

## WHAT CONDUCT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE?

by

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Reprinted from *Minnesota Lawyer* (July 6, 2015)

Rules of conduct for lawyers in Minnesota have evolved considerably since they first appeared in the early 20th century. In the early part of the last century, a lawyer could be suspended or disbarred for a “willful violation of his oath” — an oath that very generally obligated a lawyer to “conduct himself in an upright and courteous manner” with “all good fidelity as well to the court as to the client,” and to “use no falsehood or deceit, nor delay any person’s cause for lucre or malice.”

With the adoption of the Code of Professional Responsibility (MCPR) in 1970 and then the Rules of Professional Conduct in 1985, the rules have gradually become less about exhortation and aspiration to ethical conduct and more about specific and definite parameters of professional behavior. Gone are most of the broadly-worded prohibitions, such as “illegal conduct involving moral turpitude” or “any other conduct that adversely reflects on fitness to practice law” (DR 1-102(A)(3) and (6), MCPR).

One exception is Rule 8.4(d), Minnesota Rules of Professional Conduct (MRPC) (former DR 1-102(A)(4)), which still prohibits “conduct that is prejudicial to the administration of justice.” Neither the rule nor the comments that follow it precisely define what conduct is “prejudicial to the administration of justice,” although the comments give examples. They include “offenses involving fraud and the offense of willful failure to file an income tax return . . . violence, dishonesty, or breach of trust, or serious interference with the administration of justice.” However, the comments to the rules have never been formally adopted by the Minnesota Supreme Court. It often falls, therefore, to the court in public discipline decisions to give meaning to this rule.

Despite the lack of specificity in Rule 8.4(d), perhaps no rule has been cited more often in lawyer discipline cases — some 300 times — and for a wide range of misconduct. Examples include refusing to pay law-related debts, failing to file income tax returns, challenging a judge’s impartiality in a pleading filed with the court, using a racial epithet toward opposing counsel in a deposition, and failing to cooperate with a lawyer discipline proceeding.

The Minnesota Supreme Court’s recent decision in *In re Kennedy* — a relatively rare 4-3 decision — added to the list of conduct that may be considered prejudicial to the administration of justice and violate Rule 8.4(d). *Kennedy* represented an individual

who was on criminal probation. The client engaged in sex with a probation officer who was not his probation officer. The officer was charged with a sex crime and misconduct by a public employee.

While the officer was awaiting trial, Kennedy faxed three letters to her defense lawyer, but not to the prosecutor. The Court's majority found that these letters were intended to convey an offer that, in exchange for \$300,000 from the officer, Kennedy's client would not testify against the officer in the criminal case. The Court found that the letters influenced the prosecutor's decision to offer a plea bargain because they "alerted defense counsel . . . that [the victim] may be an uncooperative witness and may have been willing to barter his testimony in exchange for a price." A dissenting opinion noted the letters only suggested a dismissal could happen and did not specifically propose a method. Kennedy was suspended for a minimum of 30 days.

So what ethical guidance does *In re Kennedy* offer to Minnesota lawyers? Although lawyers have been publicly disciplined for advising a client to lie under oath, before *In re Kennedy* no lawyer had been disciplined for offering to have a crime victim "change [his or her] testimony in a criminal case to be more favorable to the defendant as part of a civil settlement, even if the settlement is not accepted or the client does not testify." The court determined that offering to alter or withhold a person's testimony in a criminal matter in exchange for money, even if the offer is not accepted, is prejudicial to the administration of justice and violates Rule 8.4(d), MRPC. It does not appear to matter to the court's majority that the person making the improper offer has not been subpoenaed or ordered to give testimony, or if the civil action "does not yet exist."

The rationale behind the court's decision, that, "[W]hen 'justice' can be bought by the highest bidder, there is no justice," could also apply more broadly, but whether that is so will have to wait for future cases and decisions of the court.