



PROFESSIONAL RESPONSIBILITY

ACCOUNTABILITY OR OVERKILL: DISCIPLINING PRIVATE BEHAVIOR

BY EDWARD J. CLEARY

... the system exists for one purpose and one purpose only: to protect the public from wayward lawyers, not to root out evil whenever and wherever it occurs.¹

If we want to regain the public's and our own self-respect, if we want to feel whole as persons, we need to embrace full accountability for our entire lives, not just of disjointed segments.²

At what point does a lawyer's "private" conduct become grounds for professional discipline? It is true that some private conduct has resulted in professional repercussions for decades, particularly serious criminal conduct. Over the years, other areas of misbehavior, not directly tied to professional activities, have been added as grounds for discipline. These areas include the failure to file or pay personal income taxes,³ having sexual relations with a current client,⁴ or willfully failing to comply with court-ordered child support and spousal maintenance.⁵ On the other hand, it could well be argued that overzealous disciplinary counsel should be restrained from overseeing and judging lawyers' personal lives without a nexus to professional activities. Most would agree that egregious personal misconduct (*i.e.*, a felony conviction, extensive nonfiling of tax returns, ignoring a court order, etc.) falls within the ambit of "professional" misconduct. The problem is identifying where the line is drawn thereafter.

RULE 8.4 MISCONDUCT

Rule 8.4 of the Minnesota Rules of Professional Conduct (and of the Model Rules as well) provides the framework within which "professional" misconduct is addressed:

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

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honesty, trustworthiness or fitness as a lawyer in other respects;

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

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

* * *

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities;

Rule 8.4(a) clarifies that direct or indirect violation of the remaining provisions of the Rules of Professional Conduct is in itself professional misconduct. For the most part, the other rules address activities commonly thought of as professional in nature, but 1.8(k), which prohibits sexual relations with a current client (unless the relationship existed when the lawyer-client relationship commenced), which some might consider personal in nature, was clarified as relating to a lawyer's professional activities when the rule was amended in 1994.

Rule 8.4(b) addresses the committing of a "criminal act," but does not specify how serious the act must be. The comment to the rule notes that "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 the practice of law . . . involving violence, dishonesty, or breach of trust or serious inter-

ference with the administration of justice . . ." While virtually all felony convictions would fall under this provision, this language encompasses certain misdemeanors as well. Prior to *In re Bunker*, decided by the Minnesota Supreme Court in 1972,⁶ the failure to file tax returns was generally treated as a misdemeanor violation, not prohibited by the old standard of "moral turpitude" without other misconduct and thus not constituting a grounds for discipline. The Court, in finding that extensive nonfiling of tax returns was a ground for discipline for the first time, observed:

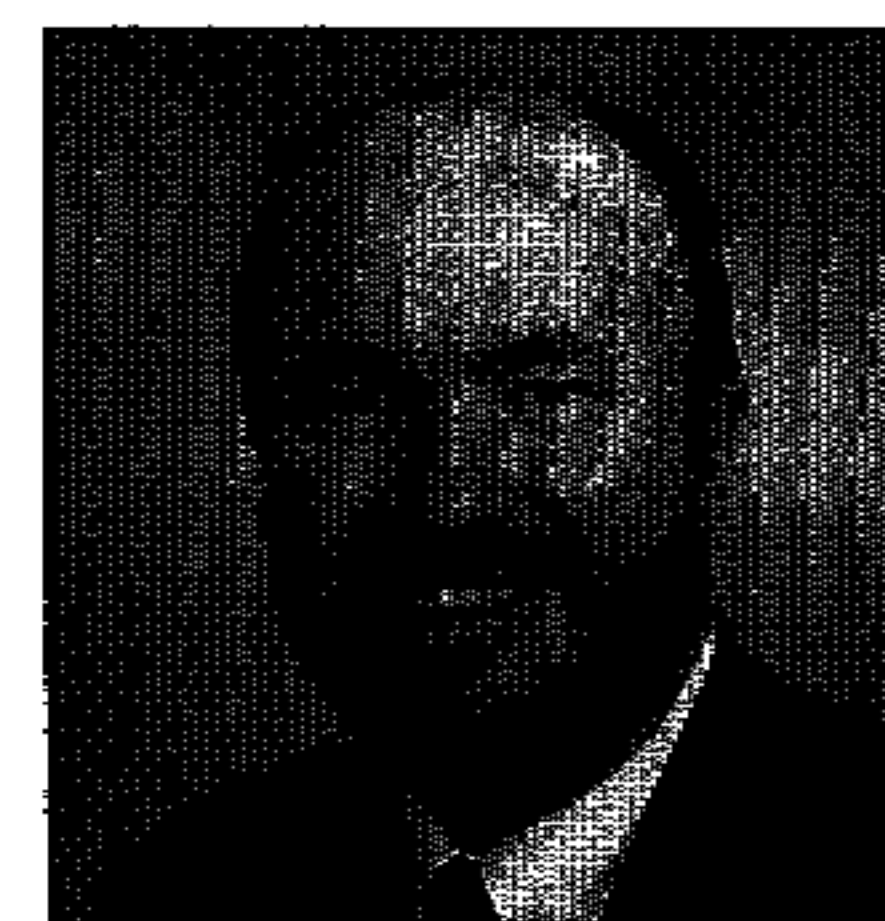
At the time of his admission to practice in this state, each lawyer takes an oath to support the laws of the state and the nation. . . .

Violation of the income tax laws represents a clear violation of his oath to uphold the Constitution and the laws of the United States and the State of Minnesota. . . . Of deeper concern is the injury to all lawyers by the failure of one to properly maintain the degree of professional propriety that reflects the integrity and honor of his profession.⁷

Thus, almost three decades ago, the Court both noted the violation of the tax laws and the lawyer's oath and cited the lawyer's failure to "maintain the degree of professional propriety that reflects the integrity and honor of his profession," the latter a more elastic standard that begs the question of when an act of personal misconduct becomes a failure of professional propriety.

Rule 8.4(c) takes aim at "dishonesty, fraud, deceit or misrepresentation." While

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the necessity for honesty permeates a number of rules (truthfulness with others (4.1, MRPC), candor with the tribunal (3.3, MRPC), etc.) and while a lawyer may be cited for personal activities that involve dishonesty, fraud, deceit or misrepresentation, this provision also serves to limit the areas of personal misconduct that constitute a basis for discipline. In other words, noncriminal personal conduct that does not involve dishonesty, fraud, deceit or misrepresentation (and is not prejudicial to the administration of justice in violation of 8.4(d)) would generally not be subject to discipline. As an example, 8.4(g) limits harassment as a ground for discipline to harassment that occurs “in connection with a lawyer’s professional activities.” (Unless, as the comment notes, the harassment is actionable under 8.4(h), which is unlikely absent a legal finding of discrimination.)

Those who would expand the types of misconduct subject to discipline to include other personal activities argue that such an expansion is necessary to maintain the integrity of the profession and to combat the public perception that lawyers are too often amoral. Although the objectives of those who seek expanded jurisdiction may be understandable, their proposed solution is too onerous.

Some state officials have gone so far as to proclaim that lawyers “should be accountable for everything they do.”⁸ There is, however, a danger in a too expansive interpretation of what constitutes misconduct subject to discipline. Constitutional concerns surrounding lack of notice and the application of a vague standard to personal behavior, along with respect for individual privacy rights, should give pause to those who would impose their view of acceptable conduct. Conduct that does not involve a lawyer’s professional activities should be subject to discipline only if it clearly falls within the provisions of 8.4 or the legal profession in a given jurisdiction will be subject to the shifting moral viewpoint of those empowered to regulate those who practice.

THE MINNESOTA EXPERIENCE

In the past decade, this office has been circumspect in applying 8.4 to personal activity. In 1990 a previous Director privately cited an attorney for violating 8.4(c) by misrepresenting the condition of his home. The attorney in question had stated in disclosure papers that his home had a partial basement without water problems while concealing the portion of the basement that had suffered severe water damage. While noting that the misrepresenta-

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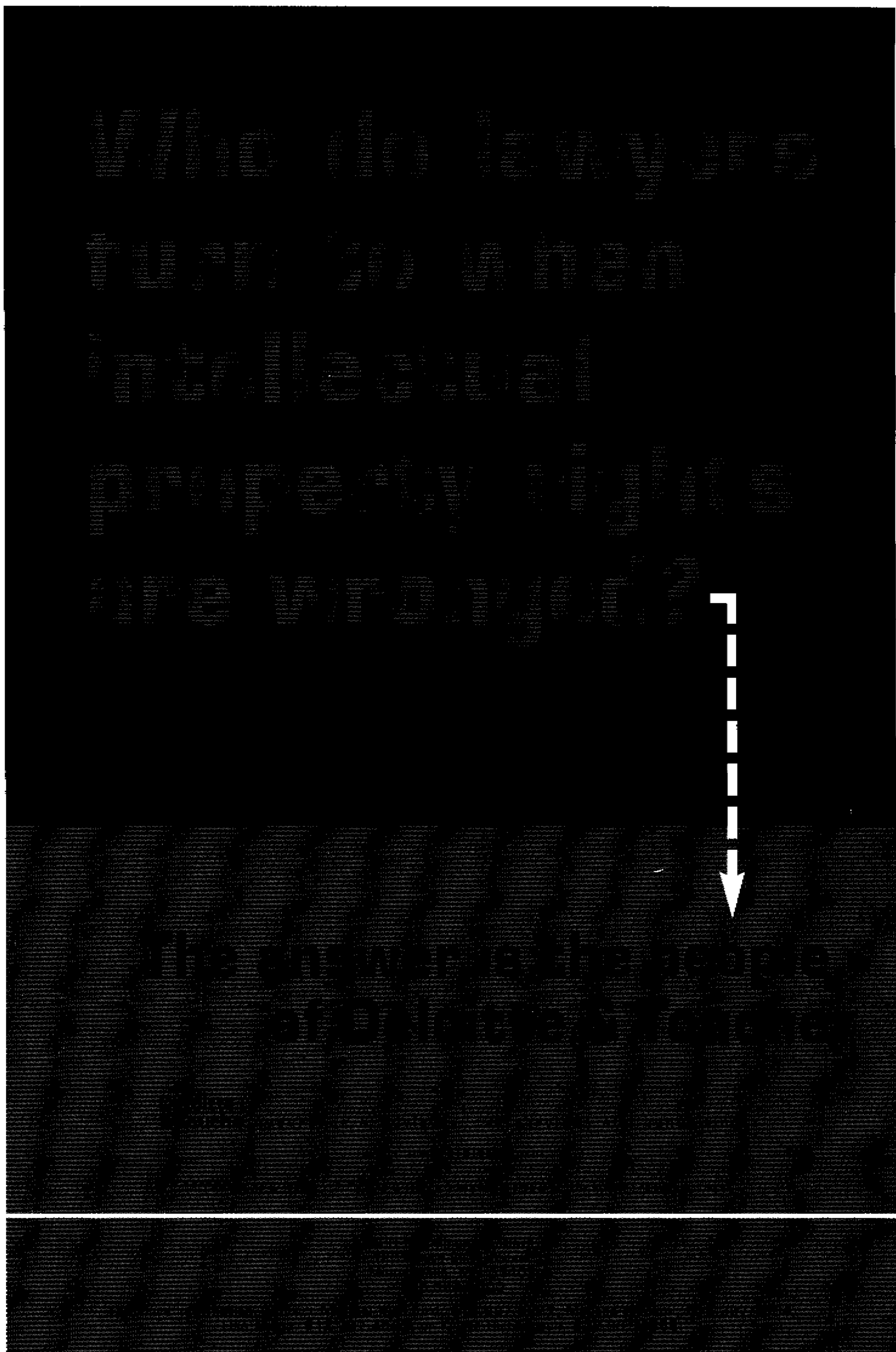
tion had occurred outside of the practice of law, the Director went on to note that 8.4(c) applied to all conduct which reflects adversely on the practice of law and that if the victim of the misrepresentation had been a client, public discipline would have been appropriate. More recently, in 1995, also under a previous Director, an attorney was the subject of a complaint regarding the failure to pay a water bill in a personal real estate transaction. While the complaint was dismissed based on its reference to conduct occurring outside the practice of law, the attorney was eventually disciplined under 8.4(d) for contacting the complainant and for engaging in abusive statements and intimidation after the dismissal.⁹ Here the lawyer handed the Court the professional nexus required, namely the abusive conduct of the lawyer towards the complainant following the filing of the complaint.

CONCLUSION

Deciding on when the personal becomes the professional will often be difficult, despite a consensus regarding the outside parameters of such misconduct. While all of us in the legal profession would benefit from an improved public image, stretching disciplinary jurisdiction to cover all of a lawyer's activities is dangerous and unwarranted. Rule 8.4 adequately outlines when it is justifiable to treat personal conduct as professional in nature in seeking discipline. While our mandate remains the protection of the public, we must resist imposing our personal values on a lawyer's private activities if there is no professional nexus and if the conduct does not fall under the provisions of 8.4, MRPC. □

NOTES

1. Mark Hansen, "Big Brother Bar," ABA Journal, November 2000, p. 16, quoting law school dean Burnele Powell.
2. Hansen, *ibid.*, p. 15, quoting the director of the Washington State Disciplinary Office, Barrie Althoff.
3. *In re Bunker*, 199 N.W.2d 628 (Minn. 1972).
4. 1.8(k), Minnesota Rules of Professional Conduct.
5. *In re Giberson*, 581 N.W.2d 351 (Minn. 1998).
6. 199 N.W.2d 628 (Minn. 1972).
7. *In re Bunker*, 199 N.W.2d 628, 630, 631 (Minn. 1972).
8. Hansen, *op. cit.*, p. 15, quoting Director Althoff.
9. Appeal of Admonition Regarding A.M.E., 533 N.W.2d 849 (Minn. 1995).



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