



When You're a Lawyer You're a Lawyer All the Way

Several of the Supreme Court Rules of Professional Conduct for Attorneys apply 24/7, whether or not you're representing a client and regardless of where you are.

BY STACIE H. ROSENZWEIG

At your job, you're an "associate" or a "partner" or maybe a "shareholder" or "assistant general counsel" or even a "director of basketball operations." And when you leave your office or log off your laptop, you can (at least sort of) leave your job title – and many of the Rules of Professional Conduct for Attorneys – behind. If you decide to surprise your spouse by tackling that IKEA assembly and mess it up, there's no Office of Furniture Regulation to investigate that pile of shredded LAGKAPTEN by the curb. Your lack of communication and diligence regarding a birthday dinner is a *you* problem. If you want to commingle your personal funds and your kid's tooth fairy money, have at it.

However, just as you can't shut your lawyer brain off completely,² when it comes to some of the rules, you're never alone, you're never disconnected.³ "A lawyer is a professional [person] 24 hours a day, not eight hours, five days a week."⁴ Some of the Supreme Court Rules do apply all the time – not only when you're practicing law or representing a client. Several of these so-called 24/7 rules appear in SCR 20:8.4, a subsection of the rules simply titled "Misconduct."⁵

Let's take a closer look at some of these "misconduct" rules.⁶

SCR 20:8.4(b) – Committing a Criminal Act

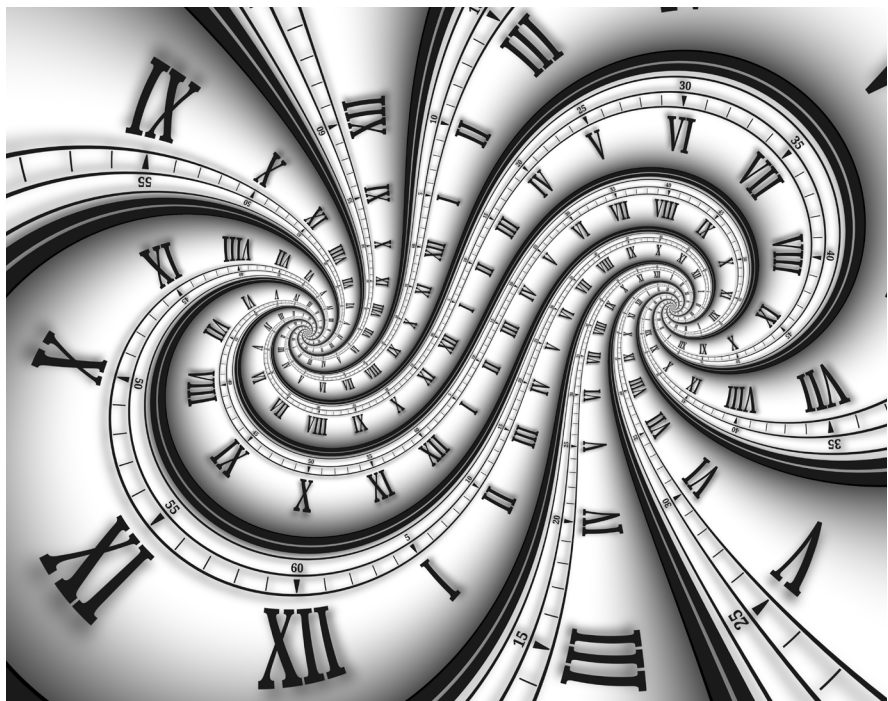
Lawyers are human beings, and human beings sometimes commit crimes. SCR 20:8.4(b) deems it misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Note that this rule does not say "be convicted of a criminal act" but "commit a criminal act," so it is the underlying behavior, not the fact of a conviction, that can trigger the rule.⁷

The second clause of this rule – "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" – is important because not all criminal acts constitute professional misconduct. It is impossible for anyone outside the Office of Lawyer Regulation (OLR) to know exactly which cases the OLR declines to pursue, but an ABA Model Rules comment⁸ is helpful here:

"Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. Some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving 'moral turpitude.' That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable



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offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”

Perhaps sadly reflective of Wisconsin drinking culture, many cases leading to discipline concern operating while under the influence (OWI). The OLR Compendium is replete with private reprimands⁹ for second-offense OWI, with more public discipline for higher-order convictions.¹⁰ Interestingly, in 2014, a lawyer who was convicted of

homicide by intoxicated use of a motor vehicle after he drove while drunk and killed his brother was *not* disciplined because, as stated by the referee, “The evidence in this case clearly shows that the crime committed by [the attorney] was a once in a lifetime aberration in his otherwise fine behavior. Except for this one specific and tragic event, [the attorney] has led an exemplary personal and professional life. There is no evidence that points to even a hint of any other kind of personal or professional misconduct.”¹¹

SCR 20:8.4(c) – Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation

Be honest: You’re a liar. We all are. People lie pretty frequently – we tell our dentist, of course we floss every day. We tell our Aunt Mildred we’d love to see the slides of her 1986 trip to Niagara Falls. And we lie by omission – our kids

really don’t need to know what happened to Alexa (“I guess it ran out of Baby Shark”), do they?

SCR 20:8.4(c) states that it is misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Now, neither the OLR nor the courts are concerned with the relatively innocuous lies told in our personal lives (sorry, Aunt Mildred), and most SCR 20:8.4(c) cases involve conduct concerning representation of a client. Some, however, involve lying to an employer or law partners,¹² and some involve fraud or other acts that also violate SCR 20:8.4(b), such as structuring cash transactions to evade the obligation to file a currency transaction report.¹³ One case involved a lawyer lying, not to a law enforcement officer or an investigator but to a magazine reporter covering the disciplinary case, about his past drug use.¹⁴



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SCR 20:8.4(g), enforcing SCR 40.15 – Engaging in Offensive Personality

Depending on when and how you were sworn in to practice law in Wisconsin, you either appeared before Wisconsin Supreme Court justices (or a federal judge or a member of a high court of another jurisdiction), with a crumpled piece of paper in your sweaty hand, or you logged into Zoom, and read the attorney's oath.¹⁵ When you did so, you agreed, among other things, to "abstain from all offensive personality."¹⁶ SCR 20:8.4(g) allows attorneys to be disciplined for violating their oath.

Most "offensive personality" cases do have a direct connection to the practice of law, and the supreme court has found that, like the criminal acts at issue in SCR 20:8.4(b), the acts constituting offensive personality do need to reflect poorly on a lawyer's character or fitness as a lawyer.¹⁷ So, purely personal obnoxiousness likely won't result in discipline.

Sometimes, the same criminal conduct giving rise to an SCR 20:8.4(b)

violation also constitutes offensive personality. See, e.g., *Public Reprimand of Ford*¹⁸ (biting a law enforcement officer and resisting arrest following an altercation while on public transit in another state); *Disciplinary Proc. Against*

acting as a litigant on the lawyer's own behalf,²¹ they would be offensive regardless of the context. See, e.g., *Disciplinary Proc. Against Beaver*²² (90-day suspension for "verbally threatening to kill a man who was an adversary party in pending

This rule does not say "be convicted of a criminal act" but "commit a criminal act," so it is the underlying behavior, not the fact of a conviction, that can trigger the rule.

*Evenson*¹⁹ (30-month suspension for, among other things, sexually assaulting a woman to whom the lawyer had provided ecstasy and alcohol).

But sometimes, the acts are offensive independent of any other rule. See, e.g., *Disciplinary Proc. Against Johann*²⁰ (six-month suspension for, among other things, distributing a handout with a picture of the lawyer's child's father and the caption "Accused Serial Rapist" and urging a boycott of the law firm of the man's wife). And sometimes, while the acts were related to law in that the lawyer was

litigation and [for] striking and pushing that man's vehicle with his own").

Conclusion

Although breaking the law is never a good idea, doing so will not necessarily subject a lawyer to discipline. There are, however, some responsibilities lawyers can never shed, even when the workday is over. Knowing which actions and behaviors will likely be considered always off limits, and then not engaging in those, is key to complying with the rules of professional conduct. **WL**

ENDNOTES

¹Maybe not literally "from your first cigarette to your last dyin' day," but you know what I mean. Stephen Sondheim, *Jet Song*, on *West Side Story* (Original Broadway cast, Columbia 1957).

²Think, for example, about when you are watching a courtroom scene on TV and reflexively complain that the judge is handling the rules of evidence all wrong and your partner shakes their head and decides to stick to cooking shows when you're around (not that I have any experience with this).

³Wow, that sounds paranoid. I can't imagine Stephen Sondheim meant it that way. Anyhow, discipline is complaint based, not surveillance based, so you are "disconnected" at least in that sense.

⁴*State v. Postorino*, 53 Wis. 2d 412, 419, 193 N.W.2d 1 (1972).

⁵Or, in keeping with the *Jet Song* theme, we can call these the "spit hits the fan" rules.

⁶If you prefer Violent Femmes to showtunes, we can subtitle this section, "I Forget What 8.4 Was For." Violent Femmes, *Kiss Off*, on *Violent Femmes* (Slash 1983).

⁷That said, the fact of the conviction or a finding of guilt triggers another rule, SCR 21.15(5), which requires lawyers to report any such conviction or finding in a felony or misdemeanor case to the OLR and the supreme court within five days.

⁸ABA cmt. [2] to SCR 20:8.4.

⁹There are too many OWI-related private reprimands to list here, but they can be found at <https://compendium.wicourts.gov/app/search>.

¹⁰In Wisconsin, a first drunk-driving offense, absent aggravating circumstances, is considered a civil infraction (see Wis. Stat. § 346.65(2)(am)), not a criminal act, and therefore is not implicated by SCR 20:8.4(b).

¹¹*Disciplinary Proc. Against Johns*, 2014 WI 32, 353 Wis. 2d 746, 847 N.W.2d 179.

¹²See, e.g., *Disciplinary Proc. Against Bant*, 2019 WI 107, 389 Wis. 2d 446, 936 N.W.2d 152 (suspension for submitting falsified

expense-reimbursement documents).

¹³*Public Reprimand of Rajek*, No. 2006-4 (available at <https://compendium.wicourts.gov/app/search>).

¹⁴*Disciplinary Proc. Against Calhoun*, 196 Wis. 2d 665, 538 N.W.2d 797 (1995). The lawyer telling a reporter that the lawyer had never used cocaine, knowing that was untrue, was not the only basis for the three-year suspension imposed here, but the SCR 20:8.4(c) violation was part of the mix.

¹⁵SCR 40.02(4)(b).

¹⁶Your homework: Let a non-lawyer friend know that you swore to this, and let me know what they say and how long it took before they stopped laughing.

¹⁷*Disciplinary Proc. Against Beaver*, 181 Wis. 2d 12, 22, 510 N.W.2d 129 (1994).

¹⁸*Public Reprimand of Ford*, 2014-OLR 3 (available at <https://compendium.wicourts.gov/app/search>).

¹⁹*Disciplinary Proc. Against Evenson*, 2015 WI 38, 361 Wis. 2d 329, 861 N.W.2d 786.

²⁰*Disciplinary Proc. Against Johann*, 216 Wis. 2d 118, 574 N.W.2d 218 (1998).

²¹As a reminder, lawyers acting as litigants (whether self-represented or represented by another lawyer) must abide by the Rules of Professional Conduct, not just the 24/7 rules, when doing so. See, e.g., *Disciplinary Proc. Against Nora*, 2018 WI 23, 380 Wis. 2d 311, 909 N.W.2d 155 (one-year suspension for violations of SCR 20:3.3(a)(1) and SCR 20:3.1 during lawyer's own foreclosure actions and subsequent lawsuit against judge and lawyer's former counsel in foreclosure action).

²²*Beaver*, 181 Wis. 2d 12. **WL**