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The story of the lawyers who violated every single ethics (and professionalism) concept possible
Seminar Written Materials

There is no better way to understand professionalism than by learning the story of the Watergate lawyers. That's because the sophisticated, accomplished lawyers who were embroiled in that scandal violated nearly every professionalism standard imaginable.

1. The break-in

Take the metro in Washington DC to the Foggy Bottom station. When you emerge from the station, step off the escalators and make a right. Walk to the first corner, then make another right. A few blocks later you'll find yourself at a traffic circle. If you look across the street, on the other side of that traffic circle, you'll see one of the most famous buildings in United States history. Actually, it's a series of buildings. Right there, on the banks of the Potomac River, is the Watergate Hotel and Office complex.

The Watergate hotel is an attractive property. I stayed there a few years ago when I was in town speaking at an event not too far away. The owners renovated the hotel not too long ago, and they did a great job. It's got well appointed rooms with beautiful views of the river. But most people don't think of the accommodations when they hear the word "Watergate." They don't think about the residences which are located in other buildings in that same complex. They don't think of the retail stores located on the first level, facing the courtyard. No, when people think about Watergate, they think of the office buildings. Well, there's one particular office that comes to mind. And it entered the national consciousness in 1972.

In 1972, Republican President Richard Nixon was up for reelection. As the election drew closer, some of Nixon's closest aides switched from governmental roles, to campaign roles. The President's Attorney General, John Mitchell, was one of those aides. Earlier that year. Mitchell left his post in the cabinet to lead the Committee to Reelect the President (CREEP), a group who was charged with raising money for the campaign and otherwise defeating the challenger from the Democratic Party. The group certainly engaged in the type of election-year tactics that were pursued by countless other political campaigns throughout history. But there was one effort they pursued that would set them out from their predecessors, and make them notorious. But none of it would have been possible without the help of a key political operative.

G. Gordon Liddy[1] was an East Coast Boy. Born in Brooklyn, he was raised in New Jersey, served with the Army in the city of his birth, and eventually got a law degree from Fordham University. After a stinting the FBI, Liddy became a district attorney, and eventually entered the world of politics. After losing a primary race for a Congressional seat, Liddy ran the Duchess County (NY) campaign for Richard Nixon's 1968 Presidential race. After Nixon's election, Liddy worked in the Department of Treasury.

While working in Washington, Liddy met a man named Bud Krogh. Krogh was a White House aide who spearheaded a group called the "Plumbers." They were tasked with investigating, and stopping, leaks to the press.

Liddy seems to have taken the job seriously. "In 1971 Liddy and former Central Intelligence Agency (CIA) agent E. Howard Hunt, the future Watergate mastermind, led a group that broke into the Beverly Hills, California, office of the psychiatrist of military analyst Daniel Ellsberg, who had infuriated Nixon with his leak of the Pentagon Papers. They came up empty

[1] Background information from https://www.britannica.com/biography/G-Gordon-Liddy last checked 9/27/2023.

in their search for compromising information."[2] Eventually, the Plumbers were disbanded. When that happened, Liddy went to work for John Mitchell in CREEP.

Liddy brought a sense of relentless determination to the group. Normally, that would be a good thing! The desire to pursue out clients' matters with a sense of relentless determination was reflected in the Texas Creed:

> II. Lawyer To Client
> A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate legal means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

The concept of relentless determination is also reflected in the rule on diligence:

> Rule 1.3. Diligence.
> A lawyer shall act with reasonable diligence and promptness in representing a client.

Diligence is about being aware, motivated, engaged, and vigilant. It's almost a perfect ethical representation of the issue of relentless determination. While that certainly is an admirable approach for lawyers, it's not one that G. Gordon Liddy followed. Quite the contrary, he recommended some wild tactics to ensure that Nixon was reelected. Dubbing the strategy "Gemstone," Liddy's ideas included hiring prostitutes to set up members of the opposing political party, filming it all with hidden cameras, and even kidnapping radicals and assassinating members of the press.[3]

It seems that most of Liddy's proposals were too extreme for the campaign, but there was one idea that seems to have resonated with his colleagues. Liddy and Hunt proposed that the group break into the Democratic Party headquarters located at the Watergate office complex. John Mitchell agreed to give them $250,000 from CREEP's coffers to finance the operation.

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[2] https://www.britannica.com/biography/G-Gordon-Liddy last checked 9/27/2023.

[3] https://www.britannica.com/biography/G-Gordon-Liddy last checked 9/27/2023.

Liddy and Hunt put together a team of seven people — six burglars and James W. McCord, the head of security for the Nixon Campaign. On May 28. 1972, the group entered the offices of the Democratic National Committee at the Watergate complex and plated surveillance bugs. A few weeks later on June 17, McCord and several of the burglars broke in again. In the early morning hours of that day, a night guard at the complex was making his rounds when he noticed a suspiciously taped-open exit door.[4] Local police were called to the scene and the burglars were arrested, along with Liddy and Hun who were monitoring the operation from a Watergate hotel room. In addition, the FBI was notified of the incident and that one of the people arrested was the security officer for the Commitee to Re-Elect the President.

When news of the arrest went public, CREEP and the administration assumed a protective posture. Mitchell issued a statement denying any involvement. President Nixon claimed to have no involvement.

Evidence, however, started to appear, establishing a link between the burglars and the White House. When the police searched the hotel rooms where the burglars stayed, they found $2300 in cash that was eventually tied to the CREEP group. That didn't matter the the White House, though. They were in cover up mode.

Nixon's White House Counsel, John Dean, even got involved. Actually, it seems like a bunch of high ranking individuals got involved in cover up effort in the aftermath of the arrest. John Dean spoke with Liddy, top Nixon aides John Ehrlichman and John Haldeman. The group was charged with placing obstacles in front of the FBI investigation efforts and to otherwise keep the burglars from talking. Ehrlichman and Haldeman even arranged to pay $154,000 to the burglars to get them to plead guilty and otherwise keep their mouths shut.

Over at the FBI, however, agents were pursuing their investigation. One agent, in particular was growing frustrated. Mark Felt was the second-in-command at the FBI and he was

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[4] https://www.fbi.gov/history/famous-cases/watergate last checked 9/27/2023.

basically spearheading the Watergate investigation. Felt got the impression that information about the FBI's investigation was being leaked to the Nixon Administration.

Felt's investigations seemed to be hitting dead ends, though he seems to have felt strongly (pun intended) that Nixon was involved in the scandal. In an effort to push the matter along, Felt began to leak information to Washington Post reporters Bob Woodward and Carl Bernstein. Felt became known as the reporters' secret informant *Deep Throat*. "According to their books, *All the President's Men* and *The Secret Man: The Story of Watergate's Deep Throat*, Woodward spoke with Felt 17 times between June 1972 and November 1973, sometimes by phone but also in person at a parking garage in Rosslyn, Virginia, and often using clandestine tactics to keep from being discovered."[5] Woodward and Bernstein used the information supplied by Deep Throat to keep the pressure on the Nixon Administration. It wasn't enough, however, to derail the President.

In fact, in the short term, things we working out for the Nixon team. For instance, on September 15, federal indictments were sent down, but they appeared to be limited — a grand jury indicted the five burglars, along with Liddy and Hunt, and charged them with conspiracy, burglary, and violation of federal wiretapping laws. All of the men, except for Liddy and McCord, pleaded guilty.[6]" The silver lining for the White House, however, was that no one else was indicted and Nixon won reelection in a landslide.

The White House continued to push the cover up story in a big way. There was even a meeting at the White House in March of 1973 with Haldeman, Ehrlichman, Mitchem. Dean and President Nixon. At that meeting, Nixon made the famous statement, "I don't give a [expletive

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[5] https://www.history.com/news/watergate-deep-throat-fbi-informant-nixon last checked 9/28/2023.

[6] https://www.crf-usa.org/bill-of-rights-in-action/bria-25-4-the-watergate-scandal.html last checked 9/27/2023.

deleted] what happens. I want you all to stonewall it, let them plead the Fifth Amendment, cover up or anything else, if it'll save it—save the plan."

2. The independence of the lawyer in the context of the lawyer-client relationship

These lawyers should have spoken up to the President. Attorneys have a requirement to maintain a sense of independence. That's mandated in the ethics rules in Rule 2.1.

> Rule 2.1 Advisor
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

The idea os speaking up is also a professionalism concept. Consider this section of the Georgia Aspirational Statement on Professionalism:

> As to clients, I will aspire:
>
> (a) To expeditious and economical achievement of all client objectives.
> (b) To fully informed client decision-making. As a professional, I should:
>
> > (1) Counsel clients about all forms of dispute resolution;
> > (2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
> > **(3) Maintain the sympathetic detachment that permits objective and independent advice to clients;**

Incidentally, this happens to be the exact same language found in Ohio's "A Lawyer's Aspirational Ideals:

> Preamble [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. **While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.**

Also consider the Florida Creed, which states: "I will exercise independent judgment and will not be governed by a client's ill will or deceit."

Meanwhile, things began to unravel for the Nixon Administration. James McCord, Nixon's security chief, did not take plea and went to trial. After being found guilty, McCord must have had a change of heart. The idea of keeping things quiet apparently no longer seemed so attractive, and he started talking to the authorities. McCord wrote a letter to the judge from his case, and it revealed and alleged some pretty damning things: witness perjury, pressure being put on defendants, and the fact that the cover up went high up in the Nixon Administration. Then, White House Counsel John Dean came clean. He read a 245 page statement to the State committee that was investigating Watergate in which he disclosed everything: the break ins, the fact that everyone (including the President) was in on the cover up.

In what appears to be a fit of desperation, Nixon aides testified that Dean was lying. But then an aide to the President revealed that the President had secretly taped all of the conversations in the Oval Office.

The special Prosecutor Archibald Cox, tried to get Nixon to turn over the tapes, but Nixon refused. The prosecutor sought relief in the court and In August of 1973, the judge ordered the President to turn over the tapes. Nixon, however, refused, claiming executive privilege.

At that moment, the President's desperation peaked. In what is now known as the "Saturday Night Massacre", Nixon ordered his attorney general to fire the Special Prosecutor, Archibald Cox. The attorney general refused and resigned, as did his deputy. Robert Bork, the solicitor general, eventually stepped up to the plate and did the deed. He fired Cox and shut down the special prosecutor's office. After that, the move for impeachment intensified.

3. The lawyer's responsibility to perceive and protect the image of the profession

This all looked terrible to the public. As Woodward and Bernstein's information seeped through society, the public became more distrustful of the President. It surely also denigrated the image off the legal profession. The public was sure to see just how many people involved were lawyers. That's certainly a problem, given that lawyers have a professional duty to maintain the image of the profession:

Georgia:

> As to the public and our systems of justice, I will aspire: (b) To consider the effect of my conduct on the image of our systems of justice including the social effect of advertising methods.

Note that it's the same language in Ohio, except that Georgia added the phrase "social effect"

Also check out the language in the Creed of Professionalism of the Florida Bar:

> I will revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

The new special prosecutor ended up turning the tapes over to the court. The problem was that there was an 18-1/2 minute gap in the recording. The judge ordered an investigation into potential destruction of evidence. Further subpoenas were sent demanding more tapes. Nixon continued to refuse. The pressure was ratcheted up even further when, on March 1, 1974, Mitchell, Haldeman, and Ehrlichman were indicted. The President was names as an un-indicted co-conspirator.

In July 1974 the court heard the case US v. Nixon. The President contended that he didn't have to turn over any more tapes because of executive privilege. The special prosecutor disagreed. The United States Supreme Court ultimately unanimously ordered that the tapes be turned over.

Nixon turned over the tapes, and that was all she wrote. “[T]he newly released tapes—including the “smoking gun” tape of June 20, 1972—showed clearly that Nixon had lied to the public and had obstructed justice. On the tape, Nixon and Haldeman discussed the hush money, and Nixon told Haldeman to ask the CIA to call the FBI and ‘say that we wish for the country, ‘don't go any further into this case,’ period.’”[7]

Nixon was finished, and he knew it. He was sure to be convicted in the House if they impeached him. On August 8, 1974m Richard Buxom resigned as the President of the United States. Gerald Ford became the President the following day.

4. Public good and public service

Lawyers have a responsibility to serve the public. We know that because each state has some version of Rule 6.1. Here’s the version, for instance, from Delaware:

> Rule 6.1. Voluntary pro bono publico service.
> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

When it came to pro bono concepts, the lawyers involved in Watergate had a particular duty in that regard, given the exalted positions they held.

a. The conflict between duty to client and duty to the public good

Ohio’s “A Lawyer’s Aspirational Ideals”

> AS TO CLIENTS, I shall aspire: d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve fidelity to clients.

Slightly different in Georgia (italicized section is different)

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[7] https://www.crf-usa.org/bill-of-rights-in-action/bria-25-4-the-watergate-scandal.html last checked 9/28/2023.

> As to clients, I will aspire: (d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve *the fidelity to clients that is the purpose of these obligations.*

b. The responsibility of the lawyer to the public generally and to public service

To the public generally:

> Ohio
> TO THE PUBLIC and our SYSTEM OF JUSTICE, I offer service. I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.
>
> Look at the slight difference in Georgia. It's a "client focused" approach to a public duty:
> To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

To public service:

> Ohio
> TO THE PROFESSION, I offer assistance in keeping it a calling in the spirit of public service, and in promoting its understanding and an appreciation for it by the public. I recognize that my actions and demeanor reflect upon our system of justice and our profession, and I shall conduct myself accordingly.
>
> Georgia: In the General Aspirational Ideals
>
> As a lawyer, I will aspire: (i) To practice law not as a business, but as a calling in the spirit of public service.

5. How Watergate changed the entire system

a. Why our current ethics code sounds like it does

Let's start by getting one concept clear. Ethics and Professionalism are not the same thing. To understand what I mean, consider that one of the biggest complaints about our disciplinary code is that the current code amounts to nothing more than a how-to manual — how-to stay away from a grievance. Surely you're wondering how that can be a bad thing. Well, staying away from grievances is good, but is that all our ethics code is really supposed to

be about? The critics contend that the current code is devoid of the aspirational goals and the statements of morality that could be found in the predecessor codes. It's a valid point, but I once you learn the story of Watergate, you realize why the code is written that way.

After the Watergate fiasco, the powers that be realized that many of the people implicated in the scandal were lawyers. They also realized that many of the lawyers implicated really didn't take the ethics rules seriously. If those high-powered lawyers didn't take the code seriously, there was little chance that the rest of the practice was taking the code seriously. So the practice rewrote the rules, created an enforcement mechanism, and the attorney ethics world was changed forever. The current code we have today is an amended version of the 1983 code that was developed in the wake of the Watergate scandal.

The current code has a very different tone than the predecessor code. It's a harsh set of rules. Gone are the theoretical considerations, notions of justice and honor and other philosophical items. Why are they gone? I believe that they took out the aspirational elements from the disciplinary rules because they had to reinforce the idea that there really would be disciplinary action if you acted inappropriately. The problem was that all of the morality was removed.

b. The Fab Five of Attorney Lies

Let's take a look at some relevant rules from the "new code." What did the Watergate lawyers do when covering up their bad behavior? They lied. So let's look at the rules that address misrepresentation in the code. I call them the Fab Five of Attorney Lies.

Misleading Statements and Deception

Rule 3.3. Candor toward the tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

This is the most complicated rule in the representation genre. It only seems logical, given the forum to which it applies. We need to be sure that our statements to tribunals are as far away from deception as possible. Not only do we want to avoid deception, but we may need to remediate situations where untrue testimony is provided to a tribunal. In that regard, this rule contains significant guidance regarding our duty to remediate false statements. Note something else in that regard: this is one of the rules where you should check to commentary. The commentary contains a lot of direction regarding how we remediate and the steps we must take when counseling a client who may have given false testimony to a tribunal. Furthermore, the commentary expands on the differing obligations in a civil and criminal context.

Rule 4.1. Truthfulness in statements to others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

What I find interesting about Rule 4.1 is the limited responsibility with respect to the failure to disclose. Of all the rules addressing misrepresentation, this rule appears to impose the

minimum responsibility because it only prohibits the failure to disclose when it's necessary to avoid assisting in a crime or fraud. That's a pretty limited situation. I think it has something to do with the audience.

4.1 governs those situations where we are speaking on behalf of a client, but not necessarily to a tribunal or other authority (since those venues are governed by Rule 3.3). Thus, the rule is most likely in play when we are talking to an adversary. It makes sense that, given the adversarial nature to our system, we would have a limited obligation to disclose when it comes to the opposing lawyer.

> ***Rule 8.1. Bar admission and disciplinary matters***
> ***An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:***
> ***(a) knowingly make a false statement of material fact;***
> ***(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.***

Rule 8.1 deals with several specific instances of misrepresentation. Interestingly, this is the only rule that applies to lawyers before they become members of the bar. But it's not only applicable to almost-lawyers. In addition to bar applications we also need to be concerned about statements about CLEs. The item that I want to make sure I point out to you, however, pertains to disciplinary tribunals.

We can see from the text of the rule that it's improper to make a misrepresentation in connection with a disciplinary matter. But also note this related item: In many jurisdictions, failure to respond to a disciplinary tribunal is grounds for an independent grievance. In many cases it won't matter if you're ultimately exonerated for the underlying charge that got you into ethical trouble—if you fail to respond, you will still face a grievance.

Misrepresentations that may occur when we talk about ourselves or our services are covered by Rule 7.1. That rule is placed in the sections that deal with advertising, so it's common for lawyers to think that 7.1 is only invoked in cases of advertising. Personally, I think

it's easier to think of it as being invoked in cases of "self-promotion." Every time you think you're acting in a self-promoting nature, Rule 7.1 could be in play.

Self-promotion is the cornerstone of any business's marketing effort. Major stars employ publicists and scores of other personnel whose sole job is to promote the celebrity and get them noticed and as we all know, many will sink to almost any level in order to get attention. As the old saying goes, "Bad publicity is better than no publicity." That's what the drafters of the rules of professional conduct were afraid of.

To a certain extent, lawyers are no different. We need to attract clients and self-promotion is certainly a way of doing that. But the drafters know that, if left to our own devices, many attorneys would likely indulge in ethically questionable tactics in order to get noticed and would end up denigrating the integrity of the profession in the process. Thus, it regulates advertising through Rules 7.1 and 7.2. There are other reasons that lawyer advertising is regulated, such as protecting the long standing professional traditions in the practice. The commentary to Rule 7.2 expresses that best when it states, "Advertising involves an active quest for clients, contrary to the tradition that lawyers should not seek clientele." Rule 7.2, Comment [1].

On the other hand, there are reasons to permit attorney promotion such as the desire to encourage competition among lawyers to keep the cost of legal services at a reasonable level for the public and the "interest in expanding public information about legal services" Rule 7.2, Comment [1].

Two rules to be aware of when dealing with attorney advertising are Rules 7.1 and 7.2. Those Rules state:

> ***Rule 7.1. Communications concerning a lawyer's services***
> ***A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.***
>
> ***Rule 7.2. Advertising***
> ***(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.***

(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and
(3) pay for a law practice in accordance with Rule 1.17.
(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Basically. Rule 7.2 tells us where we're permitted to advertise. The content of our advertisements, however, must be seen through the prism of Rule 7.1. By way of example, we are permitted to put an ad in an, "electronic communication," per 7.2, but the content of that communication may not contain a "material misrepresentation of fact," per 7.1. One of the underlying goals of these rules is to make sure that attorneys avoid deceptive tactics.

Deception is an issue that was dealt with by the Philadelphia Bar Association as well. In Opinion 2009-02, the bar dealt with permissible actions in the world of social media. What's helpful to attorneys is that the decision hinged on the issue of deception (Note: The opinion is reprinted in its entirety in the Appendix). It's often been difficult to determine when a statement is permissible or so misleading that it violates the code. I think decisions like the Philadelphia opinion give that issue some teeth-- if you intended to deceive, then your statements/actions are probably in violation of the rule.

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<u>Preying on Vulnerabilities</u>

While this section may be slightly off the beaten path (at least as far as this program is concerned) it's closely related and deserves exploration. After all, when we talk about misrepresentation we're talking about a form of deception and the drafters know that there is a very real risk that lawyers will resort to questionable tactics in their effort to drum up business. That aggressiveness may manifest itself in misleading advertisements as we discussed in the previous section, but it may also appear in the context of soliciting clients for work. The drafters realized that lawyers might put undue pressure on people in order to convince them to retain the services of the lawyer, so Rule 7.3 was created.

Rule 7.3. Direct contact with prospective clients
(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.
(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 7.3 places different restrictions on different types of conduct. The rule distinguishes the conduct by the ability for the lawyer to coerce the potential client. Thus, subsection (a) addresses the more pressure-filled communication of in-person, live telephone or real time electronic contact. Since the potential to coerce in those instances is so great, the rule outright prohibits that kind of solicitation, unless the lawyer has a close relationship with the prospect.

That restriction exists because there is an inherent potential for abuse in direct interpersonal communication. Rule 7.3, Comment [1]. With in-person communication there is a greater potential that a lawyer could persuade the client in a way that overwhelms the client's judgment. Comment [2].

Note, however that the rule does not prohibit contact with *any* person, rather the rule refers to contact with a "prospective client." Rule 7.3, Comment [1] describes that person as one who is, "known to need legal services." The key here is that the pressing need for legal services puts the prospective client in a more vulnerable mental state. Thus, the purpose of the rule prohibiting solicitation is to protect vulnerable people from being preyed upon.

The reason I say that there are only four rules that address misrepresentation (3.3, 4.1, 7.1 and 8.1) is because the fifth rule, 8.4 Misconduct, is about much more than just misrepresentation. In fact, it almost seems as if misrepresentation is an afterthought—or at the very least buried among some other important concepts. Here is the rule, along with some important things to consider in Rule 8.4.

> ***Rule 8.4. Misconduct***
> ***It is professional misconduct for a lawyer to:***
> ***(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;***
> ***(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;***
> ***(d) engage in conduct that is prejudicial to the administration of justice;***
> ***(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or***
> ***(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.***

The sections that I find most interesting are (b), (c) and (d). In subsection (b) the rules tell us that misconduct can be the commission of certain crimes that impact our fitness to be an attorney. Do you think that driving drunk would fall in there? Maybe that's debatable. How about drug offenses? Of course it seems to get a little easier when you talk about check fraud or theft. What's interesting, though is that the rule doesn't say that you must be “convicted” of a criminal act, only that you “commit” the act. As a result, discipline may be forthcoming if the criminal behavior occurred, even if there were no formal consequences in the justice system.

Subsections (c) and (d) are what I call the “catch all” sections. For instance, I think we could spend an entire day giving examples of, “conduct involving dishonesty, fraud, deceit or misrepresentation.” What's critical to remember is that the conduct we're talking about is not limited to the things you do in your office-- the rule doesn't make that distinction. That's one of the reasons that I tell attorneys that there is almost no separation between the professional and private life of an attorney. What you do outside the office matters and if your behavior outside the office violates Rule 8.4, you're going to be subject to discipline

Likewise, I could imagine a slew of actions that could be considered "prejudicial to the administration of justice." What about blogging about how you believe a judge is a thief and a liar? How about stealing evidence out of a courthouse. The list could go on. An interesting side note: 8.4(d) would probably be the section that would be cited in a claims of discrimination in the profession. Many states have adopted specific ethics rules outlawing discrimination, but not all of them. 8.4(d) would serve the purpose for states without a specific prohibition.