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FEATURED TOPIC
RULE 8.4(C)

Neither the students of Professional Responsibility classes nor practicing lawyers ever seem to pay much attention to Rule 8.4(c). Perhaps it is because the basic text of Rule 8.4(c) is relatively simple:

> It is professional misconduct for a lawyer to:
> . . .
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

But the sheer volume of discipline cases charging Rule 8.4(c) violations belies the rule's apparent simplicity.

The challenge is, in part, due to the fact that only one of the four operative terms in the rule is specifically defined. Rule 1.0(e) provides:

> "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

But Rule 1.0 offers no guidance on the meaning of dishonesty, deceit, or misrepresentation. To ascertain the definitions of these terms, one must consult court decisions and other sources. One source that is extremely useful for understanding the full scope and effect of Rule 8.4(c) is the *Annotated Rules of Professional Conduct* published most recently in 2020 by the American Bar Association and edited by E. Bennett and H. Gunnarson.

To fully appreciate the scope and application of Rule 8.4(c), it is important to understand three basic points.

First, the rule applies to all of a lawyer's actions—whether they are related to a representation or not. This is similar to Rule 8.4(b), which states that "it is professional misconduct for a lawyer to: . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." It is well established, and readily accepted, that a lawyer may commit a criminal act unrelated to her legal practice, such as robbing a bank, and that such crime would fall squarely within the prohibition of Rule 8.4(b). While many find it more difficult to process, Rule 8.4(c) has a similar scope—although it does not contain the qualifier that the act "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." In that sense, Rule 8.4(c) is broader than Rule 8.4(b).

Second, Rule 8.4(c) violations often accompany violations of other Rules of Professional Conduct. For instance, in *In re Trester*, 285 Kan. 404 (2007), a lawyer was charged with unauthorized practice of law in violation of Rule 5.5(a). Because the court considered unauthorized practice to involve dishonest conduct, it found a violation of Rule 8.4(c)

as well. A Rule 8.4(c) charge also is often lodged against lawyers charged with violating Rule 3.3(a)'s requirement to maintain candor toward the tribunal. There are a number of other instances in which one finds Rule 8.4(c) charges coupled with charges of violating another rule.

Lastly, although it is often used to emphasize the severity of another rule violation (*i.e.*, by charging two violations for the same act), Rule 8.4(c) is also a powerful rule all on its own. Its broad scope and undefined language permits it to be used to exact discipline for a wide variety of possible lawyer misdeeds. For instance, it has been used against a lawyer who was studying for an LLM degree and, in the course of that program, submitted a plagiarized thesis. *See In re Lamberis*, 443 N.E.2d 549 (1982). It has also been used multiple times against lawyers who forged documents or signatures. In one Kansas case, *In re Holyoak*, the Court found a violation of Rule 8.4(c) because:

> The respondent misrepresented information when he communicated with Mr. Missey and Mr. Metzler and when he drafted the covenant not to sue. Specifically, the respondent claimed that he represented 50 other landowners when he did not. As such, the hearing panel concludes that the respondent violated KRPC 8.4(c).

304 Kan. 644, 657 (2016).

One of the more informative notes about the wide scope of Rule 8.4(c) is ABA Formal Opinion 97-407 (1997). This opinion explains the different treatment to be accorded a lawyer who acts as an expert witness versus a lawyer acting as a "testifying expert" and a lawyer who acts as a "consulting expert." Briefly put, the Opinion states that a lawyer serving as testifying expert is not deemed to have entered a lawyer-client relationship with the person who retains her services; nor does she provide "law-related services" by serving as a testifying expert. Nonetheless, even though the lawyer is not acting as a lawyer when serving as a testifying expert, the lawyer is still subject to Rule 8.4(c) because she is still a member of the Bar. As a result, if she were to "testify falsely" in the course of her expert testimony she may be subject to a Rule 8.4(c) charge.

In spite of the broad scope and potential applicability of Rule 8.4(c), a major issue remains unresolved in many jurisdictions: does Rule 8.4(c) have a *scienter* requirement? The *Annotated Model Rules* and the cases discussed therein do not give a clear answer. At one point the text states that: "A lawyer's intent or purpose to deceive is generally irrelevant to Rule 8.4(c)…" But, only one paragraph later, the text states: "Courts do, however, look for some culpable mental state." It goes on to quote the Iowa Supreme Court's position that "[t]he better view is to require some level of scienter that is greater than negligence to find a violation of Rule 8.4(c)."

The Model Rules authors also cite a Kansas case: *In re Kline*, 298 Kan. 96, 311 P.3d 321 (2013). The Kansas Supreme Court's discussion

of Rule 8.4(c) is very helpful to understanding the full and proper application and warrants quoting extensively:

> Kline first contends KRPC8.4(c), (d), and (g), are violated only when conduct is "egregious and flagrantly violative of accepted professional norms." In support, Kline cites cases from other jurisdictions that adopted this or a similar standard. *See, e.g., Attorney Grievance v. Marcalus*, 414 Md. 501, 522, 996 A.2d 350 (2010) (concluding Rule 8.4[d]applies only when conduct is "'criminal or so egregious as to make the harm, or potential harm, flowing from it patent'"); *In the Matter of the Discipline of an Attorney*, 442 Mass. 660, 668-69, 815 N.E.2d 1072 (2004)(concluding rule prohibiting "conduct 'prejudicial to the administration of justice'" is violated only when conduct is "'egregious' and 'flagrantly violative of accepted professional norms'"); *In re Hinds*, 90 N.J. 604, 632,449 A.2d 483 (1982) (concluding conduct is "'prejudicial to the administration of justice'" only when it is "egregious").
>
> But Kline fails to note that with one exception, these other jurisdictions that have adopted this standard did so only in the context of Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. *But see In re Gadbois*, 173 Vt. 59,66-68,786 A.2d 393 (2001) (stating that the rule prohibiting "any other conduct that adversely reflects on the lawyer's fitness to practice law" is only violated by "'conduct flagrantly violative of accepted professional norms'"). Significantly, this court rejected a similar challenge to KRPC 8.4(d) in *In re Comfort*, 284 Kan. 183, 200-01, 159 P.3d 1011 (2007). There we considered the respondent's vagueness challenge and his suggestion that the rule is "'a simplistic standard that warns nobody of what hidden layer of discipline awaits them.'" 284 Kan. at 200. In rejecting this argument, we relied on the definition of "prejudicial" and reasoned that this term sufficiently defined the degree of conduct expected from a licensed attorney. 284 Kan. at 201(quoting *State v. Nelson*, 210 Kan. 637, 639-40, 504 P.2d 211 [1972]).
>
> For this same reason, we reject Kline's suggestion that the phrase "conduct that is prejudicial to the administration of justice" in KRPC 8.4(d) must be constrained in order to provide a clear, objective, and predictable standard. As we held in *Comfort*, the word "prejudice" as used in this context sufficiently defines the standard and restricts a lawyer's conduct. As we noted: "'The word "prejudicial" is universally found throughout the legal and judicial system.'" 284Kan. at 200.
>
> Additionally, a holistic reading of our rules contradicts Kline's suggestion that KRPC8.4(c), (d), and (g) should be confined by a professional norm standard. As the Preamble to the KRPC notes, some rules apply to lawyers not actively practicing or to practicing lawyers not acting in a professional capacity. KRPC

> Preamble (2012Kan. Ct. R. Annot. 427). Similarly, lawyers can be disciplined for conduct outside the profession if the conduct "functionally relates" to the practice of law. Rotunda and Dzienkowski, The Lawyer's Deskbook on Professional Responsibility § 8.4-1(a) (2013). Holding attorneys to a professional norm standard might hinder this court's ability to punish conduct that is not prohibited by professional norms but may still impact a licensed lawyer's fitness to hold that license.
>
> For these reasons, we reject Kline's suggestion that we should confine the application of KRPC 8.4(c), (d), and (g) to conduct that is egregious and flagrantly violative of professional norms.

In re Kline, 298 Kan. at 117-119.

Whenever a lawyer finds herself charged with one or more acts violative of the Rules of Professional Conduct, it is important to recognize that Rule 8.4(c) might also be at play precisely because of its broad language and scope. Similarly, as the cases—including *In re Kline*—make clear Rule 8.4(c) may well apply to "some lawyers not actively practicing or to lawyers not acting in a professional capacity" or, even, for conduct "outside the profession if the conduct functionally relates to the practice of law." Whenever a lawyer believes that she may have an 8.4(c) problem, the ABA's *Annotated Rules of Professional Conduct* is a good place to begin research.

NEW AUTHORITY
FORMAL ETHICS OPINION 496: RESPONDING TO NEGATIVE REVIEWS ONLINE

On January 13, 2021, the American Bar Association published Formal Ethics Opinion 496 by the Standing Committee on Ethics and Professional Responsibility. The Opinion discusses how lawyers may respond ethically to online attacks, including negative online reviews of their work. In the Opinion, the Committee clarifies the application of Model Rule 1.6 (KRPC 1.6 and MRPC 4-1.6) and supplements Formal Ethics Opinion 480 (published in 2018).

Every practicing lawyer is aware of the power of the Internet and social media. Most lawyers have established a presence on the Internet and use various social media platforms to increase their visibility and aid marketing efforts. This is the positive side of social media for lawyers. The negative side is that social media content is relatively unregulated either by the government or by the social media platforms themselves. Nowadays, it is common for individuals and businesses to face the problem of what to do about negative, even defamatory, social media postings. While non-lawyers may well decide to "fight back" against negative posts or comments, lawyers must be very cautious

about doing so—for fear of violating the confidentiality requirements of Rule 1.6.

KRPC 1.6(a) states:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

Though not identical, Missouri's version is quite similar. It reads:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).

MRPC 4-1.6(a). Subsection (b) of each of these rules lists exceptions to the general prohibition against revealing confidential client information without client consent. While there are significant differences between the exceptions listed in subsection (b) of KRPC 1.6, MRPC 4-1.6, and Model Rule 1.6 (the rule addresses by Formal Opinion 496), the analysis in Opinion 496 is equally relevant to the rules in Kansas and Missouri as it is to the Model Rule.

In Opinion 496, the Committee advises that the best response to negative online criticism is no response at all:

> Lawyers should give serious consideration to not responding to negative online reviews in all situations. Any response frequently will engender further responses from the original poster. Frequently, the more activity any individual post receives, the higher the post appears in search results online. As a practical matter, no response may cause the post to move down in search result rankings and eventually disappear into the ether. Further exchanges between the lawyer and the original poster could have the opposite effect.

Nonetheless, many lawyers feel compelled to make some response to negative online criticism. If they must, they must do ethically.

Examining how a lawyer may respond ethically, Opinion 496 differentiates between cases in which a client or former client post something negative and ones in which a non-client posts unfavorable commentary. When a client posts negative criticism, the Opinion reminds lawyers that their ability to respond is severely limited by Rule 1.6:

> The Committee concludes that, alone, a negative online review, because of its informal nature, is not a "controversy between the lawyer and the client" within the meaning of Rule 1.6(b)(5), and therefore does not allow disclosure of

> confidential information relating to a client's matter. As stated in New York State Bar Association Ethics Opinion 1032 (2014), "[u]nflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice."
>
> The Committee further concludes that, even if an online posting rose to the level of a controversy between lawyer and client, a public response is not reasonably necessary or contemplated by Rule 1.6(b) in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. Comment [16] to Rule 1.6 supports this reading explaining, "Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes stated."

Opinion 496, at 3. However, one possible solution to the limitation imposed by Rule 1.6 is for a lawyer to contact the website hosting the negative comment:

> A lawyer may request that the host of the website or search engine remove the post. This may be particularly effective if the post was made by someone other than a client. If the post was made by someone pretending to be a client, but who is not, the lawyer may inform the host of the website or search engine of that fact. In making a request to remove the post, unless the client consents to disclosure, the lawyer may not disclose any information that relates to a client's representation or that could reasonably lead to the discovery of confidential information by another, but may state that the post is not accurate or that the lawyer has not represented the poster if that is the case.

Id. at 5.

If the negative post is by a non-client, a lawyer has more flexibility in her response:

> If the poster is not a client or former client, the lawyer may respond simply by stating that the person posting is not a client or former client, as the lawyer owes no ethical duties to the person posting in that circumstance. However, a lawyer must use caution in responding to posts from non-clients. If the negative commentary is by a former opposing party or opposing counsel, or a former client's friend or family member, and relates to an actual representation, the lawyer may not disclose any information relating to the client or former client's representation without the client or former client's informed consent. Even a general disclaimer that the events are not accurately portrayed may reveal that the lawyer was

> involved in the events mentioned, which could disclose confidential client information. The lawyer is free to seek informed consent of the client or former client to respond, particularly where responding might be in the client or former client's best interests. In doing so, it would be prudent to discuss the proposed content of the response with the client or former client.

Id. at 6.

In the "best practices" section of the opinion, the Committee gives another possible option for the lawyer upset with a negative online posting:

> An additional permissible response, including to a negative post by a client or former client, would be to acknowledge that the lawyer's professional obligations do not permit the lawyer to respond. A sample response is: "Professional obligations do not allow me to respond as I would wish." The above examples do not attempt to provide every possible response that a lawyer would be permitted to make, but instead provide a framework of analysis that may be of assistance to lawyers faced with this issue.

Id. at 6-7.

Today, we all live in a country divided by politics, besieged by the pandemic, and stressed by a faltering economy. Tempers are frayed, and people are acting out on and off line in ways we have not seen before. It is too easy for an aggrieved individual to go online and use social media to air both real and imagined slights. Lawyers live by different and more restrictive rules than the rest of the population. Our lives, both professional and personal, are bounded by the *Rules of Professional Conduct*. Though a negative online posting may injure a lawyer's pride, lawyers must restrain themselves and remember that they are bound by the *Rules*—especially Rule 1.6. As the old adage goes: "When angry, pause, take a few breaths, and think before responding." Formal Ethics Opinion 496 should encourage every lawyer to do this and tailor a reply, if the lawyer believes it necessary to make one, to conform strictly to the *Rules*.

TECH TIP
COMPUTER TIPS AND COMMENTS
by Matthew Beal, JD, MCSE, MCP, A+, SEC+

One of the story lines that has risen from the events at the United States Capitol on January 6, 2021, is the theft of a laptop computer from the office of Speaker of the House Nancy Pelosi. Multiple news outlets have reported that the accused woman stated the theft was a spontaneous act, and press releases from the Speaker's office state that the computer was a "conference room laptop" only used for

presentations. All this information has been offered to suggest the incident presented a minimal risk for releasing sensitive information. Nonetheless, the situation raises issues your law office should be concerned about.

While it is unlikely that your office will be subject to a mass gathering of upset citizens, that does not preclude the spontaneous theft of a firm or individual attorney's laptop, tablet, or similar device. It can happen at the office, at a hotel, or many other seemingly safe environments.

The statement that the laptop was only used for presentations raises another consideration. When an outside parties comes to your office to make a presentation, they usually bring presentation materials on a USB device or access the presentation on a website. But just because the presentation materials aren't created on the office computer that does not mean information is not left behind. A presenter may decide the show would work better if it was copied to the computer. Though the presenter may fully intend to erase the information later, it is easy to forget. If this happens (and it can happen many times over), the directory where files are saved by default may become filled with a variety of presentations and other material previously shown and forgotten to be erased. In addition, the presentation itself and certainly any internet links that it accesses are copied onto the computer by the application.

While your law office's laptops may not contain data implicating national security, they do contain confidential client-related information. This laptop theft story serves as a reminder that, in addition to password protecting devices, we should also consider what physical protections can be implemented as well. That is the directive of KRPC 1.6(c), which requires that lawyers undertake "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Now is a great time to review your firm's physical security measures for protecting electronic data. Implement a procedure to regularly erase default storage data on the office presentation laptop. Consider storing it in a locked file cabinet. Where reasonable, implement similar procedures for attorney laptops. Even a simple reminder that electronic devices should be stored out of sight when not in use could be the difference that protects your firm's data from the threat of a spontaneous theft.

ETHICS & MALPRACTICE RESEARCH TIP
KRPC RULE 1.1 AND MRPC RULE 4-1.1: COMPETENCY IN RESEARCH

KRPC Rule 1.1 and MRPC Rule 4-1.1 impose the same requirement on Kansas and Missouri lawyers:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

It goes without saying that one of the most fundamental skills a competent lawyer must possess is the ability to do legal research. This is not to say that a lawyer in general practice must have the same skills as a senior law librarian at a law school. However, a lawyer must be competent to do ordinary legal research necessary in her practice fields. Or she must be prepared to hire others to do research necessary to a particular matter if the lawyer herself is not competent to do it (see KRPC Rule 1.1 and MRPC Rule 4-1.1 Comments 1 and 2).

Precisely what does competency in legal research require? One useful source for understanding the concept of competency in legal research is the American Association of Law Libraries' statement of "Principles and Standards for Legal Research Competencies."[1] The AALL is the principle professional organization for law librarians in the United States and provides a variety of services and guidelines for professional law librarians. The 2013 statement on research principles and competencies is one of the guides published by the AALL. It identifies five basic principles with corresponding competencies in legal research:

I. A successful legal researcher possesses foundational knowledge of the legal system and legal information sources.
II. A successful legal researcher gathers information through effective and efficient research strategies.
III. A successful legal researcher critically evaluates information.
IV. A successful legal researcher applies information effectively to resolve a specific issue or need.
V. A successful legal researcher distinguishes between ethical and unethical uses of information, and understands the legal issues associated with the discovery, use, or application of information.

Principles and Standards for Legal Research Competencies (American Association of Law Librarians July 2013).

[1] Available online at https://www.aallnet.org/wp-content/uploads/2017/12/AALL2013PrinciplesStandardsLegalResearchCompetencyPrint.pdf.

Must every lawyer follow these principles and competencies? Yes, with qualifications. Certainly, every lawyer should possess a "foundational knowledge" of American law and legal processes. Second, every lawyer should be able to formulate an effective legal research strategy and know how to research legal issues within her fields of practice. This is a basic research criterion that undoubtedly will fall within the scope of Rule 1.1. As Comment 2 to Rule 1.1 states: "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."

The third AALL principle requires that a researcher be able to critically evaluate information. With the increasing use of the Internet for legal research and the multitude of potential sources for information, every lawyer must be able to differentiate between websites that are accurate and provide dependable, fact-based information and those that do not. The AALL specifically speaks of the importance of being able to evaluate the accuracy, credibility, currency, and authenticity of each potential source that a lawyer may use in her research and writing. On the web, it is often difficult to do this, and legal researchers must take extreme care that any source they cite complies with these standards for research.

The fourth AALL principle states that every legal researcher must be able to apply information effectively to resolve specific issues. In describing the associated competencies, the AALL highlights the need to "synthesize legal doctrine by examining cases similar, but not identical, to the cases that are the current focus of research" and "use search results to craft or support arguments that resolve novel legal issues lacking precedent, when appropriate."

Finally, the fifth AALL principle requires that every legal researcher be able to "distinguish between ethical and unethical uses of information and understand the legal issues associated with the discovery, use or application of information." This principle clearly accords with KRPC 1.2(d) and MRPC 4-1.2(f), which both state:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Although the AALL Standards are designed primarily for librarians, they provide a useful guide, as well, for lawyers who wish to maintain basic competency in research as required by Rule 1.1.

BLAST FROM THE PAST
GEORGE SHARSWOOD'S *LEGAL ETHICS*

Another plain duty of counsel is to present everything in the cause to the court openly in the course of the public discharge of its duties. It is not often, indeed, that gentlemen of the Bar so far forget themselves as to attempt to exert privately an influence upon the judge, to seek private interviews, or take occasional opportunities of accidental or social meetings to make ex parte statements, or to endeavor to impress their views. They know that such conduct is wrong in itself and has a tendency to impair confidence in the administration of justice, which ought not only to be pure but unsuspected. A judge will do right to avoid social intercourse with those who obtrude such unwelcome matters upon the moments of relaxation. There is one thing, however, of which gentlemen of the Bar are not sufficiently careful, -- to discourage and prohibit their clients from pursuing a similar course. The position of the judge in relation to a cause, under such circumstances, is very embarrassing, especially, as is often the case, if he hears a good deal about the matter before he discovers the nature of the business and object of the call upon him. Often the main purpose of such visits is not so much to plead the cause, as to show the judge who the party is—an acquaintance, perhaps—and thus, at least to interest his feelings. Counsel should set their faces against all undue influences of the sort; they are unfaithful to the court, if they allow any improper means of the kind to be resorted to.

From: George Sharswood, Legal Ethics (1884), pp. 66-67