

**January 2009 *Multnomah Lawyer Ethics Focus***

## **First Among Equals: The Dishonesty Rule**

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Just over 100 years ago, the American Bar Association adopted the first set of national professional rules. The ABA Canons of Professional Ethics included a rule entitled “The Lawyer’s Duty in its Last Analysis.” It read, in part: “But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty[.]” Lawyers have always been expected to carry out their duties with honesty. The duty of honesty has many sources: the Rules of Professional Conduct, principally RPC 8.4(a)(3), which is often called simply “the dishonesty rule”; the Oregon State Bar’s formal ethics opinions, which apply the dishonesty rule to a wide variety of practice settings; specific statutes directed to lawyers, primarily ORS 9.460(2), which addresses honest dealings with courts, and ORS 9.527(4), which authorizes disbarment and other regulatory sanctions for “willful deceit” in the practice of law; general statutory law proscribing such crimes as forgery, perjury, criminal fraud and bribery; the common law fiduciary duty of honest dealings with clients; and regulatory case law dealing with lawyers, principally multiple decisions of the Oregon Supreme Court.

RPC 8.4(a)(3), like its similar counterpart under the former Disciplinary rules, DR 1-102(A)(3), prohibits lawyers from engaging in “conduct involving

dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." The sweep of the rule is broad in three ways. First, it covers conduct arising both directly in the practice of law and conduct beyond practicing law (including private conduct) that "reflects adversely on the lawyer's fitness to practice law." Second, the rule cuts broadly across practice areas, with reported Oregon cases involving private practitioners, government attorneys and in-house counsel. Third, as to misrepresentation in particular, it applies to both affirmative misrepresentations (as long as they are made knowingly) and to misrepresentations by omission (again, as long as they made knowingly).

The "easy" cases in terms of applying the rule are those involving lawyers who outright lie, cheat or steal and cause significant injury in the process. These situations often result in a one-way ticket to a new line of work.

The more difficult cases are the more nuanced. These cases often involve alleged misrepresentations by lawyers who are attempting to advance their clients' interests rather than their own. In these situations, there are often two critical questions: (1) was the statement by the lawyer actually a misrepresentation?; and (2) even if so, did the lawyer know that? The Supreme Court has wrestled with these twin threads in several cases over the past decade. Necessarily, the outcome in any given case is fact-specific. In one recent case, the Supreme Court summarized its analytical framework. Although

the case involved former DR 1-102(A)(3), the general framework articulated by the Supreme Court should apply with equal measure under RPC 8.4(a)(3):

“For purposes of DR 1-102(A)(3), the initial focus is on the truth or the falsity of the fact asserted.

.....

“DR 1-102(A)(3) provides that ‘[i]t is professional misconduct for a lawyer to \* \* \* [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]’ Evaluating misrepresentation involves a two-part inquiry: (1) whether the lawyer knew that the lawyer’s statement was a misrepresentation; and (2) whether the lawyer knew that it was material.” *In re Fitzhenry*, 343 Or 86, 101, 162 P3d 260 (2007) (citations omitted); *see also In re Cobb*, 345 Or 106, 120, 190 P3d 1217 (2008) (discussing the related, but more subtle, concept of simply “dishonest” conduct).

RPC 1.0(h) now defines “[k]nowingly,’ ‘known,’ or ‘knows’ [as] . . . actual knowledge of the fact in question[.]” It goes on to note, however, that “[a] person’s knowledge may be inferred from circumstances.” In *Fitzhenry*, the Supreme Court defined materiality for purposes of this analysis as a misrepresentation that “would or could significantly influence the hearer’s decision-making process.” *Id.* (citation omitted).

The “easy” cases usually don’t involve sophisticated legal lessons for the rest of us because they involve simple but central values that we should have learned as children. The more nuanced situations provide cautionary illustrations of how even lawyers who thought they were protecting their clients or advancing their clients’ interests found themselves on the wrong side of the bar. With both, “The Lawyer’s Duty in its Last Analysis” offered by the ABA over 100 years ago

still rings true: “But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty[.]”

### **ABOUT THE AUTHOR**

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