Vermont Rules of Professional Conduct
Rule 8.4 - Misconduct

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Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- Rule 8.4 was amended in 2022.
- Paragraph (b) was amended effective 11/14/22. The new language is underlined and deleted language is ~~struck through.~~

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) engage in a ''serious crime,'' defined as any illegal conduct involving any felony or lesser crime that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or involving any ~~lesser~~ crime a necessary element of which involves interference with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a ''serious crime'';

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

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

(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;

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

(g) engage in conduct related to the practice of law that the lawyer knows or should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, or other grounds that are illegal or prohibited under federal or state law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

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.

[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] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests, for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and antiharassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer’s representation of a client does not constitute endorsement by the lawyer of the client’s views or activities. See Rule 1.2(b).

[6]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.

[7] 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.

Reporter’s Note - 2022 Amendment

The amendment conforms with the ABA Model Rule. In addition, the new language harmonizes Rule 8.4(b)’s definition of “serious crime” with the definition of “serious crime” that appears in Administrative Order 9, Rule 21(c).

Prior to this amendment, A.O. 9 Rule 21 authorized the immediate interim suspension of any lawyer who had been convicted of a serious crime, as defined by A.O. 9, Rule 21(C). The rule defined “serious crime” more broadly than Rule 8.4(b), including in its definition “any lesser crime that adversely reflects on the lawyer’s honesty, trustworthiness or fitness a lawyer in other respects.” The language was not part of Rule 8.4(b), thus leaving possible the perverse situation in which a lawyer could be placed on an immediate interim suspension for certain crimes, but not finally disciplined for the same conduct.

Reporter's Notes -2017 Amendment

Rule 8.4(g) and new Comments 3-5 are amended to adopt, with minor verbal changes, amendments to the American Bar Association's Model Rules of Professional Conduct approved by the ABA on August 8, 2016. See ABA, House of Delegates 2016 Annual Meeting Daily Journal, at 5. Former Comment [3] is deleted and replaced by new Comment [3]. Former Comments [4] and [5] are renumbered [6] and [7].

Despite prior unsuccessful amendment efforts, the Model Rules had not previously contained a specific provision prohibiting discrimination and harassment. Former Comment [3], adopted in 1988, had stated that discrimination and harassment could violate Rule 8.4(d) if they constituted conduct prejudicial to the administration of justice. That Comment, however, was generally only to guide interpretation and was of narrow scope. See, generally, ABA Revised Report 109 (House of Delegates, August 2016). New Model Rule 8.4(g) was adopted to fill this void with a black letter rule. Its purpose is to fulfill the ABA's responsibility to "lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us." Id. at 15.

Vermont originally adopted the predecessor of V.R.Pr.C. 8.4(g) in 1986, becoming one of a group of 25 states frustrated by ABA inaction. ABA Revised Report 109, at 5, n.11. In addition, 13 states have adopted language similar to former Comment [3]; only 14 states do not address the matter at all in their Rules of Professional Conduct. Id. at 5-6,nn. 13-14. The present amendment of Rule 8.4(g) supersedes prior language, both for uniformity with the amended ABA Model Rule and to incorporate the more specific and detailed language of the ABA amendment and its additions to the Comment.

The amended rule prohibits conduct in the practice of law that discriminates or harasses on the basis of a lengthy list of characteristics. The rule carries forward from the former Vermont rule "color," "ancestry," and "place of birth," which are also included in the Vermont Fair Employment Practices Act, 21 VSA § 495(a)(1). The addition in the Vermont rule of "other grounds that are illegal or prohibited under federal or state law" extends the prohibition to include provisions such as 21 VSA § 495(a)(5) (discrimination on the basis of HIV), 39 U.S.C. § 4301 et seq. (discrimination on the basis of veteran status), and 42 U.S.C. § 2000 et seq. (discrimination on the basis of genetic information).

Comment [4] makes clear that "conduct related to the practice of law" is to be understood broadly to include many activities beyond the confines of traditional client representation, including law practice management and bar association or other practice-related activities including social occasions.

The rule also makes clear that it does not affect the provisions of Rule 1.16 concerning mandatory or optional refusal or optional withdrawal from representation. Rule 1.16(a)(1) requires withdrawal if the representation would lead to a violation of the Rules of Conduct or other law. Thus, a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g). The optional grounds for withdrawal set out in Rule 1.16(B0 must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule.

Finally, Rule 8.4(g) permits "legitimate advice or advocacy" consistent with the rules. Essentially, as new Comment[5] suggests, this language calls on the lawyer not to forget that even the client whose views or conduct would violate legal prohibitions against discrimination and harassment applicable to him or her may deserve representation under Rules 6.1 and 6.2. As Rule 1.2 makes clear, representation does not constitute endorsement of a client's views and may include efforts to assist the client to avoid unlawful activity. The effect of Rule 8.4(g) is to prohibit the lawyer from expressing views as his own that would violate that rule.

Reporter's Notes — 2009 Amendment

V.R.P.C. 8.4 is amended to conform to changes in the Model Rule, retaining significant variations in the Vermont Rule as originally adopted. That rule incorporated the specific former Code language of ''serious crime'' in Rule 8.4(b) and carried forward paragraphs (g) and (h) from the former Code. See Reporter's Notes to V.R.P.C. 8.4 (1999). Comment [3] describes the application of Rule 8.4(g), which forbids discrimination in employment, in the context of client representation, where references to protected characteristics, even of an employee or associate, are not subject to discipline if they are legitimate advocacy and are thus not conduct prejudicial to the administration of justice in violation of Rule 8.4(d). Discrimination against an associate or employee in the employment context, however, is a violation of Rule 8.4(g), regardless of the purpose. The present amendment follows the Model Rules in deleting subdivision (h) and related language in Comment [5] in light of the omission from these Rules of ABA Model Rule 1.8(j) prohibiting sexual relations with a client (see Reporter's Notes to V.R.P.C. 1.8 and comment [17] to that rule) and the fact that as drafted the provision was overly broad.

The Supreme Court has addressed a number of issues under V.R.P.C. 8.4: *In re Sinnott*, 2005 VT 109, 178 Vt. 646, 891 A.2d 896 (mem) (federal indictment and negotiated guilty plea to two felony counts of interstate transmission of stolen property provided clear and convincing evidence of violation of V.R.P.C. 8.4(c), (d), and (h) as grounds for disbarment); *In re McGinn*, 2005 VT 71, 178 Vt. 604, 877 A.2d 688 (mem.) (admission of facts as to transactions involving criminal conduct provided clear and convincing evidence of violation of V.R.P.C. 8.4(c), (d), and (h) as grounds for disbarment); In re Andres, 2004 WL 5581930 (Vt., September 29, 2004) (assault on man in wheelchair was sufficient basis for finding of violation of V.R.P.C. 8.4(h) and sanction of three-year suspension from practice of law); *In re Lane*, 174 Vt. 550, 811 A.2d 207 (2002) (mem.) (admission of facts as to misappropriation of funds provided clear and convincing evidence of violation of V.R.P.C. 8.4(c), (d), and (h) as grounds for disbarment). The ABA Reporter's Explanation in pertinent part is as follows:

TEXT:

Paragraph (e): Add material deleted from Rule 7.1

Rule 7.1 [formerly provided] 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.

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 legally entitled to take. Comment [3] from the original Model Rules Comment is added to elaborate on the provisions of paragraph (g), which is unique to the Vermont Rules.

Reporter's Notes

The ABA version of this rule was rewritten to make it consistent with the present Vermont Code. Model Rule 8.4 at paragraph (b) prohibits a lawyer from committing a criminal act ''that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.'' The drafters opted to replace that language with the more specific prohibition contained in DR 1-102(A)(3) as amended in 1989.

Model Rule 8.4 does not contain paragraphs (g) or (h). These were incorporated from the present Vermont Code. See DR 1-102(A)(6) and (7).

While many jurisdictions are presently considering adopting specific prohibitions against sexual contact with clients, the drafters felt that a formal comment to this rule specifically advising against such conduct in certain situations would address the problem sufficiently.

ANNOTATIONS

1. Dishonesty, fraud, deceit or misrepresentation. Text and construction of the rule prohibiting a member of the Bar from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation persuade the Court that the rule was meant to reach only conduct that calls into question an attorney's fitness to practice law. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523. Subsection (h) of this rule is meant to

capture other conduct similar to that described in the preceding subsections and to specifically define such conduct as that which reflects adversely on fitness to practice law. Thus, while the subsection prohibiting a member of the Bar from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation is broad and encompasses conduct both within and outside the realm of the practice of law, the Court is not prepared to believe that any dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rule; rather, the subsection prohibits conduct involving dishonesty, fraud, deceit or misrepresentation that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life, and the subsection applies only to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

Not all misrepresentations made by an attorney raise questions about her moral character, calling into question her fitness to practice law. If the subsection prohibiting a member of the Bar from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation is interpreted to automatically prohibit ''misrepresentations'' in all circumstances, the rule prohibiting an attorney from knowingly making a false statement of material fact or law to a third person would be entirely superfluous. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

Respondents' actions in falsely denying that they were recording a telephone conversation with a potential witness did not reflect adversely on their fitness to practice. In the course of zealously representing a defendant in a serious criminal matter, respondents engaged in an isolated instance of deception; all indications were that they earnestly believed that their actions were necessary and proper. In re PRB Docket No. 2007-046, 2009 VT 115, 187 Vt. 35, 989 A.2d 523.

2. Sanctions. Attorney who concealed the continuation of her romantic relationship with the husband of a client of the firm that she worked for was publicly reprimanded, as her relatively brief professional experience and her lack of other disciplinary actions mitigated in favor of that more lenient sanction. In re Strouse, 2011 VT 77, 190 Vt. 170, 34 A.3d 329.

Public reprimand was an appropriate sanction for an attorney who knowingly failed to put a contingent fee agreement in writing and who negligently attempted to charge an unreasonable 12 percent contingent fee for facilitating communication between the complainant and another attorney. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

Two concurrent six-month suspensions were proper for an attorney who failed to cooperate with the disciplinary system, failed to communicate with her client and to return his papers, and practiced law where doing so violated the regulation of the legal profession. Furthermore, when respondent sought reinstatement, she would have to provide a detailed explanation for her lack of participation over the course of these proceedings. In re Hongisto, 2010 VT 51, 188 Vt. 553, 998 A.2d 1065 (mem.).

3. Particular cases. Attorney who concealed the continuation of her romantic relationship with the husband of a client of the firm that she worked for, which was a clear conflict of interest, acted deceitfully and her conduct reflected adversely on her fitness to practice law. In re Strouse, 2011 VT 77, 190 Vt. 170, 34 A.3d 329.

Facts supported the panel's finding that respondent, however erroneously, believed that he would contribute to a greater degree to complainant's case. Because he was not consciously aware that he would do very little work for a large fee, his actions in charging an excessive fee were negligent. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461

Respondent's agreement to a 12 percent contingent fee for facilitating communication between the complainant and another attorney was misconduct. Respondent's role did not require a large investment of time or labor; his tasks did not require specialized legal knowledge or legal experience; and facilitating communication would not preclude respondent from accepting other employment. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

In determining that respondent charged an excessive contingent fee, it was irrelevant that respondent did not actually bill the complainant for the contingent fee. In contracting with the complainant for 12 percent of the complainant's recovery, respondent attempted to violate the directive that lawyers charge a reasonable fee, which was a violation of the rule stating that it was unprofessional conduct for a lawyer to attempt to violate the Rules of Professional Conduct. In re Fink, 2011 VT 42, 189 Vt. 470, 22 A.3d 461.

Respondent, who was convicted of giving false information to a law enforcement authority and impeding a public officer after he left the scene of a car accident and then falsely reported that his wife had caused the accident, violated an ethical duty to the public when he engaged in serious criminal conduct that reflected adversely on his honesty and trustworthiness. Because the public expected a lawyer to be honest and to abide by the law,
respondent's criminal conduct violated his duty to maintain the standards of personal integrity upon which the community relied. In re Neisner, 2010 VT 102, 189 Vt. 145, 16 A.3d 587.

Respondent, who was convicted of giving false information to a law enforcement authority and impeding a public officer after he left the scene of a car accident and then falsely reported that his wife had caused the accident, acted intentionally when he committed the crime underlying his ethical violation. Respondent consciously sought to achieve a particular result when he falsely stated to the state trooper that his wife had caused the car accident. In re Neisner, 2010 VT 102, 189 Vt. 145, 16 A.3d 587.

When respondent was convicted of giving false information to a law enforcement authority and impeding a public officer after he left the scene of a car accident and then falsely reported that his wife had caused the accident, there was no merit to his argument that his conduct had not caused an injury to the public. Respondent's misconduct demonstrated a failure to maintain personal honesty and integrity; this type of misconduct was closely related to practice and posed an immediate threat to the public. In re Neisner, 2010 VT 102, 189Vt. 145, 16 A.3d 587.

Mitigating factors, which included respondent's lack of a prior disciplinary record, his cooperative attitude, his criminal sentence, his good character and positive reputation in the community, his remorse, and his alcoholism and rehabilitation, outweighed the aggravating factors, which included a dishonest or selfish motive,
respondent's substantial experience as a lawyer, and his illegal conduct. Accordingly, respondent, who was convicted of giving false information to a law enforcement authority and impeding a public officer after he left the scene of a car accident and then falsely reported that his wife had caused the accident, was suspended for two years, running from the date his interim suspension began, followed by probation, during which time respondent had to perform at least 200 hours of pro bono legal services. In re Neisner, 2010 VT 102, 189 Vt. 145, 16 A.3d 587.