINE FOR VIOLATING MISSOURI SUPREME COURT RULE 4-8.4(d) IN THAT DILIGENT, COMPETENT, AND LOYAL REPRESENTATION OF A BIRTH MOTHER IN PURSUING HER LEGAL OBJECTIVE OF HAVING HER CHILD ADOPTED IS NOT CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE BECAUSE THE INTERESTS OF THE BIOLOGICAL FATHER AND THE CHILD ARE INDEPENDENT INTERESTS, FULLY REPRESENTED IN ADOPTION AND CONSENT PROCEEDINGS.

Missouri Rule of Professional Conduct 4-8.4

Missouri Revised Statutes § 453.025 (2015)

Missouri Revised Statutes § 192.016 (2015).

Missouri Revised Statutes § 453.061 (2015).

In re Adoption of J.S., 2014 UT 51, 20120751.

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Heidbreder v. Carton, 645 N.W.2d 355, 368 (Minn. 2002).

Lehr v. Robertson, 463 U.S. 248 (1983).

Quilloin v. Walcott, 434 U.S. 246 (1978).

Troxel v. Granville, 530 U.S. 57, 66 (2000).

AUTHORITY TO FILE

While respondents have consented to Amici filing, Disciplinary Counsel has indicated to attorney for Amici that he refuses consent. Therefore, Amici filed a motion for leave to file. As directed by Rule 84.05 Amici curiae conditionally file this brief with the motion for leave.

INTEREST OF AMICI CURIAE

The law professors and practitioners, as Amici curiae, respectfully submit this brief in support of Respondent on the issue of whether waiting to see if a third party takes legally required steps to secure their rights violates Rule 4-4.4(a) and Rule 4-8.4(d) of the Missouri Rules of Professional Conduct. As the motion accompanying this brief explains, the law professors and practitioners signing onto this brief seek to assist the court in considering the broader implications of

this issue. The Amici curiae take no position on the factual issues in this case. Specifically, amici take no position on alleged violations of Missouri Supreme Court Rules 4-3.3(a)(3) (knowingly offering false evidence) and 4-4.1(a) (false statement of material fact). Amici focus exclusively on the affirmative obligations to assist a person with adverse interests to the client that this Court would impose if it treated as an ethical violation the passivity of a birth mother's attorney with respect to the birth father and the legal steps necessary for him to secure his rights. Amici respectfully requests that, in resolving this issue as presented in this case, the court take into consideration the impact of its ruling on the ethical and professional obligations of all attorneys as advocates, not just representatives of birth mothers, and the implications of creating unique responsibilities for attorneys in adoption practice.

Amici curiae (designations of academic affiliations are for identification purposes only)

- Barbara Glesner Fines, Attorney for Amicus, is the Rubey M. Hulén Professor of Law at the University of Missouri Kansas City where she teaches Professional Responsibility (since 1989) and courses in the law school's Child and Family Law Emphasis program. She is the author of two textbooks on professional responsibility, including *Ethical Issues in Family Representation* (Carolina Academic Press 2012), as well as numerous articles

addressing the professional responsibility issues in cases involving families.

She regularly provides pro bono consultations with attorneys regarding their obligations under the rules of professional conduct. Resolution of the issues in this case will affect her teaching, scholarship, and advising of clients.

- Susan Frelich Appleton is Lemma Barkeloo & Phoebe Couzins Professor of Law at the Washington University School of Law in St. Louis, Missouri. She is a nationally known expert in family law. Her teaching, research, and scholarship address such legal issues as adoption, reproductive rights, and parentage. She has co-authored a family law casebook, now with its sixth edition, as well as a casebook on adoption and assisted reproduction. A member of the American Law Institute (ALI), she sits on the ALI Council and has served as an adviser on numerous projects, including the Restatement of the Law: Children & the Law (currently) and ALI's Principles of the Law of Family Dissolution.
- Naomi Cahn is the Harold H. Greene Professor of Law at George Washington University School of Law in Washington, D.C. She has written numerous law review articles on family law and reproductive technology. She is the author of several books, including *The New Kinship* (NYU Press 2012) and *Test Tube Families: Why the Fertility Market Needs Legal Regulation* (NYU Press 2009).

- June Carbone is the Robina Chair in Law, Science and Technology at the University of Minnesota College of Law in Minneapolis, Minnesota. She is a nationally recognized expert in expert in family law and assisted reproduction, having published leading textbooks in Family Law and, along with Professor Cahn, the books *Marriage Markets: How Inequality is Remaking the American Family* (Oxford University Press 2014) and *Red Families v. Blue Families: Legal Polarization and the Creation of Culture* (Oxford University Press 2011).
- Gary A. Debele, Attorney at Law (Licensed in Minnesota, Wisconsin, US District Court for the District of Minnesota, US Supreme Court, and several tribal courts)

practices family law practice with particular expertise in adoption, assisted reproduction, and third party custody in the firm of Walling, Berg & Debele, P.A., in Minneapolis, Minnesota. He is a Fellow in the American Academy of Adoption Attorneys, American Academy of Assisted Reproduction Technology Attorney (where he chairs the amicus committee), American Academy of Matrimonial Attorneys, International Academy of Matrimonial Lawyers (chair of its Adoption Committee), and an Adjunct Professor at the University of Minnesota Law School.

- Taylor Goodale is an attorney in the firm of Aubuchon, Buescher, & Goodale, LLC, Union, Missouri 63084. This case could affect how he represents his client in a current case.
- Leigh Goodmark is Professor of Law at the University of Maryland Francis King Carey School of Law in Baltimore, Maryland. She is currently Director of the Clinical Education and Family Law Clinic and previously taught in the Families and the Law Clinic at the Catholic University of America, Columbus School of Law in Washington, D.C. and, before becoming a legal educator, directed the Children and Domestic Violence Project at the American Bar Association's Center on Children and the Law.
- Jamila Jefferson Jones is Associate Professor of Law at the University of Missouri Kansas City School of Law in Kansas City, Missouri, where she teaches professional responsibility. She previously served as a member of the Louisiana Attorney Disciplinary Board.
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- Nancy Levit is the Curators' and Edward D. Ellison Professor of Law at the University of Missouri Kansas City School of Law, where she teaches courses in the law school's Child and Family Law Emphasis program as well as Torts. She is co-author of *The Good Lawyer* (Oxford Press 2014) and a national speaker on the ethical responsibilities of attorneys.
- Marcia Narine is Assistant Professor of Law at St. Thomas University School of Law in Miami, Florida, where she teaches and writes on civil procedure and legal ethics.
- Christina R. Neff is an adoption attorney who is in private practice in Jefferson City, Missouri and was focusing on family representation for over forty years. She is a member of the Missouri Bar and the ABA Family Law Committee. Until this past year, she was a member of the Family Law Section of the Missouri Bar. She served as a member of the Advisory Committee of the Supreme Court of Missouri for 12 years.
- Sean O'Brien is Associate Professor of Law at the University of Missouri Kansas City School of Law and a leading expert on standards of representation in criminal defense matters, particularly death penalty and wrongful conviction cases. Resolution of this case will affect his current representation in these matters as a duty to provide information on rights to third persons who may be

adverse to one's client would create a duty to Mirandize potential witnesses in criminal defense investigations.

- Mary Kay O'Malley is Clinical Professor of Law and Director of the UMKC Child and Family Services Clinic. She directs students in the clinic representing adults in paternity, custody, guardianship, and other cases that permit the court to release children from jurisdiction into safe and permanent homes. She also teaches in the Guardian Ad Litem Workshop and other courses in the law school's Child and Family Law Emphasis Program. Resolution of the issue presented in this brief will affect how she trains current students and represents her current clients.
- Peter Raith is a private practice attorney in the Raith Law Firm, P.C., Shawnee, Kansas, practicing juvenile and family law. Resolution of the issue presented in this brief will affect current representations.
- Irma Russel is currently the Edward D. Smith Chair in Law, the Constitution, and Society at the University of Missouri Kansas City School of Law, having just stepped down from her role as the Dean of the University of Montana School of Law from 2009-2014. She teaches and writes in the field of Professional Responsibility and is a member of the ABA Center for Professional Responsibility and author of *Issues of Legal Ethics in the Practice of Environmental Law* (ABA 2003).

- Wanda M. Temm is Clinical Professor of Law and Director of Bar Services at the University of Missouri Kansas City School of Law, where she teaches as part of the Child and Family Law Emphasis Program. Before becoming a lawyer she served as a social worker specializing in adoption counseling.
- Kay A. Van Pelt is a private practice attorney in the firm of Van Pelt & Van Pelt, P.C., Springfield, Missouri. Her practice is exclusively in the field of adoption law and she is a Fellow of the American Academy of Adoption Attorneys. Resolution of the issue presented in this brief will affect her current representation.
- F. Richard Van Pelt is also an attorney in the adoption law firm of Van Pelt and Van Pelt, Springfield, Missouri. He is a Fellow of the American Academy of Adoption Attorneys and a Fellow of the American Academy of Matrimonial Lawyers. Resolution of the issue presented in this brief will affect his representation of clients.

Amici curiae's teaching, scholarship, national leadership, and practice will be profoundly affected by the court's ruling on the issue discussed in this brief. Amici seek to bring to this case this broader perspective and deep experience to supplement the arguments presented to the court in the briefs submitted.

JURISDICTIONAL STATEMENT

Amici curiae agree with the Informant's statement of jurisdiction.

STATEMENT OF FACTS

Amici curiae have not had an opportunity to access the record in this case, as it is filed under seal. Moreover, Amici take no position on any factual issues this case may present. Amici submit the statements of fact of both Informant's and Respondent's briefs to the extent they do not conflict, including those excerpts from the record provided therein.

SUMMARY OF ARGUMENT

“As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.” Missouri Supreme Court Rule 4, Preamble: A Lawyer's Responsibilities, ¶ 2. This disciplinary proceeding proposes to impose on lawyers an extraordinary and unprecedented duty: to compel them to inform clients, who owe no fiduciary duty to a third party, to supply that third party

with information that the client is not legally obligated to provide and that is arguably not in the clients' interest to provide. The proposed obligation is at odds with the lawyers' duties to zealously represent their clients, to honor their confidentiality, and to provide them the competent and diligent advocacy demanded in our adversary system.

These principles of advocacy are derived from the common law of malpractice and fiduciary duty and are embodied in the rules of professional conduct. These rules provide that an attorney has duties to counsel his or her client and decide, with the client, whether and when to assert his or her legal rights. Rules 4-1.4 and 4-1.2. The client may trust that the attorney will pursue the client's lawful objectives competently and diligently, Rules 4-1.1 and 4-1.3, and that the attorney will "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Rule 4-1.3, cmt. 1. The client may trust that the attorney will keep information relating to the representation confidential and not use or disclose that information in any way that would undermine the client's objectives. Rules 4-1.6 and Rule 4-1.8(b). Most importantly, the client may trust that the attorney will not permit the interests of others to materially limit his or her ability or willingness to pursue the client's interest. Rule 4-1.7.

The lawyer's duty to exercise "zeal in advocacy upon the client's behalf" necessarily implies that the lawyer will use the law to defeat the claims of those adverse to the client, whether by actively marshalling evidence and arguments against adverse claims or by doing nothing until a third party actually makes a claim. Rule 4-1.3, cmt. 1. Where no legal obligation exists to provide notice or information to a third person, an attorney has no ethical obligation to do so. This is especially so when that third person is represented by counsel.

Because an attorney owes competence, confidentiality, counseling, advocacy, and loyalty to his or her client, the attorney may not undertake to assist a third person with information and notice that will advance a third person's interests against the client unless the law mandates that affirmative obligation. When that third person is represented by counsel, the rules presume that the counsel is competent to advise and assist that third person in taking these steps. But even if the third person is represented by incompetent counsel or no counsel at all, unless the substantive law directs otherwise, an attorney representing a client opposing that person is not acting unethically to simply wait to see if such third persons are willing and able to take the steps the law provides to them to create or further their rights.

To hold otherwise is to place at risk of discipline any attorney who would seek to protect his or her client's interests in light of an opposing party's failure

to observe the technical requirements of pleading, timing, recording, registration, or other predicate acts that create or preserve the rights of that opposing party.

Nothing in the nature of adoption law justifies an exception to these duties of the advocate. Missouri law protects a client's right to confidentiality and loyalty, permitting – and regularly requiring – attorneys to subordinate even very serious interests of others to the interests of a client. The grave interests at stake involved in adoption are well protected. The rights of a biological father are protected by Missouri law, which provides that biological fathers who have not married the mother or otherwise demonstrated commitment to the child through support may nonetheless secure their rights to notice of adoption actions by registering with the putative father registry.

Those rights are independent of the biological mother. Her attorney has no duty to assist the father in asserting those rights. The best interests of children who are subjects of an adoption action are represented by the court appointed guardian ad litem. The interests of the adoptive parents are protected by their attorney. If one of these other attorneys does not act competently to protect their client, it is not the province of the court in a disciplinary action to shift those duties to an attorney representing another family member under the broad standards of “fairness” or the needs of the “administration of justice.” Those values are protected by the structure of the substantive and procedural law of

adoption. It is only through the reform of those laws that these rights should be best adjusted.

ARGUMENT

Missouri statutes impose a deadline on putative fathers to register their desire to be involved in a child's life. § 453.030.3(2), RS Mo. 2015. Settling paternity issues facilitates the child's placement in a stable and secure home, and these statutes have been upheld based in large part on the belief that an interested father would timely assert his parental rights. Biological mothers have no duty to provide information or assistance to biological fathers or their attorneys in asserting these rights. Indeed, the biological mother has no duty to inform the biological father of the child.

Counsel for the birth mother did not notify the biological father of her child of this statutory deadline or of the fact of the child's birth. No principle of substantive or procedural law compels that notice or communication unless or until the biological father secures those rights. Counsel for the birth mother did not advise counsel for the biological father of the court hearing in which the birth mother consented to termination of her rights. Again, no law requires this notice. Can a lawyer who simply waits to see if the father will take the legally required steps to secure the right to notice of adoption hearings be disciplined for

facilitating his client's weighty decision to consent to her child's adoption only after the father had defaulted on the statutory registration period? Such a result would punish the lawyer for exercising his duty of confidentiality and loyalty to his client, and create unprecedented duties to third parties in a broad range of situations where a third party's interests conflict with the client's.

POINT I

MISSOURI SUPREME COURT RULES 4-1.1, 4-1.2, AND 4-1.3 AND LONG-STANDING PRINCIPLES OF FIDUCIARY DUTY IN AN ADVERSARIAL SYSTEM OF JUSTICE REQUIRE THAT ATTORNEYS FULLY INFORM THEIR CLIENTS REGARDING THEIR LEGAL RIGHTS AND OPTIONS AND ASSIST THESE CLIENTS IN PURSUING LAWFUL OBJECTIVES, EVEN IF DOING SO INTERFERES WITH OR DENIES A THIRD PARTY'S ASSERTION OF HIS OR HER RIGHTS.

In this case, there are no express allegations that Mr. Krigel violated his professional obligations to his client. Mr. Krigel observed his client's rights to determine the objective of the representation and to be fully advised of her legal rights and obligations as well as the procedures that must be followed for her to exercise consent and achieve her objective of having her child adopted.

Throughout informant's argument runs the suggestions that his very observance of these obligations should provide the basis for discipline.

In Missouri, the two most frequent bases for disciplinary complaints are alleged violations of Rules 4-1.4 and 4-1.3. Alan D. Pratzel, *Report of the Office of the Chief Disciplinary Counsel for the Year 2014 Together with the Financial Report of the Treasurer of the Advisory Committee Fund for 2014*, Supreme Court of Missouri, May 2015, available at

<http://www.mochiefcounsel.org/articles/AnnualReport2014.pdf>. Yet, the implications of this disciplinary action suggest that an attorney has engaged in an unprofessional scheme designed to unlawfully deny another person their rights when the attorney fully counsels a client on a lawful objective, on the legal rights and responsibilities of others whose decisions may impact the client and the technical limitations of those rights, and on the prudent restraint in communicating with opposing parties. Such limitations on attorney advice will only have the effect of impeding the ability of attorneys to represent their clients competently and diligently.

First, as is her right, Mr. Krigel's client determined that the objective of the representation: to place her child in an adoptive home rather than have the child raised by either her or the biological father. There is nothing illegal about this objective and, Rule 4-1.2 demanded that Mr. Krigel respect and advance that

objective. To accomplish this objective, the client would need to consent to the adoption; but, she would also need the biological father to either consent to the adoption or do nothing to acquire rights to contest the adoption. Otherwise, client would find herself in a situation in which the very reason for her consent to terminate her parental rights – to insure her child would be placed in a two-parent adoptive home – would be frustrated.

Both the law of agency and the rules of professional conduct provide that attorneys must pursue their clients' lawful objectives and may not disregard their lawful instructions regarding those means that are not purely “technical” or “legal tactical” issues. Rule 4-1.2, cmt. 1. *In re Mirabile*, 975 S.W.2d 936, 939 (Mo. banc 1998). Nothing in the rules would “prohibit a lawyer from advising a client concerning action the client is legally entitled to take.” Rule 4-8.4, cmt. 1. Just the opposite, the duty of communication demands that if a biological mother’s is to give truly informed consent to an adoption, she must be fully informed of “the material risks of and reasonably available alternatives to the proposed course of conduct.” Rule 4-1.0(e). Thus, Mr. Krigel was duty bound to inform the client of the potential consequences of the father’s actions or inactions.

Informant's brief notes that "B.S. would not have consented to the adoption if D.O. had registered" so that he would then have the right to object to the adoption. Informant's Brief at 23. The implication is that the client's objective of making her decision contingent on the father's actions was somehow illegal or impermissible. However, nowhere does the law require joint actions or decisions by these parents. In adoption, as in divorce or paternity actions, parents are always permitted to contest the custodial rights of other parents. The entire structure of our child custody statutes is premised on that assumption. § 452.375, RS Mo. 2015. Informant appears to suggest that, in the context of an adoption, a birth mother has no right to be antagonistic to the man with whom she has conceived a child but who has not taken the legal steps necessary to secure his parental rights. There is simply no authority for such a proposition.

Second, in Missouri the birth father's rights to consent or object to an adoption are contingent upon his taking some affirmative action in a timely fashion to preserve his rights. § 453.030.3(2), RS Mo. 2015. Just as in any other situation in which a third party's rights depend on timely action, the attorney is not only permitted but required by Rule 4-1.4 to inform the client of this fact so she can make a fully informed decision regarding her course of conduct. In this case, Mr. Krigel informed his client regarding the biological father's potential rights

and the ways in which he might seek to perfect those rights by registering with the putative father registry.

Informant's brief highlights the discussion of statutory timing with the client as though this was impermissible or was furthering a fraudulent scheme.

Informant's Brief at 24-25. However, this information was necessary for the attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 4-1.4(b).

So long as an attorney does not counsel or assist a client in fraudulent actions, merely providing information is not prohibited by the rules.

Certainly, the biological father's attorney, had he been acting competently in advising his client, would have advised the birth father that he had a limited period of time to perfect his parental rights by registering in the putative father registry. That attorney could even have advised his client to wait to register until after the birth mother had irrevocably consented to termination of her own rights and then objected to an adoption, securing his own custodial rights free of any obligation to honor the mother's legal rights. Neither the attorney nor the client in these circumstances would be violating any law or engaging in any fraud by taking advantage of timing and making their decisions contingent on the actions of the other party.

Equally here, the law permitted the client to wait to see if the father availed himself of the opportunities afforded to him under the law. While this action has been described as a “passive strategy,” it is not so much a “strategy” as it is an appropriate course of action that any competent lawyer (in an adoption or otherwise) could choose.

Of course, a client might take information about the law, such as the information regarding statutes of limitations, and then decide to engage in illegal or fraudulent activity such as misrepresenting or concealing facts or timing. There is some evidence in this case the birth mother did so here. However, no evidence exists that Mr. Krigel actively counseled or assisted the client to take these steps. “[T]he fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action.” Rule 4-1.2, cmt. 7. The attorney is always permitted to “discuss the legal consequences of any proposed course of conduct with a client.” Rule 4-1.2(f) (emphasis added).

Third, in advising a birth mother who wishes to insure that her child is adopted may advise that client to avoid communication with the biological father. Yet Informant’s brief suggests that it is a violation of the rules of professional conduct for an attorney to keep the opposing party “in the dark” (Informant’s Brief at 61-62) and to instruct his client to have no communication with the

opposing party (*Id.* at 61), characterizing this advice as “concealment of factual information” (*Id.* at 63). Questioning of Mr. Krigel in the disciplinary hearing implied this further in asking, “Did you do anything to encourage communication between the young couple?” *Id.* at 25.

However, as Informant’s brief admits, this advice to avoid communication with a biological father when pursuing adoption is part of the custom and practice in adoption law. Informant’s Brief at 34. It is undoubtedly common in a wide variety of practice settings because a client’s communication with an opposing party, especially in highly emotional personal disputes, can not only harm the client’s interests but can further exacerbate the dispute rather than advance its resolution.

It is for this reason that, while Rule 4-3.4(f) provides that attorneys may not request others to “refrain from voluntarily giving relevant information to another party,” that restraint does not apply to a client, relative, employee, or agent of the client. Rule 4-3.4(f). “Fair competition in the adversary system” requires that each side be able to choose to interact only through the formal procedures established by the courts. Rule 4-3.4, cmt. 1. Counseling a client to refrain from communicating facts to an opposing party is not “concealment” – the exercise

of an advocate's duty to protect a client in an adversary system contemplates that evidence is to be "marshaled competitively by the contending parties." *Id.*

The suggestion that an attorney is subject to discipline if he or she counsels an unwed mother client to avoid communication with the father of her child is a dangerous proposition to entertain. Birthmothers may have very serious reasons for wishing to isolate themselves from biological fathers. Domestic violence and domestic homicide are tragically common facts of life. The dynamics of domestic violence are characterized by coercive control of a victim through physical, sexual, psychological or financial abuse. U.S. Dept. of Justice, Office on Violence against Women, *Domestic Violence*, available at <http://www.ovw.usdoj.gov/domviolence.htm>. The Missouri State Highway Patrol reports that in 2013 Missouri law enforcement agencies reported 40,013 incidents of domestic violence. Missouri State Highway Patrol Research and Development Division Statistical Analysis Center, *Crime in Missouri 81* (2013). Forty-eight of these incidents were homicides and a significant percentage were incidents between unmarried individuals with a child in common. *Id.*

Furthermore, an unwed mother's pregnancy may be the product of rape by her partner. In one of the most comprehensive studies of intimate partner rape, the U.S. Department of Justice reported that 7.7% of women have been raped by their husbands or intimate partners. Patricia Tjaden & Nancy Thoennes, U.S.

Dep't of Just., NCJ 181867, *Extent, Nature, and Consequences of Intimate Partner Violence*, at iii (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm>.

Abuse is exacerbated during pregnancy. *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 889 (1992) (“The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy.”). Homicide is the second leading cause of death for pregnant women, and domestic homicide kills a greater proportion of pregnant than non-pregnant women. Rebekah Kratochvil, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of a Mandatory Reporting Statute*, 10 Hous. J. Health L. & Pol’y 63, 69 (2009).

It is little wonder that some birthmothers would wish to avoid contact with the biological fathers of their children. So clear is the association between identifying a father and abuse that Congress developed an exception to a mother’s obligation to name the father of her child for government use in enforcing child support in the cases where danger to mothers and children existed. Social Services Amendments, Pub. L. 93-647 (1974). *See also* Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 Wis. Women’s L.R. 367, 372 (2000) (This amendment established the good cause exception for women not to

name fathers in order to escape abuse). *See, e.g.*, § 208.055.1, RS Mo. 2015(providing good cause exception to cooperation requirement). Likewise, putative father registries act as a legal mechanism that not only permits father to secure their parental rights but does so in a way that does not require a mother to have any interaction with that father in any way. § 192.016, RS Mo. 2015. A birthmother's privacy and safety are protected because she is not obligated to share information with the father who in some cases may pose a danger to her or the child.

Given these facts, if the court were to sustain informant's interpretation of the rules, an attorney would be subject to discipline if he did not advise an unwed mother to consult with and assist a biological father. It is not hyperbole to suggest that in too many cases, that attorney could be forced to choose between losing his license or having his client lose her life.

POINT II

IMPLYING A DUTY UNDER RULE 4-4.4(a) FOR AN ATTORNEY TO PROVIDE NOTICE TO A THIRD PARTY TO FACILITATE THAT PARTY'S ABILITY TO SECURE LEGAL RIGHTS IN OPPOSITION TO A CLIENT, WHEN THE LAW DOES NOT MANDATE THIS NOTICE, WOULD PLACE ATTORNEYS AT RISK OF LIABILITY FOR VIOLATING

THEIR FIDUCIARY DUTIES TO PROTECT A CLIENT'S RIGHT TO CONFIDENTIAL AND CONFLICT-FREE REPRESENTATION.

An attorney has duties of confidentiality and loyalty to his client. Rule 4-1.6 and 4-1.7, duties that have their roots in the law of fiduciary obligation. Missouri is one of the most aggressive states in protecting that duty of confidentiality and loyalty, rejecting Model Rules exceptions that would permit an attorney to reveal a client's crime or fraud that results in substantial financial injury to a third person when the attorney's services were used to further that fraud.

Compare Rule 4-1.6 with ABA Model Rule of Professional Conduct 1.6(b)(2)-(3). An attorney may not disclose information about the facts or law to opposing counsel or his or her client for the purposes of facilitating that opposing party's actions against the client. The only exception that would justify doing so is the exception permitting disclosures "to comply with other law or a court order." Rule 4-1.6(b)(4).

The duty of confidentiality is part of the larger duty of loyalty an attorney owes the client. An attorney may not permit the interests of others to materially limit his or her ability or willingness to pursue the client's interest. Rule 4-1.7. A conflict of interest is "any substantial risk that a lawyer's representation of a client would be materially and adversely affected because of the lawyer's

countervailing interests or duties." Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 10.7 (3d ed. Supp. 2004). Consequently, attorneys have a duty to avoid representation of clients when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person." Rule 4-1.7(a)(2). When a lawyer is laboring under this kind of conflict of interest, "[t]he conflict in effect forecloses alternatives that would otherwise be available to the client." Rule 4-1.7, cmt. 8; *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 736 (Mo. banc 2004).

The duty of loyalty is most clearly breached when an attorney acts on behalf of opposing parties in the same litigation. This is a conflict that not even client waiver can cure. Rule 4-1.7(b)(3). In Missouri, an attorney is not permitted to represent both husband and wife in a dissolution proceeding even where it is uncontested and both parties consent. *See Missouri Formal Op. 109* (1974).

Yet in this disciplinary proceeding, Mr. Krigel has been charged with a violation of Rules 4-4.4 and 4-8.4(d) for pursuing a "passive strategy" that was "designed to refrain from providing any information to the biological father." Informant's Brief at 27. The charge implies that this "strategy" is unethical because it violates an alleged duty to the biological father to provide him the facts and

avenues for creating and enforcing his rights. Informant's Brief at 19, 22.

Recognizing this duty to a third party would turn the adversary system on its head, not only in adoption law practice, but in any litigation in which a third party has a potential legal claim or defense but has not taken the steps to secure that legal claim or defense.

Inherent in the nature of an adversary system is the principal that each party is responsible for securing and asserting its own rights. These duties of competence and diligence do not extend to persons in an adversarial relationship to the client because the law presumes that "adversaries would never desire to benefit one another." *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 776 (Mo. Ct. App. W.D. 2003) (citing *Wild v. Trans World Airlines, Inc.*, 14 S.W.3d 166, 168 (Mo. Ct. App. 2000)).

The attorney's duty to refrain from assisting others in acquiring or exercising rights adverse to the client is especially strong when those persons are themselves represented by counsel. The duty to protect an adverse party's interests belongs to that party's attorney, not opposing counsel. "A lawyer is charged during the progress of a cause with the duty, and in fact presumed, to know what is going on in his case." *Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97, 100 (Mo. 1989). Indeed Rule 4-4.2 precludes an attorney from

communicating with represented parties for precisely the reason that the presumption would be that this communication would undermine the relationship between opposing counsel and his or her client.

Even when a third person is unrepresented, however, the rules do not require an attorney to assist that third person in acquiring or exercising rights adverse to the attorney's client. Quite the opposite: Rule 4-4.3 prohibits the attorney from giving legal advice to an unrepresented person, "other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." Prior proposed versions of the rules would have gone further, prohibiting lawyers from "unfairly exploiting [an unrepresented] party's ignorance of the law or the practices of the tribunal." ABA Model Rules of Professional Conduct Rule 3.6 (Discussion Draft 1980). However, neither the ABA nor Missouri adopted this extension of the duty to unrepresented persons and most certainly did not adopt such an extension to situations in which a third person is represented.

The proposition advanced by informant in this case is that an attorney who does not advance an opponent's ability to create or exercise their rights is engaging in conduct whose substantial purpose is to burden and delay a third person.

Remarkably, the only authority the informant discusses in advancing this proposition is *In re Wallingford*, 799 S.W.2d 76 (Mo. banc 1990), which rejected the argument that pressure tactics in custody actions violate this rule. Informant suggests that *Wallingford* is distinguishable because the attorney's "sharp practices" were justified because the opposing party had engaged in unlawful conduct whereas here the birthfather did nothing wrong. However the key feature in *Wallingford* is not the fault of opposing party but the court's recognition that the adversary system must provide a degree of deference to an attorney's choice among lawful strategies to advance the client's cause. If *Wallingford*'s actions in luring the opposing party into the state to secure jurisdiction over her by withholding payments of child support to her does not violate Rule 4-4.4, it is difficult to accept that the perfectly lawful strategy of inaction, which involved no pressure on the opposing party to surrender his rights at all, would be a violation.

Indeed to accept the interpretation of Rule 4-4.4 advanced by Informant would be to jeopardize the ability to advocate effectively for any client whose rights might be limited or defeated by the timely filing of a legal action by an opponent and place attorneys in a Catch-22 of discipline or liability. Whether representing an employer waiting to see if an employee will meet statutory deadlines for filing discrimination claims, an occupant of property with an adverse possession

claim against the property owner of record, or a debtor awaiting suits by creditors, the implications of a ruling that holds an attorney responsible for providing an adversary notice that the law does not otherwise compel significantly burdens the profession. Attorneys representing a client whose exercise of legal rights would be affected by the creation or exercise of an opposing party's timely actions will have a choice of disciplinary risks: either help the opposing party realize their rights and violate fundamental fiduciary duties to the client or protect the client's interests by waiting to see if the opposing party grasps or exercises their rights and violate this newly created interpretation of the duty to third parties.

The implications of this extension of duties to opposing parties has not been lost on Missouri courts, which have recognized in a broad range of cases that "Enlarging the attorney's duty to non-clients to this extent will result in liability being extended to an unlimited class, in clear violation of the holding in *Donahue*. Furthermore, such an expansion of liability would unduly interfere with the attorney's ethical obligation to vigorously represent his or her client's interests." *Tutera Investments, L.L.C. v. Pullen*, No. 04-1155-CV-W-GAF, 2005 WL 2285558, at *5 (Mo. Ct. App. W. D. Sept. 19, 2005) (citing *Donahue v. Shugart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624, 628 (Mo. banc 1995)).

An attorney has no legal duty to provide notice of pending proceedings to others unless that duty is directed by the legislature. *Minor v. Terry*, No. ED 101131, 2014 WL 5462409, at *7 (Mo. Ct. App. E.D. Oct. 28, 2014), reh'g and/or transfer denied (Dec. 15, 2014)(citing *Hackmann v. Mo. Amer. Water Co.*, 308 S.W.3d 237, 239 (Mo. Ct. App. E.D. 2009)). In that case, the attorney Terry represented two sisters in a wrongful death action involving their mother's death. The attorney provided unrepresented siblings the statutorily required notice of the settlement hearing in the case. After the settlement hearing resulted in a distribution of proceeds in which the attorney's clients received a disproportionate share of the settlement, unrepresented siblings sued the attorney for malpractice and breach of fiduciary duty, claiming that he "owed them a duty to keep them apprised of the litigation and to ensure an equal and fair distribution of the settlement proceeds."

The court of appeals upheld the summary judgment on the claims against the attorney. The court found that the attorney had no duty of care under malpractice law that would extend to the unrepresented siblings. While noting that in limited circumstances an attorney may have a duty to third persons, that duty arises only when the representation is designed to carry out the "client's specific intent to benefit the non-client." *Id.* at *5.

Likewise the court found that the attorney had no fiduciary duty to the siblings to insure an equal settlement. “In fact, pursuing equal shares for Appellants at the expense of his clients' shares would have violated Terry's ethical duty to zealously represent only his clients' interests. Cf. Rule 4-1.7(a)(1) (preventing a lawyer from representing one client where it will be directly adverse to the interests of another).” *Id.* at *6.

In that case, as in this one, the clients themselves were alleged to have lied to their siblings about the settlement in order to discourage their attendance at the hearing. The court of appeals reversed the summary judgment in their favor, finding that there were genuine issues of fact regarding whether the client’s statements to their siblings constituted fraud. However, even in these circumstances of possible client fraud, the court concluded that the attorney had no duty to the unrepresented siblings to protect their interests other than the duty to provide them the notice mandated by the legislature. The court recognized that “to hold that an attorney representing the named plaintiff in a wrongful death class has a duty to the other class members to ensure an equal settlement amount, to make them appear at the hearing, and to ensure they are represented, would put a huge burden on the legal profession.” *Id.* at *6.

Similar considerations guided the court in *France v. Podleski*, 303 S.W. 3d 615 (Mo. Ct. App. S.D. 2010), where the court held that an attorney for the public administrator does not have a duty of due care to the wards for whom the public administrator has been appointed guardian:

[W]ere we to hold that Respondents owed a duty to Appellants in this case, we would place other attorneys representing a public administrator in a rather precarious position. Essentially, a public administrator would be appointed as guardian or conservator of someone deemed incompetent by the probate court, and a public administrator's attorney would then be forced to argue on behalf of the ward that the ward was competent and that the appointment of a public administrator as guardian or conservator was unnecessary. We decline to issue a holding that would create such a conflict.

Id. at 620.

Even in a situation in which an attorney is representing an individual who has a fiduciary duty to a third person, as a public administrator does to a ward, the court has refused to extend a duty to that third person. How much more so should this case refuse to find that a birth mother's attorney owes a duty to a biological father.

Likewise, in *Sprung v. Negwer Materials, Inc.*, 727 S.W. 2d 883 (Mo banc 1987), the court affirmed a circuit court's denial of a motion to set aside a default judgment. After a remand to consider an equitable proceeding to set aside the default, the court again affirmed the trial court's finding that there was no basis for excusing the default. *Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97 (Mo. banc 1989).

The plaintiff in that case was awarded a default judgment because of a series of clerical errors the defendant attorney failed to file and answer or a motion for extension of time. Even though the plaintiff discovered that the defense attorney was assuming that it had filed an extension of time, the plaintiff directed its attorney to wait until the statutory time limit had elapsed for a motion to set aside the default, leaving the defendant with only a suit in equity for relief. As in this case, there were allegations that the attorney was wrong in failing to give a "head up" to the opposing party.

Defendant's attorney argued that "local custom and courtesy require an attorney to inform his adversary of a default." *Id.* at 893.

Judge Rendlen in his concurring opinion carefully examined the precarious position a contrary result would imply: "to require an attorney to inform his adversary of a default stands athwart the attorney's duty to zealously

represent his client.” *Id.* at 893. He noted that this was especially so when the client had directed the attorney not to extend this courtesy to opposing counsel, since “when an attorney is specifically instructed by the client the attorney must follow these instructions, if lawful, with reasonable care and promptness or risk possible liability for damages proximately caused by the attorney's failure.” *Id.*

The court in that case was sharply divided. Judge Donnelly dissented, noting that he was “being somewhat old-fashioned” in his view that the default judgment should have been reversed. *Id.* at 893 (Donnelly, J. dissenting). Perhaps his position was grounded in the ethical canons of an earlier time. Before the Missouri Supreme Court adopted a new set of rules based on the ABA Model Rules of Professional Conduct, Missouri’s disciplinary code was modeled on the ABA Code of Professional Responsibility, which, in its ethical considerations, promoted an aspirational standard that attorneys should “follow local customs of courtesy or practice.” ABA Code of Prof. Resp. EC 7-38 (1986). However, it is not clear that those rules of etiquette governing attorney deportment of an earlier time ever had the force of law or were intended to trump the attorney’s duty to the client. Dennis Tuchler, *Teaching Legal Profession: Ethics Under the Model Rules*, 51 St. Louis U. L. Rev. 1161, 1188 (2007)(“ reference to consideration for others and etiquette [applies] to those

situations in which the client’s ultimate victory is not prejudiced”) In any case, they no longer are a part of the disciplinary standards today.

Indeed, even the dissenting judge noted the dilemma faced by the attorney by imposing a duty on the attorney to warn the other attorney of the failure to observe the requirements of the law:

Here, the attorney for plaintiff was directed by his client to conceal the taking of the default judgment from his brother [sic] lawyer. What was he to do in such circumstance? Should he have invited the wrath of his client and risked a claim of malpractice? Had he acted as a professional and not as a hired representative who did solely the bidding of his client, would/could this Court have protected him?

Id.

Of course, today the answer is clear. The Court would not protect an attorney from liability when the attorney disregards the direction of the client and provides opposing counsel with information that would give the opponent an advantage over his own client. *In re Carey*, 89 S.W. 3d 477, 499 (Mo. banc 2002)(attorneys suspended after the “violated the trust of their former client” by prosecuting a class action lawsuit against a former client that was substantially related to their prior representation of that client).

This court has held on more than one occasion that an attorney has not acted improperly by keeping silent in the face of an opposing party's imminent loss of rights. For example, in another default judgment case, the court stated:

Defendant negligently disregarded legal process. Once he was validly served he was charged with notice and in court for all subsequent proceedings. Plaintiff proceeded properly under the rules. Defendant ignored them. If judgments are properly rendered they should not be disturbed by loose interpretations of cases and newly created and imposed rules. Dereliction by a defendant should not be so rewarded. No additional notice was required under the law.

Barney v. Suggs, 688 S.W.2d 356, 359–60 (Mo. banc 1985). *See also Friedman v. The Caring Group, Inc.*, 750 S.W.2d 102, 103–04 (Mo. App. 1988)(failure of plaintiff's attorney to notify defendant's attorney, who had entered his appearance in the case but not filed an answer, that plaintiff's attorney intended to take a default judgment was not a basis for setting aside the judgment). Of course these are cases involving malpractice and relief from default judgment, not discipline cases; however, maintaining congruence between the standards for attorneys announced in these various settings is critical. If an attorney does not have a legal duty to place the interests of an opposing party above those of his client, creating an ethical duty to do so will place attorneys in a precarious

situation of regularly having to choose between the risks of discipline or liability.

A close analog to this case is the situation in which an attorney is aware that the statute of limitations has run on a client's claim. The American Bar Association Standing Committee on Ethics and Professional Responsibility in a Formal Opinion on this topic noted the dilemma this situation presents and concluded that the attorney's duty to advocate for the client prevented disclosure to an opposing party the fact that a defense of limitations was available. The opinion states:

A lawyer has no ethical duty to inform an opposing party in negotiations that the statute of limitations has run on her client's claim; to the contrary, it would violate Rules 1.3 and 1.6 to reveal such information without the client's consent. It follows that where the opposing party and his counsel appear to be unaware that the limitations period has expired, the lawyer may not discontinue negotiations over the claim simply on this ground, in the absence of agreement by her client that she do so. Nor is the lawyer constrained by the rules of ethics from filing suit to enforce a time-barred claim, unless the rules of the jurisdiction preclude it.

ABA Standing Comm. on Ethics and Prof. Resp., Formal Opinion 94-387, *Disclosure to Opposing Party and Court That Stature of Limitations Has Run* (September 26, 1994).

Just as in these other contexts in which courts have found no error or misconduct in situations in which an attorney waits to see if a person with an interest opposed to the client takes the steps provided by the law to further that interest, so too here the Court should not accept Informant's urging to conclude that an attorney who fails to provide information or advice to the opposing party or his attorney is guilty of a violation of ethical rules because he used "means that had no substantial purpose other than to embarrass, delay or burden a third party." Rule 4-4.4(a). The attorney in these instances is not acting to burden a third party but is in fact ethically representing his own client, pursuing the proper purpose only of advancing his client's interest. Nor should the court conclude that legal advancing a client's interests, even at the detriment of a third person, is "conduct prejudicial to the administration of justice." Rule 4-.4(d) Rather, the administration of justice in an adversary system requires that an attorney advance his client's objectives using the substantive and procedural law undiluted by the partisan interests of third persons except as that law would demand.

POINT III

RESPONDENT IS NOT SUBJECT TO DISCIPLINE FOR VIOLATING MISSOURI SUPREME COURT RULE 4-8.4(d) IN THAT DILIGENT, COMPETENT, AND LOYAL REPRESENTATION OF A BIRTH MOTHER IN PURSUING HER LEGAL OBJECTIVE OF HAVING HER CHILD ADOPTED IS NOT CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE BECAUSE THE INTERESTS OF THE BIOLOGICAL FATHER AND THE CHILD ARE INDEPENDENT INTERESTS, FULLY REPRESENTED IN ADOPTION AND CONSENT PROCEEDINGS.

The Informant's brief in this case repeatedly suggests that Mr. Krigel should have encouraged his client to communicate with the biological father and notify him of the birth and of pending legal proceedings, so that he could act to secure the rights to object to an adoption. Informant's Brief at 17, 19, 22, and 61.

However, as noted previously, an attorney has no legal duty to provide notice of pending proceedings to others unless that duty is directed by the legislature.

Hackmann, 308 S.W.3d at 239.

The implication throughout this proceeding has been that this general principle of law has exception within the context of adoptions: that mothers and their attorneys owe a legal duty to biological fathers to provide them the information

and notice necessary to permit them to object to an adoption. This is not the law. The rights of unwed biological parents are independent of one another and they have no affirmative duties to advance or protect each other's rights under Missouri law.

Informant's brief suggestions that the attorney's actions provided "a delay in D.O.'s knowledge of the facts beyond the statutory time within which he could have exercised his legal rights." Informant's Brief at 61. The argument misconceives the law of adoption in fundamental ways. First, a biological father does not automatically have legal rights to exercise simply by virtue of his having had sexual intercourse with a woman resulting in a pregnancy. Second, under the law of Missouri, the biological father had all the facts he needed to acquire the legal rights of parenthood: he knew that he had sexual intercourse which may have resulted in his fathering a child.

Once a child is born, the birth mother is the legal parent and has parental rights that are independent of the biological father. Unwed mothers acquire parental rights as a result of the commitment to their child demonstrated by their decision to carry the child to term. Unless her rights have been terminated by the state for failing to adequately care for the child, a birthmother by virtue of the fact that she has a constitutionally recognized right to the "care, custody and control of

her children” must consent to the termination of her rights. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). This consent must be both voluntary and informed. Procedures designed to ensure this is the case may include the signing of a standardized comprehensive form or a hearing before a judge.

Biological fathers acquire these same rights to consent or object to an adoption by their own actions: marrying the mother, assuming responsibility for the child, filing a paternity action, or filing with the putative father registry. § 453.030.3(2), RS Mo. 2015. The act of conceiving a child does not alone give a biological father constitutionally protected rights; rather the father must take some affirmative step to demonstrate his commitment to the child. *Quilloin v. Walcott*, 434 U.S. 246 (1978)(holding that the US Constitution provided no protection for unwed father who had never legitimated his son, never taken custody of him, and not shouldered significant responsibility for him). The United States Supreme Court has most recently reaffirmed this understanding of the rights of unwed fathers, where the Court withheld federal statutory protection for parental rights under the Indian Child Welfare Act from an unwed Indian father because he had prenatally abandoned his child and her mother by failing to support them during the pregnancy and/or otherwise assume custody of the child after birth. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

One of the steps an unwed father can take to secure their rights in approximately 33 states is registering with the putative father registry. These registries are designed to give a father an opportunity to assert his rights to the child or consent to the adoption. Once a father registers he is entitled to notice of any potential adoption action regarding his child. A man who believes he has fathered a child need not wait until he is sure of that fact or until the child is born in order to register. He need not investigate, communicate with the mother, or verify the pregnancy, birth, or even his parentage. He need only register.

This method of preserving his rights was specifically approved by the U.S. Supreme Court in *Lehr v. Robertson*, 463 U.S. 248 (1983). In that case the Court affirmed that a state was only constitutionally required to provide an unmarried birthfather an opportunity to assert his parental rights. If he failed to avail himself of the opportunity he could be foreclosed from participating in the decision concerning his child.

The registries not only protect biological fathers but also serve the purpose of ensuring that the adoption will not be disrupted due to a father's delayed claim in asserting his rights.

The system places responsibility solely on the birthfather to protect his own rights from the time of a possible conception. In Missouri, the statute clearly

states “Any man who has engaged in sexual intercourse with a woman is deemed to be on notice that a child may be conceived and as a result is entitled to notice of an adoption proceeding only as provided in this chapter.” § 453.061, RS Mo. 2015. Again the rationale for imposing this obligation on biological fathers is to protect children. If a father were permitted to contest an adoption later based on his failure to comply with the statutory provision, it could harm the child by forcing a child to leave the only home she has known.

In providing this obligation to protect his rights as a birthfather, he cannot be excused from it because of ignorance of a pregnancy. § 192.016. 6. RS Mo. 2015. Neither is the father excused by the birth mother’s actions apart from a limited set of specific circumstances in which the mother fraudulently represents that she is not pregnant, that she has terminated the pregnancy, or that the child died after birth. § 192.016. 7, RS Mo. 2015. Apart from these limited proscriptions of specific frauds, there is no affirmative duty on a birthmother to provide information to a biological father. In a case from Minnesota, which has the same statutory requirement as Missouri, the court upheld an adoption where the birthmother hid from the father who failed to preserve his rights. The court held that the birthmother had no duty to inform the birthfather of her location or otherwise assist him in protecting his rights.” The court explained:

We decline to impose a fiduciary duty on an unmarried birth mother to disclose her location to the putative father even if she knows he wants to know her location or establish a relationship with his child. . . .

Furthermore, there is no need to impose such a duty on the birth mother in the interest of protecting a putative father's interests because the legislature has provided a means for the putative father to assert his interest in his child independent of the birth mother through registration with the Minnesota Fathers' Adoption Registry. Because a putative father is able to protect his interest in his child without any assistance or information from the birth mother, the birth mother is not in a position superior to the putative father such that she should be required to provide him with information regarding her location.

Heidbreder v. Carton, 645 N.W.2d 355, 368 (Minn. 2002).

Because a birthmother does not have any duty to provide information to an absent or unregistered biological father, neither does her attorney. While an adoption might present unique challenges due to the number of interests involved, it does not alter the attorney's ethical duties, particularly that of a duty of loyalty to a client. The rights of biological parents are independent of one

another and they have no duties to advance or protect each other's rights other than those created by the legislature.

Informant's argument suggests that, because parental rights are "hugely important", the duties an attorney for a birth mother has to a birth father somehow create duties beyond those imposed by law. However, if the law does not impose affirmative duties on an attorney to disclose a client's confidential information to another, the gravity of the third party's interests does not override the attorney's duty of loyalty and confidentiality.

Consider the attorney who knows that his client is dangerous. Rule 4-1.6 (b)(1) provides that an attorney may reveal confidential information" to the extent the lawyer reasonably believes necessary to prevent death or substantial bodily harm that is reasonably certain to occur." However, unless that disclosure is required by law, the attorney has no ethical obligation to do so.

[T]he duty of counsel to be loyal to his client and to represent zealously his client's interests overrides the nebulous and unsupported theory that our rules and ethical code mandate disclosure of information which counsel considers detrimental to his client's stated interest. Because disclosure is not "required by law," appellants' theory of liability on the basis of ethical or court rule violations fails for lack of substance.

Hawkins v. King County, 602 P.2d 361 (Wash. Ct. App 1979)(attorney knew of client's mental illness but did not disclose to court in a pre-trial release hearing; client attacked mother and attempted suicide upon release).

If an attorney has no ethical obligation to undermine his client's objectives in order to protect the life of another person, it is not difficult to see that, when a client's objective is to place her child for adoption, an attorney has no ethical obligation to undermine that objective by actively assisting a putative father to acquire the rights to object to that adoption.

No matter how weighty the interests are in an adoption, each is independent of the other. There is no policy reason to impose on attorneys for biological mothers a duty to communicate with a biological father. Unlike custody actions, in which parent education and mediation requirements facilitate co-parenting, a biological mother who consents to an adoption will have no future legal relationship with the child's biological father regarding the child. Likewise, there is no policy reason grounded in the best interests of the child to require attorneys for biological mothers to assist biological fathers who have not taken the steps necessary to secure their rights. The child in adoption proceedings in Missouri is not unrepresented, but has a guardian ad litem. § 453.025, RS Mo. 2015.

In this case, there is no dispute that father knew about the pregnancy for most of its duration – in fact, he and the biological mother concealed the pregnancy from their parents for as long as they could. Respondent’s Brief at 41. During all this time, biological father could have taken steps to secure his right to notice should mother decide to place the child for adoption. He could have married the mother. He did not. He could have provided financial support for the baby during the pregnancy. He did not. He could have sought out legal assistance from an attorney knowledgeable in family or adoption law. He did not, preferring representation from an attorney who warned that he did not practice adoption law. He could have filed a paternity action or registered with the putative father registry. He did not do so until after the statutory time limit for this registration had passed.

Significantly, the hearing panel did not find that any of the father’s inaction was caused by the respondent attorney’s fraud, dishonesty or misrepresentation.

Rather the panel concluded that the respondent attorney’s failure to take affirmative steps to inform the biological father – steps that the substantive law did not require – was inaction with a substantial purpose to burden a third person and was conduct prejudicial to the administration of justice. This conclusion creates a duty of an adversary to protect the rights of a represented third party

who himself refuses to take actions to protect his rights, even over the attorney's duties of loyalty, competence, and confidentiality owed to his or her own client.

CONCLUSION

There is much in this case one might wish were different. We might wish that a man and woman who conceive a child together would not thereafter be adversaries. We might wish that they would involve one another in any decisions concerning that child. We might wish they would each want to facilitate the other's rights to the child. But that is neither the reality of people's lives nor is it the law.

We might even wish that our adversary system was one in which courtesy to an opposing attorney was a higher duty than loyalty to a client. We might prefer a system in which attorneys would not be able to prevail for their clients through technical devices such as moving for default judgment when no answer has been timely filed or moving to strike a late-filed brief or one in which points relied on are improperly fashioned or, as here, waiting to see if an opponent observes a statutory deadline.

But that is not our system and disciplining attorneys for taking advantage of the very procedural tools the legislature provides is not the proper method to realize our aspirations. Rather, if we are uncomfortable with the adversary system, “the procedural rules should themselves be amended to reflect the measure of diligence with which lawyers should be expected to enforce violations.” James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 Wake Forest L. Rev. 781, 800 (1997). It is not the purpose of the disciplinary system to create new rights for fathers or new duties for mothers; the disciplinary system loses all grounding if it demands that attorneys must refrain from pursuing their client’s legal rights or must act to create legal rights in opposition to their own clients. For the reasons set forth herein, Amici curiae respectfully request this Court to dismiss the Information as to any allegations suggesting that a “passive strategy” was a violation of the rules of professional conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2015, a copy of Amici Curiae's Brief is being served via U.S. Mail and through the Missouri Supreme Court's electronic filing system pursuant to Rule 103.08 to:

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CERTIFICATION

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(c);
3. Contains 11,962 words, in Microsoft Word format, which is the word processing system used to prepare this brief.

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