

Outside Counsel

Expert Analysis

A Curious Case of Attorney Discipline Under ‘Fitness’ Provision of Rule 8.4(h)

Attorney discipline is typically imposed under Rule 8.4 of the Rules of Professional Conduct. 22 NYCRR 1200.0 et seq. The Rule, titled Misconduct, addresses various kinds of professional and personal behavior which, for the most part, are self-evidently improper. The last paragraph, Rule 8.4(h), a catch-all provision which reads, “A Lawyer or law firm shall not engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer,” is seldom used alone as an independent basis for attorney discipline. *Matter of Reno*, 147 A.D.3d 8 (2d Dep’t 2016), is a rare exception that gives us some insight into how the Appellate Division, Second Department views professional fitness in the context of an attorney’s handling of a transaction with an unrepre-

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sented and vulnerable party. It also highlights that in certain circumstances an attorney’s professional responsibilities extend beyond the exclusive interests of the client.

Rule 8.4

But first a look at the scope of the Misconduct Rule:

Rule 8.4 lays out eight categories of misconduct in paragraphs designated “a” through “h”. Paragraph (a), to start, sensibly prohibits a lawyer from violating the other Rules of Professional Conduct (or from having someone else do that for him). For example, it is a generally acknowledged duty to protect the confidences and secrets of a client. But it is also a mandate

under Rule 1.6 (Confidentiality of Information). We also know that we need to behave ourselves in court. Rule 3.3(f)(3) states that a lawyer appearing before a tribunal shall not, among other things, engage in undignified or discourteous conduct; intentionally or habitually violate an established rule of procedure or evidence; or engage in disruptive conduct. And

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of course misappropriating client funds in violation of Rule 1.15 is uniformly recognized as a reliable path to the most severe disciplinary penalties. Generally speaking, whenever the Rules mandate or forbid any behavior under the

directives, “A lawyer shall...” or “A lawyer shall not...,” the potential consequence of disobedience is professional discipline.

Paragraph (b) prohibits a lawyer from engaging in “illegal conduct,” which is to say criminal conduct, but only to the extent that the crime adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer. This qualification is actually a thin life-line for the lawbreaking attorney. Honesty and trustworthiness are virtues that tend to be compromised with most criminal activity; and “fitness as a lawyer,” a term undefined by the Rules, is ultimately the minimum standard of professional comportment that a Grievance Committee or an Appellate Division panel will insist upon, as we will see in *Matter of Reno*. Moreover, Comment [2] to Rule 8.4 cautions that, “[m]any kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of a minor significance when considered separately, can indicate indifference to legal obligation.”

Rounding out the list under Rule 8.4: Paragraph (c) forbids conduct

involving dishonesty, fraud, deceit or misrepresentation, irrespective of criminality, while Paragraph (d) prohibits a lawyer from engaging in conduct “prejudicial to the administration of justice.” Paragraphs (e) and (f) concern a lawyer’s responsibility to assure the integrity of the courts, our law making bodies and public officials. And Paragraph (g) prohibits employment discrimination in the practice of law.

Then there is Paragraph (h). Here conduct reflecting unfitness is its own ground for discipline, untethered from illegal conduct, dishonesty, fraud, or any of the other specified types of misconduct. Indeed, as comprehensive as the other provisions of Rule 8.4 may appear, none are as broad or ambiguous as Paragraph (h).

There is no Comment to Rule 8.4 that specifically addresses Paragraph (h). Comment [2] cited above offers some guidance, but not much because its pretext is illegal conduct as the basis for discipline. And the types of illegal conduct specified as adversely reflecting fitness (violence, dishonesty, fraud, breach of trust and serious interference with the administration of justice) are themselves independent grounds for discipline.

So what is the criterion for a Rule 8.4(h) violation? Until *Matter of Reno*, this question was largely aca-

demic. That is because Rule 8.4(h) and its predecessor DR 1-102(A)(7) of the Code of Professional Responsibility were rarely, if ever, the only basis for attorney discipline. (DR 1-102(A)(7) was carried over verbatim into Rule 8.4(h)). Instead, the charge was typically tacked-on to other more specific violations that also reflected poorly on the lawyer’s professional fitness. See, e.g., *Matter of Baker*, 98 A.D. 3d 38 (4th Dep’t 2012) (involving sexual misconduct directed toward opposing counsel).

'Matter of Reno' Background

Matter of Reno is unusual in that it was brought on no other charge than conduct adversely reflecting on the lawyer’s fitness as a lawyer. No other violations of the Rules were cited. The matter involved no crime, or fraud, or dishonesty or breach of trust. It did not involve a complaint by the lawyer’s client, or even by the party to the transaction that formed the basis for discipline—the sale of a home. Instead, it was a relative of the seller who lodged the complaint against the attorney well after the sale was completed and the seller had died. The seller, it appears, had never herself objected to the transaction or complained about the lawyer’s conduct in it.

There was no dispute over the facts. An 80-year-old widow,

admittedly infirm and in need of care, sold her home to her home health care aide at a below-market price in exchange for an agreement that the elderly woman would continue to live in the home and the aide would continue to care for her. The attorney, an experienced real estate practitioner, represented the aide. The elderly woman had no legal representation.

In addition to her occupation as a home health care aide, the buyer also made a living investing in real

to allow her to reside in the home indefinitely.

None of these terms were put in writing, however. Instead, the attorney contended that he was retained by the buyer for the sole purpose of preparing a deed for the transfer. The buyer had conducted her own investigation of title. And since she was satisfied with the condition of title and there were no contingencies to the sale, such as the procurement of a mortgage, the attorney felt there was no need for a contract of sale.

The closing was conducted at the elderly seller's home, where the attorney introduced himself to her as the buyer's lawyer. The attorney admitted that the seller was frail and infirm, but otherwise appeared competent to complete the transaction. There is no suggestion in the decision that she was not.

The attorney prepared a bargain and sale deed with covenants against grantor's acts and other required transfer documents based on information and tax documents provided to him by the buyer. He entered the sale price of \$100,000 on the transfer documents and oversaw their execution, including notarizing the seller's signature on the deed. He also witnessed the exchange of a check drawn by the buyer for the purchase. But, he said, he did not examine the check

or observe the amount drawn on it. The check, as it turned out, was for only \$10,000, not the \$100,000 agreed upon.

Some months after the closing the elderly widow had an accident. She was hospitalized and died soon afterward. About one year later, the seller's daughter commenced a civil action against the buyer to have the deed declared null and void. The District Attorney's office also conducted an investigation into the matter, but filed no criminal charges against anyone involved in the transaction. By the time the disciplinary proceeding was initiated, the civil action had been settled between the parties. The property was sold and the proceeds divided between the buyer and the deceased seller's daughter.

Grievance Petition

The Grievance petition contended that the attorney failed to confirm or take steps to ensure that the seller received the \$100,000 sale price from the buyer, and failed to take any steps to ensure that the seller would have recourse against the buyer in the event that the buyer failed to permit the seller to remain in the home and to care for her as promised. The attorney contended that he never saw the amount on the check, and that as the buyer's lawyer he had no duty to protect the seller from his

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estate. The attorney was aware of this, and had in fact represented the buyer in at least four other real estate transactions. At the time of the closing the buyer had only recently become the seller's home health care aide. The purchase price, \$100,000, was concededly below market value for the property, but it also apparently reflected the fact that the buyer had already performed some repairs to the home, as well as the buyer's agreement to continue to care for the seller as her aide and

client. He allowed that if he had any duties to the seller at all they were to not discriminate against her, to not deceive her, and perhaps also “some duty ... to ensure [that] a legitimate transaction occurred.”

The Special Referee appointed to investigate the complaint declined to sustain the charge. The Appellate Division, however, on motion of the Grievance Committee, disaffirmed the Special Referee’s report. The court held that under the circumstances of the case, the lawyer, at a minimum, had a duty to confirm that his client tendered the agreed consideration of \$100,000 to ensure that the transaction was “legitimate.” The failure to do so was sufficient to sustain the charge that the attorney engaged in conduct that adversely reflects on his fitness as a lawyer.

The attorney was censured.

Analysis

But should he have been disciplined at all? The factual narrative of the case certainly raises the specter of elder abuse—an abhorrent and persistent problem. But presumably that would have been the District Attorney’s focus, and there were no criminal charges brought against anyone. The seller, the attorney said, appeared to be competent—a representation that was not challenged. And the court’s decision does not propose that the

seller was coerced or manipulated into the transaction. Indeed, the fairness of the agreement was not the issue, the enforcement was—or, more precisely, the attorney’s failure to assure enforcement for the seller. The sale price was low, the court highlighted, but the buyer was also making repairs to the premises, and the seller was to get long-term care within the comfort of her home and without the burdens of ownership that, for all anyone knows, may have presented a challenge to a frail and elderly widow. Indeed, from the decision alone it is impossible to tell if anyone got the better of the deal that was reached.

Moreover, there was never any dispute that the attorney was representing the buyer’s interests only; nor was any overt issue taken with the fact that the seller was unrepresented. Transactions can and do occur with unrepresented parties. There is also no suggestion that the attorney gave any legal advice to the seller, an act which might violate Rule 4.3 (Communicating with Unrepresented Persons). The court also noted the fact that the attorney had no prior disciplinary history, and that he did not profit from the transaction since he earned only a nominal fee.

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Greene v. Greene, 47 N.Y.2d 447, (1979)) and the obligation to pursue all of the client’s lawful objectives under Rule 1.3. But even these core duties have their limits, as *Matter of Reno* now makes clear. As one Bar Association commented, “the duty of loyalty does not require an attorney ‘to exploit’ an unrepresented party’s ‘ignorance about the need for legal assistance’.” N.Y. City 2016-1 (2016). And in the end, this may be what the court’s decision in *Matter of Reno* came down to. In this instance, the elderly widow’s vulnerability and dependence on the buyer to keep the promises made begged for some legal protection. And the attorney’s failure to recognize that fact and to assure that the elderly widow was not being exploited, at least while he was present, ultimately failed the court’s test of professional fitness.