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A Multitude of Sins: Conduct Prejudicial to the Administration of Justice

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In each of the past five years, the Oregon Supreme Court has wrestled with Rule of Professional Conduct 8.4(a)(4), which prohibits “conduct that is prejudicial to the administration of justice[.]” Reflecting the open-ended nature of this broad phrase, the Supreme Court found the lawyers liable on three occasions and dismissed the charges in the other two cases. In this column, we’ll review the definition of the rule crafted by our Supreme Court and survey the broad kinds of conduct that fall inside and outside that definition. In doing so, we’ll look primarily at the Supreme Court’s recent decisions and the principal cases from earlier years on which those decisions are built.

The Definition

RPC 8.4(a)(4) is functionally identical to its predecessor under the former Disciplinary Rules, DR 1-102(A)(4). The Supreme Court, therefore, has continued to define RPC 8.4(a)(4) with the same elements it developed under DR 1-102(A)(4). This past August in *In re Carini*, 354 Or 47, 54-55, 308 P3d 197 (2013), the Supreme Court invoked that long-standing definition:

“To establish a violation of RPC 8.4(a)(4), the Bar must prove that (1) the accused lawyer’s action or inaction was improper; (2) the accused lawyer’s conduct occurred during the course of a judicial proceeding; and

(3) the accused lawyer’s conduct did or could have had a prejudicial effect upon the administration of justice.”

The Supreme Court in *Carini* elaborated—again citing case law developed under the former Disciplinary Rules—that two distinct kinds “administration” fall within the scope of the rule: the procedural functioning of the proceeding involved or a substantive interest of a party in the proceeding. With either variant, the *Carini* opinion noted (at 55) that the conduct involved must have “[h]armed [or had the potential to harm] the procedural functioning of the judicial system, either by disrupting or improperly influencing the court’s decision-making process or by creating unnecessary work or imposing a substantial burden on the court or the opposing party.”

Although the focus under the Supreme Court’s definition is on judicial proceedings, the rule has also been applied to arbitration proceedings that are court-annexed or court-enforced (see, e.g., *In re Jackson*, 347 Or 426, 436, 223 P3d 387 (2009)) and other forums that “strongly resemble judicial proceedings” (see, e.g., *In re Boothe*, 303 Or 643, 654, 740 P2d 785 (1987) (lawyer disciplinary proceeding)). Again summarizing its prior decisions, the Supreme Court in *Carini* observed (at 55) that the “prejudice” can come from either a single act that causes “substantial harm” or a series of act that leads to “some harm.”

In or Out?

Given the broad sweep of the Supreme Court's definition, it is not practical in this short space to catalog the many forms of conduct that the Court has applied the rule to over the years. Two poles, however, suggest the range of conduct proscribed.

On one end, cases involving misrepresentations to courts that affect the orderly functioning of the judicial system clearly fall within the prohibition. *In re Kluge*, 335 Or 326, 66 P3d 492 (2003), for example, involved a lawyer who appeared at an ex parte session of a court with an "affidavit of prejudice" against a judge assigned to hear his summary judgment motion without telling the judge handling ex parte that day that the judge against whom the "affidavit" was directed had already heard and denied an earlier summary judgment motion in the same case. At the other end of the spectrum, *Carini* and another recent case where the Court found a violation, *In re Hartfield*, 349 Or 108, 239 P3d 992 (2010), primarily involved missed court appearances.

By contrast, the Supreme Court's recent decisions dismissing charges suggest two broad categories of conduct that are not prohibited.

First, in *In re Lawrence*, 350 Or 480, 489, 256 P3d 1070 (2011), the Supreme Court held that the simple violation of a court rule or the equivalent will not violate RPC 8.4(a)(4) unless it also causes substantial actual or potential harm to a specific judicial proceeding:

“The Bar appears . . . to take the position that virtually any violation of a statute, rule, or court order that occurs during the course of a court proceeding . . . is prejudicial to the administration of justice. . . . Our cases, however, require proof by clear and convincing evidence that an accused’s conduct in a specific judicial proceeding caused actual or potential harm to the administration of justice and, when only one wrongful act is charged, that actual or potential harm must be ‘substantial.’”

Second, in *In re Marandas*, 351 Or 521, 538, 270 P3d 231 (2012), the Supreme Court noted that simply fighting hard does not violate the rule either:

“The accused advance plausible legal arguments during the litigation, responded to requests for information from the court and other parties, and did not make knowing misrepresentations of material fact[.] . . . His approach to the litigation may have been more combative and aggressive than was appropriate or reasonable in the circumstances, but it violated no ethical rule.”

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