

## Supplemental Materials

### ***Ethics: Real Cases, Real Issues: Why Should In-House Counsel Care?***

Article: When is a lawyer not a lawyer?

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*You are a licensed lawyer and you currently are employed as the CEO for a mid-sized company. You do not hold yourself out as a lawyer although your status is noted on company letterhead and the company website. You wonder how the legal ethics rules apply to your activities in your current position. Do the rules apply when practicing a separate profession or trade? Do they apply to lawyers when not acting in their official capacities as lawyers?*

ABA Formal Opinion 336 (1974) squarely addresses this issue. It was issued after the Watergate scandal, which brought the question about the applicability of lawyer ethics codes to conduct outside of law practice into public discourse. At the time of its issue the ABA Model Code of Professional Responsibility was official ABA policy.

In the opinion, the ABA Ethics Committee acknowledged that while most of the Model Code's Disciplinary Rules apply to a lawyer's conduct only when acting in his professional capacity, some — particularly those that address a lawyer's obligations to abstain from criminal conduct or conduct involving fraud, deceit, misrepresentation or dishonesty — are meant to apply even when the lawyer is not acting as a lawyer. The opinion stated:

...The answer is that a lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity.

Many, if not most, disciplinary rules by their nature relate only to conduct of a lawyer acting in his professional capacity. For example, DR 7-106, which regulates the trial conduct of a lawyer, obviously is concerned with the conduct of a lawyer in his professional capacity of a trial lawyer. However, other disciplinary rules are equally clearly designed to be applicable to a lawyer without regard to whether he is acting individually or as a lawyer...

The provisions of DR 1-102(A)(3) and (4) DR 1-102(A)(3) and (4), (which reads as follows: '(A) A lawyer shall not: . . . (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.') are not limited to a lawyer's conduct while he is acting in his professional capacity as a lawyer. They are applicable to all conduct of the nature specified in those provisions without regard to the capacity in which the lawyer may be acting.

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Note that DR 1-102 (A)(4) of the Model Code is (with the exception of the dropped moral turpitude language) similar to subparts (b) and (c) of ABA Model Rule [Misconduct of the ABA Model Rules of Professional Conduct](#) that states as follows:

**It is professional misconduct for a lawyer to:**

- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;**
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...**

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The applicability of the Rules of Professional Conduct to lawyers when acting in a nonprofessional capacities is also addressed in paragraph [3] of the [preamble](#) to the ABA Model Rules of Professional Conduct:

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. **In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.** See Rule 8.4

ABA Formal Opinion 04-433, Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law further supports the ongoing applicability of the legal ethics rules in the context of the duty to report the misconduct of a nonpracticing lawyer. The headnote of the opinion states:

A lawyer having knowledge of the professional misconduct of another licensed lawyer, including a non-practicing lawyer, is obligated under [Model Rule 8.3](#) to report such misconduct if it raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer. The professional misconduct must be reported even if it involves activity completely removed from the practice of law. If the report would require revealing the confidential information of a client, the lawyer must obtain the client’s informed consent before making the report.

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Charles Wolfram, in his treatise “Modern Legal Ethics,” Thompson West Publishing Co. (1986) had this to say about the applicability of the rules of professional conduct to lawyers in nonlegal capacities:

*... Lawyer in Nonlawyer Roles*

A traditional view is that a lawyer is subject to professional discipline for conduct that the lawyer engaged in outside his or her role as a lawyer. That view is generally sound under most conceptions of the purposes of professional discipline, but under some can lead to intrusive and unwarranted prying into irrelevant aspects of the lawyer's nonpractice life. Clearly, conduct that suggests that a lawyer is presently incapable of practicing law in an honest and competent manner must be examined...Also included by most modern decisions are acts that are remote from law practice, such as nonlegal business activities, political activities, civic activities, activities in a foreign country, or personal activities to the extent that they furnish proof of seriously deficient qualities of relevance to law

practice. Some nonlawyer roles share many common characteristics with law practice, such as acting as a nonlawyer fiduciary, and many such activities are also commonly engaged in by lawyers because they have legal ability. Wrongdoing in those capacities is particularly susceptible to strong disciplinary measures because of its strongly suggestive quality. “Modern Legal Ethics,” at p. 97.

#### Case Law

In a lawyer [discipline case](#) against former Vice President Spiro Agnew during the Watergate era Maryland *State Bar Association, Inc. v. Agnew*, 318 A.2d 811, 815 (Md. 1974) the Maryland Court stated

“The professional ethical obligations of an attorney, as long as he remains a member of the bar, are not affected by a decision to pursue his livelihood by practicing law, entering the business world, becoming a public servant, or embarking upon any other endeavor. If a lawyer elects to become a businessman, he brings to his merchantry the professional requirements of honesty, uprightness, and fair dealing”;

see also [Iowa Supreme Court Board of Professional Ethics and Conduct v. Mulford](#), 625 N.W.2d 672, (Iowa 2001) (court’s authority to discipline lawyer “is not suspended merely because the attorney does not hold an active license and is not actively engaged in the practice of law”).

#### State Bar Ethics Opinions

State bar ethics opinions agree with the general consensus. Nevada Opinion 45 (2011) allows a lawyer to own and operate a nonlaw business but all the applicable ethics rules still apply to the lawyer. The Nevada opinion voiced an oft-heard concern that lawyers not use the business as a means of soliciting clients to the law practice. Any referral to the law practice would be considered to be a conflict under [rules 1.7 Conflict of Interest: Current Clients](#) and [1.8 Conflict of Interest: Current Clients: Specific Rules](#). See also [District of Columbia Opinion 336](#) (2006) (Lawyer who acts as guardian for disabled individual must at all times comply with Rule 8.4(c).)

In Opinion 90-9 (1990) the Ohio Board of Commissioners on Grievances and Discipline found that a lawyer, whether acting as lawyer or realtor, is bound by the applicable disciplinary rules. It set forth strict restrictions against overlap between the two businesses, particularly in regards to signage, letterhead and referrals.

Pennsylvania State Bar Opinion 94-118 (1994) found that the rules do apply to the lawyer who worked as an account executive selling securities and financial products to the public. Rhode Island Opinion 92-57 (1992) stated that a lawyer who seeks employment as a zoning consultant must adhere to [Rule 4.2 Communication with Person Represented by Counsel](#).

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For extensive annotations on the applicability of the ethics rules to lawyers in nonlegal capacities, see the annotations to Rule 8.4 as they appear in the seventh edition of the *ABA Annotated Model Rules of Professional Conduct* (2011).

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