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THE LEGISLATION AND POLICY ROUNDTABLE



ELECTION LAW: LEGISLATION AND CONTROVERSIES

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The Model Rules of Professional Conduct and Political Campaign Activities

Lauren Gilius

Dirty campaign tricks have a long history in American politics. As early as the campaigns of George Washington and Thomas Jefferson, candidates distributed alcohol at the polls.¹¹⁹ Today, local laws prohibit such behavior. As time passed, the candidates relied more and more on negative attack advertisements. In response to these advertisements, some private groups such as FactCheck.org attempt to provide an unbiased review of the accuracy of the candidates' messages.¹²⁰

There is an interesting relationship between lawyers and politics in the United States; many of the country's politicians are lawyers. Attorneys have special social privileges; they can file complaints on behalf of clients, and compel parties to appear for depositions. As a result, attorneys are "officers of the court" and the local Bar carefully scrutinizes their professional and personal behavior.

When an attorney fails to maintain the high standard of trust required of the profession, the legal community in which the attorney is licensed to practice may impose sanctions. In addition to judges and lawyers private conduct outside of a professional capacity, sanctions apply to the non-professional public conduct. To an extent, this regulates how those judges and lawyers that participate in the political process. This article will discuss how legal ethics rules¹²¹

¹¹⁹ TRACY CAMPBELL, *DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION* 5 (Carroll and Graf Publishers, 2005).

¹²⁰ About FactCheck.org, <http://www.Factcheck.org/about> (last visited Oct. 27, 2008).

¹²¹ For the purpose of this article, "legal ethics rules" refers generally to the various ethics codes adopted by the States in the United States or the historical versions of the American Bar Association's model codes.

apply to political activities of lawyers and judges, particularly when an attorney is involved in a political campaign that is not for judicial or legal office.¹²²

This article will examine whether the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules") should apply to lawyers in situations where a lawyer-candidate or a lawyer involved in a disingenuous political campaign activity, particularly when the lawyer was not convicted on criminal charges. Though the American Bar Association said that the Model Rules apply to dishonesty, fraud, deceit or misrepresentation by lawyers, even when acting in a non-professional capacity, the support for applying the Rules in this context is lacking.¹²³

There are logistical problems with applying the Model Rules to disingenuous political campaign activities such as the use of misleading political advertisements. For example, different ideological groups may differ on what the "truth" is, making it difficult to apply a standard of truth at all. Further, there is a substantial question as to the ability of Bar Counsel to perform an investigation for every political assertion lawyer-candidates or political campaigns make. In addition, there are policy concerns regarding the public's interest in having a trustworthy legal community, and politicians' rights to run fierce campaigns with free political speech, even if this includes dubious promises. Presently, state Bar Councils tend to not involve themselves with political candidates and their staff members unless there is a criminal conviction or misconduct related to legal practice.¹²⁴

This article will first briefly discuss the development of applying the Model Rules to the non-professional conduct, specifically as related to campaign activities. In part II, this article

¹²² Examples of public legal offices are "attorney general, prosecuting attorney and public defender." MODEL RULES OF PROF'L CONDUCT 8.2 cmt. n. 1 (2007).

¹²³ MODEL RULES OF PROF'L CONDUCT 8.4(c) (2007).

¹²⁴ See Robert F. Housman, *The Ethical Obligations of a Lawyer in a Political Campaign*, 26 U. MEM. L. REV. 3, 53 (referring to Model Rule 8.4).

will discuss the arguments for applying the Model Rules to non-professional conduct of attorneys involved in campaigns that are not for judicial or legal office.

I. Historical Development

This section will focus on three aspects of the application of the Model Rules to lawyer's conduct during campaigns for non-judicial and non-legal office: the application of historic and current ABA model ethics rules to non-professional conduct generally; the role of the Model Rules in addressing the conduct of lawyers during judicial or legal campaigns; and the development of application of the legal ethics rules to campaigns that are not for judicial or legal office.

Applying Ethics Rules to Conduct Outside of a Professional Capacity

Many states have adopted ethical rules that mirror the Model Rules in order to govern the behavior of judges and lawyers. These rules apply even when the attorneys are not acting in professional capacities. The courts and the American Bar Association used strong language to say that a lawyer's conduct, even when in a non-professional capacity, is subject to sanction by the Bar.¹²⁵

As the ABA explained in Formal Opinion 336 (1974),¹²⁶ “[a] lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary rules of the Code of Professional Responsibility.”¹²⁷ The Supreme Court of Kansas agreed in State v. Russell, “[i]t is recognized generally that lawyers are subject to discipline for improper conduct in connection

¹²⁵ *In re Abrams*, 689 A.2d 6, 12 (D.C. 1997).

¹²⁶ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 336 (1974).

¹²⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 336 (1974).

with business activities, individual or personal activities, and activities as a judicial, governmental or public official.”¹²⁸

Model Rule 8.4 regulates conduct of lawyers involving dishonesty, fraud, deceit or misrepresentation¹²⁹ and criminal acts that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.¹³⁰ Courts have not interpreted this provision lightly. For example, one court disciplined a judge for using drugs, when the judge continued to “publicly maintain his innocence and malign his accusers for over a year... [and he] did so with full knowledge of his culpability.”¹³¹ Other examples of recipients of sanctions include a lawyer who used fraudulent conduct to obtain a loan from a mortgage company;¹³² a lawyer who misappropriated funds from a real estate closing company he owned;¹³³ and a lawyer who posted messages using the name of a local high school teacher implying that the teacher engaged in sexual relations with students.¹³⁴

Applying Ethics Rules to Judicial Campaign Conduct

Applying rules of professional responsibility to the behavior of lawyers and judges who are candidates for judicial office or who are acting on behalf of a candidate is not new. It is also particularly important to the legal profession because of its interest in maintaining the justice system, and because lawyers and judges are in a unique position to influence the public regarding these particular public offices. The Model Rules address conduct related to judicial or legal office directly in Model Rule 8.2(a). This Rule states “[a] lawyer shall not make a statement that

¹²⁸ State v. Russell, 610 P.2d 1122, 1127 (Kan. 1980) (citing *In re Kirtz*, 494 S.W.2d 324 (Mo. 1973); *In re Wilson*, 391 S.W.2d 914 (Mo. 1965); *Chernoff's Case*, 344 Pa. 527, 26 A.2d 335 (1942)).

¹²⁹ MODEL RULES OF PROF'L CONDUCT 8.4(c) (2007).

¹³⁰ MODEL RULES OF PROF'L CONDUCT 8.4(b) (2007).

¹³¹ *In re Discipline of Harding* 104 P.3d 1220, 1225 (Utah 2004).

¹³² *People v. Parsley*, 109 P.3d 1060, 1063 (Colo. 2005).

¹³³ *In re Disciplinary Action against Pugh*, 710 N.W.2d 285, 289 (Minn. 2006)

¹³⁴ *In re Carpenter*, 95 P.3d 203, 210 (Or. 2004).

a lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.”¹³⁵

In fact, Model Rule 8.2(b)¹³⁶ makes it a violation for a lawyer seeking judicial office to violate the Model Code of Judicial Conduct.¹³⁷ The limitations on the conduct of lawyer-candidates for judicial office are not limited non-political conduct. Model Rule 8.2 Comment 2 states that “when a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.”¹³⁸

Development of Application of Ethics Rules to Non-Judicial Campaigns

Developments in the Model Rules and the behavior of lawyers during Watergate are closely related in time, though not explicitly connected.¹³⁹ Legal commentators debate the extent of a connection between the new focus on legal ethics in the 1960s and 1970s and the Watergate scandal of the 1970s.¹⁴⁰ For the purposes of this article, the following is a brief outline of the major events during this period related to the new focus on legal ethics, specifically, how it relates to the conduct of lawyers during political campaigns for non-judicial and non-legal office.

The ABA created the Special Committee on Evaluation of Ethical Standards (“Wright Committee”) in 1964, in order to assess the Canons of Professional Ethics, the ethics rules in

¹³⁵ MODEL RULES OF PROF'L CONDUCT 8.2(a) (2007).

¹³⁶ MODEL RULES OF PROF'L CONDUCT 8.2(b) (2007).

¹³⁷ MODEL CODE OF JUDICIAL CONDUCT (2007).

¹³⁸ MODEL RULES OF PROF'L CONDUCT 8.2 cmt. n. 2 (2007).

¹³⁹ Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463, 474, n. 46 (2005).

¹⁴⁰ Paul T. Hayden, *Putting to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1332 (2003); Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. Legal Prof. 33, 37-38 (2004).

force at the time, and determine whether to make changes.¹⁴¹ The Wright Committee drafted the Model Code of Professional Responsibility (“Model Code”),¹⁴² which the ABA House of Delegates adopted on August 12, 1969.¹⁴³

The ABA Special Committee on Evaluation of Disciplinary Enforcement (“Clark Committee”) was created in 1967. From its creation until the publication of its findings in 1970, the Clark Committee assembled and studied “information relevant to all aspects of professional discipline.”¹⁴⁴ The Clark Committee concluded that, “[a]fter three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility.”¹⁴⁵

On June 18, 1972, the Washington Post printed an article announcing that five men were arrested in “what authorities describe as an elaborate plot to bug the offices of the Democratic National Committee here.”¹⁴⁶ The events that followed became known as Watergate. As the facts were disclosed, it became more apparent that lawyers played a significant role in Watergate. Twenty-seven of the people involved in these events were lawyers, including both the indicted members of the Nixon administration and their named un-indicted co-conspirators.¹⁴⁷

¹⁴¹ MODEL RULES OF PROF'L CONDUCT Preface (2007).

¹⁴² MODEL RULES OF PROF'L CONDUCT Preface (2007).

¹⁴³ MODEL RULES OF PROF'L CONDUCT Preface (2007).

¹⁴⁴ Problems and Recommendations in Disciplinary Enforcement, American Bar Association Special Committee on Evaluation of Disciplinary Enforcement (1970) (available at xiii http://www.abanet.org/cpr/reports/Clark_Report.pdf).

¹⁴⁵ Problems and Recommendations in Disciplinary Enforcement, American Bar Association Special Committee on Evaluation of Disciplinary Enforcement (1970) (available at xiii http://www.abanet.org/cpr/reports/Clark_Report.pdf).

¹⁴⁶ Alfred E. Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST, June 18, 1972 at A01.

¹⁴⁷ Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics – II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 209 (2002).

Commentators have argued that each or all of these events caused the changes in legal ethics rules and education that followed. It is clear, however, that nationwide changes were made to the legal profession during and after this period.

In 1973, the ABA adopted Standard 302(a), which added a professional responsibility education element requirement for all ABA approved law schools.¹⁴⁸ In 1974, an ABA Formal Opinion stated: “A lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary rules of the Code of Professional Responsibility.”¹⁴⁹

The Multistate Professional Responsibility Examination (MPRE), the first national legal ethics exam, was administered for the first time in 1980.¹⁵⁰ California’s exam, first administered in February 1975¹⁵¹, was the foundation for the MPRE, but states such as Pennsylvania and Ohio included questions on ethics in the bar exam as early as the 1930s.¹⁵²

The primary concerns of this article are the legal ethics cases that came out of these developments in legal ethics and politics. First, in *Matter of Nixon*, former President Richard Nixon, an attorney, was disbarred in New York for improperly obstructing investigations by the Federal Bureau of Investigation and the United States Department of Justice. These investigations concerned the unlawful entry into the headquarters of the Democratic National Committee and the offices of Dr. Lewis Fielding, and the conduct that followed, which later

¹⁴⁸ Paul T. Hayden, *Putting to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1331 (2003).

¹⁴⁹ ABA Comm. on Ethics and Pro'l Responsibility, Formal Op. 336 (1974).

¹⁵⁰ Paul T. Hayden, *Putting to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1325 (2003).

¹⁵¹ Paul T. Hayden, *Putting to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1327 (2003).

¹⁵² Paul T. Hayden, *Putting to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1325 (2003).

became known as Watergate.¹⁵³ The Appellate Division of the Supreme Court for the First Judicial Department noted that

while Mr. Nixon was holding public office he was not acting in his capacity as an attorney. However, the power of the court to discipline an attorney extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar.¹⁵⁴

A second case involved what we refer to today as dirty campaign tricks. In 1973, Donald Segretti plead guilty to violating 18 U.S.C. 612¹⁵⁵ and 18 U.S.C. 371¹⁵⁶ for campaign pranks against Democratic presidential hopefuls by preparing and distributing bogus letters falsely accusing Democratic candidates of sexual improprieties, printed on the letterhead of a third Democratic presidential candidate.¹⁵⁷ Segretti intended to foster a split among the Democratic presidential candidates so that it would be less likely that the party would unite behind the candidate that receives the nomination.¹⁵⁸ Segretti was sanctioned by California, which included the requirement that he pass the Professional Responsibility Exam at the end of his period of suspension.¹⁵⁹

¹⁵³ Matter of Nixon, 385 N.Y.S.2d 305 (1976).

¹⁵⁴ Matter of Nixon, 385 N.Y.S.2d 305 (1976) (citing Matter of Dolphin, 240 NY 89, 92-93 (1925); Matter of Kaufman, 29A.D.2d 298 (N.Y. App. Div. 1968)).

¹⁵⁵ 18 U.S.C. § 612 (1950) Publication and distribution of political statements law (repealed 1976).

¹⁵⁶ Conspiracy to commit offense or to defraud United States 18 U.S.C. § 371.

¹⁵⁷ Segretti v. State Bar of California, 15 Cal. 3d 878, 883 (Cal. 1976).

¹⁵⁸ Id. at 882.

¹⁵⁹ Id. at 891.

II. Considerations for Applying Ethics Rules to Non-Professional Conduct During Non-Judicial Campaigns

Determining how courts will apply a state's version of Model Rule 8.4 to political activity can be difficult.¹⁶⁰ Comment 5 to Model Rule 8.4 most directly relates to lawyers in a political campaign for an office other than judicial or legal office, as it says "[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."¹⁶¹

Although Comment 5 contemplates the role of the lawyer-lawmaker, there is little recorded legislative history for Comment 5,¹⁶² making it difficult to determine how the drafters intended for it to be applied. Additionally, as commentators have observed, there are few reported cases applying Model Rule 8.4 to campaign activities of lawyers during campaigns that are not for judicial or legal office.¹⁶³

There are several aspects of applying the ethics rules to these cases. First, there are logistical challenges in applying the ethics rules in this context. Second, valid policy concerns exist on each side of the issue.

Logistical Problems

The logistical considerations center on a Bar Counsel's resources to perform the independent investigations necessary for fact-finding without a prior criminal conviction. In a

¹⁶⁰ MODEL RULES OF PROF'L CONDUCT 4.1 Cmt. n. 1 (2007), "For dishonest conduct that does not amount to a false statement or for misrepresentation by a lawyer other than in the course of representing a client, see Rule 8.4."

¹⁶¹ MODEL RULES OF PROF'L CONDUCT 8.4 Cmt. n. 5 (2007), "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustees, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization."

¹⁶² Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS U. L. REV. 839 (2005).

¹⁶³ Kevin Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians*, 57 RUTGERS U. L. REV. 839 (2005).

situation where a lawyer was convicted of a crime, under Model Rule 8.4(b), that crime can be evaluated for its connection to the lawyer's fitness to practice law. In contrast, if the disciplinary investigation is based solely on conduct that falls under Model Rule 8.4(d), there may be no public record to base the investigation on. In this situation, Bar Counsel would be responsible for compiling and analyzing the facts involved the scrutinized conduct.

There are at least two issues that make an investigation by Bar Counsel more problematic. As campaigns for office, such as President of the United States, get more contentious, the ability to determine some objective truth for political advertisements may become more difficult. As political rhetoric becomes more partisan, it may be difficult to determine when language becomes misleading under the Model Rules.

Second, the scope of Comment 1 of Model Rule 8.4, which includes conduct by a lawyer to assist or induce another into violating the Model Rules, may also make it difficult to perform these investigations.¹⁶⁴ The breadth of an investigation broadens when, for instance, a lawyer is not directly involved in the production or dissemination of a misleading political advertisement, but instead is involved with fundraising or management of the political campaign generally.

Policy Argument

In assessing whether the Model Rules should apply to the non-professional conduct of lawyers taking part in campaigns for office other than judicial or legal office, it is important to determine the reasons that such an application may be beneficial. In this analysis, the confusing history of the application of the ethics rules comes into play. Though observers have commented that a criminal conviction is not necessary for Model Rule 8.4 to be applied to a lawyer's conduct

¹⁶⁴ MODEL RULES OF PROF'L CONDUCT 8.4 cmt. n. 1 (2007).

during a political campaign that is not for judicial or legal office,¹⁶⁵ it is unclear that the Model Rules have had significance without such a criminal conviction.

State courts have articulated several reasons for applying legal ethics rules to non-professional conduct: to maintain the integrity of the profession, to protect the public and the courts, and to deter other attorneys from engaging in similar misconduct.¹⁶⁶ There is a fourth reason that is sometimes included: to enhance public confidence in the legal system.¹⁶⁷ State courts have stated that the purpose of disciplining lawyers for non-professional conduct is not to punish the lawyers.¹⁶⁸

If one of the goals of applying the Model Rules to the conduct of lawyers during political campaigns that are not for judicial or legal office is to encourage public confidence, it is unclear what advantage there is to adding the bar's discipline to a criminal conviction. In cases that arise out of a criminal conviction, the purpose seems to be to remove unfit lawyers rather than anything related to public confidence. The Model Rules and states themselves require a nexus between the lawyer's conduct and the lawyer's fitness to practice law before they will discipline an attorney for conduct outside of a professional capacity.¹⁶⁹

However, courts have stated that it is the underlying conduct that is the concern in a disciplinary proceeding, not the existence of a criminal conviction: “[t]he central question in a disciplinary proceeding is whether the attorney has adhered to the high standards of honor and integrity which membership in our profession demands, and not whether he has been criminally punished for any derelictions.”¹⁷⁰

¹⁶⁵ Robert F. Housman, *The Ethical Obligations of a Lawyer in a Political Campaign*, 26 U. MEM. L. REV. 3, 53 (referring to Model Rule 8.4).

¹⁶⁶ *In re Abrams*, 689 A.2d 6, 12 (D.C. 1997) citing *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc).

¹⁶⁷ *State ex rel. Neb. State Bar Ass'n. v. Michaelis*, 316 N.W.2d 46, 50 (Neb. 1982).


¹⁶⁸ *In re Abrams*, 689 A.2d 6, 12 (D.C. 1997).

¹⁶⁹ *In re Conduct of Carter*, 337 Ore. 226, 233 (2004).

¹⁷⁰ *In re Abrams*, 689 A.2d at 12.

States have said that a lawyer may speak out and state his opinion on current campaign issues without fear of the jeopardizing his law license, but this is not without limits.¹⁷¹ This First Amendment protection is important to the ability of lawyers to participate in the political process.

III. Conclusion

Perhaps it is the lack of clarity about the creation of the ethics standards and the purpose of the rules that makes this topic difficult to summarize. There is an opportunity for state courts to regulate the conduct of lawyers during political campaigns to a greater extent than described in the Model Rules applying to campaigns for judicial or legal office. It is unclear, however, if the Model Rules were designed or are capable of consistent application in this area. For these reasons, the public and the legal community would benefit from a unified, national statement about how the Model Rules should apply to a lawyer involved in a political campaign that is not for judicial or public office, whether the lawyer is the candidate or a member of the campaign staff. This is prime territory for the American Bar Association to clarify the current interpretations of the Model Rules or, perhaps more appropriately, evaluate how legal ethics rules can take into account a broader range of lawyer activities outside of a lawyer-client environment. 

¹⁷¹ *State v. Russell*, 610 P.2d 1122, 1127 (Kan. 1980) (discussing the Model Code of Professional Responsibility).