

## Rule 8.4: Misconduct

### 1. Current Kentucky Rule with Official Comments:

#### SCR 3.130(8.3) 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 act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) State or imply an ability to influence improperly a government agency or 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.

#### Supreme Court Commentary

[1] 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.

[2] 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(d) 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.

[3] 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.

## 2. Proposed Kentucky Rule with Official Comments:

### SCR 3.130(8-3) (8.4) Misconduct

It is professional misconduct for a lawyer to:

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

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

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

~~(d)~~ (e) ~~State~~ 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; or

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

### ~~Supreme Court Commentary~~ Comment

[1] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

~~[1]~~ [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 offenses 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] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

~~[2]~~ [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(d) 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.

~~[3]~~ [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 lawyers. 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.

### 3. Discussion and Explanation of Recommendation:

#### a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The proposed KRPC 8.4 adopts MR 8.4 without change. This results in the addition to KRPC 8.4 of paragraph (d) “engage in conduct that is prejudicial to the administration of justice” and the related Comment [3]. This MR paragraph was not included in the KRPC in 1990. It is understood that some believed this ground for misconduct was too vague. Experience has shown that this ground has utility and covers the circumstances described in Comment [3] as well as disrespect for a court, abusive behavior toward opposing party and counsel, and abuse of public office. (See, *Annotated Model Rules of Professional Conduct*, 5th Edition, page 615.)

(2) The ABA Reporter’s Explanation of Changes expresses the Committee’s view of the MR 8.4 changes to the proposed KRPC 8.4. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- ABA Reporter’s Explanation of Changes – Model Rule 8.4

TEXT:

Paragraph (e): Add material deleted from Rule 7.1

Rule 7.1 currently provides that a lawyer may not make a false or misleading communication about the lawyer or the lawyer’s services and, further, that a communication is false or misleading, inter alia, if it “states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.” The Commission recommends that this prohibition be moved out of Rule 7.1 and added to paragraph (e) in order to clarify that the prohibition is not limited to statements made in connection with marketing legal services. (*Ed. Note: This consideration has been brought to the attention of the Attorneys’ Advertising Commission. The Committee opted to include it in proposed Rule 8.4 and sees no reason why the prohibition cannot be in both Rules.*)

COMMENT:

[1] The purpose of this new Comment is to explain when a lawyer is subject to discipline for violating or attempting to violate the Rules “through the acts of another” and to distinguish such conduct from advising a client concerning action the client is lawfully entitled to take.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance from proposed KRPC 8.4 from MR 8.4.

Adopted by the Court with deletion of proposed 8.4(d) and comments 3 and 5. Order 2009-05, eff 7-15-09.