

Considerations for Lawyers Acting in a Non-Professional Capacity

By Mark Flanegin

Lawyers licensed to practice law in Missouri understand that violation of the Rules of Professional Conduct¹ will subject them to possible disciplinary action. Discipline that may be imposed includes an admonition (issued by the Office of Chief Disciplinary Counsel), probation, reprimand, suspension, or disbarment. The majority of investigations of alleged violations of the Rules of Professional Conduct, and subsequent imposition of discipline, involve actions by a lawyer while representing a client. But what about lawyer conduct that occurred when a lawyer was not representing a client?

This article will discuss several Rules within Rule 4, the Rules of Professional Conduct, that address lawyer conduct in a non-professional capacity and how that conduct could result in discipline. This article will also address the recent Supreme Court of Missouri case of *In re Hess*, 406 S.W.3d 37 (Mo. banc 2013).

The purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession.² The Supreme Court of Missouri has not limited attorney discipline to conduct by a lawyer that only occurs while the lawyer is representing a client. “It is not necessary to the exercise of the disciplinary powers of this court that the fraud committed by a lawyer be committed in his capacity as a lawyer, nor is it necessary that a lawyer be previously convicted of a criminal offense based upon fraudulent acts.”³

PREAMBLE: A LAWYER’S RESPONSIBILITIES

Unlike the text of the Rules, the Preamble is not authoritative, but does provide guidance for lawyers regarding their conduct. A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and also in a lawyer’s business and personal affairs.⁴ The Preamble also states that there are

Rules that apply to lawyers not active in the practice of law and to practicing lawyers even when they are acting in a non-professional capacity.⁵ The Rules should not be considered to exhaust the moral and ethical considerations that should inform a lawyer but provide a framework for the ethical practice of law.⁶ Failure to comply with an obligation or prohibition of a Rule is a basis for invoking the disciplinary process.⁷

RULE 4-8.1

This Rule provides that a lawyer, in connection with a bar admission application or in connection with a disciplinary matter, shall not “knowingly make a false statement of material fact”⁸ or “fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter.”⁹

A lawyer who knowingly makes a misrepresentation or omission in connection with a disciplinary investigation of the lawyer’s conduct commits a separate professional offense.¹⁰

RULE 4-8.4(B)

It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness.

A violation of this Rule would subject a lawyer to discipline whether committed while representing a client or in a non-professional capacity. Examples of illegal conduct that reflect adversely on a lawyer’s fitness to practice law are offenses involving fraud and the offense of willful failure to file an income tax return.¹¹

Also, a lawyer should be professionally responsible for criminal offenses that indicate a lack of characteristics relevant to law practice, such as offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice.¹²

Examples of orders issued by the Supreme Court of

Missouri imposing discipline for criminal conduct include: disbarment after plea of guilty to one count of mail fraud and one count of wire fraud, *In re Evans*, Case No. SC 93580; disbarment after plea of guilty to felony stealing, *In re Kaludis*, Case No. SC 89977; disbarment after plea of guilty of four felony counts of failure to file or pay a Missouri state income tax return and one felony count of passing a bad check, *In re Simon*, Case No. SC 92279; suspension after conviction of one count of misdemeanor of willful failure to pay income tax, *In re Lovelace*, Case No. SC 87629; and suspension after plea of guilty to the misdemeanor of stealing, *In re Michel-Setzer*, Case No. SC88610.

RULE 4-8.4(C)

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.¹³

A lawyer does not need to be convicted of a criminal offense or commit a criminal act to violate this subsection. The language of the Rule does not limit conduct that occurs while a lawyer represents a client.

RULE 4-8.4(D)

It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

The language of the Rule does not limit its scope to lawyer conduct committed while representing a client. The Rules of Professional Conduct do not define what conduct is prejudicial to the administration of justice. The Comment to the Rule also does not specifically address lawyer conduct that would be prejudicial to the administration of justice. Decisions by the Supreme Court of Missouri provide assistance in defining conduct that violates this Rule.

CASE LAW

In the Supreme Court of Missouri case *In re Kazanas*, 96 S.W.3d 803 (Mo. banc 2003), Kazanas pled guilty, pursuant to a plea agreement, of filing a false federal tax return. Kazanas' conduct referenced in the opinion included his misappropriation of fees from a law firm, depositing checks made payable to the firm into his own account, altering the firm's address stamp to make it appear to be a bank deposit stamp, forging the signature of a law firm lawyer on checks, and signing his name on the checks.

The Court found that Kazanas' willful violation of the tax code reflected adversely on his fitness to practice law and violated Rules 4-8.4(b), (c), and (d). The Court also

found that Kazanas' conduct in withholding funds from his law firm, altering the firm's stamp and forging the name of a law firm lawyer on deposited checks reflected adversely on his honesty, trustworthiness and fitness as a lawyer (a violation of Rule 4-8.4(b)), involved dishonesty, fraud, deceit and misrepresentation (a violation of Rule 4-8.4(c)), and was prejudicial to the administration of justice (a violation of Rule 4-8.4(d)). The Court further determined his conduct in misappropriating fees from the law firm violated Rule 4-8.4(b), (c), and (d). Kazanas was disbarred.

In re Zink, 278 S.W.3d 166 (Mo. banc 2009). After the FBI received information that Zink advised his client that the prosecuting attorney agreed to accept sports memorabilia in exchange for reducing his client's criminal charges, he made false and misleading statements to the FBI and the United States Attorney's Office. To avoid prosecution, Zink entered into a diversion agreement with the United States Attorney's Office, which he completed. Zink agreed his conduct violated several Rules of Professional Conduct, including Rule 4-8.4(c). Zink was suspended with leave to reapply in six months.

In re Donaho, 98 S.W.3d 871 (Mo. banc 2003). The Office of Chief Disciplinary Counsel alleged several violations of the Rules of Professional Conduct by Donaho in representing a client and his attempt to deceive disciplinary authorities. While his case was pending before the disciplinary committee assigned to the case, the committee notified Donaho that satisfaction of a judgment obtained by his client against him for funds paid to Donaho would be regarded as a mitigating factor. Donaho faxed to the committee copies of two money orders for the amount of the outstanding judgment, payable to his client, with a notation that the money orders had been sent to the client by certified mail. Contrary to this assurance of payment, Donaho did not mail the money orders; instead, he cashed them for his own use. After learning that the money orders had not been sent as promised, the Office of Chief Disciplinary Counsel charged Donaho with violations of several Rules regarding his representation of his client and Rule 4-8.4(c). The Court stated that Donaho failed to perform duties owed his client and leniency might be appropriate except for the charges that involved intentional deception of the committee. (Charges included violations of Rule 4-3.3 (Candor toward a Tribunal), and Rule 4-8.1(b) (failure to disclose a fact necessary to correct a misapprehension known by a lawyer to have arisen in connection to a disciplinary matter)). Donaho's license was suspended with leave to apply for reinstatement no sooner than 12 months.

A lawyer's felony conviction for driving while intoxicated was a violation of Rule 4-8.4(b). *In re Stewart*, 342 S.W.3d 307 (Mo. banc 2011). Stewart pleaded guilty to his fourth charge of driving while intoxicated. His prior discipline involved an admonition for diligence and communication. The Court stated that a criminal act by a lawyer that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer is professional misconduct under Rule 4-8.4(b). The opinion noted that non-professional misconduct can be as injurious as professional misconduct.¹⁴ Stewart was suspended with no leave to apply for reinstatement for six months.

In re Hess

A recent Supreme Court of Missouri case that addressed the issue of lawyer discipline for conduct committed by a lawyer in a non-professional capacity is *In re Hess*, 406 S.W.3d 37 (Mo. banc 2013). This case was a reciprocal discipline case filed by the Office of Chief Disciplinary Counsel after the Illinois Supreme Court suspended Hess' Illinois license for filing frivolous lawsuits in violation of two Illinois Rules that are analogous to Missouri Rules 4-3.1 and 4-8.4(d).¹⁵

Two clients agreed to a contingency fee agreement with the law firm that employed Hess to represent them in a medical malpractice case. Hess performed most of the work on the case prior to his termination. The clients remained with the law firm. Hess asserted he had a breach of contract claim against the law firm and the firm owed him compensation. Hess retained counsel to represent him on that claim. The attorney sent a letter to the clients stating that Hess remained responsible for their lawsuit. The attorney and Hess knew at the time the letter was sent that Hess had not performed any work on the case for more than a year and did not have an active Illinois law license. A lawsuit was subsequently filed against the former clients. Hess and his attorney discussed the claims against the former clients, but Hess said he did not read the complaint before it was filed. The circuit court found Hess' claims were "legally deficient" and he did not have a valid legal basis for his claims against them.

The Illinois hearing board found that the attorney and Hess filed the lawsuit knowing it was frivolous and without merit and filed for the purpose of harassing the former clients because of the dispute with the law firm.

His attorney also filed notices of attorney's liens in matters involving the former clients, and two other clients. The Illinois hearing board found that Hess and the attorney actively participated in the serving of the notices of attorney's lien and the filing of the notices with courts

knowing that the liens were without merit.

Hess argued that the Supreme Court of Missouri should not impose reciprocal discipline against him because he was a client in the Illinois litigation.

In the opinion written by Judge Fischer, Judge Russell and Judge Wilson concurring, the Court found that the hiring by Hess of an attorney to file claims against his former clients that were frivolous did not relieve him of his duties to abide by the Rules of Professional Conduct, and his conduct violated Rules 4-3.1 and 4-8.4(d). "Whether an attorney or a litigant, Hess was always an officer of the court and had an obligation to conduct his business and personal affairs in accordance with the law. Because Hess knowingly participated in the filing of multiple claims and liens lacking a basis in fact and law, this Court holds that Hess violated Missouri's comparable rules of professional responsibility which are Missouri Rules 4-3.1 and 4-8.4(d)."¹⁶

Judge Breckenridge wrote in a separate opinion that she concurred with the opinion holding that Hess violated Rule 4-8.4(d). Judge Breckenridge did not believe that Rule 4-3.1 applies to a lawyer who is acting as a client.

The dissenting opinion written by Judge Teitelman, with Judge Stith and Judge Draper concurring, agreed with that portion of Judge Breckenridge's opinion that Rule 4-3.1 applies to a lawyer in a representational capacity, not as to actions taken by a client. Judge Teitelman stated that since the alleged violation of Rule 4-8.4(d) was based on the alleged violation of Rule 4-3.1, the Court should not enter an order of reciprocal discipline.

Rule 4-3.1 states in pertinent part:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

Judge Fischer wrote:

Any time an attorney participates in the filing of a frivolous claim in a court of law, whether as an attorney in a representative capacity or as a client of another attorney, such an action reflects badly on the legal profession as a whole. The plain language of the rules does not provide Hess any defense to discipline, and there is no good policy reason for exempting Hess from reciprocal discipline.¹⁷

The majority of Supreme Court judges did not agree with Judge Fischer's position regarding Rule 4-3.1. In his dissenting opinion, Judge Teitelman referenced that the language of Rule 4-3.1 provides that a lawyer shall not bring a frivolous lawsuit and the Comment to the Rule indicated it is intended to apply to a lawyer's conduct in representing clients. It should also be noted that Judge Teitelman and Judge Breckenridge stated that neither the Office of Chief Disciplinary Counsel nor the Supreme Court's own research found any other case in which Rule 4-3.1 was applied to a lawyer who was not acting as an advocate.

Although a majority of the Supreme Court determined that Rule 4-3.1 did not apply to the conduct of a lawyer as a client, a majority did agree that Hess violated Rule 4-8.4(d).

In her concurring opinion, Judge Breckenridge wrote:

Professional misconduct may arise when an attorney engages in conduct that is prejudicial to the administration of justice, regardless of whether such conduct violates any other Rule of Professional Conduct. Therefore, the lack of a violation of another Rule of Professional Conduct does not preclude a violation of Rule 4-8.4(d).

While this Court has rarely applied the rule outside the context of an attorney's representation of a client, the language of Rule 4-8.4(d) does not limit its application to conduct occurring in the representation of a client.¹⁸

The Court suspended Hess from the practice of law in Missouri without leave to apply for reinstatement for six months.

CONCLUSION

The Supreme Court of Missouri has made it clear that conduct by a lawyer in a non-professional capacity may subject the lawyer to discipline. The *Hess* case confirms the Supreme Court's position that the purpose of attorney discipline is to protect the public and maintain the integrity of the profession.

ENDNOTES

- 1 Missouri Supreme Court Rule 4.
- 2 *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997).
- 3 *In re Kirtz*, 494 S.W.2d 324, 328 (Mo. banc 1973).
- 4 Missouri Rules of Professional Conduct, Preamble Section 5.
- 5 Missouri Rules of Professional Conduct, Preamble Section 3.
- 6 Missouri Rules of Professional Conduct, Preamble Section 16.
- 7 Missouri Rules of Professional Conduct, Preamble Section 19.
- 8 Rule 4-8.1(a). For the complete text of the Rule, see Rule 4-8.1.
- 9 Rule 4-8.1(b).
- 10 Rule 4-8.1, Comment [1].
- 11 Rule 4-8.4, Comment [2].
- 12 *Id.*
- 13 Rule 4-8.4(c) provides an exemption to lawyers with a criminal law enforcement agency, regulatory agency, or state attorney general who provide advice or supervise another in an undercover investigation or for lawyers employed in a capacity other than as a lawyer by such agencies who participate in an undercover investigation, if the agency is authorized by law to conduct undercover investigations.
- 14 *In re Stewart*, 342 S.W.2d 307, 310 (Mo. banc 2011).
- 15 *In re Hess*, 406 S.W.3d 37, 38 (Mo. banc 2013).
- 16 *Id.* at 43.
- 17 *Id.* at 46.
- 18 *Id.* at 49.

Mark Flanegin is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.