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## General Misconduct

### Key Concepts



- It is a violation of Rule 8.4 to violate any of the rules of professional conduct;
- A lawyer must not engage in criminal acts that “reflect adversely on the lawyer’s honesty, trustworthiness, or fitness”;
- A lawyer cannot commit acts of dishonesty;
- A lawyer cannot engage in conduct prejudicial to the administration of justice; and
- A lawyer cannot improperly influence a judge, government official, or another lawyer in violating the rules of professional conduct.

### Introduction



Attorney misconduct encompasses a variety of issues related to unethical or illegal conduct by an attorney. Attorney misconduct can include a wide array of improper acts, including conflicts of interest, over-billing, refusing to represent a client for political or professional motives, false or misleading statements, hiding evidence,

abandoning a client, failing to disclose all relevant facts, arguing a position while neglecting to disclose a known law which might counter the argument, and in some instances having sex with a client.

Rule 8.4 lists various activities that qualify as professional misconduct. In general, a lawyer is subject to discipline for violating a mandatory requirement of the rules or for engaging in conduct forbidden by other laws if that conduct demonstrates that *the public should not entrust the lawyer with the confidence that clients normally place in a lawyer*. Of course, the fact that the lawyer is subject to discipline does not

mean that the disciplinary authority will in fact seek discipline. In order to render discipline, the authorities must know about the conduct or find it so problematic that they begin an investigation. In reality, some personal conduct may simply go unnoticed, or it may be overlooked. Or the authorities may simply exercise discretion not to seek a penalty.

In fact, a lawyer is subject to discipline for wrongful conduct even though she was not acting in her capacity as a lawyer while she was engaging in the wrongdoing—if the conduct relates to her capacity to practice law. Any conduct involving dishonesty, fraud, deceit, or misrepresentation adversely affects a lawyer’s capacity to practice law and can be considered “misconduct.”

Why do we regulate lawyers’ conduct so specifically? There are three main policy reasons for regulating the practice of lawyers: (1) to protect the public, (2) to protect the integrity of the justice system, and (3) to protect the reputation of the legal community.<sup>1</sup> These three goals of legal self-regulation can be competing or complementary. And these different rationales may work in opposite directions at times, such as when the interest of the legal profession to resolve issues quietly and internally conflicts with the goals of protecting the public and providing “on-the-record” sanctions.<sup>2</sup>

For example, assume a news reporter interviews several people near the courthouse about judicial candidates. One of those interviewed is a lawyer who knowingly makes a false statement of fact about a judicial candidate. Because that person’s lie evidences his lack of trustworthiness, he is subject to discipline under Rule 8.4(c) (conduct involving dishonesty). Similarly, if the lawyer, not acting in his capacity as a lawyer, misappropriates money from a bank, or defrauds a homeowner, the lawyer is subject to discipline because those crimes have a functional relationship to the qualities required to practice law. Lawyers routinely handle client funds and make representations to the court. Crimes or misconduct that reflect adversely on a lawyer’s honesty and trustworthiness relate to his ability to practice law.

## **The Rule**

Specifically, Rule 8.4 of the Delaware Lawyers’ Rules of Professional Conduct states that it is professional misconduct for a lawyer to engage in various activities, including:

- (a) To violate or assist someone else in violating a Rule of Professional Conduct;
- (b) To commit a criminal act;
- (c) To engage in dishonest conduct;
- (d) To engage in conduct that is prejudicial to the administration of justice; or
- (e) To improperly influence a judge or government official.

The remainder of this chapter will discuss in more detail the specific categories of misconduct under Rule 8.4.

## 1. Violating the Rules of Professional Conduct

Rule 8.4 (a) opens with the basic concept that it is a violation of Rule 8.4 if a lawyer violates any Rule of Professional Conduct.

### THE RULE

### Rule 8.4

#### General Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

Rule 8.4 clearly states that a lawyer commits misconduct by violating, attempting to violate, or assisting another in violating a rule of professional conduct. Lucy Lawyer would be guilty of misconduct under Rule 8.4 if she assisted another lawyer in destroying evidence in violation of Rule 3.4.3. Additionally, a lawyer can violate a rule of professional conduct through the acts of another. For example, if Lucy Lawyer directs Penny Paralegal to talk with a represented opposing party in a litigation matter, then Lucy is responsible and can be disciplined for Penny's actions in violation of Rule 4.2.4. A question that often arises is whether Lucy can

be disciplined if her client, Cindy, talks with the represented opposing party. In recognition of the parties' right to talk with each other, Lucy is not violating Rule 4.2 through Cindy's actions if Lucy simply tells Cindy of her right to talk with the opposing party and Cindy does so. Lucy could be responsible if she closely directs Cindy's conversation with the opposing party.

Rule 8.4(a) is a broad prohibition against lawyer misconduct. This rule means that not only can lawyers be found responsible for violating specific provisions of the professional rules, they can also be found to have a separate violation under Rule 8.4 for violating the professional rules under Rule 8.4(a).

## 2. Criminal Acts

Rule 8.4(b) goes on to state that it is professional misconduct for a lawyer to commit a criminal act.

### THE RULE

### Rule 8.4

#### General Misconduct

It is professional misconduct for a lawyer to:

- (a) ...
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

Lawyers are supposed to uphold the law, not violate it. While not all violations of the law are professional misconduct, it is professional misconduct for a lawyer to commit a criminal act that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." The criminal act need not occur in the context of the practice of law. Further, note that the rule requires the commission of a criminal act but not necessarily a conviction. Consider the following example.

**Example.** If Larry Lawyer steals valuable property from a neighbor, would Larry be guilty of criminal misconduct?

**Analysis.** Yes. Larry's action is a criminal act that reflects poorly on his honesty and fitness as a lawyer; his actions would be professional misconduct in violation of Rule 8.4.

Interestingly, discipline cases have differed widely in their treatment of criminal acts that were done outside the lawyer-client relationship. Some states mandate automatic disbarment for attorneys convicted of any felony—regardless of whether the felony was related to the practice of law or not. Other jurisdictions specify certain offenses or acts involving “moral turpitude,” a standard open to widely varying interpretations. California is one such state.

[T]he California Supreme Court has declared: “To hold that an act of a practitioner constitutes moral turpitude is to characterize him as unsuitable to practice law.” ... [Certain offenses such as those involving marijuana, political protest, tax evasion, and sexual misconduct have proven particularly divisive.] State courts are currently split as to whether willful evasion of taxes or failure to file a return constitutes moral turpitude. Even within the same jurisdiction, local disciplinary committees have different views of comparable cases... .

[A]lthough a Florida lawyer lost his license following a conviction for indecent exposure in a public lavatory, an Indiana practitioner received only a year suspension for making sexual advances to one client and offering to exchange legal services for nude photographs of another client and her daughter; ... the latter attorney’s activities were deemed “personal and unrelated” to professional practice.<sup>5</sup>

Other courts have disbarred lawyers convicted of serious crimes, including violent altercations, armed bank robbery, perjury, concealing assets in a bankruptcy proceeding, and mail fraud.<sup>6</sup>

Discipline authorities typically have found that violent criminal acts reflect poorly on a lawyer’s fitness to practice law and as such, a commission of a violent criminal act is professional misconduct in violation of Rule 8.4. Sometimes a repeated pattern of minor criminal offenses may be viewed as criminal acts that reflect poorly on the lawyer’s fitness to practice law because the conduct shows a disrespect for or indifference to the law.

Note, however, that there can be technically “unlawful” conduct that does not necessarily reflect “adversely” on the fitness to practice law. How do courts draw the distinction? Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude” as referenced above. If an act was technically illegal—such as a traffic violation—but did not involve “moral turpitude,” then the offense was not considered lawyer misconduct. But what about offenses that involve matters of personal morality, such as adultery and comparable offenses that have no specific connection to the fitness to practice law? Courts have differed in their treatment of these personal morality offenses. It is clear, however, that a lawyer is professionally answerable for offenses that indicate a lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are almost always considered “misconduct” in violation of Rule 8.4.

What about substance abuse? Drug and alcohol problems have been on the increase in the legal profession and have played an increasingly important role in disciplinary cases. Estimates in different jurisdictions suggest that drug and alcohol problems are involved in between 20 and 75 percent of disciplinary cases.<sup>7</sup>

Courts are divided on how to handle these cases. Consider the example where a District of Columbia disciplinary committee recommended leniency for a lawyer recovering from a cocaine addiction as long as he was under adequate supervision to prevent further abuse. In challenging that recommendation, the attorney for the state bar argued that “people go to jail for conduct that [the attorney] offer[ed] as a mitigating factor. An informed public would find it intolerable that such a lawyer be granted special grace.” Do you agree? One of many challenges of lawyer discipline is that the state bar is balancing its own public image against the policy of protecting the public from lawyers who are not able to practice law properly.<sup>8</sup>

One thing is clear, however. There are always confidential assistance programs for impaired attorneys who are not yet charged with any disciplinary violations and these types of programs are of enormous assistance to those attorneys and to their clients.<sup>9</sup> There are also special treatment and monitoring programs for impaired lawyers guilty of minor misconduct; these have proven very valuable for attorneys.<sup>10</sup> Further, recovery rates among professionals who obtain adequate treatment

for drug/substance abuse are actually quite high, and increasing support for drug assistance programs is becoming a greater priority throughout the bar.<sup>11</sup>

### 3. Dishonest Conduct

Dishonesty, fraud and deceit are treated as specific types of misconduct under the rules. Even if such conduct does not amount to a criminal act, if the conduct involves dishonesty, it can be professional misconduct under Rule 8.4(c).

#### THE RULE

#### Rule 8.4

#### General Misconduct

It is professional misconduct for a lawyer to:

...

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Honesty is so vital to the job of a lawyer that any dishonesty cannot be tolerated by the profession. For example, a lawyer engaged in misconduct by improperly backdating stock certificates in the course of representing a client.<sup>12</sup> A lawyer also engaged in misconduct by misappropriating funds or property belonging to the lawyer's law firm.<sup>13</sup> And dishonest conduct can be professional misconduct even when the conduct does not occur during a lawyer's practice of law. Consider the following case.<sup>14</sup>

**Example.** A lawyer heard rumors that his high school classmate who was now working as a high school sports coach had been involved in an extramarital affair with a student at the high school. The lawyer posted a message on a website, written in the first person pretending to be his prior classmate, the coach—boasting about the coach's wife and all the high school women whose company the coach had enjoyed. The coach reported the matter to the Oregon State Police after his employer, the school,

told him his job was in jeopardy because of the website posting. The police discovered that the source of the message was the lawyer. Should the lawyer be subject to discipline under the rules? What if the lawyer was never charged with a crime?

**Analysis.** The lawyer will be subject to discipline—regardless of whether the lawyer was actually charged with a crime. In this case, the Oregon Supreme Court determined that the lawyer had committed an act of dishonesty and should be disciplined.

#### 4. Conduct “Prejudicial to the Administration of Justice”

Under 8.4(d), a lawyer commits professional misconduct if he or she engages in conduct “prejudicial to the administration of justice.”

### THE RULE

### Rule 8.4

#### General Misconduct

It is professional misconduct for a lawyer to:

...

- (d) engage in conduct that is prejudicial to the *administration of justice*;

But what exactly is conduct “prejudicial to the administration of justice?” Lawyer conduct which courts have found to be conduct prejudicial to the administration of justice is varied. For example, a court determined that a lawyer had engaged in conduct “prejudicial to the administration of justice” by repeatedly failing to take proper procedural steps in a court-appointed representation.<sup>15</sup> Another court determined that a lawyer had engaged in conduct “prejudicial to the administration of justice” by telling the client that making misrepresentations to the court would be acceptable conduct.

A court considered it “prejudicial to the administration of justice” when an assistant district attorney threatened criminal prosecution against a person in order to



collect a personal debt.<sup>16</sup> Also, a lawyer who improperly acted as a “witness” to the signature of an absent person engaged in such prejudicial misconduct.<sup>17</sup> A lawyer who pointed a gun at another lawyer during a deposition engaged in conduct “prejudicial to the administration of justice.”<sup>18</sup> A court-appointed lawyer who failed to disclose to the court that he had accepted a private fee for representing a purportedly indigent defendant committed prejudicial conduct.<sup>19</sup> Further, a lawyer handling a personal injury case who approached the presiding judge *ex parte* to inquire about making a \$5,000 campaign contribution engaged in conduct “prejudicial to the administration of justice.”<sup>20</sup> Finally, a criminal defense counsel who failed to provide information necessary to complete a client’s pre-sentence report (which could have resulted in the client’s receiving a significantly longer prison sentence) violated Rule 8.4(d).<sup>21</sup>

Some courts have stated that Rule 8.4(d) typically applies to litigation-related misconduct; however, it is really broader in scope than simply conduct involving in-court matters. The rule also “reaches conduct that is uncivil, undignified, or unprofessional, regardless of whether it is directly connected to a legal proceeding.”<sup>22</sup> Therefore, you can consider the phrase “prejudicial to the administration of justice” to be broadly construed. Although the prejudicial conduct often occurs during a court proceeding or trial, this type of misconduct can occur outside the courtroom as well.

## **5. Implying an “Ability to Influence Improperly a Government Agency or Official”**

Further, pursuant to Rule 8.4(e), a lawyer commits professional misconduct if he or she states or implies that he or she can obtain a result with improper influence.

## THE RULE

## Rule 8.4

### General Misconduct

It is professional misconduct for a lawyer to:

...

- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

A lawyer cannot state or imply that he or she can influence a government agency or court in a manner contrary to law or to the rules of professional conduct. It is the actual statement or implication that a lawyer can influence an official that is the misconduct, regardless of whether the lawyer actually has the ability to exercise that influence. The policy behind this prohibition is that the statement or implication itself damages the general confidence in the system of justice and the entities involved. Consider the following example based upon an actual case.

**Example.** Oklahoma Attorney was representing Client Cappers—a known troublemaker in Crook County.<sup>23</sup> On an unrelated case, Oklahoma Attorney ran into the assigned Assistant District Attorney (ADA). Oklahoma Attorney brought up the case regarding Cappers, at which point the ADA jokingly said that the Cappers case could “go away” or be “made to go away” for fifty thousand dollars. Oklahoma Attorney then replied, “How about twenty-five thousand?” The two men laughed and went their separate ways.

Later that week, Oklahoma Attorney met with his client, Cappers, and told Cappers about his hallway exchange with the ADA. Oklahoma Attorney told the client that the ADA’s offer was not serious, and explained to Cappers that had it been a genuine bribery offer, Oklahoma Attorney would have reported it to the FBI.

Instead, Client Cappers reported the offer to the FBI who showed up at Oklahoma Attorney’s office shortly thereafter and questioned Oklahoma

Attorney about the alleged bribery. Was Oklahoma Attorney guilty of lawyer misconduct?

**Analysis.** Oklahoma Attorney was prosecuted by the state bar for attorney misconduct—specifically, for suggesting that he had the power to influence a government official, i.e., bribing the ADA. However, the attorney was not found guilty of lawyer misconduct under Rule 8.4. The state bar eventually found there was no evidence that the attorney attempted to complete the bribery or brought up the subject to pursue the conversation with the ADA. Oklahoma Attorney was found not to have had the intent to participate in any illegal or unethical conduct. Nonetheless, the state bar did find that the attorney exercised poor judgment in failing to show indignation and castigate the ADA for his original suggestion of bribery. However, the attorney's lack of action did not constitute misconduct as defined by Rule 8.4(e).

This example illustrates that even small comments between colleagues can lead to problematic results. The lesson from this case is that lawyers can never be too careful about making jokes with their opposition—or with their clients.

## 6. Assisting a Judge in Conduct That Violates the Code of Judicial Conduct or Other Law

Finally, under Rule 8.4(f), a lawyer commits professional misconduct by knowingly assisting a judge or other judicial officer in conduct which violates the rules of professional conduct for judges or violates other law.

### THE RULE

### Rule 8.4

#### General Misconduct

It is professional misconduct for a lawyer to:

...

- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

If Larry Lawyer gave a judge money in exchange for a favorable decision, Larry Lawyer would commit professional misconduct by offering the bribe. Of course,

the act of offering the judge a reward for a decision is illegal in itself and professional misconduct as well. Consider an actual example.

**Example.** Attorney received a telephone call about a criminal matter where Cartel Client needed legal representation.<sup>24</sup> Cartel Client was booked on charges of trafficking cocaine. Cartel Client wanted to be released as soon as possible but could only afford a \$200,000 bond. Attorney stated to Cartel Client that the bond might be as high as \$750,000 for this type of case. Cartel Client stated that Attorney should do “whatever it took” to reduce the bond to \$200,000. Attorney then asked for a \$20,000 retainer and Cartel Client agreed. Attorney found out who the emergency judge was that evening and called the Judge’s home. Attorney offered the Judge \$6,500 to make sure that the bond was set at \$200,000. The Judge agreed and the next morning, the Judge set bond at \$200,000—noting that Cartel Client had significant ties to the community and was not a flight risk. Was this action by the Attorney subject to disciplinary action?

**Analysis.** Yes, the action of the Attorney in this case was found to violate 8.4(e) as well as other professional conduct rules. Further, the judge was also found to have accepted bribes and, therefore, the judge was guilty of violating the Code of Judicial Conduct. Bribing a judge and/or even implying that one can influence a judge violates 8.4(e).

Many kinds of improper conduct reflect adversely on a lawyer’s fitness to practice law—but in particular, the attempt to influence a judge or judicial officer is clearly misconduct under the rules. A lawyer’s relationship with judges on the bench is one of the most important relationships for a lawyer to nurture and protect. A lawyer’s reputation and credibility can take years to earn—but only mere seconds to lose.

## Quick Summary



**Rule 8.4** states that a lawyer commits misconduct by violating or assisting another in violating a rule of professional conduct. A lawyer commits misconduct by committing a criminal act; by committing an act of dishonesty; by engaging in conduct “prejudicial to the administration of justice;” or by stating or implying an “ability to influence” a government official or judge.

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## Test Your Knowledge



To assess your understanding of the material in this chapter, [click here](#) to take a quiz.

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- <sup>1</sup> Jacob Itzkowitz, *Pants on Fire? Model Rule 8.4's Implications for Lawyers As Candidates for Political Office*, 26 GEO. J. LEGAL ETHICS 741, 758 (2013).
- <sup>2</sup> See *id.* at 758.
- <sup>3</sup> See Chapter 46, Fairness to Opposing Party and Counsel.
- <sup>4</sup> See Chapter 52, Communication with Person Represented by Counsel.
- <sup>5</sup> Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 552–54 (1985).
- <sup>6</sup> See, e.g., *In re Richard*, 50 So. 3d 1284, 1290 (La. 2010) (disbarring lawyer for conviction of criminal mischief relating to a violent altercation in addition to other violations); *In re Meece*, 6 So. 3d 751 (La. 2009) (imposing permanent disbarment for armed bank robbery); *In re Norris*, 939 So. 2d 1221 (La. 2006) (imposing permanent disbarment on lawyer who had been convicted of four counts of perjury); *In re Hattier*, 894 So. 2d 1123 (La. 2005) (imposing discipline for concealing assets in bankruptcy proceedings); *In re Gros*, 871 So. 2d 1091 (La. 2004) (ordering permanent disbarment in connection with mail fraud conviction).
- <sup>7</sup> Deborah L. Rhode, *Professional Responsibility: Ethics By the Pervasive Method* 1, 81 (1998).
- <sup>8</sup> *Id.* (citing Panel Allows ADA Defense for Addicted Lawyers, *The Recorder*, Jan. 14, 1997, at 3).
- <sup>9</sup> *Id.*
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.* See also Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is it Time for a New Approach?*, 61 TEMP. L.Q. 1409 (1988).
- <sup>12</sup> See *In re Sealed Appellant*, 194 F.3d 666, 672 (5th Cir. 1999).
- <sup>13</sup> See, e.g., *In re Sharp*, 16 So. 3d 343 (La. 2009).
- <sup>14</sup> *In re Carpenter*, 95 P.3d 203 (Or. 2004).
- <sup>15</sup> See *In re Jeffery M. Goodwin, Respondent*, No. 110,200 (January 14, 2014) (where the lawyer failed to appear on behalf of a juvenile client despite taking the client's money).
- <sup>16</sup> See *In re Ruffin*, 54 So. 3d 645, 646–648 (La. 2011).
- <sup>17</sup> See *In re Wahlder*, 728 So. 2d 837, 839 (La. 1999); see also *In re Warner*, 851 So.2d 1029 (La. 2003) (suspending lawyer for directing client to sign her deceased father's name on release and settlement check).
- <sup>18</sup> See *In re Estiverne*, 741 So. 2d 649 (La. 1999) (suspending lawyer for a year and a day).
- <sup>19</sup> See *In re Barstow*, 817 So. 2d 1123, 1129 (La. 2002).
- <sup>20</sup> See *In re Bolton*, 820 So. 2d 548 (La. 2002).
- <sup>21</sup> *In re Martin*, 982 So. 2d 765, 769 (La. 2008).
- <sup>22</sup> See *In re Downing*, 930 So. 2d 897, 904 n.5 (La. 2006).
- <sup>23</sup> *State ex rel. Oklahoma Bar Ass'n v. Erickson*, 29 P.3d 550, 551–54 (2001).
- <sup>24</sup> See, *The Florida Bar v. Swickle*, 589 So. 2d 901 (Fla. 1991).