

Proposed Amendment to Rule 8.4 of the Rules of Professional Conduct

Proposed new Comments 6-10 are underscored. As Approved by VSB Council on October 27, 2006 and submitted to the Supreme Court of Virginia by the bar.

RULE 8.4 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;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

(d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

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

COMMENT

[1] *ABA Model Rule* Comment not adopted.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] *ABA Model Rule* Comment not adopted.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning

a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law. *See* also Rule 3.1, Rule 3.4(d).

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Use of Undisclosed Recording

[6] Generally, a lawyer who makes or causes another to make an undisclosed recording of communications or events violates these Rules if the recording is unlawful, is accomplished by means of fraud or misrepresentation which reflects adversely on the lawyer's fitness to practice law, or is accomplished by means which violate the legal rights of another.

[7] It is not an automatic violation of the Rules for an lawyer to record or cause to be recorded a communication or event without disclosing the fact of recordation to all parties to the communication or event where the recording: a) is lawful, b) is consented to by one of the parties to the transaction, c) is in furtherance of an investigation on behalf of a client, d) is not effectuated by means of any misrepresentations, and e) the means by which the communication or event was recorded and the use of the recording do not violate the legal rights of another. Such conduct is not unethical per se. For example, a lawyer representing a criminal defendant, or his investigator, may

conduct interviews with potential witnesses using an undisclosed recording device, provided that the lawyer or the lawyer's investigator clearly informs the potential witness of the interviewer's identity and the interviewer's connection with the accused, the recording is lawful, the recording is consented to by one of the parties to the interview, and is not effectuated by means of any misrepresentations or violation of legal rights of another. In civil cases, a lawyer or his agents investigating a matter on behalf of a client may interview potential witnesses using

an undisclosed recording device with the consent of only one party to the conversation provided the same conditions are met.

[8] Lawyers should be aware that although federal law, and most states' laws, permit recording with the consent of only one party to the conversation, some states prohibit recordings unless consent has been obtained from all parties to the conversation. In addition, a secret recording that is accomplished by means of false statements would generally violate Rule 4.1 prohibiting false statements of material fact to a third person, as well as Rule 8.4 (c).

[9] There may be special circumstances in the civil and criminal setting where even the use of misrepresentations in connection with an undisclosed recording made in the course of an investigation does not reflect adversely on an attorney's fitness to practice law. See, e.g., Virginia Legal Ethics Ops. 1738 and 1765.

[10] The use of undisclosed recording permitted under these comments is limited to the lawful undisclosed recording of events or communications "in furtherance of an investigation of behalf of a client." These comments do not suggest or encourage the routine use of undisclosed recording of communications with other lawyers without their consent. Except where exceptional circumstances exist, lawyers should not, without obtaining consent, record communications with a client, because such conduct is likely to undermine the client's trust and confidence in the attorney/client relationship. A lawyer's lawful recording of an event or communication does not violate the Rules of Professional Conduct if such recording is performed in his or her personal capacity and such recording is unrelated to his or her representation of a client or is not performed in his or her capacity as a lawyer.

VIRGINIA CODE COMPARISON

With regard to paragraphs (a) through (c), DR 1-102(A) provided that a lawyer shall not:

- "(1) Violate a Disciplinary Rule or knowingly aid another to do so.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Commit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law."

Paragraph (d) is substantially the same as DR 9-101(C).

There was no direct counterpart to paragraph (e) in the Disciplinary Rules of the *Virginia Code*. EC 7-31 stated in part that "[a] lawyer ... is never justified in making a gift or a loan to a [judicial officer] under circumstances which might give the appearance that the gift or loan is made to influence official action." EC 9-1 stated that a lawyer "should promote public confidence in our [legal] system and in the legal profession."

COMMITTEE COMMENTARY

Much of this Rule parallels provisions of the Disciplinary Rules of the *Virginia Code*. Paragraph (e), however, sets forth a prohibition not in the *Virginia Code*, and the Committee believed it is an appropriate addition.