LEARNING SERIES

LEARNING PROFESSIONAL RESPONSIBILITY

SECOND EDITION

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PREFACE

The study techniques you have developed in other courses will help you in this course as well. But this book approaches legal study differently than the typical casebook. Here are some tips on how to get the most out of this book:

A. Learning the Basics

The materials in this book teach the basic rules of professional responsibility by referring to the Delaware Lawyers' Rules of Professional Conduct ("Delaware Rules") in our examples. We chose Delaware as our preferred set of rules because the Delaware Rules very closely resemble the ABA Model Rules of Professional Responsibility. When we refer to a particular rule in this book, we are referring to the Delaware Lawyers' Rules of Professional Conduct and we will note explicitly any important differences between the Delaware Rules and the ABA Model Rules.

Further, this book is very practical and spends a great deal of time decoding and analyzing the rules themselves and utilizing concrete, real-life examples. The text does not require you to extract principles from cases, respond to questions, or solve problems to grasp these basics. Hence, this is why we call it the "uncasebook" method. By the end of each chapter, you should understand the basic features of the rule(s) discussed in that chapter.

Key Concepts. Most chapters begin with a text box labeled "Key Concepts" and marked with this key icon. These boxes serve two purposes. First, they will alert you to the most important concepts that you should focus on when reading the chapter. Second, when you review the materials, you should be able to glance at the Key Concepts box for each chapter and readily recall the meaning of those concepts.

Quick Summary. Each chapter ends with a "Quick Summary" of the contents, designated by the "summary folder" icon. These boxes do not contain all of the information you need to know from the chapter. But these summaries will give you a mental framework for organizing the material in the chapter. After reading the chapter, look at the Quick Summary and see how many details you can recall to accompany each principle we've focused on in the chapter.

B. Reading Rules

The rules of professional responsibility have been codified in all states in some form. Many states follow the ABA Model Rules of Professional Responsibility closely. Other states, such as California, have their own unique set of rules relating to professional conduct. As indicated above, we will refer to the Delaware Lawyers' Rules of Professional Conduct throughout this book. Remember: to truly understand the law of professional responsibility and to apply these rules effectively, you need to read the rules in each chapter before class! Rather than refer you to a separate statutory appendix or rulebook as we study the rules, this book incorporates the rules directly within each chapter. The materials attempt to walk you through the rules step-by-step, so that you will see how the language of the rules relates to the issues disputed in the practice of law.

To aid in your understanding, we underline key words in the rules and arrange complex language into more simplified bullet points. This formatting is not part of the official rules; it is designed to introduce you to each rule. Here is how a hypothetical rule (one that is not part of any professional responsibility code) might appear:

HYPOTHETICAL RULE

Prohibited Conduct by Students

In any law school class, students *may not*:

Snore

Yawn, *or*

Roll their eyes during the presentation of a professor's lecture, **except** when the professor is *particularly* boring.

In addition to studying the rules in each chapter, you should look frequently at the full set of rules on the Delaware State Bar website (https://www.dsba.org/) or in any purchased rule supplement; reading the rules in context will help you understand how the rules relate to one another. You may want to annotate or "rewrite" the rules in your supplement with notes from your readings and class lectures. This is a good way to learn the rules.

C. Organization

Each chapter in this book addresses a particular rule of professional responsibility or principle. The chapters are self-contained, although later chapters build on earlier ones. True mastery of the rules of professional responsibility, however, requires seeing relationships among the rules and using the rules in combination.

D. How to Prepare for Class

You need to carefully read the assigned materials before class! All professors say that, but there is a particular reason to read the chapters in this book before class. With the case method, some students (especially in upper level courses) find that it is efficient to read the cases very lightly—or not at all—and wait for the professor to illuminate the principles contained in the cases during class. The materials in this book, however, teach the basics of the rules directly; there is no quicker way to learn them. Your professor, moreover, may not review the basics in class. Instead, the professor may focus class on review questions, advanced problems, policy discussion, and simulations. If you haven't read the materials before class, you will lose out on the more in-depth classroom discussions.

E. How to Prepare for Exams

You should find these materials helpful, both in preparing for the exam in this course and when reviewing for the MPRE and bar exam. The techniques outlined below will help you prepare well for all three types of exams:

1. Be sure that you understand the Key Concepts in each chapter. These appear both at the beginning of the chapter and in the Table of Contents.

2. Read over the Quick Summary for each chapter. In addition to understanding the summary, you should be able to recall details relating to each of the points in the summary.

3. Review the Rules of Professional Conduct (or the rules that your professor specifically assigns) that you have personally annotated, either in this book or in a separate rulebook. Most of professional responsibility law stems from these rules. The language of the rules should help you track the basics, while your annotations and notes will provide you with examples that flesh the rules out.

4. Review Overview chapters and paragraphs to be sure that you understand how the rules relate to one another. Reviewing the Table of Contents will also reveal important relationships.

5. Take special note of Evolving Issues and know how you would argue both sides of those issues. You may argue these issues someday in court and you almost certainly will have to argue some of them on an exam.

We wish you the best of luck and hope this book provides additional support to help you learn the rules of professional responsibility!

1

The Sources of Law for Professional Responsibility

Key Concepts

- Professional Responsibility is about the rules and values you will encounter in law practice.
- Most states or jurisdictions have adopted some version of the A.B.A. Model Rules of Professional Responsibility as a source of rules governing the conduct of lawyers in that state.
- In this book, you will learn the rules by studying the Delaware Lawyers' Rules of Professional Conduct ("Delaware Rules"). The Delaware Rules mirror the A.B.A. Model Rules of Professional Responsibility very closely.
- In addition to the professional responsibility rules, courts interpret other rules, such as the rules of evidence or the rules of civil procedure, to regulate the conduct of lawyers.

Introduction

Professional Responsibility is about the rules and values you will encounter in law practice. In other courses, you study law and policy concerning clients. In this course, you will study rules that actually concern yourself, your colleagues, and your adversaries. As you begin this course, take a few minutes to reflect on your own views about what it means to be a lawyer and what you want from a legal career. This will help you establish a baseline for evaluating and applying what you learn in this course.

When you begin your study of professional responsibility, you will quickly realize that it is a study of the rules and standards that govern the conduct of lawyers.

However, remember that it is actually state rules (and not federal rules) that regulate the legal profession. Each state has developed its own rules of professional responsibility that also cover bar admission and the discipline procedures related to the conduct of lawyers (and judges) in that particular state. Luckily, there are many similarities between states regarding these procedures and standards. This similarity results mainly from the fact that the American Bar Association (A.B.A.) has taken the leading role in the regulation of lawyers and judges by adopting a set of Model Rules and most states have adopted a version of these standards so there is little variation between different states' rules.

In addition to these rules, it is important to recognize that there are other sources of standards that govern lawyers and judges as well. For example, constitutional law provides standards for what constitutes ineffective assistance of counsel. Further, for concepts such as the attorney-client privilege, we look to the rules of evidence or common law.

A. The Delaware Lawyers' Rules of Professional Conduct

In this book, we will study the Delaware Lawyers' Rules of Professional Conduct ("Delaware Rules"). The Delaware Rules are easily accessible and they also follow the A.B.A. Model Rules of Professional Conduct very closely. In most states, the state courts promulgate or adopt the ethics rules (with the exception of California where the legislature has a major role). Over the years, the A.B.A. and most states have created various commissions to evaluate their professional responsibility rules and suggest changes. In other words, the rules of professional responsibility change over time. For example, as a result of lawyer involvement in corporate scandals such as Enron, various commissions on corporate responsibility recommended several modifications to the professional responsibility rules covering corporations. You should think about the rules of professional responsibility within the context of an ever-changing legal landscape.

B. Ethics Opinions

Ethics opinions are also a source of law for the conduct of lawyers and judges. Ethics opinions interpret the professional responsibility rules. Each state (as well as the A.B.A. Committee on Ethics and Professional Responsibility) publishes ethics opinions. The opinions examine questions that involve the application of the professional responsibility rules to the specific facts of a case. These ethics opinions can typically be found online and are instructive as to how the rules should be

interpreted in that jurisdiction. Each state typically has a board of ethics or a board of professional responsibility whose job it is to investigate and hear complaints filed against lawyers. A particular state's board of professional responsibility will apply its own state's rules of conduct to the facts of a case. One state's opinion on a rule is not binding on another state. Further, ethics opinions—unlike published judicial opinions—typically have an educational or advisory purpose only. A particular board investigating or ruling on a case is not bound by past precedent (although the board may use prior decisions as a guide and come to its own conclusion on the unique facts of the case before it).

C. Other Sources of Law

In addition to the professional responsibility rules and ethics opinions, there are a few additional sources of law that are important to your understanding of professional responsibility. For example, this book will examine separate state rules on issues such as how one is admitted to the bar in a state and how a lawyer is disciplined in a given state. Each state has its own rules governing these issues. This book will not examine all of the states' separate rules, but instead, will study the commonalities among the various state rules and case law—using the Delaware Rules as an example.

Another example of additional sources of law governing lawyer conduct is the rules of evidence. For example, the attorney-client privilege is relevant to lawyer conduct, but this rule actually comes from the evidentiary rules or common law. The work product doctrine comes from a rule of civil procedure and various common law decisions. And to understand the standards governing the issue of ineffective assistance of counsel, one must study the constitutional principles that apply to this legal issue.

D. The Standards for Judges

The A.B.A. adopted the first Model Code of Judicial Conduct in 1972. In 1990, the A.B.A. Model Code of Judicial Conduct became the basis for many state judicial codes today. States adopt their own rules pertaining to the conduct of judges. Although you will be responsible for knowing the A.B.A. Model Code of Judicial Conduct for the MPRE, we will not cover the rules pertaining to the conduct of judges in this book.

E. The Role of the Courts

In addition to each state court's role in adopting ethics rules for lawyers, courts also interpret those rules through 1) their review of discipline cases against individual lawyers, and 2) other matters that require them to apply the ethics rules (such as in reviewing motions to disqualify based upon the conflicts of interest rules).

Bar associations also play an important role in interpreting the professional conduct rules. Many bar associations establish ethics committees to advise lawyers on whether their proposed conduct conforms to the rules. This advice can take the form of informal, telephone advice in urgent situations or of systematic, written opinions. Note that bar opinions are not binding on state courts in disciplinary matters. Nonetheless, courts tend to treat bar opinions with some deference.

Further, both courts and bar associations rely on the American Law Institute's Restatement of the Law Governing Lawyers. The Restatement is not binding but has been considered very influential. In doing research on professional ethics issues, consider using the Restatement as a good source of authority as well as your state bar's ethics opinions, A.B.A. ethics opinions, and case law.

Finally, remember that the common law and statutes also regulate lawyer conduct. The most familiar common law regulation of lawyers is the law of malpractice, but other common law doctrines, such as fraud, also apply to lawyers. In addition, legislation regulates lawyers directly, such as the Sarbanes-Oxley provisions governing lawyers who practice before the Securities and Exchange Commission, the Bankruptcy Reform Act that applies to bankruptcy lawyers, and laws of general application, such as criminal law.

Quick Summary

You are beginning your exploration of Professional Responsibility. By now, you realize that this is a course that applies to you personally, provides you with a framework for understanding and developing your career as a lawyer, and is a subject that matters a great deal to the organized bar. We hope that this book provides you with the necessary tools for analyzing these and related issues in this course, as well as preparing you for how these issues will impact you in your career.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

2

Admission to the Bar

Key Concepts

- The highest court in each jurisdiction regulates the practice of law in that jurisdiction.
- To practice law in a jurisdiction, you must be admitted to the bar of that jurisdiction.
- For admission, states require graduation from an accredited law school; a passing score on the MPRE; a passing score on a bar exam; and a determination that the applicant is of "good moral character."
- A bar applicant must not "knowingly make a false statement of material fact," on his or her bar application.

Introduction

How do you go from being a law student to being a lawyer? You might have assumed that once you pass the bar exam in your state, you'll be ready to go! Well, not quite. There are several steps that you have to take in order to be fully admitted to any state bar. This chapter will highlight the basic steps required to gain admission to practice law in most jurisdictions.

For most of this nation's history, bar admission standards were strikingly permissive. Until the late nineteenth century, the chief method of legal education was apprenticeship. Students read law in a licensed attorney's office and did much of the tedious copying of legal documents that was necessary before typewriters and duplicating machines. Training was often inadequate, but most bar applicants had no realistic alternative. Except for a few fairly short-lived efforts by independent

law schools, American legal education remained rudimentary until the turn of this century.[1]

Requirements for admission to the bar varied but were rarely rigorous. During the Jacksonian era, applicants simply had to satisfy good moral character requirements and pass an informal oral exam. The experience of one candidate is interesting. His examination *actually took place with Abraham Lincoln*, who was taking a bath in his hotel room. Lincoln made a few "meager inquiries" concerning extremely basic issues such as the definition of a contract, and certified the applicant as competent to practice![2]

Things changed over time. The rise of bar associations brought increased efforts to upgrade admission standards and these associations actively assisted the campaign. Between 1880 and 1920, states established centralized boards of bar examiners and adopted additional entry requirements such as written exams and investigation by bar character committees. The exams were not all that difficult; some surveys suggested that about 90 percent of those who took the test eventually passed.[3]

Currently, the legal profession within a state is regulated by the supreme court of that individual state. So for example, the California Supreme Court has the authority to regulate lawyers in California. Each state's highest court is ultimately responsible for deciding who may practice law in that jurisdiction. Further, each state's highest court is responsible for creating the standards of conduct for those practicing law in the jurisdiction and disciplining lawyers who violate those rules of conduct.[4]

The supreme court in each state does not actually deal with the day-to-day admissions activities. The court delegates these tasks to a board or office of bar examiners. But a jurisdiction's highest court will continue its supervisory involvement on policy matters, and it is directly involved in lawyer discipline.

The rule that governs admission to the bar is Rule 8.1. Under Rule 8.1, no applicant for admission to the bar *or any lawyer connected with an applicant's bar admission* can make a false statement of fact. In addition, the bar applicant or lawyer must correct any known "misapprehensions" with regard to the bar application process—regardless of when the person finds out, and must respond to all demands for information.

A. Admission Requirements for New Lawyers

In order to practice law in any jurisdiction, you must be admitted to the bar of that jurisdiction. For a new lawyer, most states have four basic requirements for admission to the state bar. First, you must graduate from an accredited law school. Some states also may require that you have taken certain specific courses in law school such as a course in professional responsibility.

The second and third requirements involve exams. You must pass a national exam dealing specifically with the topic of professional responsibility, called the Multistate Professional Responsibility Examination (MPRE). In addition, you must pass a bar examination that tests various law subjects. Usually, the bar exam is composed of a multiple choice national exam portion (typically the Multi-State Bar Exam or MBE) as well as an essay portion that is often specific to the state. Each state has its own list of subjects covered by this exam—and the list of required subjects can be very different between states. Make sure to research what subjects your state will test so you can ensure that you have taken all the appropriate classes in law school.

The last typical admission requirement is that the person be of appropriate character and fitness for the practice of law. A candidate for admission has the burden of proving that he or she has this character and fitness. Often, the requirement is stated in the following way: a lawyer must have "good moral character." To determine present moral character, the admissions committee often looks to past relationships and acts. Typically, you will be asked to list all prior employers and to provide names of character references. The state bar will then send forms directly to these individuals and ask them to complete a character reference describing the applicant's "moral character." Rule 8.1 requires any lawyer filling out a moral character and fitness form to do so honestly. Further, Rule 8.1 requires that the applicant be honest and forthright throughout the application process.

If it turns out the applicant has had significant acts of dishonesty—for example, lied to an employer—then the state bar may decline the applicant's admission to the state bar. Incidences of dishonesty can occur in any setting: financial dishonesty, plagiarism or other forms of academic dishonesty, or even a failure to disclose information on the law school application or bar application. Further, if a candidate has shown a lack of respect for the law, the state can find that the applicant lacks the appropriate character and fitness. For example, a candidate who has repeatedly violated the law—even on small matters such as speeding tickets, DUI's, etc.—may be found to lack the appropriate character and fitness to practice law. A candidate with a single violent offense may have the same problem. Some

states are particularly suspect of anyone with a past that includes a felony crime even if the crime did not involve violence.

The best piece of advice we can give you is this: disclose all of these past incidents honestly and in *full detail*. Most state bars worry far more about the non-disclosure of a past event than the act itself. Rule 8.1 lays out this obligation very clearly.

The Rule

Rule 8.1 of the Delaware Lawyers' Rules of Professional Conduct (DLRPC) states generally that the rule to disclose honestly applies to any bar applicant or any lawyer in connection with a bar. Further, 8.1(a) provides that neither the applicant nor any lawyer connected with a bar admission shall "knowingly" make a false statement of fact.

THE RULE Rule 8.1

Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact… .

Part (b) of Rule 8.1 goes on to state that if the applicant later finds that she made a mistake in her application to the bar or that a new fact arose, the applicant is required to correct any misapprehension or mistake. The same is true for a lawyer who is providing information to the state bar in connection with a bar admission application.

THE RULE Rule 8.1

Bar Admission and Disciplinary Matters

An applicant … or lawyer … shall not:

...

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail

> to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

In order to be admitted to a state bar, you will need to complete a very long and detailed application. You need to be forthcoming with requested information. Law students are often surprised at the detail required for the bar application; it may require you to list all places you have lived over the past two decades. You may have to report any lawsuit you have been in—even a prior divorce. You may even have to list all your speeding tickets or any other driving violation since you were 18.

Further, you are required to be honest and forthright in the application process. This also applies in the event that an applicant commits an offense after the application is submitted. Rule 8.1(b) states clearly that an applicant or lawyer involved in the application process must disclose all facts known to them and correct any facts that are *later found to be incorrect*.

This honesty and forthrightness is not just a bar admission requirement; it is also an ethical requirement. While a candidate for admission is not yet an admitted lawyer and thus is not technically within the bounds of the rules of professional conduct for lawyers, the rules of professional responsibility still require this candor. Rule 8.1 states that an applicant for admission must not "knowingly make a false statement of material fact." In addition, the candidate must not fail to disclose a fact necessary to correct a known misapprehension. Finally, an applicant must not "knowingly fail to respond" to demands for information unless such information is somehow protected by the duty of confidentiality of Rule 1.6.[5].

If an applicant is admitted to the bar of a jurisdiction and then the disciplinary authorities discover that the applicant was dishonest or not forthcoming with regard to the bar admission application, the admitted lawyer can be disciplined for a violation of Rule 8.1.

1. Being Honest and Forthcoming as an Applicant

Consider the following example.

Example. Lori, a bar applicant, had been fired from a job she had in college because she took money from the cash register without permission. Lori does not want to disclose that she was terminated from this job. If the

bar application in her state contains a question about past employment, does Lori have to disclose her employment history? And can she be disciplined if she does not disclose her employment history?

Analysis. Lori is required to disclose this information on her bar application. If the bar application contains a question about past employment and Lori does not disclose the employment history, the jurisdiction's disciplinary authority may discover the nondisclosure. Lori can be disciplined for violating Rule 8.1.

2. A Lawyer Involved in an Application for Admission of a Non-Lawyer Must Be Honest

Lawyers are often called upon to provide information to admitting entities in connection with applicants to the bar. Law students work for lawyers during law school and often have significant contact with these students. Further, students often ask their law professors to supply a moral character recommendation for the student. **Rule 8.1 makes it clear that the rule applies with equal force to these lawyers providing information about bar applicants.** Such lawyers must not "knowingly make a false statement of material fact" and must not fail to disclose a fact necessary to correct a known misapprehension. Further, the lawyer must not knowingly fail to respond to a demand for information unless such information is somehow protected by the duty of confidentiality of Rule 1.6.[6].

Example. Student is applying for admission to the State A Bar. When Student was in high school, he and his parents lived in State B, next door to Attorney Alex. Alex is admitted to practice in State B, but not in State A. Alex liked Student; Student mowed Alex's lawn frequently and seemed to be a good kid. Alex was disappointed to learn that during Student's senior year in high school, Student was convicted of burglarizing a liquor store. After serving his sentence, Student went to college and later to law school. Alex has had no contact with Student since his high school years, but as far as Alex knows, Student has not done anything since high school that would reflect badly on his character. The Bar of State A sent Alex a routine questionnaire, asking a series of questions about Student's character. Alex does not know whether Student disclosed the burglary conviction on Student's bar application, and Alex does not know where to contact Student

to find out. Should Alex respond to the questionnaire? And if so, what should Alex disclose?

Analysis. Alex is required under Rule 8.1 to disclose any relevant information he has on Student. Alex should state what he knows about Student, including mention of his burglary conviction. In fact, if Alex does not disclose the information he has about Student, Alex *himself* could be disciplined under State B's ethical laws for not providing honest information to a state bar. Under these circumstances, Alex has an absolute duty to respond honestly to the questionnaire.

B. The Moral Character Application: What's the Purpose?

Every jurisdiction in the United States requires applicants to the state bar to establish their good moral character. To meet that requirement, bar candidates are required to provide extensive personal information to boards of examiners or character committees. The decisions of these boards are subject to judicial oversight. The scope and formality of the investigation processes vary from state to state— although all denials of admission to practice law must meet minimum due process standards of notice and an opportunity to be heard.[7]

There are two main purposes for the moral character inquiry. The first is to protect clients and the public at large from lawyers likely to engage in misconduct. The second is the state bar's own interest in maintaining its public image and sense of professional community with shared "moral" values. Whether the current procedures and application processes adequately serve these objectives is unknown.

The U.S. Supreme Court has acknowledged that the moral character requirement is "unusually ambiguous" and "any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer."[8] The Court does require that any criteria for disqualification have a "rational connection with the applicant's fitness or capacity to practice law."[9] The Court also has stated that the focus is on whether a "reasonable [person] could fairly find that there were substantial doubts about the [applicant's] honesty, fairness, and respect for the rights of others and for the laws of the state and nation." [10] According to more recent case law, relevant factors

include the recurrence, seriousness, and circumstances of the conduct; evidence of rehabilitation; and candor in the application process.

1. Differing Standards of Moral Character and Fitness

One of the problems for bar applicants in any state is that reasonable people can and *do* disagree about what sort of conduct raises substantial doubts about someone's moral character. When you review the decisions of courts reviewing these matters, you find inconsistent judgments about the very same issue. Consider the following question. You are a member of your state bar moral character committee. Would you vote to deny admission to the following applicant? What factors would you consider?

> a. A candidate who was suspended for plagiarism during his second year of law school.
>
> b. A candidate who discharged his student loans in bankruptcy after a temporary loss of employment. What if the person had experienced financial or health problems—or made an effort to repay?

While you may have your own thoughts about the situations mentioned above, the supreme courts in each of the states dealing with these real-life situations came to very different conclusions on similar facts.

In Minnesota, an applicant who plagiarized a paper did so because he was experiencing "stress" due to his wife's illness. The Supreme Court of Minnesota admitted this applicant.[11] Yet the Supreme Court of Minnesota denied an applicant when the discharge of his student loans suggested a disregard for his responsibility to hold true to the loan commitment and an inability to manage finances.[12] In Georgia, the court denied an applicant who failed to make a good faith effort to pay her student loans.[13] And in Florida, the Board of Examiners was ordered to admit an applicant who declared bankruptcy during law school because she was unsuccessful in a job search.[14]

As you can see, different courts have different opinions. But the conventional view has been that certain illegal acts, regardless of the likelihood of their repetition in a lawyer-client relationship, evidence attitudes toward law that cannot be accepted among practitioners. The difficulty, of course, is that this logic necessitates inquiry

into "any illegal activity, no matter how remote or minor."[15] Your best course of action in your moral character application is to be as open and honest as possible, and to provide your state bar with as much information as possible with regard to any potential character issue.

Quick Summary

Rule 8.1 governs the admission of lawyers to the bar in any given state. Typically, the highest court in each jurisdiction regulates all aspects of the practice of law in its jurisdiction. With regard to the bar application and process, a bar applicant or lawyer must not "knowingly make a false statement of material fact," must correct known misapprehensions, and must respond to demands for information.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 James William Hurst, The Growth of American Law 256–284, 292–293 (1950).

2 Len Yang Smith, *Abraham Lincoln as a Bar Examiner*, 51 Bar Examiner 35, 37 (1982).

3 *Id.*

4 *See* Chapter 5, Lawyer Discipline.

5 *See* Chapter 32, The Duty of Confidentiality.

6 *See* Chapter 32, The Duty of Confidentiality.

7 *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

8 *Konigsberg v. State Bar*, 353 U.S. 252, 263 (1957).

9 *Schware v. Board of Bar Examiners,* 353 U.S. 252, 263 (1957).

10 *Konigsberg*, 353 U.S. at 264.

11 *In re Zbiegien*, 433 N.W.2d 871 (Minn. 1988).

12 *Application of William W. Hahan*, 279 N.W.2d 826 (Minn. 1979).

13 *In re Application for Certification for C.R.W.*, 481 S.E.2d 511 (Ga. 1997).

14 *Florida Board of Bar Examiners re S.M.D.*, 609 So. 2d 1309 (Fla. Sup. Ct. 1992).

15 Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 538 (1985).

3

Preamble & Scope

Key Concepts

- A lawyer represents clients, is an officer of the legal system, and is a public citizen having special responsibility for the quality of justice.
- Lawyers have an interest in earning a satisfactory living.
- Ethical problems often arise when these interests conflict.
- The rules of professional responsibility provide a framework for resolving these ethical problems, but lawyers still must exercise sensitive professional, legal, and moral judgment beyond the terms of the rules.
- The violation of a rule of professional responsibility does not in and of itself establish a lawyer's civil liability.

Introduction

Ask a few lawyers to define their job along with their job's professional responsibilities. You may hear fairly diverse responses because lawyers can perform many roles with varying professional priorities. The public prosecutor, for instance, may identify some very different conceptions of her role and priorities as a lawyer than what the defense lawyers she regularly faces in court would offer. Now consider the corporate lawyer working in a large firm, the family law lawyer practicing as a solo practitioner, the lawyer working as a consultant to a large intellectual property venture, the lawyer serving as a dispute mediator, the legal services lawyer working in a rural community, the transactional lawyer providing *pro bono* litigation services on weekends to a local environmental advocacy organization, or the lawyer working as a law clerk to a federal judge. Lawyers can perform an almost

limitless range of professional roles for individuals, organizations, and communities, and each role may ask something unique from the lawyer professionally.

This diversity in legal practice offers a wide range of career opportunities for lawyers. But this same role diversity can make lawyer ethics more challenging: if your professional role can shift significantly depending on what you actually do as a lawyer, your ethical responsibilities may also seem more like a moving target. Moving targets are not especially well-suited to regulation by a codified body of legal rules like the rules of professional responsibility.

The Preamble to the Rules of Professional Conduct provides an important anchor to the rules by framing a unifying purpose and function of those rules for all lawyers.[1]

More specifically, the Preamble articulates a universal job description for lawyers. This job description by no means resolves ethical quandaries for lawyers. Rather, the Preamble helps lawyers to identify the different professional responsibilities they are balancing when resolving a problem under one or more of the rules.

The Scope to the Preamble advises lawyers and law students on how they should read, understand, and apply the rules as a code of ethics. The Scope thus identifies proper modes of interpreting and applying the ethical rules. The Scope further limits the rules in resolving some legal problems, including legal issues outside of pure professional responsibility questions, such as a lawyer's civil liability.

Lawyers and law students thus should study the Preamble and Scope carefully. The Preamble provides valuable insight into the legal profession. Moreover, the Preamble and Scope together offer an important interpretative anchor to lawyers and law students each time they analyze an ethical problem under one or more of the rules.

The Rule

The Preamble and Scope contain no rules enforceable by professional discipline. But, the rules, which are enforceable, are informed and guided by the Preamble and Scope.[2] The Preamble contains 13 paragraphs identifying all lawyers' core professional responsibilities. The Preamble further indicates how a lawyer properly can balance and prioritize those responsibilities when they conflict. The Scope, by

contrast, explains the purpose, function, and limits of the rules themselves. The Scope adds an additional seven paragraphs to this introductory section.

1. Preamble: A Lawyer's Responsibilities

The Preamble begins by identifying every lawyer's three core roles "as a member of the legal profession": (1) a representative of clients, (2) an officer of the legal system, and (3) a public citizen having a special responsibility for the quality of justice. Lawyers must know these core roles when working through negotiating the rules because almost "all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."[3]

As a representative of clients, a lawyer performs four functions. First, as an *advisor,* the lawyer "provides the client with an informed understanding of the client's legal rights and obligations and explains their practical limitations."[4] This function is client-centered for the lawyer, but is also objective in nature: a lawyer must advise the client accurately and completely about legal rights and obligations.

Second, the lawyer is an *advocate* for the client. In this role, the lawyer "*zealously* asserts the client's position."[5] This function is the most partisan role a lawyer performs for a client: the role of a zealous advocate. Illustrating this point, one of the most heavily quoted expressions of zealous advocacy reads this way:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is the first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring onto others.[6]

This hyper-partisan expression of loyalty to the client has been questioned and challenged.[7] But in one form or another, zealous advocacy remains a core feature of a lawyer's representational role.[8]

Third, as a *negotiator*, the lawyer "seeks a result advantageous to the client but consistent with requirements of honest dealings with others."[9] This function combines objective and partisan roles for the lawyer: the lawyer negotiates with the goal of advantageous outcomes for the client, but in that process, the lawyer must honor the *requirement* of honest dealings with third parties.

Fourth, the lawyer *evaluates* on behalf of the client. In this role, "the lawyer acts by examining a client's legal affairs and reporting about them to the client or others." This function focuses on a more objective role for the lawyer: a lawyer must provide an accurate reporting to the client of the lawyer's examination of the client's legal affairs.

In addition to representing clients, a lawyer is also an officer of the legal system. The law empowers the lawyer's ability to represent clients, so the lawyer is expected to honor the law. Thus, "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."[10] A lawyer further should use the law only for legitimate purposes,[11] and should demonstrate respect for the legal system and for the persons who serve it.[12] Even when challenging the law or official action, the lawyer has a "duty to uphold legal processes."[13]

Finally, the Preamble requires lawyers to act as "public citizens" who "should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[14] Recognizing that

the law is more than a technical trade but a "learned profession,"[15] the Preamble obliges lawyers to serve as stewards of the legal system, for the benefit not just of that system, but for society as a whole. A principal commitment of lawyers in fulfilling this function should be to improve access to justice for persons of limited or no means—either directly through *pro bono legal services, or indirectly through "civic influence."*[16]

This universal job description established by the Preamble fills every lawyer's professional plate with a broad range of important priorities and responsibilities. It is easy to imagine how these professional responsibilities sometimes could conflict with each other, particularly when a lawyer's interest in earning money is added to the mix.[17] The Preamble notes that specific rules "often prescribe terms for resolving such conflicts."[18] But, terms for conflict resolution do not mean cookie-cutter solutions. To the contrary, even under the rules, "many difficult issues of professional discretion can arise."[19]

The Preamble admonishes that when exercising this discretion, a lawyer must exercise "sensitive professional and moral judgment,"[20] relying on various principles and sources. The lawyer, for example, must remain faithful to the obligation to protect and pursue a client's interests zealously. Indeed, as the Preamble acknowledges, the duty of zealous advocacy plays an important role in our adversary system of justice.[21] Thus, "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."[22]

The lawyer's advocacy, however, must remain within the bounds of the law. In identifying the bounds of the law, the lawyer cannot limit him or herself to the ethical rules in isolation. Other substantive and procedural law may govern ethical issues, such as discovery rules, the law of evidence, or the U.S. Constitution.[23]

Beyond positive law, lawyers' ethical discretion is "also guided by personal conscience and the approbation of peers."[24] Moreover, the Preamble directs lawyers to "maintain[] a professional, courteous, and civil attitude toward all persons involve in the legal system,"[25] and to "strive to attain the highest level of skill."[26]

All these professional responsibilities may seem uniquely difficult and burdensome. This professional responsibility framework, however, reflects the fact that "[t]he legal profession is largely self-governing."[27] The legal profession is believed to depend on this political independence for lawyers properly to pursue their special role "in the preservation of society."[28] As a result, rather than being subject to legislative or administrative oversight, the legal profession principally is governed by the courts and members of the bar themselves.[29] Yet, as the Preamble observes, only "[t]o the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."[30]

To get a sense of how difficult the task sometimes can be to meet all the obligations of a lawyer's professional calling, consider this lawyer's predicament:

Example. Lawyer Larry represented Donna in a personal injury lawsuit brought by Paul. Paul sued Donna for injuries Paul sustained as a passenger in a vehicle accident when Donna was the driver of the vehicle. During settlement negotiations, Paul's doctor examined Paul and determined that Paul's injuries included rib cage and tissue injuries, along with a concussion. Several weeks later, Larry retained a doctor to examine Paul independently. This doctor confirmed the prior doctor's test results, but also detected an aortic aneurysm. According to this doctor, the aneurysm presented "a serious matter as far as Paul's life. This aneurysm may dilate further and rupture which would cause immediate death." This doctor could not determine whether the accident caused the aneurysm, which may have been present for some time. But the accident could have caused the aneurysm, which might not manifest for several weeks after the accident, explaining the first doctor's inability to detect it. Unaware of the

aneurysm, Paul's lawyer agreed to settle for a modest amount of damages. Larry knew that Paul's lawyer likely would increase the settlement offer exponentially if she knew about the aneurysm. Larry also knew from his own doctor that Paul could avoid the risk of death from the aneurysm through surgery if Paul learned of the condition. According to the Preamble to the rules, how should Larry advise Donna regarding the settlement offer?[31]

Analysis. This circumstance presents Donna with the opportunity to capitalize on Paul's lack of knowledge about his own medical condition. This legal decision, however, raises a serious moral question —whether Donna should allow Paul to risk an avoidable death to reduce Donna's liability, and perhaps Larry's own bottom line.

Larry has several options of how to advise Donna about this decision. For instance, Larry simply could advise Donna objectively about the pros and cons of this decision, and leave the choice to Donna. This decision would remove Larry somewhat from whatever decision Donna chose. But this decision would not advocate zealously for Donna's decision, and would not involve particularly candid advice. Nor would this decision by Larry accept real responsibility for the moral dilemma of whether to inform Paul of his medical condition.

In another option, Larry could advise Donna to protect herself from liability by authorizing Larry to settle promptly and withhold the information about Paul's medical condition. This decision certainly would advance Donna's financial interests "at all costs and hazards to other persons."[32] But this decision also would accept Paul's avoidable death as a legitimate cost of the client's benefit. This decision may prove too morally questionable for some lawyers— or clients, for that matter—to handle, regardless of how financially beneficial the decision might be for the client and lawyer.

In yet another option, Larry could contact Paul's lawyer independently to inform Paul of his medical condition. This decision might seem morally palatable for many individuals. This decision also might appear more consistent with the duty of honest dealing. Yet, this decision would A.B.A.ndon any loyalty to the client by disclosing confidential information without the client's authorization or concern for the client's interest in how to resolve the matter.

This decision additionally could undermine Larry's own remuneration from the litigation, depending on the nature of his fee with Donna.

As this problem illustrates, the Preamble does not give Larry a firm answer for how to resolve this dilemma. Nor, as you will learn shortly, do the rules definitively solve this problem.[33] But before Larry goes to the rules for guidance, the Preamble lets him think about the competing professional responsibilities at stake, and in the process, helps Larry to frame the issues more clearly for an analysis under the rules.

2. The Scope

The Scope section of the rules supplies a number of important interpretative considerations for working with the rules themselves. The Scope begins by noting that the rules fundamentally "are rules of reason," and "should be interpreted with reference to the purposes of legal representation and the law itself."[34] Critical to reading the rules as rules of reason, the Scope notes, is whether the particular rule is cast an as imperative, an aspiration, or a discretionary judgment call. The rules use terms like "shall" and "shall not," for example, to identify imperatives that establish legal obligations.[35] "Should," by contrast, denotes an aspiration: a lawyer's choices are encouraged but not obligatory.[36] If a rule instead employs the term "may," the rule is "permissive and define[s] areas ... in which the lawyer has discretion to exercise professional judgment."[37]

This framework demonstrates that the rules are "partly obligatory and disciplinary and partly constitutive and descriptive."[38] Within this framework, the rules "presuppose a larger legal context shaping the lawyer's role."[39] This legal context includes court rules and statutes creating lawyer responsibilities, such as discovery rules,[40] as well as substantive and procedural law that regulates lawyer conduct.[41] In addition to this legal context, "moral and ethical considerations … should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."[42] The rules thus recognize the inherent limitations of a code of professional ethics, and the rules should be construed in this light—"a framework for the ethical practice of law."[43]

Consider how the Scope helps to orient the analysis of this lawyer's professional responsibility:

Example. Client Cathie filed a bar complaint against Lawyer Sam. Cathie alleged that Sam did not competently handle a real estate transaction for Cathie. To defend against the bar complaint, Sam disclosed confidential information from his representation of Cathie that he judged was reasonably necessary to refute Cathie's claim of incompetence. This confidential information, once disclosed, compromised Cathie's position in the real estate matter. Cathie accordingly sued Sam for malpractice, arguing that Sam's violation of his duty of confidentiality prima facie breached his duty of care to Cathie in tort. Does Cathie have a legitimate civil claim against Sam?

Analysis. Sam had an ethical duty to maintain confidentiality with Cathie, even as a former client.[44] This duty provided that Sam "shall not reveal" confidential information, an ethical imperative. But, as the Scope explains,

> even if Sam violated that ethical duty, that violation alone did not create a presumption that Sam violated an actionable duty of care in malpractice. Cathie would need to demonstrate that Sam's disclosure of confidential information breached a recognized civil duty of care.[45] Sam's conduct under his ethical duty of confidentiality, however, could be admissible as relevant to that duty of care.
>
> Moreover, Sam disclosed confidential information in response to Cathie's bar complaint. The rules include an exception to the duty of confidentiality that permitted Sam to disclose confidential information when reasonably necessary to defend against a bar complaint.[46] This exception did not *require* Sam to disclose this information, but the exception provided that Sam "may" disclose. The decision whether to disclose thus rested with Sam's discretionary judgment, and "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."[47] Thus, to the extent that Sam's ethical duty of confidentiality might be relevant to whether Sam breached a civil duty of care to Cathie, so would be the discretion the rules afforded to Sam in deciding whether to disclose in this context.

The Scope also advises on how the Comments apply to the rules. The Comments to each rule play an important interpretative role. The Scope explains this role:

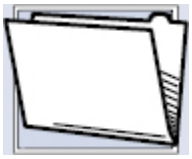
> The Comments accompanying each Rule explain and illustrate the meaning and purpose of the Rule. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.[48]

A lawyer therefore cannot be disciplined for violating a Comment to the rules, only for violating a rule itself.[49] But, the Comments are a critical, interpretative resource for construing the rules.

The Preamble and Scope are easy to overlook. But these sections of the rules are critical resources because they "provide general orientation" to the rules' purpose

and application to specific problems.[50] Lawyers and law students thus would do well to consult these sections when applying the rules—especially in the many cases where the text of a rule does not provide straightforward resolution of a particular ethical problem.

Quick Summary



The Preamble and Scope provide general orientation to the rules. The Preamble defines a lawyer's three core roles under the rules: (1) the representation of clients, (2) an officer of the legal system, and (3) a public citizen having special responsibility for the quality of justice. Many ethical dilemmas for lawyers arise when these responsibilities conflict with each other or the lawyer's interest in earning a satisfactory living. The Scope provides interpretative guidance to the rules, such as the meaning of obligatory rather than permissive responsibilities, and the role of the Comments to the rules.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 The Delaware Lawyers' Rules of Professional Conduct (DLRPC) have adopted the Preamble and Scope to the Preamble found in the A.B.A. Model Rules of Professional Conduct.

2 *See* DLRPC Scope ¶ 21.

3 DLRPC Preamble ¶ 9; *cf. Lawyer Disciplinary Bd. v. Artimez*, 540 S.E.2d 156, 164 (W. Va. 2000) (referring to Preamble's three-part role of lawyers in addressing lawyer's misconduct).

4 DLRPC Preamble ¶ 2.

5 *Id.* (emphasis added)

6 *See* Monroe H. Freedman, Henry Lord Brougham and Zeal, 34 HOFSTRA L. REV. 1319, 1322 (2006), quoting 2 Trial of Queen Caroline 2 (1821).

7 *See e.g.*, Brooks Holland, *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct*, 43 GONZ. L. REV. 327, 333–24 (2006) (noting that changes to language in the Washington Preamble and rules "signal[] a firm rejection in Washington of the traditional 'zealous advocacy' model"); Fred C. Zacharias & Bruce Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WA. L. REV. 1 (2005) (reframing traditional zealous advocacy, as articulated by Lord Brougham, into a "professional conscience" model of lawyering).

8 *See* Zacharias & Green, *supra* note 7, at 2 (acknowledging zealous advocacy as the "dominant" lawyering model).

9 DLRPC Preamble ¶ 2.

10 DLRPC Preamble ¶ 5.

11 *See id.*

12 *See id.*

13 *Id.*; cf. *In re Karavidas*, 999 N.E.2d 296, 317 (Ill. 2013) (emphasizing that " '[t]he preamble ... likens the practice of law to a public trust, and charges lawyers with maintaining public confidence in a system of justice by acting competently and with loyalty to the best interests of the client' ").

14 DLRPC Preamble ¶ 6.

15 *Id.*

16 *Id.*

17 *See* DLRPC Preamble ¶ 9.

18 *Id.*

19 *Id.*; *cf. The Florida Bar v. Machin*, 635 So .2d 938, 940 (Fl. 1994) (emphasizing a point from the Preamble that, "[w]hen confronted with possible ethical conflicts, it is the lawyer's obligation to look to the rules of professional conduct and discipline for guidance," and "an attorney must use sound judgment in applying these ethical standards to a given set of facts").

20 DLRPC Preamble ¶ 9.

21 *See generally* Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006) (exploring the history and nature of zealous advocacy); see also Michael I. Krauss, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325 (2001) (recounting history of zealous advocacy model of lawyering).

22 DLRPC Preamble ¶ 8.

23 *See id.* at ¶ 7.

24 *Id.*

25 DLRPC Preamble ¶ 9.

26 *Id.* at ¶ 8.

27 *Id.* at ¶ 10.

28 *Id.* at ¶ 13.

29 *See id.* at ¶ 10.

30 *Id.* at ¶11; cf. *In re Restaurant Dev. Group, Inc.*, 402 B.R. 282, 292 (N.D. Ill. 2009) (explaining that "compliance with the rules … depends upon understanding and voluntary compliance" by lawyers).

31 This hypothetical is based on *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

32 Freedman, Henry Lord Brougham and Zeal, 34 HOFSTRA L. REV. at 1322, quoting *Trial of Queen Caroline* 2.

33 In the *Spaulding* case, the precise issue was whether the settlement agreement would be enforced despite the plaintiff's lack of knowledge of the aneurysm condition. The court observed, "when the parties were in an adversary relationship, no rule required or duty rested upon defendants or their representatives to disclose this knowledge." *Spaulding*, 116 N.W.2d at 709. In reviewing the defense lawyers' decision not to share this information, the Court commented further, "[t]here is no doubt of the good faith of both defendants' counsel." *Id.* The court nevertheless concluded that once the parties submitted the settlement agreement to the court for approval, the parties left a purely adversarial position with each other. *See id.* Instead, the settlement agreement became a joint application to the court. *See id.* By unilaterally concealing this material information at this stage, the defense lawyers took a "calculated risk," that the settlement would not remain final. *See id.* at 709–10. Therefore, the lawyers were not unethical, but the court had discretionary power to vacate the settlement. *See id.* at 710.

34 DLRPC Scope ¶ 14.

35 *See id.*; *see e.g.*, DLRPC Rule 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client"); DLRPC Rule 1.8(j) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced"); DLRPC Rule 2.1 ("A lawyer shall exercise independent professional judgment and render candid advice"); DLRPC Rule 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause").

36 *See* DLRPC Scope ¶ 14; *see e.g.*, DLRPC Rule 6.1(a)(1) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay … In fulfilling this responsibility, the lawyer should … provide a substantial amount of the [50] hours of legal services without fee or expectation of fee … .").

37 DLRPC Scope ¶ 14; *see e.g.*, DLRPC Rule 1.2(c) ("A lawyer may limit the scope of representation if the limitation is reasonable under the circumstance and the client gives informed consent"); Rule 1.5(c) ("A fee may be contingent on the outcome of the matter for which the service is rendered … ."); DLRPC Rule 1.6(b) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary … ."); DLRPC Rule 1.16(b) ("a lawyer may withdraw from representing a client if … ."); DLRPC Rule 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation").

38 DLRPC Scope ¶ 14.

39 DLRPC Scope ¶ 15.

40 *See* id; *see e.g.*, Fed. R. Civ. Pro 26.

41 *See* DLRPC Scope ¶ 15; *see e.g.*, N.Y, Crim. P. Law 190.50(5) (requiring prosecutors in cases where a defendant has been charged by felony complaint to notify defendant of grand jury proceeding and accord defendant a reasonable opportunity to testify in the grand jury).

42 DLRPC Scope ¶ 16.

43 *Id.*

44 *See* DLRPC Rules 1.6(a) and 1.9(c).

45 *Cf. Smith v. Morrison*, 47 A.3d 131, 135–37 (Pa. 2012) (relying on *Scope* to reject proposed jury instruction in civil liability case that verbatim incorporated the ethical fiduciary duties that applied to the lawyer-client relationship under the state rules of professional conduct, instead of referring to common law principles in tort to define the applicable standard of care).

46 *See* DLRPC Rule 1.6(b)(5).

47 DLRPC Scope ¶ 14; see also DLRPC Rule 1.6 comment 17 (acknowledging the discretionary nature of the decision whether to disclose confidential information under this exception).

48 *Id.* at ¶ 21.

49 Cf. id. at ¶ 19 ("failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process" [emphasis added]).

50 DLRPC Scope ¶ 21.

4

Unauthorized Practice of Law

Key Concepts

- The practice of law by one without a license or other permission to practice law is the unauthorized practice of law.
- A lawyer who assists another person in the unauthorized practice of law is acting improperly.
- A lawyer may not have an office or other "systematic and continuous" presence in a jurisdiction in which the lawyer is not admitted.
- A lawyer may practice law temporarily if the lawyer seeks the appropriate approval.
- A lawyer may not advertise him or herself as a lawyer admitted in a jurisdiction in which the lawyer is not admitted.

Introduction

The traditional rule tends to be that you may only practice law in jurisdictions where you have been licensed to practice. This makes sense—particularly given the many steps you must take in order to be admitted to the bar of your particular state. The admissions process was created on the theory that the practice of law requires a high level of skill and expertise, and that the public should be protected from people lacking that skill and expertise. It is logical that jurisdictions would allow only those individuals certified as exhibiting the requisite level of skill and expertise to practice law.

The issue of the unauthorized practice of law typically arises in two settings: first, the practice of law by a non-lawyer, a person not admitted to practice in any

jurisdiction; and second, the practice of law by a lawyer admitted to practice in a jurisdiction but not admitted to the jurisdiction in which the lawyer is practicing.

The first setting is obvious. A person with no legal training or expertise, not admitted in any jurisdiction, engages in conduct within the definition of the practice of law. For example, assume Jerry has just graduated college but has no legal training and has not been admitted to practice law in any state. Jerry has created a business that gives estate planning advice and drafts wills in the state he lives in (California). By so acting, Jerry is engaging in the unauthorized practice of law in California. Many states make the unauthorized practice of law a crime. A court could punish Jerry or issue an injunction prohibiting Jerry from engaging in these activities.

In the second situation, Lucy Lawyer is admitted in the state jurisdiction of Washington. Lucy engages in conduct within the definition of the practice of law when she renders legal advice to a client about a contract matter—the client wants to sue for breach of an employment contract that was created in California. If Lucy renders this advice when she visits the movie studio owned by her client, Lucy engages in the unauthorized practice of law under the traditional view. Lucy is practicing law in California, a state that has not admitted Lucy. Like the first example, Lucy's conduct is improper under the ethical rules and possibly criminal as well.

The rules of professional responsibility have modified this approach slightly by allowing certain conduct that might have otherwise constituted the unauthorized practice of law under the traditional rules. Under the recent changes in most states' rules, Lucy's conduct may not be the unauthorized practice of law in California *if she obtained the appropriate permission from a California court to practice law in the state temporarily*.

What's the rationale behind this rule? Some commentators believe that the true rationale for forbidding the practice of law by those not admitted to the bar of a particular state is the need for that state to control competition between lawyers. Others question such restrictions in light of the inability of some individuals to gain access to legal assistance because of economic or other barriers. These commentators argue that any constraint on the supply of legal services is improper. In the first scenario—where a person with no legal training "practices" law—the rationale of protecting the public from the unskilled "pretend" lawyer seems to justify a restraint on a person with no legal training.

The rule governing the unauthorized practice of law is Rule 5.5.[1] Rule 5.5 (a) prohibits a lawyer from practicing law or assisting another in the practice of law

if those actions are a "violation of the regulation of the legal profession in that jurisdiction." The traditional approach has been that any practice of law without admission in the jurisdiction was a violation of the ethical rules. Rule 5.5(b) provides guidelines about what it means to practice law. Rule 5.5(b) prohibits anyone who is not admitted to practice in that state from having a "systematic and continuous presence" in that state or from holding out to the public that the lawyer is practicing law in that state.

Rule 5.5(c) modifies the traditional prohibition on out-of-state lawyers practicing in a particular jurisdiction by providing exceptions to this traditional rule. If a lawyer's situation fits within an exception, then the lawyer may practice law in a jurisdiction in which he or she is not admitted. This modification is helpful to the modern practice of law where lawyers often have clients in many different jurisdictions. Rule 5.5(c) states that a lawyer may provide legal services on a temporary basis in a jurisdiction if the lawyer:

(1) Associates with a lawyer who is admitted to practice in the jurisdiction and who actively participates in the matter;

(2) Is working on a matter related to the pending or existing proceeding before a court when practice before that court is proper;

(3) Is working on activities "reasonably related" to an "arbitration, mediation or other alternative dispute resolution proceeding" in connection with practice in an admitted jurisdiction; or

(4) Is working on activities "reasonably related" to the practice of law in an admitted jurisdiction.

Note that this last ground is a large exception. A lawyer admitted to a bar but not admitted in that particular jurisdiction can practice law in that jurisdiction on a temporary basis if the activities "arise out of or are reasonably related to the lawyer's practice" in an admitted jurisdiction.

Finally, 5.5(d) provides that an admitted lawyer may provide services through an office in the jurisdiction as long as a court does not require formal approval. This is often called the "in-house" lawyer exception. The reality is that in-house lawyers are sometimes required by the employer to move around with the subsidiaries or affiliates of the company so that admission in multiple jurisdictions is overly burdensome. In addition, in-house lawyers may be working in one state but rendering advice and thus "practicing law" in another. Rule 5.5(d) provides flexibility so that

in-house lawyers can render legal advice to the different arms of a corporation that may be located in many jurisdictions.

The Rule

Rule 5.5 prohibits a lawyer from practicing law without authorization. Rule 5.5 (a) states that a lawyer cannot practice law or assist another in the practice of law if those actions are a "violation of the regulation of the legal profession in that jurisdiction."

THE RULE — Rule 5.5

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

The traditional approach has always been that any practice of law in a jurisdiction without admission in that jurisdiction was a violation of this rule. As mentioned above, Rule 5.5 now contains exceptions to this traditional rule. If a lawyer's situation fits within an exception, that lawyer may practice law in a jurisdiction in which he or she is not admitted.

1. What Is the Practice of Law?

For lawyers to know that they are practicing law improperly, they must know what activities are within the definition of the practice of law. So what activities constitute the practice of law? There is no single definition shared by the states. Rather, each state, by rule, statute, or case law, has developed its own definition of the "practice of law." Most states have broad definitions that can be read to include almost any conduct. For example, in *In re Thonert*, 693 N.E.2d 559, 563 (Ind. 1998), the Indiana Supreme Court defined the "practice of law" as follows:

A person who gives legal advice to clients and transacts business for them in matters connected with the law is engaged in the practice of law … . Thus, the practice of law is not defined only as the giving of legal advice or acting in a representative

capacity—it also had been extended by this Court to conducting the business management of a law practice.

The activity of Jerry, the college student in the earlier example, and Lucy, the lawyer giving advice to a client in California, both fall within common definitions of the "practice of law." Consider the following example.

Example. A California corporation sued its New York law firm for legal malpractice, and the firm filed a counterclaim for attorney fees earned for work performed in both California and New York. Lawyers in the New York firm had traveled to California to advise the corporation on various contract issues regarding the corporation's business in California. The California corporation claimed that the firm was not entitled to any legal fees for work done in California because none of the lawyers were actually licensed to practice in California. The New York law firm claimed that they were entitled to fees because any work they had done in California related to the overall work they had done for the client—regardless of geography. Was the New York firm "practicing law" in California? Should the lawyers be able to recover fees for their work?

Analysis. The court in this case analyzed the facts based upon the language in California's Business and Professions Code § 6125: "No person shall practice law in California unless the person is an active member of the State Bar." The court noted that there was no definition of "practice law," but that the common law definition was: "[t]he doing and performing of services in court … including legal advice … in California." The result was that the firm did violate the statute as stated above because the firm practiced law in California by meeting with clients, giving advice, etc. As such, the firm was not allowed to recover under the fee agreement for services rendered in California.

Rule 5.5(a) prohibits a lawyer from practicing law or assisting another in the practice of law if those actions are a "violation of the regulation of the legal profession in that jurisdiction." Subsection (a) and the examples above represent the traditional view that any practice of law without admission to the jurisdiction is a violation of the ethical rules.

2. Assisting in the Unauthorized Practice of Law

Jimmy Smith, a person without legal training and not admitted to the bar in any jurisdiction, engages in the unauthorized practice of law if he engages in conduct within the definition of the practice of law. Rule 5.5(a) forbids a lawyer from assisting a person in practicing law when that person is not admitted in the jurisdiction. If Lisa Lawyer is admitted to practice in Delaware and assists Jimmy, a non-lawyer, in setting up his estate planning and will preparation business, Lisa has assisted Jimmy in the unauthorized practice of law. Lisa has violated Rule 5.5(a).

More commonly, the issue of a lawyer assisting a non-lawyer in the unauthorized practice of law arises regarding the lawyer's employees. A lawyer cannot allow anyone working with or for the lawyer to take action within the definition of the practice of law if the person is not a lawyer. Often paralegals and other law office employees develop skill and expertise. Perhaps lawyers may even allow or require these individuals to perform tasks that are within the definition of the practice of law. Lawyers who allow or require employees to so act without lawyer supervision are violating Rule 5.5 unless the jurisdiction has a special rule allowing the non-lawyer to practice law.

Occasionally, a lawyer may employ an individual who was an admitted lawyer at one time but is now suspended or disbarred. The employee has certain lawyer skills and expertise and the employing lawyer may be tempted to allow the employee to practice law. Allowing such a person to practice law would be assisting in the unauthorized practice of law and would violate Rule 5.5. Lucy may have hired David, a disbarred lawyer, to do legal research, thinking that David could do great work at a bargain price. Lucy must be careful not to rely on David to practice law. David must work under Lucy's supervision at all times.

Finally, a lawyer cannot assist another lawyer in the practice of law in a jurisdiction in which the lawyer is not admitted if the lawyer otherwise is not granted the right to practice in that jurisdiction. So a California lawyer, such as Julie, cannot assist a Georgia lawyer, such as Larry, in practicing law in California if Rule 5.5 does not allow Larry to practice in California.

Example. Petitioner was not a lawyer and had never been admitted to the bar of any state. However, Petitioner was authorized to practice before the United States Patent Office—which does not require a law degree in order to submit patents. As part of that practice, he had for many years represented patent applicants, prepared and prosecuted their applications, and advised them in connection with their applications in the State of Florida.

The Florida Bar sued the Petitioner in the Supreme Court of Florida to enjoin the performance of these and other specified acts within the State, contending that they constituted the unauthorized practice of law. What should the court do?

Analysis. A federal statute expressly permitted non-lawyers to practice before the Patent Office. Because there was a federal law that explicitly granted such authority, Florida may not have a statute that goes against this federal law. In essence, the State of Florida cannot deny Petitioner the right to practice before the Patent Office; the federal law preempts the state law in this circumstance.

Consider the following example involving a fifteen-year old teenager who held himself out as a lawyer and answered questions on an internet message board. Was there a problem with a non-lawyer posting advice on www.AskMe.com?

Example. In the early 2000's, www.AskMe.com was an internet message board. People posted questions on the site and then another person posted a response. The site then ranked responses and identified "experts" based upon those rankings. In June of 2000, the 10th highest ranked legal expert on AskMe.com was a person who went by the name of LawGuy1975, aka Justin Anthony Wyrick, Jr., who fielded thousands of legal questions— sometimes hundreds per day. LawGuy1975 was actually Marcus Arnold, a fifteen-year-old boy. Marcus was not an attorney. He had not yet finished high school. Marcus Arnold's "clients" posed simple questions and Marcus responded with direct answers. Here's an example:

> Q: What amount of money must a person steal or gain through fraud before it is considered a felony in Illinois?
>
> A: In Illinois, you must have gained $5,001+ in an illegal fashion in order to constitute fraud. If you need anything else please write back! Sincerely, Justin Anthony Wyrick Jr.

Was Marcus Arnold practicing law by answering these questions?

Analysis. Yes, Marcus Arnold was engaged in the unauthorized practice of law. The interesting twist in this real-life scenario is that Marcus eventually decided to update his profile on www.AskMe.com to reflect the fact that

he was a fifteen-year-old boy. Immediately, other "legal experts" on the site began to send him emails ranging from threats to giving him intentionally low rankings on his legal advice to lower his high-ranking status on the site. But Marcus also received overwhelming support from his client base. People began to believe that any 15-year-old who had risen so high in the ranks of AskMe.com legal experts must be some kind of genius. Two weeks after Marcus admitted he was only fifteen, he was the single-highest ranked legal expert on AskMe.com.

Could Marcus Arnold have been prosecuted for the unauthorized practice of law in his state? The reality is that Marcus could have been prosecuted by any state in which he was "practicing law." He was not prosecuted but other lawyers have been prosecuted for similar behavior. The interesting thing about Marcus' case is the fact that the internet site on which he was giving his advice reached all the states in the country so Marcus could potentially have been prosecuted by any state in which he was allegedly practicing law. Commentators have suggested that perhaps Marcus Arnold symbolizes the descent of the legal field from a profession to a business that is simply the sum of its parts; one of its parts being nothing more than information. Michael Lewis, who wrote about the Marcus Arnold story in both a book and an article wrote: "Once the law became a business, it was on its way to becoming a commodity: Reduce the law to the sum of its information, and, by implication, anyone can supply it." Even a fifteen-year-old boy.

Rule 5.5(a) is clear. A lawyer cannot allow anyone working with or for the lawyer to take action within the definition of the practice of law if the person is not a lawyer. The key for lawyers working with non-lawyers is to ensure that the admitted lawyer is properly supervising the work of the non-lawyers in the office and approving of their work. Lawyers who allow or require employees to act on their own without lawyer supervision are violating Rule 5.5 unless the jurisdiction has a special rule allowing the non-lawyer to practice law.

3. A Lawyer Admitted to a Bar but Not to the Jurisdiction; No Systematic and Continuous Practice Allowed

What happens if Lucy Lawyer is admitted in Georgia but not Delaware and renders legal advice in Delaware? The traditional analysis would be that Lucy engages in the unauthorized practice of law because she is practicing law in Delaware, a jurisdiction in which she has not been admitted.

Rule 5.5 (b) provides the general rule that a lawyer admitted to a bar but not admitted in the jurisdiction cannot practice in that jurisdiction.

THE RULE — Rule 5.5

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) …

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

As stated above, Rule 5.5(b) initially states the traditional rule that a lawyer admitted in one state cannot practice law in another state in which the lawyer has not been admitted to practice. The rigidity of this rule has been qualified with the exceptions in (c) and (d). Consider how this more rigid interpretation would impact the modern practice of law. Realistically, a lawyer admitted in California may be asked to go to a client's office or factory in Nevada and render legal advice there. Traditionally, this conduct would be improper under the traditional rule yet it is necessary for efficient and proper representation of the client. In addition, the California lawyer's advice is not problematic simply because the lawyer renders that advice in Nevada. Suppose the lawyer deposes a witness in Nevada who has information important to a litigation matter in California. Again, it would be illogical to say that the lawyer is not competent to take the deposition. Yet, the lawyer's conduct would be improper under the historical unauthorized practice notions.

The reality is that lawyers today take these sorts of actions every day in an attempt to provide service for their clients or cases with evidence that exists outside the jurisdiction. In recent times, discipline authorities usually have not disciplined lawyers for this conduct but the inconsistency between rule and practice has been uncomfortable.

Although state boards have not imposed discipline on lawyers, courts have refused to enforce a fee contract if the services for which a client owes a fee constitute the

unauthorized practice of law. Consider the Birbrower case which is the principal case on this issue.[2] A New York law firm with no lawyers admitted in California had a contract for legal services with a company that had offices in both New York and California. The California Supreme Court did not allow the New York firm to enforce a contract for fees for legal services. The court determined that because the legal services were provided in California, the lawyers were practicing law inappropriately in California. With regard to the determination of where the services were rendered, the court noted that physical presence in the state was not required and that a lawyer could practice in California "by telephone, fax, computer, or other modern technological means."

a. Establishing an Office or Other "Continuous Presence"

Rule 5.5(b)(1) also clearly states that a lawyer who is not an in-house lawyer cannot have an office in a jurisdiction in which the lawyer is not admitted and cannot otherwise maintain a "systematic and continuous presence" for the purpose of practicing law. If Larry Lawyer is admitted in Georgia, but not Delaware, Larry cannot have an office in Delaware.

There is an unstated exception to this rule, however. Because a lawyer may have the right to practice federal law in a non-admitted jurisdiction as recognized in Rule 5.5(d)(2), such a lawyer may have an office in a non-admitted jurisdiction for the purpose of conducting the federal law practice. In *Surrick v. Killion*, the Court of Appeals for the Third Circuit stated that a state cannot prohibit a lawyer from operating an office for federal practice even in a state in which the lawyer is not admitted[3] Such a prohibition would violate the Supremacy clause of the United States Constitution. In *Surrick*, the lawyer was admitted in federal court but not admitted in Pennsylvania. Pennsylvania sought to discipline the lawyer for operating an office in Pennsylvania though he was not admitted there.

Example. Lawyer, who is licensed only in New York, decides it is time to make a major life change and moves to Oregon. Not wanting to completely retire from the practice of law, Lawyer retains his affiliation with his New York law firm and establishes an office in his new Oregon home. Lawyer continues to serve his New York firm's clients on various legal matters; all correspondence is by e-mail through the New York firm's server;

the lawyer is also able to send other correspondence remotely to staff at the New York firm who then print it on the New York firm's letterhead.

Is Lawyer practicing law "in Oregon?" Is it practicing in Oregon if the matter involves only the law of another jurisdiction? If Lawyer is only representing New York clients or working on matters involving the law of New York, is he practicing in New York?

Analysis. The answer is likely no—Lawyer is doing something more than just practicing in New York, where he is licensed. The rule seems to suggest that handling a matter involving New York law or New York residents is not the same as practicing "in" New York. The jurisdiction in which a lawyer practices is determined by where he or she is physically located when performing the legal services. If the locus of the client or the applicable law determined where one was practicing, there would be no need for rules like Rule 5.5, which are exceptions to the general rule that a lawyer not licensed in a jurisdiction cannot provide legal services there.

Following that analysis, the answer to the question whether Lawyer is practicing law in Oregon is indisputably "yes." All of Lawyer's legal work is done from an office that is physically located in Oregon, even if some of the technical support comes from or actually takes place in New York. In that case, it would follow that Lawyer is in violation of Rule 5.5 because he is not practicing temporarily in Oregon under the auspices of Rule 5.5, but has established an office and systematic and continuous presence in Oregon.

In 2000, the A.B.A. appointed a Commission on Multijurisdictional Practice to investigate the issue of the unauthorized practice of law in the context of lawyers practicing in multiple jurisdictions. This Commission recognized the disharmony between the rules and the reality of modern law practice. The Commission suggested a new version of the unauthorized practice rule that would take several common scenarios out of the definition of improper conduct while still prohibiting the unauthorized practice of law in general. The A.B.A. adopted a new Rule 5.5 on this issue in 2002[4] and these new policies are reflected in most states' rules, including Rule 5.5 of the Delaware Lawyers' Rules of Professional Conduct.

4. *Pro Hac Vice* Admission

Most jurisdictions recognize the concept of pro hac vice admission. When Rule 5.5 allows a lawyer to practice law "temporarily" in a jurisdiction, the rule may be referring to pro hac vice admission. *Pro hac vice* admission is simply when a lawyer requests that a court admit the lawyer so that the lawyer may appear for the purpose of that matter only. A lawyer not admitted in a jurisdiction may request that a court admit the lawyer so that the lawyer may appear for the purpose of the matter. Pro hac vice admission requirements and procedures are usually stated in general court rules.

Example. Larry Lawyer, a lawyer admitted in Georgia, may have a client with a litigation matter in Delaware. Larry may ask the Delaware court presiding over the matter to allow him to practice law and appear in court for that matter only. Is the court likely to do so?

Analysis. It is likely a court will allow Larry Lawyer to handle the litigation matter in Delaware. Larry will have to apply specifically to the Delaware court where the case is pending and file the appropriate forms. Further, it is likely that Larry will be required to associate with local counsel in Delaware. If Larry meets these requirements, the court will likely grant his pro hac vice admission.

States can have other idiosyncratic rules that allow a lawyer admitted in another jurisdiction to practice law in certain specific settings. For example, a state might have a rule allowing lawyers admitted elsewhere but not in the particular jurisdiction to appear in administrative proceedings. You can check the local court rules in your jurisdiction for more specifics about pro hac vice admission requirements.

5. Legal Services on a Temporary Basis

Rule 5.5 maintains the traditional ban on practicing law where you are not admitted but provides four specific exceptions when conduct which would typically constitute the unauthorized practice of law is allowed to occur on a temporary basis. These temporary practice exceptions are found in Rule 5.5(c) and the four exceptions are: (1) the association of admitted counsel exception—which often involves pro hac vice admission; (2) the proceeding before a tribunal exception; (3) the alternative dispute resolution exception; and (4) the related activities exception. Rule 5.5(c) states as follows:

THE RULE Rule 5.5

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) …

(b) …

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction,[5] and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.Association with an Admitted Lawyer.

Rule 5.5(c)(1) allows a lawyer to temporarily practice law if the lawyer associates with counsel who is admitted in the jurisdiction in which the lawyer needs to practice. The specific language of the exception states that a lawyer who is not admitted to the jurisdiction can still practice in that jurisdiction if the services:

(c) …

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

A lawyer admitted to a bar but not admitted in a particular jurisdiction may practice law in that jurisdiction on a temporary basis if the lawyer associates with an admitted lawyer who "actively participates in the matter." Rule 5.5(c)(1).

Larry Lawyer, a lawyer admitted in Georgia, may find himself practicing law in Delaware by taking depositions in Delaware or giving legal advice to a client at the client's Delaware facility. If Larry engages in the practice of law in Delaware only temporarily and if he associates with a Delaware lawyer who remains involved in the litigation or other representation, Larry has not engaged in the unauthorized practice of law in violation of Rule 5.5.

Example. Lawyer Alex was licensed to practice in the State of California. He often works in association with Beatrice regarding legal matters in the State of Wyoming. He is also licensed to practice in Wyoming. Alex was recently disbarred in California. Beatrice recently asked Alex to help her with a case in Wyoming. Alex agreed and they won the case. Is Alex subject to discipline?

Analysis. Yes, Alex is subject to discipline for violating Rule 5.5 because Alex was disbarred in California. Rule 8.5 (c) states: "A lawyer admitted in another United States jurisdiction … , and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis." Here, the attorney was disbarred in California which violates this subsection of the rule.

b. Activities "Reasonably Related" to a Proceeding Before a Tribunal When Practice Before the Tribunal Is Proper

The second exception under Rule 5.5(c) is the "reasonably related" exception in which a lawyer admitted to a jurisdiction—but not admitted to the particular jurisdiction involved—can practice law in that jurisdiction temporarily if the conduct is "in or reasonably related to a pending or potential proceeding before a tribunal."

Part (2) of Rule 5.5(c) states that a lawyer not admitted to the jurisdiction may practice in that jurisdiction if the legal services:

> **(c)** …
>
> **(1)** …
>
> **(2)** are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; …

Therefore, a lawyer admitted to a bar but not admitted in the particular jurisdiction can practice law on a temporary basis if the legal services are "reasonably related" to a pending proceeding before a tribunal if the lawyer expects to be authorized to appear in the proceeding.

In addition, the rule recognizes that often more than one lawyer works on a matter. Rule 5.5 (c)(2) provides that this tribunal exception applies even if the lawyer does not expect to be authorized to appear but the person the lawyer is assisting expects to be authorized to appear.

Example. Larry Lawyer, admitted in Georgia, needs to take a deposition and interview witnesses in Mississippi relating to a proceeding before a tribunal in Georgia. Can Larry do so?

Analysis. Larry may do so even if the proceeding does not exist yet but is only a "potential proceeding." Larry may participate in these activities in Mississippi even if the matter will culminate in a proceeding before a North Carolina tribunal if Larry expects to be admitted pro hac vice. Larry may take the deposition even if the matter will be tried in Mississippi and even if Larry does not expect to be admitted in any way in Mississippi if he is, for example, an associate preparing a case for another lawyer who does expect to be admitted *pro hac vice*.

c. Activities "Reasonably Related" to an "Arbitration, Mediation or Other Alternative Dispute Resolution Proceeding" in Connection with Practice in an Admitted Jurisdiction

Rule 5.5(c)(3) is the third exception and it provides that a lawyer admitted to a jurisdiction but not admitted in the particular jurisdiction may practice law in that jurisdiction temporarily if the lawyer's conduct is "in or reasonably related" to an alternative dispute resolution process in the admitted jurisdiction.

(c) …

(1) …

(2) …

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;

Accordingly, Rule 5.5(c)(3) provides that a lawyer admitted to a bar but not admitted to the particular jurisdiction may practice law in that jurisdiction on a temporary basis if the lawyer's conduct is "in or reasonably related" to a pending or potential "arbitration, mediation, or other alternative dispute resolution proceeding" if the services arise out of or are reasonably related to the lawyer's practice in an admitted jurisdiction and pro hac vice admission is not otherwise required. The proceeding need not be in a jurisdiction in which the lawyer is admitted as long as the activities relate to the lawyer's practice in an admitted jurisdiction. The lawyer must, of course, follow any particular procedure the jurisdiction in which the proceeding occurs has regarding pro hac vice admission for participation on the proceeding.

Example. Larry Lawyer, a Georgia lawyer, must interview witnesses in Delaware relating to an arbitration in Georgia involving his Georgia client. Is Larry allowed to do this?

Analysis. Yes. Larry can interview witnesses in Delaware because it relates to an arbitration and this falls directly within Rule 5.5(c)(3). Larry may also interview witnesses relating to an arbitration in Delaware if the arbitration relates to the representation of one of his Georgia clients as this falls within Rule 5.5(c)(4), as explained below.

d. Activities "Reasonably Related" to Practice in an Admitted Jurisdiction

The last exception of Rule. 5.5(c) is quite broad. A lawyer admitted to a bar but not admitted in a particular jurisdiction can practice law in that jurisdiction on a temporary basis if the activities are "reasonably related" to the lawyer's practice in an admitted jurisdiction and the tribunal proceeding exception and the alternative dispute resolution exception do not apply. The language of Rule 5.5(c)(4) states that a lawyer providing legal services that:

> **(c)** …
>
> **(1)** …
>
> **(2)** …
>
> **(3)** …
>
> **(4)** are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Therefore, Larry Lawyer, a Georgia attorney, may render legal advice when he visits his Georgia client's company in Delaware because that advice is "reasonably related" to Larry's representation of the client in Georgia.

6. In-House Counsel

Finally, section (d) of Rule 5.5 deals with the complexities of in-house counsel. Inhouse lawyers may practice law in a jurisdiction in which they are not admitted if they render legal services only for the employer or the employer's subsidiaries or affiliates, if the lawyers are admitted in another jurisdiction. Rule 5.5(d)[6] states that:

THE RULE — Rule 5.5

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) …

(b) …

(c) …

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.5(a) (1)[7] and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

There are two subsections: (d)(1) which deals with in-house lawyers; and (d)(2) which permits conduct when a lawyer is authorized by some other law or statute.

Under Rule 5.5(d)(1), in-house lawyers can practice law in a jurisdiction in which they are not admitted if they are admitted in another jurisdiction and if no pro hace vice admission generally is required for the activity. Even before Rule 5.5 contained this exception for in-house counsel, many states had exceptions for inhouse counsel—simply because of the necessity of representing large corporations or companies that have offices or facilities spread across many states. This treatment of in-house lawyers recognizes that in-house lawyers are sometimes required by the employer to move repeatedly so that admission in multiple jurisdictions becomes a chore with no great benefit given that the only client is the entity requiring the moves.

The in-house counsel exception is also a recognition that in-house lawyers may be working in one state but rendering advice and thus "practicing law" in other states.

It is not uncommon for an in-house legal department for a large corporation to render legal advice to arms of the corporation located in many other states.

Example. Lois Lawyer is an in-house lawyer and works for a corporation in Georgia. Lois is also admitted to practice law in Georgia. Lois finds herself visiting many of the corporate facilities that are located in Delaware. Lois often gives legal advice to the facilities of the corporation in Delaware. Is Lois improperly giving legal advice in violation of Rule 5.5?

Analysis. Lois is allowed to visit facilities of her employer in other states such as Delaware and she can render legal advice in those states. Rule 5.5(d) (1) eliminates any suggestion that Lois is engaging in improper conduct in such a scenario.

Rule 5.5(d)(2) acknowledges that a lawyer may not be admitted in a particular jurisdiction and yet may have the right to practice in the jurisdiction by application of federal law or other specific law. The federal law subsection recognizes that federal courts can set rules that preempt state regulations. For example, the Sixth Circuit Court of Appeals in *In re Desilets*[8] considered the question of whether a lawyer could practice federal bankruptcy law in a jurisdiction in which the lawyer was not admitted. The lawyer was admitted in Texas but not Michigan. He had an office in Michigan and practiced federal bankruptcy law in the Western District of Michigan. The lawyer was admitted to the bar of the Western District of Michigan. The Western District required admission to a state bar but not necessarily to the bar of Michigan. The Sixth Circuit held that the right to practice in federal court included not only the right to appear in federal court in the Western District of Michigan but also the right to engage in activities outside the courtroom, such as consulting with and advising clients. Thus, the Desilets court determined that the state law prohibiting the lawyer from engaging in these activities impermissibly conflicted with federal law.

Example. Can Larry Lawyer, a bankruptcy lawyer admitted in Georgia and admitted to the Western District of Kentucky, practice law in Kentucky if those activities are necessary to Larry's federal practice?

Analysis. Yes. Larry can practice bankruptcy in Kentucky because he is admitted to the federal bar, i.e., the Western District of Kentucky, as long as his activities are related to his federal bankruptcy practice.

In-house counsel often work for organizations that have non-lawyer owners, officers, or directors. The rationale behind allowing in-house counsel exceptions to Rule 5.5 is that organizations may generally represent themselves and that inhouse counsel are assisting in that effort, not representing an outside client as an employee of an organization. Therefore, under Rule 5.5, in-house counsel are provided with the flexibility to represent their employer outside the jurisdiction in which they are licensed. This flexibility serves the interest of their client (the employer) and it does not create an "unreasonable risk to the client and others because the employer is well-situated to assess the lawyer's qualifications and the quality of the lawyer's work."

Quick Summary

Rule 5.5 asserts that the practice of law by one having no license or other permission to practice law is the unauthorized practice of law. A lawyer who assists another person in the unauthorized practice of law is acting improperly. A lawyer may not have an office or other systematic and continuous presence in a jurisdiction in which the lawyer is not admitted. A lawyer practicing law in a jurisdiction in which the lawyer is not admitted may practice law temporarily if the lawyer associates with admitted counsel; the lawyer engages in activities "reasonably related" to a proceeding in which the lawyer is admitted; the lawyer engages in activities "reasonably related" to an alternative dispute resolution proceeding in connection with practice in a jurisdiction in which the lawyer is admitted; or the lawyer engages in any activities related to a lawyer's practice in a jurisdiction in which the lawyer is admitted. Finally, an in-house lawyer may practice in a jurisdiction in which the lawyer is not admitted.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 DLRPC Rule 5.5.

2 *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal.4th 119, 70 Cal.Rptr.2d 304, 949 P.2d 1 (1988).

3 *Surrick v. Killion*, 449 F.3d 520 (3d Cir. 2006).

4 *See* http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.ht (last visited on 8/23/16).

5 The Delaware Lawyers' Rules of Professional Conduct (DLRPC) are slightly different than the A.B.A. Model Rules in 5.5(c). The DLRPC (c) adds "or in a foreign jurisdiction" after United States jurisdiction.

6 As in subsection (c) discussed above, the DLRPC have added one phrase to the A.B.A. Model Rules: subsection (d) adds "or in a foreign jurisdiction" after "United States jurisdiction."

7 The DLRPC have modified the A.B.A. Model Rule 5.5(d) slightly, by adding "after compliance with the Supreme Court Rule 55.1(a)(1) after "affiliates."

8 *In re Desilets*, 268 B.R. 516 (6th Cir. 2001).

5

The Discipline Process and Jurisdiction for Discipline

Key Concepts

- A lawyer has a duty to be truthful in the context of a disciplinary matter.
- Any jurisdiction that has admitted a lawyer to the practice of law has authority to discipline that lawyer regardless of where the conduct occurs.
- Any jurisdiction in which a lawyer renders legal services has authority to discipline that lawyer.
- A lawyer may practice law temporarily if the lawyer seeks the appropriate approval.
- If one state disciplines a lawyer, other states in which the lawyer is admitted may impose reciprocal discipline.

Introduction

You may think it is strange to begin talking about lawyer discipline when you are still a law student, but understanding *who* has the power to discipline you when you are a lawyer and the *breadth* of that power is very important. Indeed, law students can be disciplined by the bar if they obtain a law student practice license during law school.[1]

The most prevalent types of misconduct that lead to attorneys being sanctioned included "general neglect, failure to communicate, failure to file, failure to cooperate with a disciplinary agency, record-keeping violations, general misrepresentation,

failure to protect the interest of a client, commingling, conversion, commission of felonies, and failure to appear."[2]

Consider a report from the State of Washington that publicly documented lawyer discipline in that state in 2012. The most common ethical violation in 2012 was theft involving trust accounts, which accounted for 42% of the violations. The second most common ethical violation was for dishonesty. The remaining topics involving lawyer discipline were as follows:

Client Confidences	1%
Conflicts	2%
Criminal Conduct	8%
Diligence/Competence/Communication	10%
Dishonesty	14%
Fees	10%
Litigation Misconduct	10%
Non-Cooperation	2%
Practice While Suspended	2%
Theft/Trust Account	42%[3]

Washington State also recorded the practice areas of the attorneys who were disciplined. Which area of law was most prone to discipline? In Washington State, the attorneys who practiced in family law were subject to discipline more often than other areas. Consider the statistics:

Administrative	0%
Bankruptcy	4%
Commercial	6%
Corp./Banking	0%
Criminal Law	18%
Estate/Probate	8%
Family Law	21%
Immigration	11%
Intellectual Property	1%
Juvenile	0%
Labor Law	2%

Real Property	3%
Taxation	2%
Torts	11%
Other	13%[4]

As we saw in the previous chapter, the highest court in each state regulates the practice of law within that state. In addition, the highest court in each state is also the arbiter of discipline within the state. Typically, the court delegates the operation of the day-to-day discipline system to a lesser entity, such as a Board of Professional Responsibility. This entity may or may not be a part of the state bar association.[5] This Board of Professional Responsibility investigates the complaints filed against lawyers. If the Board concludes that a complaint has merit, it presents the matter to a tribunal—often members of the court—for a determination of whether probable cause exists to charge the lawyer with professional misconduct. If the lawyer is charged, the lawyer has the opportunity to defend the charge. A hearing body made up of lawyers, and sometimes non-lawyers, hears the matter and reaches a decision on guilt and the appropriate discipline. The state's highest court usually has the right to review findings and conclusions of the hearing body. The court can decline to adopt the hearing body's decision on guilt or the court can fully adopt the hearing body's decision.

So, what happens if a lawyer is disciplined? In other words, what does lawyer "discipline" mean? "Discipline" refers to the penalties imposed by a disciplining authority on an attorney who has breached a rule or statute for which discipline can be imposed. There are three types of discipline: disbarment, suspension, and reprimand.

The least restrictive form of discipline is the reprimand, or censure, which does not prevent the attorney from practicing law. A private reprimand is an unpublished, private communication in writing from the board of professional responsibility to the attorney. A public reprimand is published, usually in bar magazines or other publications aimed at other attorneys. It actually names the attorney involved, states the facts regarding the improper conduct, and states the warning given to the attorney.

Suspension is more stringent because the attorney is prohibited from practicing law for a specific amount of time chosen by the disciplinary authority. The typical time for a suspension is from several months to several years. Suspension may

include the requirement that the attorney take the bar examination again or at least the ethical component of the bar exam before being readmitted to active practice.[6]

The most serious type of discipline is disbarment. Although disbarment typically means permanent removal from the practice of law, in some states a disbarred attorney may subsequently petition for readmission. Sometimes the petitioning attorney must retake the regular bar exam and an ethics exam to be readmitted.

A typical scenario goes something like this. Unhappy Client files a complaint with the Board of Professional Responsibility against Lucy Lawyer, claiming that Lucy kept money from Client and also did a bad job on her case. The theft of the money could be a criminal act and a violation of the applicable rules of professional conduct. Assume that in Lucy's state, the Board of Professional Responsibility is a part of the state bar association. The Board of Professional Responsibility investigates the complaint and determines that there is sufficient evidence to present the matter to a formal Professional Responsibility Committee. The Professional Responsibility Committee is a group of three lawyers and a non-lawyer; it determines that there is probable cause that Lucy violated the rules of professional conduct. After a time for discovery and the filing of briefs, the Committee presents the matter back to the Board of Professional Responsibility and Lucy has an opportunity to defend herself. Assume the Board finds that Lucy has violated the rules of professional conduct and should be disbarred. The Supreme Court has a choice: it can accept the Board's recommendation, or it can overrule the Committee if it decides the Committee incorrectly decided that Lucy violated the rules. The Court could decide that Lucy violated the rules and that she should be suspended from the practice of law for two years. Or the Supreme Court could affirm the Board in all respects.

The Rule

The main rule that governs lawyer discipline is Rule 8.5.[7] Rule 8.5 governs the disciplinary authority of courts over lawyers and addresses the situation where a lawyer commits a violation in one state but is admitted to practice in another state.

Rule 8.5 states the long-recognized principle that a state that has admitted a lawyer to practice in that jurisdiction has the authority to discipline that lawyer regardless of where the problematic conduct occurs.

Rule 8.5 also provides the authority for disciplining a lawyer. In part (a), the rule provides that a lawyer admitted to practice in a jurisdiction is subject to the disciplinary authority of that jurisdiction—regardless of where the conduct occurred. Part (b) determines which law will apply to a lawyer's conduct. Part (b)(1) states that for conduct in connection with a matter before a court, the court can apply the law of its jurisdiction—unless the court determines otherwise. If a lawyer's conduct occurs in another jurisdiction, then the court can choose whether to apply the law of the other jurisdiction (where the conduct occurred) or its own law.

Part (b)(2) provides a safe harbor for the lawyer: what if the rules of the various jurisdictions conflict? For example, one state may allow disclosure of confidential information in a particular circumstance while another state may not allow that disclosure. The lawyer must then decide which jurisdiction's standards to follow. Part (b)(2) provides that a lawyer cannot be disciplined even if the lawyer's conduct violates the standards of the jurisdiction whose law ultimately applies if the lawyer's actions are in accord with the standards of the jurisdiction in which the lawyer "reasonably believed" the conduct would have "predominant effect."

THE RULE — Rule 8.5

Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

1. The Lawyer's State of Admission

In the vast majority of situations, a lawyer who engages in improper conduct does so in a state in which the lawyer is admitted. Then there is no question of which law to apply. The rules of the state of admission clearly apply.

However, lawyers can be formally admitted to practice in more than one jurisdiction. A lawyer who has clients in several states may be admitted to the bar in each state. So, for example, let's assume that Lawyer has clients in State V and State M. Further, Lawyer is licensed to practice law in both states. In State V, Lawyer must abide by all the rules and requirements of State V. Likewise, in State M, Lawyer must abide by all the rules and requirements of State M. Lawyer must pay dues to each state and fulfill the continuing legal education requirements for each state.

Thus, Lucy, a lawyer admitted in States M and V, is subject to discipline by both State M and V if her conduct violates the rules of those jurisdictions. Since each state has granted Lucy a license to practice within that state, each state can take that entitlement away on the basis of Lucy's failure to abide by the standards of lawyer conduct in effect in that jurisdiction. If Lucy commits an act of deceit in State C in violation of rules in both State V and M, both jurisdictions have the authority to discipline Lucy.

Example. Lawyer Joe is licensed to practice law in Michigan. Recently, Joe applied for a law license in Indiana but Joe lied on his application to the bar in Indiana when they asked him about any prior convictions. Can Michigan discipline Joe for Joe's failure to be truthful on the Indiana bar application?

Analysis. Yes, Michigan may discipline Joe, even though his unprofessional act technically occurred in Indiana. The state in which Joe is licensed, Michigan, can discipline Joe even if the act occurred in a different state as long as that act was improper under the Michigan Rules of Professional Conduct.

2. The State in Which the Lawyer Offers or Provides *Legal Services*

The second part of 8.5(a) provides that any jurisdiction in which a lawyer provides legal services may discipline the lawyer for a violation of its rules.

THE RULE Rule 8.5

Disciplinary Authority; Choice of Law

(a) …

> … A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct**.**

In certain situations, a lawyer may practice in jurisdictions other than those in which he or she is admitted. For example, a lawyer may practice law in a state in which the lawyer is not admitted if the activity is on a temporary basis and relates to a proceeding in an admitted jurisdiction. Likewise, a court may admit a lawyer pro hac vice in a case in a state in which the lawyer is not otherwise admitted.[8]

Rule 8.5 provides that any jurisdiction in which a lawyer provides legal services or offers to provide legal services may discipline the lawyer for a violation of its rules. So if Lawyer is admitted to the bars of State V and M and commits an act of fraud in State C, State C has the authority to discipline Lawyer if Lawyer provides legal services in State C. It is unlikely that State C would exercise that jurisdiction when the improper conduct does not relate to the legal services rendered or offered in State C, however. State C, after all, is most concerned with protecting its own residents. The end result is that Lawyer is subject to the discipline authority of *all three jurisdictions.*

Note that Rule 8.5(a) is quite expansive. Rule 8.5 (a) grants a state authority to discipline lawyers on the basis of *offers or advertisements of the lawyer's legal services.* Therefore, it is extremely important that a lawyer know where her advertisements are being viewed or heard. If Lawyer is licensed in State B, but the advertisements of Lawyer's services are being viewed in State C, then Lawyer could be disciplined by State C (if the advertisement violates the advertising rules in State C). State C would ask the following question: Could a reasonable person viewing Lawyer's advertisement in State C believe that the advertisement offers legal services in State C? If the answer is yes, then Lawyer could be disciplined by State C if she violates State C's standards of conduct or rules on lawyer advertising.[9]

3. Reciprocal Discipline

This subsection also brings up the concept of reciprocal discipline. If one state disciplines a lawyer, other states may issue reciprocal discipline. If State V disciplines Lucy, a lawyer admitted in States V and M, M may give effect to the State V disciplinary action and discipline Lucy as well. So disbarment by State V can result in disbarment in State M too, although State M is not required to impose the same discipline or any discipline at all. Some states require admitted lawyers to notify the state discipline authority of any discipline imposed by another state. The A.B.A. also has a National Lawyer Regulatory Data Bank that records discipline actions in all states that report to it.

Example. Billy Lawyer wanted to get out of representing Terrible Client in a criminal defense case in Maryland. Billy is a criminal defense lawyer in both Maryland and Virginia. Terrible Client was problematic from the first meeting. After several meetings with Terrible, Billy felt that he could not continue representation. In the hearing to withdraw as defense counsel for his client, Billy disclosed some confidential information about the case to the court. Billy stated, "I really don't want to represent Terrible Client because I think he did it; the bodies are buried in the woods!" This conduct violated Rule 1.6 of Maryland's professional conduct rules and Billy was found to have violated Rule 1.6 by the Maryland Board of Professional Responsibility. The Virginia Board of Professional Responsibility also found out about Billy's actions and subsequently brought charges against Billy for violating Rule 1.6, Confidentiality. Can Virginia discipline Billy even though the alleged violation occurred in Maryland and not Virginia?[10]

Analysis. Yes. Billy Lawyer can be disciplined in Virginia for an act he committed in Maryland. Under Rule 8.5(a), "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs." Under Rule 8.5(b)(1), which governs choice of law, when the conduct giving rise to a disciplinary action is connected with a court proceeding, "the [disciplinary] rules to be applied [in this jurisdiction] shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise[.]" Thus, the State

of Virginia can impose a sanction upon a member of its own bar for violation of a Maryland rule.

4. Choice of Law

Rule 8.5(b) deals with the law a court applies to a given situation in which the lawyer acts improperly. In the vast majority of situations, a lawyer who engages in improper conduct does so in a state in which the lawyer is admitted. Then there is no question of which law to apply. The rules of the state of admission clearly apply.

When only one state is involved, the court will apply the rules of professional conduct of that state, which is also the state in which the lawyer is admitted. But what happens if more than one state is involved? The answer becomes a bit more complex. In this situation, the state that is imposing discipline must determine which jurisdiction's rules to apply. Rule 8.5(b) provides a court with guidance as to the proper choice of law.

THE RULE — Rule 8.5

Disciplinary Authority; Choice of Law

(a) …

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction *shall* be applied to the conduct.

Rule 8.5(b) can be interpreted as follows. First, if the problematic conduct relates to a matter before a tribunal, the professional conduct rules of the jurisdiction in which the tribunal sits apply unless that set of rules says otherwise. If Lucy, a Virginia lawyer, appears *pro hac vice* in a court in Oregon and engages in improper conduct, any discipline should be measured against the ethics rules in effect in

Oregon. Virginia may be the state disciplining Lucy, but her conduct is measured by Oregon standards.

Second, in any other situation, the disciplining jurisdiction would apply the law of the jurisdiction in which the problematic conduct occurred unless the "predominant effect" of the conduct is in another jurisdiction. Assume that Lucy, a lawyer admitted in Virginia and Maryland, commits an act of deceit in relation to the provision of legal services in California. Regardless of which state seeks to discipline her, the rules of California should apply unless the "predominant effect" of Lucy's deceit is in a jurisdiction other than California.

Example. A law professor worked to help several defense firms over a four-year period defend a large tobacco suit against tobacco manufacturers. After the suit was completed, the professor sought to enforce an oral fee-splitting agreement between them such that he would receive a portion of the lawyers' fees for his work. The defense lawyers and their firms defended by stating that fee splitting agreements violated professional conduct rules in several of the states where the lawyers were practicing. How should the court analyze the validity of the fee splitting agreement? In other words, which state's professional conduct rule should apply?

Analysis. Under a Rule 8.5(b) analysis, the court found that because the fee-splitting agreement was made in Illinois—a state that allowed fee splitting agreements—the court could use the law of Illinois concerning the rules of professional conduct. Under the Illinois rules, the professor could recover some portion of the fees. The court did, however, engage in a complex choice-of-law analysis to determine which state law applied, and concluded that the state's law where the conduct occurred should be the state law of application.[11]

5. Safe Harbor

Rule 8.5(b) also provides a safe harbor for a lawyer. Choice of law decisions are always made in hindsight. A lawyer, at the time of taking action and providing legal services, may not know definitively which set of rules apply to that conduct. Occasionally, the rules of the various jurisdictions conflict. The safe harbor provides a circumstance in which the lawyer cannot be disciplined even if the lawyer's conduct violates the standards of the jurisdiction whose law ultimately applies. If

the lawyer's actions are in accord with the standards of the jurisdiction in which the lawyer "reasonably believes" the conduct will have "predominant effect," the lawyer should be free from discipline.

THE RULE — Rule 8.5

Disciplinary Authority; Choice of Law

(a) …

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) …
… A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Rule 8.5 provides a safe harbor for a lawyer. Suppose a lawyer at the time of making a decision to provide legal services does not know which set of rules apply to his conduct. Sometimes, the rules of various jurisdictions can differ. Consider the following example.

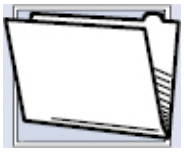
Example. You are a lawyer based in New York with expertise in corporate acquisitions. You are assisting a Texas attorney representing Y, a Texasbased company, which wants to sell assets to Z, another Texas-based company. Company X learns of your expertise in acquisitions and wants to hire you to help it purchase some of Y's subsidiaries in Texas. Neither X nor Y has New York assets, and none of the information that you have learned through your ongoing representation of Y is relevant to the acquisition contemplated by X. Can you accept X as a client?

Analysis. The answer depends on which state's ethics rules apply to the conduct. Under New York's conflict-of-interest rules, you are prohibited from accepting the representation of X unless you get informed consent from X and Y, because it would require you to represent interests adverse to those of a current client. The conflict-of-interest rules in Texas, however, would

> allow the representation as long as there is no significant risk that the clients' confidences will be used against them and the matters are not substantially related. In order to determine which conflict-of-interest rules apply, you would need to look at each state's ethics rule on choice of law. Under New York's choice of law rule, New York's conflict-of-interest rule would apply to the representation and would prevent you from representing X, unless you were licensed to practice in New York and Texas. But under Rule 8.5, you would be able to accept X as a client, because the Texas conflict-of-interest rule would apply to the representation. Because it can be difficult to make a choice of law determination at the beginning of a representation, Rule 8.5 includes a "safe harbor" provision that protects lawyers in this situation who have behaved reasonably in the face of uncertainty. Commentators look upon Rule 8.5 favorably because it achieves an appropriate balance between state regulatory interests and clients' freedom to choose their counsel. Uniformity in choice of law for ethics rules will reduce the amount of uncertainty confronted by lawyers engaging in multijurisdictional practice and the safe harbor can provide protection for lawyers who behave reasonably in the face of inevitable uncertainty. Arguably, this will increase lawyers' willingness to engage in multijurisdictional practice, increasing the number of lawyers from whom clients choose their counsel.[12]

The above safe harbor language provides that a lawyer cannot be disciplined even if the lawyer's conduct violates the standards of the jurisdiction whose law ultimately applies. If the lawyer's actions are in accord with the standards of the jurisdiction in which the lawyer "reasonably believed" the conduct would have the "predominant effect," the lawyer will be free from discipline. This provision means that if Lucy provides legal services in California and "reasonably believes" that her conduct will have "predominant effect" in California, Lucy cannot be disciplined for violating Virginia's standards if a discipline authority later determines that Virginia law actually applies. This is true, however, only if Lucy acted in accord with California standards.

Quick Summary



Rule 8.5 governs how a lawyer can be disciplined. Any jurisdiction that has admitted a lawyer to the practice of law has authority to discipline that lawyer regardless of where the conduct occurs. Any jurisdiction in which a lawyer renders legal services or offers to render legal services has authority to discipline that lawyer. If one state disciplines a lawyer, other states in which the lawyer is admitted may impose reciprocal discipline. If a lawyer is being disciplined for conduct relating to a matter before a tribunal, the standards of the jurisdiction of the tribunal must be applied to the lawyer's conduct unless the law of that jurisdiction directs otherwise. If a lawyer is being disciplined for conduct not related to a matter before a tribunal, the standards of the jurisdiction in which the conduct occurred applies unless the "predominant effect" of the conduct is elsewhere. However, if a lawyer "reasonably believes" that the lawyer's conduct will have "predominant effect" in one jurisdiction and the lawyer's conduct conforms to the standards of that jurisdiction, the lawyer is not subject to discipline if a discipline authority later determines that another jurisdiction's rules apply and have been violated.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 *See e.g.*, WA APR 28(d)(8).

2 *Stephen G. Bene, Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 Stan. L. Rev. 907, 909–10 (1991)(citing American Bar Association Center for Professional Responsibility, Statistical Report Re: Factual Information on Public Discipline Imposed Against Lawyers by State Jurisdictions During 1983, Chart III (Sept. 1984) [hereinafter A.B.A. Statistical Report]).

3 *Id.* at 24.

4 *Id.*

5 Most U.S. states have a unified (mandatory) bar association to which all attorneys must belong in order to practice in that state. Some states have voluntary bar associations to which attorney may belong, but they do not have to be a member of the bar in that state in order to practice in the state.

6 A former Ohio lawyer, dubbed the "naked photographer" by the news media, actually won reinstatement of his law license, subject to some conditions. Stephen P. Linnen, formerly legal counsel to the speaker of the Ohio House, was suspended in 2006, two years after he pleaded guilty to 53 misdemeanors. Prosecutors had alleged he approached 38 women while wearing only athletic shoes and a stocking cap, then photographed their surprised reaction. The incidents occurred in 2002 and 2003. At his hearing to regain his law license, three mental-health professionals testified that he was rehabilitated and had a low chance of relapse. For the next three years, Linnen had to participate in the Ohio Lawyers Assistance Program and serve a monitored probation period, but he did get his license reinstated. *See* http://www.abajournal.com/news/article/naked_photographer_wins_reinstatement_of_his_law_license (last visited on March 20, 2014).

7 DLRPC Rule 8.5.

8 *See* Chapter 4, The Unauthorized Practice of Law.

9 *See* Chapter 9, Communications about Lawyer Services.

10 This hypothetical was based upon *In re Billy L. Ponds, Respondent*. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 379883).

11 *See* Samantha Syverson, *Model Rule 8.5 and the Safe Harbor Provision: Balancing Client Choice and State Regulatory Interest*, 24 Geo. J. Legal Ethics 955 (2011).

12 *Id.* at 955–56.

6

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, A.B.A.ndoning a client, failing to disclose all relevant facts, arguing a position while neglecting to disclose a knownlaw 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.[1] 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.[2]

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.[5]

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.[6]

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.[7]

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.[8]

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.[9] There are also special treatment and monitoring programs for impaired lawyers guilty of minor misconduct; these have proven very valuable for attorneys.[10] 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.[11]

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.[12] A lawyer also engaged in misconduct by misappropriating funds or property belonging to the lawyer's law firm.[13] 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.[14]

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.[15] 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.[16] Also, a lawyer who improperly acted as a "witness" to the signature of an absent person engaged in such prejudicial misconduct.[17] A lawyer who pointed a gun at another lawyer during a deposition engaged in conduct "prejudicial to the administration of justice."[18] 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.[19] 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."[20] 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).[21]

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."[22] 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.[23] 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.[24] 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.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 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).

2 *See id.* at 758.

3 *See* Chapter 46, Fairness to Opposing Party and Counsel.

4 *See* Chapter 52, Communication with Person Represented by Counsel.

5 Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 552–54 (1985).

6 *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).

7 Deborah L. Rhode, Professional Responsibility: Ethics By the Pervasive Method 1, 81 (1998).

8 *Id.* (citing Panel Allows ADA Defense for Addicted Lawyers, The Recorder, Jan. 14, 1997, at 3).

9 *Id.*

10 *Id.*

11 *Id. See also* Michael A. Bloom & Carol Lynn Wallinger, Lawyers and Alcoholism: Is iIt Time for a New Approach?, 61 Temp. L.Q. 1409 (1988).

12 *See In re Sealed Appellant,* 194 F.3d 666, 672 (5th Cir. 1999).

13 *See, e.g., In re Sharp,* 16 So. 3d 343 (La. 2009).

14 *In re Carpenter,* 95 P.3d 203 (Or. 2004).

15 *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).

16 *See In re Ruffin,* 54 So. 3d 645, 646–648 (La. 2011).

17 *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).

18 *See In re Estiverne,* 741 So. 2d 649 (La. 1999) (suspending lawyer for a year and a day).

19 *See In re Barstow,* 817 So. 2d 1123, 1129 (La. 2002).

20 *See In re Bolton,* 820 So. 2d 548 (La. 2002).

21 *In re Martin,* 982 So. 2d 765, 769 (La. 2008).

22 *See In re Downing,* 930 So. 2d 897, 904 n.5 (La. 2006).

23 *State ex rel. Oklahoma Bar Ass'n v. Erickson*, 29 P.3d 550, 551–54 (2001).

24 *See, The Florida Bar v. Swickle*, 589 So. 2d 901 (Fla. 1991).

7

Reporting Misconduct

Key Concepts

- A lawyer who knows that another lawyer has violated the rules of professional conduct must report that lawyer if the violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness."
- A lawyer who knows that a judge has violated the rules of judicial conduct must report that judge if the violation "raises a substantial question" as to the judge's fitness.
- A lawyer need not report any incident if it would cause the lawyer to disclose confidential information under Rule 1.6.

Introduction

Reporting the misconduct of other lawyers is essential to the bar's system of self-regulation. Lawyers are in the best position both to observe and evaluate professional misconduct and assist the profession in sanctioning it. Public confidence in the legal profession's ability to regulate its members is diminished when lawyers fail to report substantial violations of the rules, or worse, cover them up.

Why are lawyers in the best position to know of unethical acts done by other lawyers? Clients may sometimes know of lawyer misdeeds but clients do not have the knowledge of the professional rules to determine when a lawyer or judge is behaving in a professionally inappropriate manner. Lawyers are in a position to see the conduct of other lawyers and judges, and they know when conduct is inappropriate. So lawyers have a duty to report the conduct of each other and of judges. In addition, a reporting rule makes sense in light of the profession's claim to the right to regulate itself. One state supreme court has stated:

> Reporting another lawyer's misconduct to disciplinary authorities is an important duty of every lawyer… . [T]he lawyer's duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.[1]

At a very basic level, reporting increases compliance with the rules because the chance of being caught is greater. Either a bad actor is deterred or a bad actor is more likely to be caught.

Rule 8.3(a) requires a lawyer who knows that another lawyer has violated the rules of professional conduct to report that lawyer if the violation "raises a substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer.[2] However, a lawyer need not report if doing so would require the lawyer to disclose confidential information protected by Rule 1.6.[3] In addition, a lawyer need not report if the lawyer learned of the violation by way of a lawyer assistance program. A lawyer assistance program is designed to assist lawyers who have substance abuse problems or other such issues. No lawyer would attempt to get help from an assistance program if the information the lawyer conveyed in the program could be used against him.

However, there are limitations. First, a lawyer may not *know* that a lawyer has behaved improperly. What if the lawyer had a *reasonable belief* that another lawyer behaved improperly but does not *know* it with certainty? The duty to report arises *only* with *knowledge*. Second, the duty to report applies not to all violations of the rules but only to violations that raise "a substantial question" as to the lawyer's *honesty* or *fitness*. This limitationnarrows the situations requiring reporting but, unfortunately, does not give much guidance as to when a violation of the rules of professional conduct might qualify for reporting. Any lawyer has, therefore, significant discretion as to whether to report another lawyer or not.

The Rule

Rule 8.3(a) opens with the basic concept that a lawyer is required to report another lawyer who knows that another lawyer has violated the rules of professional conduct.

THE RULE Rule 8.3

The Duty to Report Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority.

Rule 8.3(a) has two significant limitations on its application. First, in many situations, a lawyer may not know for sure that another lawyer has behaved improperly. The duty to report under Rule 8.3(a) arises only with *knowledge*.

Second, the duty to report applies not to *all* violations of the rules but only to violations that raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." This qualification narrows the situations requiring reporting but, unfortunately, does not really tell lawyers when a violation of the rules might qualify as raising a "substantial question" concerning honesty, trustworthiness, or fitness. Therefore, it is really up to the lawyer to determine subjectively whether to report another lawyer.

Further, under the rule, a lawyer need not report *himself or herself* but must only report another lawyer who has committed a violation within the rule's definition. The lawyer's duty does extend, however, to reporting the misconduct of another lawyer in the reporting lawyer's firm.

What must be reported is any conduct that *both* (1) violates a rule of professional conduct and (2) raises a "substantial question" as to the other lawyer's honesty, trustworthiness, or fitness to practice law. A lawyer considering whether to report another lawyer's conduct to bar counsel must therefore first determine whether the conduct constitutes a violation of a rule of professional conduct.

The harder question seems to be whether or not the lawyer's conduct raises a "substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer." For example, one state's version of 8.3(a) states as follows: "[M]isconduct that would constitute a 'serious crime' as defined by S. J. C. Rule 4:01, § 12(3), qualifies as misconduct that must be reported [under 8.3(a)]."[4] Serious crimes

include any felony and any crime, whether felony or misdemeanor, that includes as an element " 'interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit' [such a crime]".[5]

Conversion of client funds and perjury are examples of other conduct raising substantial questions about a lawyer's fitness to practice. Indeed, any conduct that, "if proven and without regard to mitigation, would likely result in an order of suspension or disbarment" must be reported.[6] A non-exhaustive list of such offenses also includes misrepresentations to the court,[7] including misrepresentations in pleadings filed in discovery,[8] a conflict of interest resulting in harm to a client,[9] misrepresentations on bar applications,[10]; and acts of violence.[11] Consider the following example.

Example. Arnold Lawyer plays tennis with Righty Lawyer every Thursday. At the end of their last match, Arnold spoke about a recent meeting with a client in which Arnold told the client he did not have a valid claim to pursue. Arnold confides in Righty that the client actually had a rightful claim but Arnold had forgotten to file the complaint within the statute of limitations. Righty has known Arnold for over a decade and has always been under the impression that Arnold is a competent lawyer. However, Righty thinks he might be obligated to report this conduct. Is Righty obligated to report Arnold's conduct? Why or why not?

Analysis. Yes, Righty Lawyer is obligated to report Arnold Lawyer's conduct because Arnold's failure to file a legitimate complaint within the statute of limitations raises a substantial question as to Arnold's fitness as a lawyer.[12] Additionally, an apparently isolated violation of the rules may indicate a pattern of misconduct that only a disciplinary investigation could uncover.[13] Therefore,

> even though Righty may think Arnold is a generally competent attorney or that this misconduct might be a one-time event, Righty is still obligated to report this conduct because it may be an indicator of a greater pattern of misconduct in regards to Arnold's fitness as an attorney. Furthermore, reporting a violation is especially important where the victim is unlikely to discover the offense.[14] Here, the facts indicate the client may never learn of Arnold error because Arnold told the client there was no claim to pursue. Righty is obligated under this rule to report Arnold's misconduct.

Further, the lawyer whose conduct is at issue need not be on active status or in good standing with the bar.[15] Extending the rule to suspended lawyers or lawyers on inactive status "makes sense because the lawyer on suspended or inactive status remains under the jurisdiction of the disciplinary authority, and the conduct in question might warrant discipline."[16]

1. The Duty to Report Judges

Lawyers have a similar duty to report judges, according to Rule 8.3(b). The rule clearly requires a lawyer to inform the appropriate authorities of any non-confidential information showing that a judge (whether or not a lawyer) violated the judicial rules if the conduct raises a "substantial question as to the judge's fitness for office… . " The text of Rule 8.3(b) is as follows:

THE RULE — Rule 8.3

The Duty to Report Misconduct

(a) …

(b) A lawyer who *knows* that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office *shall* inform the appropriate authority.

If a lawyer knows that a judge has violated the rules of judicial conduct for office that "raises a substantial question as to the judge's fitness for office," the lawyer must report the judge to the judicial discipline authority. Similar limitations apply to the judge reporting requirement as apply to the lawyer reporting requirement.

However, the limitations that govern lawyers reporting other lawyers also applies to judges. For example, a lawyer has no duty to report if reporting would require the lawyer to disclose confidential information protected by Rule 1.6. Second, a lawyer has no duty to report a judge if the lawyer comes upon the information about the judge's conduct through a lawyer assistance program. And third, a lawyer must know of the violation. Finally, a violation of judicial conduct alone does not trigger the duty to report. The violation must "raise a substantial question as to the judge's fitness for office."

2. Protecting the Duty of Confidentiality

Rule 8.3 requires a lawyer who knows that another lawyer has violated the rules to report that lawyer if the violation raises a substantial question as to that lawyer's fitness as a lawyer. But, a lawyer need not report if so doing would require the lawyer to disclose confidential information protected by Rule 1.6. Rule 8.3(c) contains this limitation

THE RULE — Rule 8.3

The Duty to Report Misconduct

(a) …

(b) …

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.[17]

Note the important last phrase in the rule that a lawyer need not report information that would be protected by Rule 1.6. One example of information learned that would fall within Rule 1.6 is when a lawyer contacts a lawyer's assistance program for help. What is a lawyers' assistance program? Lawyer assistance programs are designed to assist lawyers who have substance abuse problems or other such issues. No lawyer would attempt to get help from an assistance program if the information the lawyer conveyed in the program could be used against him or her. Consider the following example.

Example. Righty Lawyer is conducting a "professional misconduct" group workshop in an approved lawyer's assistance program in which Phil Lawyer is currently participating. Phil Lawyer reveals that he once misappropriated a client's funds in order to afford a week-long cruise vacation. Is Righty Lawyer obligated to report this misconduct?

Analysis. No, Righty Lawyer is not obligated to report this misconduct because the information about Phil Lawyer's misconduct or fitness was received by Righty Lawyer in the course of Righty Lawyer's participation in an approved lawyers or judges assistance program.[18] This exception encourages lawyers and judges to seek treatment through such a program, and conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.[19]

For example, in Ohio, the Lawyers' Assistance Program's website has a specific disclaimer in order to ensure that lawyers know they can come to the program without the worry of discipline following any disclosures of information.

If you or someone you know is having problems with substance abuse, alcohol abuse, addiction or mental health, don't let fears about the disciplinary consequences prevent you from contacting us. No potential disciplinary situation will be made worse by contacting OLAP [Ohio Lawyer's Assistance Program].[20]

The website goes on to state the actual rules that provide protection:

If you contact OLAP about yourself or about an attorney colleague, you can rest assured that your call and anything you discuss with OLAP will be protected by strong rules of confidentiality:

- **Prof. Cond. Rule 8.3** provides an exemption from the duty to report knowledge of ethical violations when that knowledge was obtained in the course of OLAP's work.
- **Code of Judicial Conduct Rule 2.14** provides that information obtained by a member or agent of a bar of [sic] judicial association shall be privileged.
- **R.C. § 2305.28** provides qualified immunity from civil liability for OLAP staff (B and C) and for anyone who provides information to OLAP (D).[21]

Further, the American Bar Association (A.B.A.) has a Commission on Lawyer Assistance Programs which has the following mission:

> The Commission on Lawyer Assistance Programs (CoLAP) provides a unique service for the A.B.A. membership. During this time of career and financial uncertainty, lawyers are experiencing new stress and trauma as a result of the recession and national belt-tightening in the profession. Law firms are finding it necessary to reduce their lawyer and support staff numbers and are in some instances closing firms. The states that have staffed lawyer assistance programs (LAPs) can provide peer support for individuals and referrals to counseling— career, mental, and financial. The lawyers helping lawyers component of LAPs has existed from the beginning and continues to be of critical assistance in times of relapse, stress, and trauma. These volunteers can share a special bond and understanding, which has been found to be true in other professional peer support programs as well.[22]

The reality is that lawyers are in a stressful business. Coupled with the recent economic recession, the stress of many lawyers' lives has increased dramatically. Researchers at Johns Hopkins University were able to correlate a statistical significance between economic factors, such as joblessness and social harms, with alcoholism and suicide.[23] "The legal profession has previously reached number one

in another Johns Hopkins study that ranks professionals in rate of depression and suicide."[24] With these grave statistics, it is quite possible that depression, alcohol or substance abuse could be a reality for *any lawyer*. Accordingly, we all need to be very careful and seek help from outside sources before things become too complicated and our clients suffer as a result.

3. Reporting Your Fellow Lawyer

Is it difficult to report a fellow lawyer under Rule 8.3 when you are in the practice of law? *You bet it is!* Everyone learns in grade school that "telling on someone" is frowned upon. More importantly, the situations in which a lawyer must report are often very difficult to discern. Consider the following case.[25]

A Louisiana lawyer met his friend at a bar. The two lawyers had served as prosecutors and then both had become defense lawyers. The lawyer's friend disclosed that he was dying of cancer. After a couple of drinks, the friend told the lawyer that as a prosecutor he had suppressed exculpatory blood evidence in one case. The Louisiana professional conduct rule required a lawyer to report any unprivileged knowledge of a professional responsibility violation of any kind. The lawyer did not report his friend's confession. After his friend died and five years had passed, the lawyer discovered that the lawyers of a man sentenced to death and scheduled to be executed in one month had discovered an exculpatory crime lab report that had never been shared with the defense team. The lawyer then knew this lab report was the evidence his dead friend had mentioned to him. The lawyer notified the defense team about his conversation with his now-dead friend and reported the matter to the discipline authority. Did the lawyer do the right thing? In the real case, the Louisiana Supreme Court publicly *reprimanded the lawyer* for failing to abide by the mandatory reporting rule. The lawyer *should have reported the information (and his fellow lawyer) as soon as he had learned about it*. Here is another example.

Example. Charlie Lawyer has been hired by NailColor Corporation, a national nail polish wholesaler, to defend NailColor against a products liability claim. Charlie has been interviewing dozens of the corporation's officers and employees over a period of months in preparing the corporation's case. At the end of Oona Employee's interview, Charlie invited her out to dinner and the two ended up spending a passionate night together.

At dinner with Righty Lawyer a few nights later, Charlie reveals his tryst to his friend but adds the caveat that his work with the corporation is coming to a close and he does not need to have any additional professional communications with Oona. Must Righty Lawyer report Charlie Lawyer's conduct? Why or why not?

Analysis. Righty Lawyer is probably not obligated to report Charlie Lawyer's conduct. Although attorneys must report any misconduct that raises a substantial question as to another attorney's honesty, trustworthiness, or fitness as a lawyer, attorneys are not required to report every violation of the rules because such a requirement has proven unenforceable (i.e. the failure to report a violation would itself be a professional offense).[26] Therefore, attorneys must exercise discretion in complying with this rule.[27] In the example above, despite Charlie Lawyer's admission to Righty Lawyer, the offense of becoming romantically involved with the employee of a client is not necessarily substantially seriousness enough to require being reported; therefore, Righty Lawyer is probably not obligated to report Charlie Lawyer's conduct.

The court's opinion in the case discussed above was very instructive about the importance of reporting another lawyer's conduct.

Rule 8.3(a) "imposes a mandatory reporting obligation on every lawyer with respect to other lawyers' violations of the professional rules. Probably no other professional requirement is as widely ignored by lawyers subject to it."[28] However, the court ended with the following important point: "Moreover, the lawyer's duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public."[29]

Quick Summary

Rule 8.3 requires lawyers to be a self-policing profession. A lawyer who knows that another lawyer has violated the rules of professional conduct must report that lawyer if the violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." The same applies to judges; a lawyer who knows a judge has violated the rules must report that judge. However, a lawyer need not report if to do so would require the lawyer to disclose confidential information or if the lawyer learned of the violation by way of a lawyer assistance program.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 *In re Riehlmann*, 891 So. 2d 1239, 1249 (La. 2005).

2 DLRPC Rule 8.3(a).

3 *See* Chapter 32, Duty of Confidentiality.

4 Mass. R. Prof. C. 8.3(a) comment 3.

5 *Id.*

6 *Id.*

7 *See Matter of Neitlich*, 413 Mass. 416 (1992).

8 *See Matter of Griffith*, 440 Mass. 500 (2003).

9 *See Matter of Pike*, 408 Mass. 740 (1990).

10 *See Matter of Moore*, S.J.C. No.-09089 (Aug. 9, 2004).

11 *See Matter of Grella*, 438 Mass. 47 (2002).

12 DLRPC Rule 8.3(a).

13 DLRPC Rule 8.3 comment 1.

14 *Id.*

15 *See* Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 294–295 n. 198 (Winter 2003).

16 *Id.*

17 DLRPC Rule 8.3(c) is slightly different than A.B.A. Model Rule 8.3(c). The A.B.A. Model Rule 8.3(c) adds the following phrase to the end of subsection (c): "or information gained by a lawyer or judge while participating in an approved lawyer's assistance program." The DLRPC simply added this content in a separate subsection (d): "Notwithstanding anything in this or other of the rules to the contrary, the relationship between members of either (i) the Lawyers Assistance Committee of the Delaware State Bar Association and counselors retained by the Bar Association, or (ii) the Professional Ethics Committee of the Delaware State Bar Association, or (iii) the Fee dispute Conciliation and Mediation Committee of the Delaware State Bar Association, or (iv) the Professional Guidance Committee of the Delaware State Bar Association, and a lawyer or a judge shall be the same as that of attorney and client."

18 *See* DLRPC Rule 8.3(d).

19 *Id.*

20 Ohio Lawyers Assistance Program, http://www.ohiolap.org (last visited on April 8, 2014).

21 *Id.*

22 About Us, American Bar Association, http://www.americanbar.org/groups/lawyer_assistance/about_us.html (last visited August 21, 2016).

23 *Id.*

24 *Id.*

25 *In re Riehlmann,* 891 So. 2d 1239 (La. 2005).

26 DLRPC Rule 8.3 comment 3.

27 *Id.*

28 R*iehlmann*, 891 So. 2d at 1249.

29 *Id.*