Trumping Lawyers' Suggested Ability to Improperly Influence Government Agencies and Officials

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Abstract

President Donald Trump was represented by several lawyers during Special Counsel Robert Mueller's investigation into possible Russian interference in the 2016 election. Two of those lawyers, John Dowd and Rudolph Giuliani, made statements regarding their relationships with Mueller that arguably implied their ability to improperly influence the Russia investigation. Such statements court trouble. Model Rule of Professional Conduct 8.4(e) makes it professional misconduct for a lawyer to "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Model Rules of Professional Conduct or other law."

The ethical prohibition against lawyers' suggestion of the ability to improperly influence government agencies or officials recognizes that the legal profession is harmed when lawyers state or imply their ability to improperly sway government officials or entities because all lawyers consequently earn an unfair and unsavory reputation as "fixers" rather than as zealous advocates. Moreover, lawyers' claims or suggestions that they can improperly influence government agencies or officials serve no legitimate purpose and undermine public confidence in the legal system, even if the lawyers are merely puffing or the implication is false.

Unfortunately, Model Rule 8.4(e) and state analogs do not always appear to be well understood by lawyers. Certainly, all lawyers should recognize that extreme misconduct such as soliciting money from clients to bribe judges or other government officials violates the rule, as does a lawyer's simple suggestion that she may be able to bribe a judge, but less obvious forms of misconduct may also violate Rule 8.4(e).

Table Of Contents

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INTRODUCTION

President Donald Trump was represented by several lawyers during Special Counsel Robert Mueller's investigation into possible Russian interference in the 2016 election.[1] One of those lawyers, white collar crime specialist John Dowd, reportedly "assured [President] Trump that he had a 'great relationship with Mueller' and that he could manage him."[2] Although Dowd may have been friendly with Mueller, subsequent events would amply demonstrate that Dowd could not affect or influence the course, focus, scope, or outcome of Mueller's investigation.[3] Dowd could not, in fact, manage Mueller. Dowd withdrew from the President's representation in March 2018.[4]

In April 2018, President Trump hired former New York mayor Rudolph Giuliani to replace Dowd.[5] Like Dowd before him, Giuliani apparently believed

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1. Andrew Rafferty, *The Growing List of Lawyers Representing Team Trump*, NBC NEWS (July 19, 2017), https://www.nbcnews.com/politics/politics-news/growing-list-lawyers-representing-team-trump-n783846 [https://perma.cc/H66R-9EJV].

2. Gabriel Sherman, *"Now I'm F—ing Doing It My Way": Jubilant and Self-Liberated, the President Prepares for War with Mueller*, VANITY FAIR (Mar. 22, 2018), https://www.vanityfair.com/news/2018/03/the-president-trump-prepares-for-war-with-mueller [https://perma.cc/PC5N-XK8C].

3. *See generally* Greg Price, *Donald Trump is a "Goddamn Witness" in the Mueller Investigation, Lawyer John Dowd Told Special Counsel: Book*, NEWSWEEK (Sept. 6, 2018), https://www.newsweek.com/trump-goddamn-witness-mueller-dowd-woodward-1109873 [https://perma.cc/XU6G-7ALZ] (reporting on Dowd's inability to bend Mueller to his will in connection with possible testimony by President Trump; although the President never was interviewed by Mueller's team, Dowd had resigned as President Trump's lawyer before that goal was achieved).

4. Michael S. Schmidt & Maggie Haberman, *Trump's Lawyer Resigns as President Adopts Aggressive Approach in Russia Inquiry*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/us/politics/john-dowd-resigns-trump-lawyer.html [https://perma.cc/DQK7-KNLQ].

5. Pamela Brown et al., *Giuliani Says He Is Joining Trump's Legal Team to Help Bring Mueller Probe to a Conclusion*, CNN (Apr. 20, 2018), https://www.cnn.com/2018/04/19/politics/giuliani-trump-legal-team/index.html [https://perma.cc/BX2E-KRBH]; Robert Costa et al., *Trump Hires Giuliani, Two Other Attorneys Amid Mounting Legal Turmoil Over Russia*, WASH. POST (Apr. 19, 2018), https://www.washingtonpost.com/politics/trump-hires-giuliani-two-other-attorneys-amid-mounting-legal-turmoil-over-russia/2018/04/19/8346a7ca-4418-11e8-8569-26fda6b404c7_story.html?noredirect=on [https://perma.cc/C5SW-UQZH].

that his relationship with Mueller would benefit the President.[6] Giuliani reminded a CNN correspondent that he had "known Mueller for a long time" and that he and Mueller had "worked together in the Justice Department as well as when Mueller was FBI director and Giuliani was New York's mayor."[7] Although Giuliani initially stated that he hoped to bring Mueller's investigation to a satisfactory conclusion within a week or two,[8] that ambition obviously was not realized, and the investigation was not concluded until March 22, 2019.[9]

It is unsurprising that veteran white-collar criminal defense lawyers might believe that their long professional relationships with prosecutors would afford them credibility when negotiating over aspects of a case or arguing their client's position in connection with an investigation. They might also believe that their relationships with a prosecutor gives them special insight into the prosecutor's likely approaches to certain situations or favored strategies or tactics, and that they are thus uniquely qualified to represent their client in the case at hand. For that matter, lawyers advocating for their clients routinely attempt to persuade government officials in various contexts. But assuming Dowd and Giuliani made the statements regarding Mueller that reporters attributed to them, it is possible to interpret those remarks as perhaps stating or implying Dowd's and Giuliani's ability to *improperly* influence the direction or outcome of the Russia investigation.[10] That way trouble lies. Beyond any potential criminal consequences that might attend a lawyer's suggested exercise of improper influence over a public official or governmental body,[11] Model Rule of Professional Conduct 8.4(e) provides that it is professional misconduct for a lawyer to "state or imply an ability

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6. *See generally* Bob Fredericks, *Rudy Giuliani Joins Trump Legal Team, Hopes to End Russia Probe in 'a Week or Two'*, N.Y. POST (Apr. 19, 2018) https://nypost.com/2018/04/19/rudy-giuliani-may-be-joining-trumps-legal-team/?mod=mktw [https://perma.cc/5J4A-8R2F] (reporting Giuliani's stated attempt to bring the Mueller probe to a quick conclusion, apparently based in large part on his long relationship with Robert Mueller and his great respect for him).

7. Brown, *supra* note 5.

8. Fredericks, *supra* note 6.

9. *Mueller Finds No Collusion with Russia, Leaves Obstruction Question Open*, A.B.A. NEWS (Mar. 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/mueller-concludes-investigation [https://perma.cc/8MYD-BXV9] (reporting that Mueller concluded his investigation and submitted a report to Attorney General William Barr on March 22, 2019).

10. *See, e.g.*, Aaron Keller, *In Boasting About Trump Role, Rudy Giuliani Came Close to Breaking Ethics Rules*, LAW & CRIME (Apr. 20, 2018), https://lawandcrime.com/legal-analysis/in-boasting-about-trump-role-rudy-giuliani-came-close-to-breaking-ethics-rules/ [https://perma.cc/AZX7-L9S5] (noting the competing possible interpretations of Giuliani's comments—one ethical, and one possibly not); Aaron Keller, *Ex-Trump Attorney John Dowd May Have Committed Professional Misconduct (If This Is True)*, L. & CRIME (Mar. 23, 2018), https://lawandcrime.com/trump/ex-trump-attorney-john-dowd-may-have-committed-professional-misconduct-if-this-is-true/ [https://perma.cc/N5LG-FT32] (discussing the fine line between an innocent interpretation of Dowd's reported statement and an ethics violation).

11. *See, e.g.*, 18 U.S.C. § 371 (2018) (criminalizing conspiracy to commit a crime against the United States); 18 U.S.C. § 201 (2018) (criminalizing the bribery of public officials).

to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law."[12]

The ethical prohibition against lawyers' suggestion of the ability to improperly influence government agencies or officials pre-dates the *Model Rules*. DR 9-101(C) of the predecessor *Model Code of Professional Responsibility* provided that "[a] lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."[13] DR 9-101(C) derived from Canon Nine of the *Model Code*, which expressed the norm that lawyers should avoid the appearance of professional impropriety.[14] The drafters of the *Model Rules* discarded the *Model Code*'s appearance of impropriety standard because it was unreasonably vague.[15] The *Model Rules* drafters retained the ban on lawyers' promises or suggestions of the ability to exercise improper influence over government agencies or officials, however, on the theory that such conduct damages the legal profession.[16] In particular, the legal profession is harmed when lawyers state or imply their ability to improperly sway government officials or entities because lawyers as a whole consequently earn an unfair and unsavory reputation "as 'fixers' rather than as zealous advocates."[17] Moreover, lawyers' claims or suggestions that they can improperly influence government agencies or officials serve no legitimate purpose "and undermine public confidence in the legal system," even if the lawyers are puffing or "the implication is false."[18]

Naturally, conduct that violates Model Rule 8.4(e) may also violate other rules of professional conduct. These include (1) Model Rule 1.4(a)(5), which obligates a lawyer to "consult with [a] client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law";[19] (2) Model Rule 3.5(a), which prohibits lawyers from attempting to influence judges or other officials through illegal means;[20] (3) Model Rule 4.1(a), which prohibits lawyers who are representing clients from knowingly making false statements of material fact or law to third persons;[21] (4) Model Rule 7.1, which forbids lawyers from making

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12. MODEL RULES OF PROF'L CONDUCT R. 8.4(e) (AM. BAR ASS'N 2019) [hereinafter MODEL RULES].

13. MODEL CODE OF PROF'L RESPONSIBILITY DR 9-101(C) (AM. BAR ASS'N 1969) [hereinafter MODEL CODE] (footnote omitted).

14. MODEL CODE Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

15. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 69.10, at 69-30 to -31 (4th ed. 2015 & Supp. 2016-2).

16. *Id.* at 69-29.

17. *Id.*

18. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2(f), at 1425 (2018–2019 ed.).

19. MODEL RULES R. 1.4(a)(5).

20. MODEL RULES R. 3.5(a).

21. MODEL RULES R. 4.1(a) ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . ."). Model Rule 4.1(a) would not apply where a lawyer made a false statement of material fact or law only to a client because "a third person" as used in Rule

false or misleading statements about themselves or their services;[22] (5) Model Rule 8.2(a), which prohibits certain comments about the qualifications and integrity of judges and similarly-situated officials, as well as candidates for judicial and legal offices;[23] (6) Model Rule 8.4(b), which bars lawyers from committing criminal acts that reflect adversely on their honesty, trustworthiness, or fitness as a lawyer in other respects;[24] (7) Model Rule 8.4(c), which prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;[25] and (8) Model Rule 8.4(d), which prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice.[26] Even so, Model Rule 8.4(e) has independent value for several reasons. First, as noted earlier, the rule recognizes that lawyers' stated or implied abilities to improperly influence government agencies or officials potentially undermine public confidence in the legal system and aims to prevent that harm.[27] Second, Model Rule 8.4(e) pointedly discourages misconduct by lawyers that has the unique potential to bring the legal profession into disrepute.[28] Third, the rule reminds lawyers that clients may seek improper assistance or assume that it will be provided, and that lawyers must resist these requests and avoid creating or fueling such expectations.[29]

Unfortunately, Model Rule 8.4(e) and state analogs do not always appear to be well understood or appreciated by lawyers. Certainly, all lawyers should recognize that extreme misconduct such as soliciting money from clients to bribe judges or other government officials violates the rule,[30] as does a lawyer's simple

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4.1(a) means people other than the lawyer's client. *See* DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 548, 723 (2d ed. 2016).

22. MODEL RULES R. 7.1.

23. *See* MODEL RULES R. 8.2(a) ("A lawyer shall not make a statement that the 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.").

24. MODEL RULES R. 8.4(b).

25. MODEL RULES R. 8.4(c).

26. MODEL RULES R. 8.4(d).

27. *See In re* Disciplinary Action Against Andrade, 736 N.W.2d 603, 606 (Minn. 2007) (reasoning that a Rule 8.4(e) violation requires a lawyer's disbarment because implying the ability to improperly influence a government agency or official erodes the integrity of the judicial system, which all lawyers swear to uphold).

28. *See* 2 HAZARD & HODES, *supra* note 15, § 69.10, at 69-29 to -30 (explaining that although the conduct prohibited by Model Rule 8.4(e) is prohibited by other *Model Rules*, Rule 8.4(e) reminds lawyers that clients may either expect them to improperly influence government agencies or officials or assume that they will do so, and that lawyers should not fuel such expectations or assumptions).

29. *Id.*

30. *See, e.g.*, *In re* Dickson, 968 So. 2d 136, 139, 142 (La. 2007) (disbarring a lawyer who told a client that if he paid him $18,000, he would pay off a judge and the district attorney to obtain a sentence of probation); *In re Disciplinary Action Against Andrade*, 736 N.W.2d at 606–07 (disbarring a lawyer who tried to capitalize on the client's suggestion that the lawyer bribe a judge or a police officer to swindle the client; the client owed the lawyer legal fees and the lawyer attempted to collect those fees and more by falsely telling the client that he needed the money for bribes); Ky. Bar Ass'n v. White, 783 S.W.2d 883, 884 (Ky. 1990) (applying DR 9-101(C) in disbarring a lawyer who never intended to bribe a judge despite soliciting money from his clients to do so; the lawyer faked the bribery scheme to obtain a higher legal fee).

suggestion that she may be able to bribe a judge,[31] or that she has positioned a client to achieve a desired result by laying the groundwork for the client to bribe a government official,[32] but less obvious forms of misconduct may also violate Rule 8.4(e).[33] For example, one lawyer hiring another lawyer as co-counsel who is close friends with a judge to force the judge's recusal in a case is unethical.[34] In some instances, the meaning of "improperly" as used in the rule arguably may be unclear.[35] Plus, the rule's prohibition on "implying" an ability to "influence" improperly a government agency or official potentially encompasses a broad range of alleged misconduct.[36]

On the other side of the coin, courts occasionally struggle to apply Rule 8.4(e) and equivalent rules. In *In re Isaac*,[37] for example, the court declined to find that the lawyer violated the analogous New York rule because his statements about his ability to influence the court were "made in private conversation" rather than within "the precincts of a court."[38] That was an inexplicable result. Neither Model Rule 8.4(e) nor DR 9-101(C) are or were limited to lawyer's statements or

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31. *See, e.g.*, Fla. Bar v. Swickle, 589 So. 2d 901, 905 (Fla. 1991) (disbarring a lawyer who led an undercover agent to believe that the lawyer could bribe a judge); *In re* Epstein, 87 N.E.3d 470, 470–71 (Ind. 2017) (suspending a lawyer who bragged to his client about his personal relationships with judges in a way that implied he was able to improperly influence them); Office of Disciplinary Counsel v. Atkin, 704 N.E.2d 244, 245–46 (Ohio 1999) (applying DR 9-101(C) in disbarring a lawyer for suggesting that he could bribe a federal judge).

32. *See, e.g.*, *In re* Gorecki, 802 N.E.2d 1194, 1195–96, 1205 (Ill. 2003) (suspending a lawyer who left messages on an acquaintance's answering machine suggesting that that the acquaintance's boyfriend could get a job by going through the lawyer's firm to bribe a local politician).

33. *See, e.g.*, *In re* Mole, 822 F.3d 798, 805–06 (5th Cir. 2016) (concluding that a lawyer violated Rule 8.4(e) by hiring as co-counsel a lawyer who was friends with the district judge to motivate the judge to recuse himself from the case); *In re* Holste, 358 P.3d 850, 855, 857 (Kan. 2015) (finding that a part-time county prosecutor violated Rule 8.4(e) by threatening to file criminal charges to gain an advantage for his client in a civil action even though the prosecutor never stated or implied an ability to influence the judge who would have heard either matter); Phila. Bar Ass'n, Prof'l Guidance Comm. Op. 87-28, 1987 WL 10975, at *1 (1987) (advising a lawyer regarding a proposed ad featuring an image of Lady Justice with tipped scales and the slogan "Tip the scales in your favor!" and opining that the slogan violated Rule 8.4(e) because it implied that the lawyer enjoyed impermissible and unsubstantiated influence with the court system and its employees).

34. *In re Mole*, 822 F.3d at 805–06 (concluding that such conduct violates Rules 8.4(d) and (e)).

35. *See* W.J. Michael Cody, *Special Ethical Duties for Attorneys Who Hold Public Positions*, 23 MEM. ST. U. L. REV. 453, 471 (1993) (asserting that "[t]he meaning of the word 'improperly' in Rule 8.4(e) is unclear").

36. *See, e.g.*, *In re* Anderson, 804 N.E.2d 1145, 1145 (Ind. 2004) (disciplining a deputy prosecutor who, when stopped by a police officer on suspicion of driving while intoxicated, showed the officer his deputy prosecutor's badge and suggested that it would change the officer's attitude); *In re* Edwards, 694 N.E.2d 701, 706–07 (Ind. 1998) (finding that the lawyer violated Rule 8.4(e) when he told his client in a termination of parental rights case that he knew the judge "and that he played cards and had dinner with him sometimes" and indicated that he would talk to the judge and "see which way he was going to lean" when deciding whether to return the client's son to her); Ala. State Bar, Formal Op. 1993-12 (1993) (concluding that Rule 8.4(e) prohibits a lawyer who serves as a hearing officer for a state agency from representing clients before the agency); Phila. Bar Ass'n, Prof'l Guidance Comm. Op. 91-33, 1991 WL 325879, at *1 (1991) (concluding that a lawyer's quasi-judicial role as a member of an administrative agency before which another lawyer in the firm with which he is associated represents clients would violate Rule 8.4(e)).

37. 903 N.Y.S.2d 349, 351 (App. Div. 2010).

38. *Id.* (quoting *In re* Erdmann, 301 N.E.2d 426, 427 (N.Y. 1973)).

conduct in court or other public forums.[39] The harms that these rules are or were intended to guard against may be fostered in private as well as in public. Plus, given the subtlety such plans usually require, private conversations are precisely where lawyers should be expected to state or imply the ability to improperly influence government agencies or officials or to achieve results by illegal or unlawful means.

Looking ahead, Part I of this Article analyzes the essential aspects of Model Rule 8.4(e). In doing so, it (a) illuminates the range of statements or conduct that violate the rule; (b) explains that lawyers may violate Model Rule 8.4(e) even where they are incapable of exercising improper influence over a government agency or official, fail in those efforts, or do not even attempt such mischief; and (c) outlines the types of statements and conduct that constitute improper influence under Model Rule 8.4(e). Part II principally discusses former judges' use of the honorific "Judge" upon their return to law practice which, in some circumstances, may violate Model Rule 8.4(e) by implying the ability to influence the courts in which the former judges appear. Second, this Part analyzes references to judicial service by practicing lawyers who serve as judges *pro tempore* or hold similar judicial positions.

I. UNDERSTANDING THE ESSENTIAL ASPECTS OF MODEL RULE 8.4(E)

A. STATING OR IMPLYING THE ABILITY TO INFLUENCE IMPROPERLY A GOVERNMENT AGENCY OR OFFICIAL

To violate Model Rule 8.4(e) and state counterparts, a lawyer must, in fact, state or imply the ability to improperly influence a government agency or official.[40] In contrast, a mere offer of representation on a matter in which it superficially appears that the lawyer might have influence should not ordinarily suffice.[41] In general, though, a surprising range of statements by lawyers may be held to violate Model Rule 8.4(e).[42] *State ex rel. Counsel for Discipline of the*

39. *See* MODEL RULES R. 8.4(e) (imposing no courtroom or public forum limitations on lawyers' offending statements or conduct); MODEL CODE DR 9-101(C) (finding the same).

40. *See, e.g.*, State Bar of Mich., Comm. on Prof'l & Judicial Ethics Op. RI-352, 2011 WL 2315012, at *3 (2011) (reasoning that the mere offer of representation cannot be considered an attempt to imply an ability to influence improperly the outcome of an ethics committee panel interview where the lawyer's colleague is a member of the committee).

41. *See id.* at *4.

42. There is authority for the proposition that lawyers violate Rule 8.4(e) only by stating or implying their own ability to improperly influence government agencies or officials. A lawyer's statement that another lawyer is allegedly able to do such things does not violate Rule 8.4(e). *See, e.g.*, *In re* Howard, 912 S.W.2d 61, 63 (Mo. 1995) (finding no Rule 8.4(e) violation based on the lawyer's comment about opposing counsel "having an unusual amount of influence" with a judge because the lawyer never implied *his own* ability to improperly influence the judge). Although the *In re Howard* court understandably held on the facts presented that a lawyer's suggestion that an opposing lawyer could improperly influence a judge did not violate Rule 8.4(e), the rule is not as narrow as the court's interpretation might imply. For example, a lawyer's statement to a client or prospective client that the lawyer could not improperly influence a government agency or official but that her agent, co-counsel, or colleague acting on her behalf could do so would surely violate Model Rule 8.4(e). *See*

Nebraska Supreme Court v. Koenig[43] is an extreme example of conduct that crosses the line from zealous advocacy on a client's behalf to the attempted improper influence of a government official.

Nebraska lawyer Lyle Koenig's paralegal, Dustin Garrison, was cited by a state trooper for driving without a valid vehicle registration or proper proof of insurance.[44] Koenig represented Garrison in his criminal case.[45] Garrison's case was assigned to the chief deputy county attorney at the time, Rick Schreiner.[46] Koenig wrote to Schreiner regarding Garrison's case and asserted that the newly-elected county attorney was violating the same vehicle registration law for which Garrison had been cited.[47] Koenig enclosed with his letter a photograph of the new county attorney's allegedly expired license plate and a copy of a draft motion to appoint a special prosecutor, which he threatened to file if Schreiner did not dismiss Garrison's case.[48] The draft motion to appoint a special prosecutor alleged that the new county attorney was violating the same law that Garrison was charged with violating because his car was not properly registered in the county where he lived.[49] Koenig concluded his letter transmitting the draft motion by stating, "Obviously, these motions are only proposed. Can't you dismiss [this case]? Our lips, of course, are forever sealed if [Garrison's] case gets dismissed."[50]

Koenig wrote Schreiner again a few days later, this time "asking, 'Does this case have any settlement possibility before we file the enclosures?'"[51] Enclosed with Koenig's letter was a draft motion to dismiss Garrison's case for selective prosecution which alleged that the new county attorney was driving an improperly registered motor vehicle.[52]

Koenig ultimately acknowledged that "he hoped the information regarding the county attorney's alleged violation [of the vehicle registration law] would persuade Schreiner to dismiss the corresponding charge against Garrison."[53] He "also stated that he meant the sealed lips remark [in his initial letter] only as a

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Model Rules R. 8.4(a) (providing that it is professional misconduct for a lawyer to "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").

43. 769 N.W.2d 378, 383 (Neb. 2009) (disapproving of *Koenig* to the extent that it could be read as limiting the Nebraska version of Model Rule 3.5(a)(1) solely to violations of criminal law), *disapproved of on other grounds by* State *ex rel*. Counsel for Discipline of the Neb. Sup. Ct. v. Gast, 896 N.W.2d 583, 595 (Neb. 2017).

44. *See* 769 N.W.2d at 382.

45. *Id*.

46. *Id*.

47. *Id*.

48. *Id*.

49. *See id*. ("The motion alleged that the 'county attorney is presently in violation of the law, in that his personal vehicle is not properly registered in Gage County, Nebraska.'")

50. *Id*. (alterations in original).

51. *Id*.

52. *Id*.

53. *Id*.

joke" and thought that Schreiner would see it that way.[54] Schreiner obviously did not share Koenig's sense of humor, because the state installed a special prosecutor for Garrison's case.[55] Koenig never filed any of his threatened motions and made no issue of the new county attorney's vehicle registration as Garrison's case proceeded.[56] Garrison pled guilty to one of the charges against him and the other charge was dismissed.[57]

Disciplinary authorities charged Koenig with violating several Nebraska rules of professional conduct, including sections 3–508.4(d) and (e), which track Model Rules 8.4(d) and (e).[58] With respect to section 3–508.4(d), which prohibits a lawyer from engaging in conduct prejudicial to the administration of justice, the Nebraska Supreme Court wrote:

> A lawyer, for example, can argue to a prosecutor that his or her client should not be prosecuted for an offense because "everybody else is doing the same behavior" and no other prosecutions are occurring. Or, it is even within the bounds of our ethical rules to argue, that a client should not be prosecuted for something because the prosecutor is allegedly doing the same prohibited behavior. But it is altogether different—and a violation of the rules of professional conduct—to offer to a prosecutor to stay quiet about something the prosecutor has done (or is doing) in exchange for dismissing a charge that has been lodged against one's client. It does not take a great deal of imagination to see how this type of behavior taints the adversary system and prejudices the administration of justice.[59]

Koenig was guilty of exactly the conduct that the court condemned.[60] He offered to stay silent about what he thought was illegal conduct by the new county attorney in exchange for Schreiner's dismissal of the criminal charges against Garrison.[61] The court considered Koenig's conditional threat to reveal the new county attorney's allegedly criminal conduct to be intolerable.[62]

The court rejected as incredible Koenig's claim that he was only joking about seeking the appointment of a special prosecutor or highlighting the new county attorney's alleged violation of the vehicle registration law.[63] Even if Koenig did not intend to file any of the motions he prepared, Schreiner had to take his threats to do so seriously.[64] In sum, Koenig's conduct clearly was prejudicial to the administration of justice.[65]

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54. *Id.*
55. *Id.*
56. *See id.*
57. *Id.*
58. *Id.*
59. *Id.* at 383–84.
60. *See id.* at 382 (describing Koenig's misconduct).
61. *Id.* at 384.
62. *See id.*
63. *Id.*
64. *Id.*
65. *Id.*

Similarly, the court determined that Koenig violated section 3–508.4(e), which, again, tracks Model Rule 8.4(e).[66] As the *Koenig* court explained, section 3–508.4(e) "prohibits the mere suggestion that a lawyer can or will act to exert improper influence on a public official through unethical or unlawful means."[67] According to the court, "[i]nherent in drafting and sending the letters at issue [was] the suggestion that Koenig would act to exert improper influence on Schreiner and the county attorney through unethical means."[68]

The disciplinary referee assigned to Koenig's case recommended that he be suspended from practicing law for one year.[69] The court instead suspended Koenig from practice for 120 days.[70]

Although Koenig's conduct was improper and plainly supported a Model Rule 8.4(d) violation as being prejudicial to the administration of justice, the Rule 8.4(e) violation is perhaps superficially harder to understand given the language of the latter rule. Model Rule 8.4(e) is arguably written in a way that suggests a prohibited statement or act must be made to, or directed at, someone other than the targeted government official or agency for there to be a violation.[71] From that perspective, Koenig's communications with Schreiner—the very government official he sought to improperly influence—could not have violated Rule 8.4(e).[72]

But that view would reflect an incorrect reading of Model Rule 8.4(e) for at least three reasons. First, although Model Rule 8.4(e) certainly applies to statements to people other than the public official or agency to be influenced, that is not its only application. In fact, the rule clearly anticipates misconduct in the form of statements made to, or conduct directed at, the government agency or official sought to be influenced because it imposes no limitation on the audience for prohibited statements or conduct.[73] The rule's drafters could have imposed such a limitation had they wanted to do so. Of course, courts interpret rules of professional conduct according to the same principles that govern statutory

66. *Id.*; *see* MODEL RULES R. 8.4(e).

67. *Koenig*, 769 N.W.2d at 384.

68. *Id.*

69. *Id.* at 381.

70. *Id.* at 386.

71. *See* MODEL RULES R. 8.4(e) ("It is professional misconduct for a lawyer to . . . 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. . . .").

72. It is possible that Koenig really intended to improperly influence the newly-elected county attorney in the sense that upon being informed of Koenig's intended motions, the county attorney would direct his subordinate Schreiner to drop the improper vehicle registration charge against Garrison. *See Koenig*, 769 N.W.2d at 384 ("Inherent in drafting and sending the letters at issue is the suggestion that Koenig would act to exert improper influence on Schreiner *and the county attorney* through unethical means." (emphasis added)). Such a scheme would violate Model Rule 8.4(e).

73. *See, e.g.*, *In re* Johnson, 74 N.E.3d 550, 552–53 (Ind. 2017) (involving a county's chief public defender who leveraged his position to induce the probation officer of a woman who broke off an affair with him to file a violation against her in an effort to force her to rekindle their relationship).

interpretation,[74] meaning that unambiguous rules must be enforced as written.[75] In this respect, Model Rule 8.4(e) is unambiguous. With that recognition goes any chance of a successful defense based on challenged communications being directed solely at the intended target of improper influence.

Second, and relatedly, it is clearly possible for lawyers to state or imply their ability to improperly influence government agencies or officials through statements made to the officials or agency representatives.[76] Imagine a case in which a lawyer either bluntly or impliedly threatens a prosecutor with adverse employment action based on the lawyer's close relationship with the prosecutor's supervisor if the prosecutor does not dismiss or reduce charges against the lawyer's client. Such conduct would doubtlessly violate Model Rule 8.4(e), among other rules of professional conduct.[77] Moreover, recall that Model Rule 8.4(e) makes it professional misconduct for a lawyer to "*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*."[78] It certainly is possible for a lawyer to convey to a responsible government official the lawyer's unethical or illegal plan to achieve the benefit or result the lawyer wants from the official or from the agency or office the official represents; indeed, that is just what the lawyer did in *Koenig*.[79] So, again, the plain and unambiguous language of Model Rule 8.4(e) forecloses an audience-based defense to an alleged violation.

Third, the types of misconduct punished in *Koenig* and outlined immediately above have the potential to bring the legal profession into disrepute—again, a harm that Model Rule 8.4(e) aims to prevent.[80]

Moving down the continuum from the ham-handed pressure tried in *Koenig*, lawyers must appreciate that various forms of name-dropping potentially

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74. People v. Easton, 123 N.E.3d 1074, 1078 (Ill. 2018); Comm'n for Lawyer Discipline v. Hanna, 513 S.W.3d 175, 178 (Tex. App. 2016).

75. *See* Phillips v. O'Neil, 407 P.3d 71, 73 (Ariz. 2017) (stating that unambiguous court rules are to be applied without further analysis (quoting Wade v. Ariz. State Ret. Sys., 390 P.3d 799, 801 (Ariz. 2017)); Sanders v. McLaren-Macomb, 916 N.W.2d 305, 312 (Mich. Ct. App. 2018) (quoting Decker v. Trux R Us, Inc., 861 N.W.2d 59, 63 (Mich. Ct. App. 2014) (explaining that courts must apply clear and unambiguous court rules as written); Hotz v. Hotz, 917 N.W.2d 467, 475 (Neb. 2018) ("Absent a statutory indication to the contrary, language contained in a Supreme Court rule is to be given its plain and ordinary meaning." (footnote omitted)).

76. *See, e.g.*, *In re* Pstrak, 575 S.E.2d 559, 559–560 (S.C. 2003) (suspending a lawyer who wrote letters to court clerks, judges, and a prosecutor whom he hoped to improperly influence for violating South Carolina Rule 8.4(f), which tracks Model Rule 8.4(e)).

77. *See, e.g.*, MODEL RULES R. 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

78. MODEL RULES R. 8.4(e) (emphasis added).

79. *See* State *ex rel*. Counsel for Discipline of the Neb. Sup. Ct. v. Koenig, 769 N.W.2d 378, 384 (Neb. 2009) (explaining that Koenig violated section 3-508.4(d) because he "offered to keep mum about what he believed to be illegal conduct by the county attorney in exchange for the dismissal of the charges against Garrison," which amounted to "a conditional threat to disclose the county attorney's alleged violation" of the law), *disapproved of on other grounds by* State *ex rel*. Counsel for Discipline of the Neb. Sup. Ct. v. Gast, 896 N.W.2d 583, 595 (Neb. 2017).

80. *See supra* notes 14–16 and accompanying text.

implicate Model Rule 8.4(e).[81] For example, in *In re Shapiro*,[82] the lawyer represented a client in attempting to obtain payment under the Indiana Wage Claim Act from the client's former employer.[83] In a letter to the former employer, the lawyer stated that the Indiana Attorney General's office was responsible for enforcing the act, he had gone to high school with the former attorney general, and he did not think that he would have much trouble in getting the current attorney general's "attention in th[e] matter."[84] The lawyer agreed with disciplinary authorities that he violated Rule 8.4(e) and the Indiana Supreme Court publicly reprimanded him for the offense.[85] Even subtler forms of suggested or implied improper influence, however, may support a Rule 8.4(e) violation.[86]

In re Reines[87] illustrates the ease with which lawyers may stumble into Rule 8.4(e) violations. Edward Reines represented the appellants in two companion cases known colloquially as *Promega* in the United States Court of Appeals for the Federal Circuit and presented oral argument in both cases on the same day.[88] The next day, then-Chief Judge Randall Rader, who had not participated in either case, emailed Reines.[89] In his email message, Judge Rader, reported that the judges on the *Promega* panels at a private judges' lunch had praised Reines's oral arguments.[90] Judge Rader also referred to his special friendship with Reines, described Reines as his friend, and gushed that he was "really proud to be [Reines's] friend today!"[91] Judge Rader further wrote: "You bring great credit on yourself and all associated with you! And actually I not only do not mind, but encourage you to let others see this message."[92] Judge Rader closed the message by identifying himself as Reines's "friend for life."[93]

Reines shared Judge Rader's email message with at least thirty-five current and prospective clients, and in accompanying remarks solicited their business

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81. *See, e.g.*, Cuyahoga Cty. Bar Ass'n v. Wise, 842 N.E.2d 35, 37, 40–41 (Ohio 2006) (finding that a lawyer who was representing the parents of a child in a custody dispute with the child's aunt violated a predecessor rule when he told one of the aunt's supervisors at work "that he knew 'Bill Mason,' referring to the [local] Prosecuting Attorney, and would personally go see him in order to get kidnapping charges filed" against the aunt); State *ex rel*. Okla. Bar Ass'n v. Moon, 295 P.3d 1, 9 (Okla. 2012) (violating Rule 8.4(e) by naming respected members of the local legal community in an effort to avoid prosecution and obtain favorable treatment following alcohol-related offenses).

82. 932 N.E.2d 1234 (Ind. 2010).

83. *Id*.

84. *Id*.

85. *Id*.

86. *See, e.g.*, *In re* Smith, 991 N.E.2d 106, 109 (Ind. 2013) (involving a lawyer who reported that he mentioned the names of a criminal court judge and a former employee of a governmental bail project in a conversation with an agent of the bail project to try to improperly influence the agent).

87. 771 F.3d 1326 (Fed. Cir. 2014).

88. *Id*. at 1328.

89. *Id*.

90. *Id*. at 1328, 1336 n.1.

91. *Id*.

92. *Id*. at 1328–29, 1336 n.1.

93. *Id*. at 1328, 1336 n.1.

based on the message.[94] All told, Reines shared the message with more than seventy people, most of whom were lawyers.[95] In some instances, Reines told the recipients that this sort of praise from a judge was extraordinary.[96] The message had its intended effect; clients and prospects told Reines that they shared Judge Rader's respect for his legal skills, that they would be delighted to work with him again, and that they would keep him in mind for future engagements, among other congratulatory responses.[97]

Soon thereafter, the Federal Circuit ordered Reines to show cause as to why he should not be disciplined for violating Model Rule 8.4(e).[98] The court opted to apply Model Rule 8.4(e) rather than looking to the professional conduct rules of any state because it believed that Model Rule 8.4(e) established the appropriate standard by which to measure Reines's conduct.[99]

Reines responded that his conduct did not violate the Model Rule 8.4(e) prohibition on stating or implying an ability to improperly influence a government official or agency—here the Federal Circuit—for two reasons.[100] First, he asserted that he was entitled to circulate Judge Rader's email message because information regarding his oral advocacy skills was a factor that clients could properly consider when selecting counsel to represent them.[101] According to Reines, Judge Rader's email message did not suggest his ability to improperly influence the court or Judge Rader but was merely "an 'unusually generous compliment'" from a judge about his oral advocacy skills.[102] Indeed, Reines later claimed, "it never occurred to [him] that the selected recipients of the email would think that Judge Rader could be improperly influenced because an advocate before him happened to be a friend from their years of professional interaction."[103] Second, Reines asserted a First Amendment right to circulate the judge's message as he did.[104]

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94. *Id*. at 1329.

95. *Id*.

96. *Id*. at 1326, 1329 ("Respondent told some recipients that this type of feedback was 'unusual' or 'quite unusual.'").

97. *Id*. at 1331, 1336 nn.7–8.

98. *Id*. at 1329.

99. *Id*. at 1330. Federal courts often apply the *Model Rules* rather than states' rules of professional conduct when scrutinizing lawyers' conduct. *Id*. at 1336 n.3 (offering examples).

100. *Id*. at 1329.

101. *Id*.

102. *Id*. at 1330.

103. Ryan Davis, *Calif. State Bar Clears Weil Partner of Rader Email Scandal*, LAW360 (Oct. 1, 2015), https://www.law360.com/articles/709610/calif-state-bar-clears-weil-partner-of-rader-email-scandal [https://perma.cc/G4XB-F9DY] (quoting Rader in seeking *pro hac vice* admission to represent a client before the Patent Trial and Appeal Board).

104. *In re Reines*, 771 F.3d at 1329.

The *Reines* court acknowledged that a lawyer's dissemination of compliments by a judge contained in a public document would not alone violate Model Rule 8.4(e).[105] In this case, however, Reines's conduct violated the rule for five reasons.[106]

First, Judge Rader's email message both expressly portrayed and implied a special relationship with Reines.[107] As the court explained, "[t]he very fact that the email was a private communication rather than a public document implie[d] a special relationship" between Reines and the judge.[108] Judge Rader's revelation "of internal court discussions (which would be ordinarily treated as confidential) about [Reines's] performance in a pending case" further suggested "an unusually close relationship" between the two men.[109] Were that not enough, in disseminating Judge Rader's email to clients and prospects, Reines described Judge Rader's praise as "unusual" or "quite unusual," and mentioned his own "stature" within the Federal Circuit and his chairmanship of the court's Advisory Council—all of which conveyed a special relationship with Judge Rader and the other judges on the court.[110]

Second, recipients of Reines's email message transmitting Judge Rader's email certainly understood Judge Rader's email to suggest that Reines shared a special relationship with him and perhaps with other Federal Circuit judges.[111] This was apparent from their responses to Reines.[112]

Third, Reines's email message transmitting Judge Rader's laudatory email message went beyond suggesting that clients and prospective clients should retain him in Federal Circuit cases because he was a gifted appellate advocate.[113] Rather, his message suggested that when selecting counsel, they should consider his special relationship with the court.[114] Indeed, he allegedly "touted his role as chair of th[e] court's Advisory Council, and stated that his 'stature' within the court had helped 'flip' a $52 million judgment in favor of his client and that he 'would love to help [the recipient of his message] do the same.'"[115] When another lawyer in Reines's firm forwarded Judge Rader's message to a client or

105. *Id.* at 1330 (citing Dwyer v. Cappell, 762 F.3d 275, 283–84 (3d Cir. 2014); Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd., 632 F.3d 212, 221–22 (5th Cir. 2011); Alexander v. Cahill, 598 F.3d 79, 92 (2d Cir. 2010)).

106. *In re Reines*, 771 F.3d at 1330.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1330–31.

112. *See id.* at 1331.

113. *Id.*

114. *Id.*

115. *Id.* (alteration in the original). For a different—and perfectly innocent—characterization of Reines's email message by a professional responsibility expert with intellectual property litigation experience, see David Hricik, *The Reines Matter: My Long-Promised Post*, PATENTLY-O (Nov. 30, 2014), https://patentlyo.com/hricik/2014/11/reines-matter-promised.html [https://perma.cc/MKE4-CUE4].

prospective client and said that Reines knew the Federal Circuit judges extremely well, Reines sat silently by.[116]

Fourth, in circulating Judge Rader's email message to clients and prospective clients, Reines "sought to directly influence" their choice of counsel.[117] In his cover email message, he frequently wrote, "[a]s you continue to consider us for your Federal Circuit needs, I thought the below email from Chief Judge Rader might be helpful."[118] Several prospective clients stated that they would take the judge's views into account when selecting counsel for Federal Circuit appeals.[119]

Finally, Judge Rader's email message and Reines's cover email to clients and prospective clients implied that the Federal Circuit bench "would look favorably" on litigants' retention of Reines.[120] After all, Judge Rader invited Reines to share his email message with others and, in doing so, Reines suggested that the recipients "should listen to the Federal Circuit judges when selecting counsel."[121]

The *Reines* court concluded that it "would blink reality" not to view Reines's conduct as suggesting that parties should hire him to handle their appeals because his special relationship with the Federal Circuit would yield favorable results.[122] Under the circumstances, his distribution of Judge Rader's email message to "clients and potential clients impl[ied] an ability to improperly influence" the court and consequently violated Model Rule 8.4(e).[123] The court settled on a public reprimand as appropriate discipline.[124]

In reprimanding Reines, the court necessarily rejected his First Amendment defense.[125] The *Reines* court noted that although courts may not broadly suppress lawyers' advertising efforts, there are limits on lawyers' right to communicate with clients and prospective clients.[126] In particular, courts are vitally interested in upholding the integrity of the legal profession, and they are likewise interested in protecting the public from misleading commercial speech by lawyers.[127] Here, Reines's communications with clients and prospective clients either were misleading because he had no ability to influence Judge Rader or the other Federal Circuit judges, or, if true, indicated his ability to improperly influence the

116. *In re Reines*, 771 F.3d at 1331.
117. *Id.*
118. *Id.* (alteration in original) (quoting many of Reines's email messages).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 1331–32 (quoting MODEL RULES R. 8.4(e)).
124. *Id.* at 1332.
125. *Id.* at 1332–33.
126. *Id.* at 1332.
127. *See id.* at 1333 (citing Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978)).

court.[128] Either way, according to the court, Reines's emails did not deserve First Amendment protection.[129]

Reines reportedly was "aghast at the suggestion" that he had implied he "could somehow improperly influence case outcomes" and denied that was his intent in circulating Judge Rader's email message.[130] The Federal Circuit obviously drew a contrary conclusion.[131]

Once Reines lost his innocent explanation argument, he was in trouble because his First Amendment defense stood little chance of success.[132] As a general rule, courts may restrict lawyers' speech when it conflicts with rules of professional conduct that serve substantial government interests, such as protecting public confidence in the legal system.[133] For example, courts routinely reject lawyers' First Amendment arguments when disciplining them for violating Model Rule 8.2(a),[134] which provides that a lawyer "shall not make a statement that the 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 such office.[135] So limiting lawyers' First Amendment rights is necessary because "false statements by a lawyer can undermine public confidence in the administration of justice."[136] As previously noted, Model Rule 8.4(e) prohibits lawyers from stating or implying an ability to improperly influence a government agency or official in large part because such conduct undermines public confidence in the legal system.[137] It therefore makes sense that the First Amendment should not protect statements by lawyers that violate Model Rule 8.4(e).

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128. *Id.*

129. *See id.* (observing that Reines "cites no authority and we are aware of none which calls into question the validity of Model Rule 8.4(e) or recognizes a right to suggest a special relationship with a judge to improperly influence a court").

130. Davis, *supra* note 103.

131. *See In re Reines*, 771 F.3d at 1330–32 (explaining why Reines's conduct linked to Judge Rader's email message violated Model Rule 8.4(e)).

132. *See generally* State v. Lang, 323 P.3d 740, 745 (Ariz. Ct. App. 2014) (recognizing that a lawyer's First Amendment commercial speech rights may yield to the state's interest in regulating the legal profession (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1073 (1991)).

133. *See In re* Hawver, 339 P.3d 573, 590 (Kan. 2014).

134. *See, e.g.*, *In re* Shearin, 765 A.2d 930, 938 (Del. 2000) (stating that there are ethical duties imposed upon Delaware lawyers that qualify their constitutional right to free speech); *In re* Arnold, 56 P.3d 259, 267–68 (Kan. 2002) (rejecting the lawyer's First Amendment claim); *In re* Madison, 282 S.W.3d 350, 353–54 (Mo. 2009) (discussing the state's ability to limit lawyers' First Amendment rights); Bd. of Prof'l Responsibility v. Slavin, 145 S.W.3d 538, 548–550 (Tenn. 2004) (finding the lawyer's First Amendment defense unavailing); Lawyer Disciplinary Bd. v. Hall, 765 S.E.2d 187, 198 (W. Va. 2014) (holding that a lawyer's statement that violates Rule 8.2(a) is not protected by the First Amendment).

135. MODEL RULES R. 8.2(a).

136. MODEL RULES R. 8.2 cmt. 1.

137. ROTUNDA & DZIENKOWSKI, *supra* note 18, § 8.4-2(f), at 1425.

B. THE LAWYER'S FAILURE OR INABILITY TO WIELD IMPROPER INFLUENCE

Reines's denial of his intent to suggest an ability to improperly influence the judges on the Federal Circuit and his amazement that the recipients of his email might think he had the ability to unfairly sway Judge Rader raises an interesting question: can lawyers violate Model Rule 8.4(e) if they cannot exercise the influence they claim or never attempt to do so? The short answer to this question is yes.[138] A lawyer can violate Rule 8.4(e) "by either stating or implying an ability to improperly influence a government official whether there was ever any intent to exercise that influence or not."[139] It does not matter that a lawyer's stated or implied ability to improperly influence a government agency or official or to achieve results through illegal or unlawful means does not ripen into action.[140] After all, the legal profession is injured whenever lawyers state or imply their ability to engage in any of the conduct Model Rule 8.4(e) prohibits even if they cannot carry it out or would never go that route.[141]

State ex rel. Oklahoma Bar Ass'n v. Erickson[142] illustrates this position. In *Erickson*, a Tulsa lawyer, Paul Brunton, hired Creek County, Oklahoma lawyer William Erickson to help represent Harvey Capstick in a criminal matter.[143] Capstick was a regular civil and criminal litigant in Creek County.[144] He disdained the Creek County justice system and distrusted nearly all Creek County officials, including the judges and the lawyers in the district attorney's office.[145]

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138. *See id.* § 8.4-2(f), at 1425 (stating that the Model Rule 8.4(e) "prohibition applies whether or not the lawyer actually exercises the influence and whether or not the lawyer could, in fact, exercise such influence"); *see, e.g.*, *In re* Dahlberg, 611 N.E.2d 641, 645 (Ind. 1993) (disbarring a lawyer who told a client that her case should be appealed to the Supreme Court, falsely stated that Chief Justice William Rehnquist was a close friend, and said that this friendship would bolster her case; the lawyer did not even qualify for admission to the Supreme Court bar and thus he could not have represented the client before the Court); Bd. of Prof'l Responsibility v. Knudsen, 444 P.3d 72, 75–76, 78 (Wyo. 2019) (involving a lawyer who falsely told his divorce client that he and the judge were close friends and that he would occasionally talk to the judge privately about the case; in his disciplinary proceeding the lawyer swore that he told his client those things merely to reassure her and that the judge never would have had ex parte communications about the case); Va. Legal Ethics Op. 1360, 1999 WL 348513, at *1 (Va. State Bar Legal Ethics Comm. 1999) (stating that a lawyer may violate the prohibition on improperly influencing a government agency or official regardless of whether the lawyer "intends or attempts to perform the act suggested and further regardless of whether the matter's outcome is actually affected").

139. State *ex rel.* Okla. Bar Ass'n v. Erickson, 29 P.3d 550, 554 (Okla. 2001).

140. *See* State *ex rel.* Okla. Bar Ass'n v. Evans, 747 P.2d 277, 280 (Okla. 1987) ("While the respondent's conduct may not have proceeded to action and violated the letter of the criminal law it was precisely that type of conduct which of necessity must undermine respect for the administration of justice and the faith of the people in a rule of law over men. Consequently, little comfort is found in the fact that the words spoken did not ripen into conduct.").

141. 2 HAZARD ET AL., *supra* note 15, § 69.10, at 69-29 to -30.

142. *Erickson*, 29 P.3d 550.

143. *Id.* at 552.

144. *Id.*

145. *Id.*

One day Erickson was in the Creek County courthouse on business unrelated to Capstick's case when he encountered Don Nelson, the assistant district attorney ("ADA") who was prosecuting Capstick.[146] The two lawyers briefly discussed Capstick's case and Nelson "jokingly said that Capstick's cases could 'go away' or be 'made to go away' for $50,000."[147] Erickson facetiously counteroffered $25,000.[148] After sharing a laugh, Erickson and Nelson went their separate ways.[149]

Brunton and Erickson later met with Capstick to discuss his case.[150] During this meeting they told Capstick about Erickson's courthouse exchange with Nelson.[151] They told him that "Nelson's offer was made in jest" and explained that had Nelson been serious about a bribe, they would have had to report the offer to the FBI.[152] Both Brunton and Erickson thought that Capstick left their meeting believing that Nelson's $50,000 "offer" was meant as a joke and that nothing more needed to be said about it.[153] To the contrary, Capstick accepted the possibility that Nelson was crooked and he reported Nelson's and Erickson's exchange to the FBI.[154]

The FBI wired Capstick with a hidden recording device and twice dispatched him to Erickson's office to learn whether Erickson would willingly bribe Nelson on Capstick's behalf.[155] In the most damning recorded conversation between Erickson and Capstick, Erickson told Capstick that it was "a bad time to be doing something like" bribing Nelson because of other public corruption investigations underway in the county.[156] Erickson further explained that it was likely impossible to gain an advantage by bribing Nelson because another ADA had taken over Capstick's case, there was no guarantee a bribe would work or that Brunton would accommodate such a scheme, he did not "think it was a smart time" to consider a bribe, and "at [that] point in time" a bribe was "not an option."[157]

The Oklahoma Bar Association ("OBA") charged Erickson with violating Rule 8.4(e), but a disciplinary tribunal found no violation.[158] The tribunal believed that Erickson never intended to behave illegally or unethically;[159] rather, he apparently was trying to throw cold water on Capstick's purported bribery

146. *Id*.
147. *Id*.
148. *Id*.
149. *Id*.
150. *Id*.
151. *Id*. (explaining that Brunton and Erickson agreed they would mention the exchange to Capstick "if for no other reason than to convey to [him] all contacts with the district attorney concerning his case").
152. *Id*.
153. *Id*.
154. *Id*.
155. *Id*.
156. *Id*. at 552–53.
157. *Id*.
158. *Id*. at 554.
159. *Id*.

scheme while maintaining a supportive attorney-client relationship.[160] The tribunal reasoned that although Erickson "may have exercised poor judgment in failing to properly show indignation and castigate Capstick for his suggestions of bribery," Erickson's inaction did not violate Rule 8.4(e).[161] The Oklahoma Supreme Court disagreed.[162]

Although the *Erickson* court recognized that Erickson never intended to bribe anyone,[163] that finding did not determine whether he violated Rule 8.4(e).[164] As the court explained, Rule 8.4(e) did not require the OBA to prove that Erickson "actually intended to bribe" a government official.[165] Rather, a lawyer can violate Rule 8.4(e) simply by "stating or implying an ability to improperly influence a government official," regardless of whether the lawyer intends to use that influence.[166] Here, Erickson implied several times during the recorded conversation with Capstick that he was able to improperly influence the district attorney's office.[167] He supposedly was reluctant to exercise his influence, however, because various factors upset the timing of any possible efforts along those lines.[168] In fact, Erickson's posturing for Capstick "served only to cement Capstick's already jaundiced view of the legal system."[169] His remarks were especially imprudent considering "Capstick's prospect of continued contact with the Creek County justice system."[170]

Although Rule 8.4(e) violations are serious offenses, several factors weighed in Erickson's favor when it came to the court's imposition of discipline.[171] Capstick instigated the taped conversations for the express purpose of luring Erickson into incriminating himself in a non-existent bribery plot.[172] Erickson never would have broached the possibility of bribing Nelson or another ADA with Capstick but for Capstick's insistence.[173] Furthermore, according to the court, Erickson's continued practice of law posed no threat to the public or the legal profession.[174] "Perhaps most importantly," the court noted, Erickson

160. *See id*. at 555 (noting that Erickson never would have contemplated or discussed the bribery of an ADA were it not for Capstick's probing and that Erickson never intended to attempt to improperly influence an ADA).

161. *Id*. at 554 (quoting the tribunal's majority report).

162. *Id*. at 554–55.

163. *See id*. at 555 (stating that the transcripts of the recorded conversations between Capstick and Erickson indicated that Erickson never intended to improperly influence an ADA).

164. *Id*. at 554.

165. *Id*.

166. *Id*.

167. *Id*. at 554–55.

168. *Id*. at 555.

169. *Id*.

170. *Id*.

171. *Id*.

172. *Id*.

173. *Id*.

174. *Id*.

"expressed extreme remorse and accepted responsibility for his comments and his poor judgment in dealing with Capstick."[175] Accordingly, the court publicly censured Erickson rather than suspending him from practice.[176]

In re Sears[177] is another illustrative case, even though it was decided under DR 9-101(C) during the Watergate era. Again, DR 9-101(C) provides that "[a] lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."[178]

Prominent New Jersey lawyer and legislator Harry Sears was retained by financier Robert Vesco to represent I.C.C., a corporation that Vesco controlled.[179] When the Securities and Exchange Commission ("SEC") launched an investigation into I.C.C.'s activities, the company filed a federal lawsuit in an effort to limit the discovery conducted by the SEC in its investigation for fear that the SEC might otherwise learn that Vesco had violated a prior consent judgment concerning the sale of securities.[180] Vesco was also concerned that I.C.C.'s lawsuit against the SEC might arouse suspicion regarding his activities involving the corporation.[181] He therefore asked Sears to approach the federal judge presiding over the case "and allay any such suspicions."[182] Sears counselled Vesco against this plan, but he later sent a letter to an I.C.C. officer in which he wrote: "When you talk to Bob (Vesco), will you please tell him that I have made contact [with the federal judge] and have done all that I can properly be done (sic) under the circumstances."[183]

Facts revealed in the SEC investigation and a related criminal investigation into Vesco's and I.C.C.'s activities ultimately led a county legal ethics committee to charge Sears with violating DR 9-101(C) by "creat[ing] the impression that he would or could improperly influence a federal judge in connection with the S.E.C. investigation of I.C.C."[184] The committee subsequently found that Sears had violated DR 9-101(C).[185] The ethics committee uncovered no evidence to suggest that Sears ever communicated with the judge as Vesco had requested, but nonetheless concluded that Sears's letter to the I.C.C. officer concerning his purported contact with the judge provided an adequate basis for a DR 9-101(C) violation.[186]

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175. *Id.*

176. *See id.* at 555–56 (discussing an earlier Rule 8.4(e) bribery case, State *ex rel.* Okla. Bar Ass'n v. Evans, 747 P.2d 277 (Okla. 1987), in which the court suspended the lawyer from practice for four years).

177. *In re* Sears, 364 A.2d 777 (N.J. 1976).

178. MODEL CODE DR 9-101(C).

179. *In re Sears*, 364 A.2d at 779.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 779, 785.

184. *Id.* at 784.

185. *Id.*

186. *Id.* at 785.

In his appearance before the ethics committee and then before the New Jersey Supreme Court, Sears defended his letter to the I.C.C. officer as merely "an effort to mollify a client who had been pressuring him" to persuade the judge to rein in the SEC.[187] Sears told the ethics committee:

> Well, I didn't mean I made contact because I had contacted no one. It was simply a letter that I wrote to [I.C.C. Officer] Dodd, as I recall it, knowing that Vesco was out of the country and he would be talking with him. And the last time I had talked with him he had, you know, pressed this point and, as I said, I had not firmly enough turned him off. And this was my method of closing the matter out so far as I was concerned without any further, without being bothered any further by it.[188]

Unfortunately for Sears, his explanation for sending the letter could not justify the letter itself.[189] As the New Jersey Supreme Court explained, a lawyer violates DR 9-101(C) by merely stating or implying that he or she can improperly influence a court.[190] Whether the lawyer attempts to exercise any improper influence or achieves the client's objective is irrelevant.[191] In this case:

> Aside from the obvious appearance of impropriety, . . . a statement [such as Sears's letter] creates an erroneous impression that the attorney occupies a peculiarly advantageous position in his association with the judge or government official. . . . In the instant case, the Vesco request was aimed at influencing the I.C.C. suit and was highly improper. By fostering the impression that he had satisfied or could satisfy that request, [Sears's] conduct fell directly within the ambit of DR 9-101(C). Consequently, we conclude that the findings of the [e]thics [c]ommittee in this regard were adequately supported.[192]

Sears committed several serious ethics violations beyond the DR 9-101(C) infraction, but for various reasons the New Jersey Supreme Court elected not to disbar him.[193] Instead, the court suspended him from practice for three years.[194] A lengthy suspension—while better than disbarment—was still a severe penalty.

C. UNDERSTANDING "IMPROPER" INFLUENCE

The *In re Sears* court's conclusion—that Sears's letter suggested his ability to improperly influence the judge—was correct. Had Sears spoken with the judge, he would have been unable to offer any legal or regulatory justification for

187. *Id.*
188. *Id.* (quoting Sears's testimony before the ethics committee).
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* (citations omitted).
193. *See id.* at 789–91 (explaining the court's rationale).
194. *Id.* at 791.

limiting the SEC's discovery.[195] His conversation with the judge—had it occurred—would have violated ethics rules prohibiting ex parte communications with judges.[196] The judge's participation in the planned communication would have violated several provisions of the *Model Code of Judicial Conduct*.[197] Once he decided to write the letter intended to appease Vesco, Sears was doomed because there was no *proper* basis for influencing the judge.[198] In *Erickson*, Erickson's goose was obviously cooked when he implied that it might be possible to bribe an ADA if only the timing was different rather than telling Capstick that bribery was impossible and out of the question regardless, and that the subject had never been more than a bad joke between two lawyers.[199] Bribery is a crime and thus constitutes improper influence per se.

Not all cases are as clear-cut as *In re Sears* or *Erickson*, however, and critics contend that in at least some instances in which disciplinary authorities allege that a lawyer stated or implied the ability to influence improperly a government agency or official in violation of Model Rule 8.4(e), the meaning of "improperly" is unclear.[200] So what types of conduct qualify as "improper" in this context?

Bribery unquestionably constitutes improper influence as illustrated above.[201] Blackmail and extortion constitute improper influence.[202] For that matter, any

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195. *See id*. at 779–81 (discussing the SEC investigations and Vesco's reasons for wanting to limit the SEC's probes).

196. *See* MODEL RULES R. 3.5(b) (stating that a lawyer shall not communicate with a judge during a proceeding "unless authorized to do so by law or court order"); MODEL CODE DR 7-110 (governing lawyers' communications with judges in adversary proceedings).

197. *See, e.g*., MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (AM. BAR ASS'N 2011) ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."); MODEL CODE OF JUDICIAL CONDUCT R. 2.4(C) ("A judge shall not convey or permit others to convey the impression that any person . . . is in a position to influence the judge."); MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (prohibiting ex parte communications except in certain circumstances).

198. *See In re Sears*, 364 A.2d at 784–85 (explaining Vesco's reasons for wanting Sears to speak with the judge).

199. *See* State *ex rel*. Okla. Bar Ass'n v. Erickson, 29 P.3d 550, 554–55 (Okla. 2001).

200. *See, e.g*., W.J. Michael Cody, *Special Ethical Duties for Attorneys Who Hold Public Positions*, 23 MEM. ST. U. L. REV. 453, 471 (1993) (asserting that "[t]he meaning of the word 'improperly' in Rule 8.4(e) is unclear").

201. *See* Fla. Bar v. Swickle, 589 So. 2d 901, 905 (Fla. 1991); *In re* Dickson, 968 So. 2d 136, 142 (La. 2007); *In re* Disciplinary Action Against Andrade, 736 N.W.2d 603, 606 (Minn. 2007); Office of Disciplinary Counsel v. Atkin, 704 N.E.2d 244, 245–46 (Ohio 1999) (applying DR 9-101(C) in disbarring a lawyer for suggesting that he could bribe a federal judge); ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 1952 (2017).

202. "Blackmail" and "extortion" tend to be used interchangeably. *See* BLACK'S LAW DICTIONARY 192 (9th ed. 2009) (defining blackmail as "[a] threatening demand made without justification; extortion"). In fact, extortion is accomplished when someone obtains something of value from another person through coercion. In comparison, a person blackmails another by threatening to reveal potentially embarrassing, incriminating, or defamatory information about the victim unless the victim meets the blackmailer's demand for money or services. Both forms of theft are criminal. *See* 18 U.S.C. § 875(d) (2018) ("Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a

criminal conduct should be considered improper when characterizing influence for purposes of Model Rule 8.4(e).

Statements or conduct that violate the *Model Rules of Professional Conduct* or the *Model Code of Judicial Conduct* should be considered improper when evaluating the nature of a lawyer's influence. For example, conduct by a lawyer that would be characterized as deceitful, dishonest, or fraudulent under Model Rule 8.4(c) should be deemed improper within the meaning of Model Rule 8.4(e).[203] Rule 3.13(A) of the *Model Code of Judicial Conduct* limits the types of benefits, gifts, loans, or other things of value that a judge may accept;[204] a gratuity conveyed, offered, or paid to a judge in knowing violation of Rule 3.13(A) of the *Model Code* or with reckless disregard therefor should be considered improper under Model Rule 8.4(e).[205]

Government agencies and entities frequently have anti-gratuity policies or codes of ethics that restrict the benefits, gifts, or other things of value that their employees may accept from people or organizations with matters before the agency or entity.[206] Any benefit, gift, or gratuity given with the knowledge that it would violate such a policy or code or with reckless disregard for that possibility should be considered improper under Model Rule 8.4(e).

Conduct or statements that violate no statutes, regulations, or rules may still constitute improper influence. For example, threats by a lawyer to professionally embarrass a government official, to get a government official fired, or to affect the budget of a government agency—while perhaps not criminal and therefore not extortionate in that sense—are nonetheless improper.[207] Such statements are

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crime, shall be fined under this title or imprisoned not more than two years, or both."); CAL. PENAL CODE § 519 (2015) (explaining how fear for extortion purposes may be induced and including conduct constituting blackmail); *id.* §§ 520–24 (criminalizing extortion).

203. *See* MODEL RULES R. 8.4(c) (prohibiting conduct "involving dishonesty, fraud, deceit or misrepresentation").

204. MODEL CODE OF JUDICIAL CONDUCT R. 3.13(A) (AM. BAR ASS'N 2014).

205. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 cmt. f (2000) (noting that "codes of judicial conduct broadly prohibit transactions between a lawyer and judicial officer that may influence the officer's actions," and indicating that a violation of a related provision would violate section 113(2), which prohibits a lawyer from stating or implying the ability to influence a judicial officer other than by "legally proper procedures").

206. *See, e.g.*, CODE OF ETHICS FOR JOHNSON CTY. [KAN.] GOV'T, Ethical Standards, Standard 1001, https://www.jocogov.org/sites/default/files/documents/BOCC/Code%20of%20Ethics.pdf [https://perma.cc/YDB2-GPPD] (last visited Apr. 19, 2019) (stating that certain county officials must "[a]void the appearance of improper influence and refrain from ever receiving, soliciting or accepting gifts, gratuities, favors or anything of value for himself, his family or others, which is intended or has the appearance or affect [sic] of influencing the performance of his duties [sic]"); Kan. City, Mo. Police Dep't Personnel Policy 201-10 – Code of Ethics and Rules of Conduct § III.D.3, https://www.kcpd.org/media/1873/ppbm-201-10.pdf [https://perma.cc/E8TD-Z63R] (last visited Apr. 19, 2019) ("Sworn members will refuse to accept any gifts, presents, subscriptions, favors, gratuities, or promises that could be interpreted as seeking to cause the sworn member to refrain from performing official responsibilities honestly and within the law.").

207. *See, e.g.*, State *ex rel.* Counsel for Discipline of the Neb. Sup. Ct. v. Koenig, 769 N.W.2d 378, 384 (Neb. 2009) (promising not to reveal allegedly illegal behavior by a newly-elected county prosecutor in exchange for the dismissal of charges against the lawyer's client).

in no way relevant to the merits of the client's matter. They are not legitimate advocacy.

On the other hand, lawyers who simply state that they were once employed by a government agency, or who because of such employment claim to understand how the agency operates or applies its rules or procedures, should not be understood as stating or implying the ability to influence the agency improperly.[208] Similarly, a lawyer who once clerked for a judge and tells a client or prospective client how the judge tends to approach particular legal or procedural issues, manages his or her docket, or conducts trials should not be seen as stating or implying the ability to improperly influence the judge.[209] Clerking for a judge is a form of government service, and there is nothing improper about lawyers merely sharing professional knowledge or insight gained in government service to attract clients or advance clients' interests.

II. THE IMPROPER USE OF JUDICIAL TITLES

Consideration of lawyers' references to their former government service leads naturally to the issue of former judges' use of judicial titles when they leave the bench and return to the practice of law. Certainly, nothing prohibits judges from returning to the practice of law; in fact, a number of judges have made that move in recent years.[210] Even federal judges, who enjoy the luxury of lifetime tenure, have increasingly returned to practice in recent years.[211] Law firms welcome opportunities to add former judges because they see them as valuable resources.[212]

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208. *See* Allied Realty of St. Paul, Inc. v. Exch. Nat'l Bank of Chi., 283 F. Supp. 464, 467 (D. Minn. 1968) ("Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. . . . [T]his is perfectly proper and ethical.").

209. In comparison, a lawyer who once clerked for a judge telling a client or prospective client that the lawyer lunches with the judge weekly or regularly participates with the judge in other social activities may in some instances be understood as implying "the ability to influence improperly" the judge in violation of Rule 8.4(e). *See* MODEL RULES R. 8.4(e).

210. *See, e.g.*, Jenna Greene, *From Federal Judge to Private Practice: Why This Debevoise Partner Left His Ultimate Dream Job*, NAT'L L.J. (Oct. 30, 2018), https://www.law.com [https://perma.cc/L8NF-HL9U] ("For 22 years, John Gleeson served as a federal judge in the Eastern District of New York . . . . But in 2016, Gleeson gave up his gavel and became a law firm partner at Debevoise & Plimpton where he specializes in white-collar matters, civil litigation and internal investigations."); Press Release, Stroock & Stroock & Lavan LLP, Former Southern District of New York Judge Shira Scheindlin Returns to Stroock (May 2, 2016), https://www.stroock.com/news/former-southern-district-of-new-york-judge-shira-scheindlin-returns-to-stroock [https://perma.cc/86FS-7A8P] ("Former United States District Court Judge Shira A. Scheindlin of the Southern District of New York has joined the Litigation Practice Group of Stroock & Stroock & Lavan LLP as Of Counsel to the Firm.").

211. *See* Judicial Conf. of the U.S., Comm. On Codes of Conduct, Advisory Op. 72 (2009) http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf [https://perma.cc/RT5C-AUZL] (reporting in June 2009 that federal judges were increasingly returning to the practice of law).

212. Joanne Pelton Pitulla, *Trading on Titles*, PROF. LAW., Aug. 1995, at 14.

Former judges who return to law practice often continue to refer to themselves as "judge" on the convention that "once a judge always a judge."[213] Judicial experience certainly is a legitimate professional credential.[214] At the same time, former judges' use of the honorific "judge" in their law practices may imply the ability to influence government officials or agencies—especially courts—in violation of Model Rule 8.4(e).[215] Responding to this concern, judicial ethics and legal ethics committees have discouraged, limited, or prohibited former judges' use of their bygone titles upon their return to practice based first on DR 9-101(C) and later Rule 8.4(e), as well as Rule 7.1, which bars a lawyer from making "a false or misleading communication about the lawyer or the lawyer's services."[216]

For example, in a 1993 ethics opinion, the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline concluded that former judges' use of their former titles or references to judicial positions on business cards and letterheads in connection with the practice of law was improper under DR 9-101(C).[217] As the Ohio Board explained:

> Such communication creates an appearance that a former judge's previous public position is being used to influence others . . . . Such communication on letterhead and business cards is also misleading to a client by creating the appearance that an attorney can use the prestige of past judicial experience to assure a client's success. Further, the use of such title on letterhead and business cards is irrelevant to handling of a legal matter for a client. It falsely indicates to clients and others that a former judge has influence over others to achieve desired ends or favorable treatment for the client.[218]

The Ohio Board reiterated its position in 2013 under the *Model Rules* regime when it was asked whether it was "appropriate for former judges to use judicial titles after leaving the bench."[219] As the Board pointed out, a lawyer who leaves judicial office for any reason to return to the practice of law is no longer a judge.[220] The title "judge" is not portable; it attaches to the position and not to the person who occupies the position.[221] Thus, the Ohio Board reasoned, former judges who return to the practice of law and continue to use their judicial titles

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213. Ohio Adv. Op. 2013-3, 2013 WL 5826955, at *2 (Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline 2013) [hereinafter Ohio Adv. Op. 2013-3].

214. Pitulla, *supra* note 212, at 14.

215. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-391, at 2–3 (1995) [hereinafter ABA Formal Op. 95-391].

216. MODEL RULES R. 7.1.

217. Ohio Adv. Op. 93-8, 1993 WL 818168, at *3 (Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline 1993).

218. *Id*. at *2.

219. Ohio Adv. Op. 2013-3, *supra* note 213, at *1 (identifying the question posed), *3 (reiterating the Board's position from 1993 "that a lawyer who formerly served as a judge should not use a judicial title while engaged in the practice of law").

220. *Id*. at *3.

221. *Id*. (quoting Pitulla, *supra* note 212, at 15).

violate the Rule 7.1 prohibition on false and misleading communications regarding a lawyer or the lawyer's services, and are guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).[222] Furthermore, according to the Ohio Board, "[i]dentifying oneself as a judge in the practice of law further implies to clients and the public an ability to influence the courts and other public entities or officials" in violation of Rule 8.4(e).[223]

In Formal Opinion 95-391, the ABA Standing Committee on Ethics and Professional Responsibility opined that "it is improper for a former judge who returns to the practice of law to refer to himself, or encourage others to refer to him, by any title that refers to his former judicial status."[224] In making this determination, the Standing Committee examined applicable *Model Rules* and also considered whether a lawyer's use of a former judicial title was fair to opposing counsel and parties.[225]

With respect to applicable *Model Rules*, the Standing Committee observed that in some contexts a lawyer's use of the honorific "Judge" might imply the ability to influence improperly a government agency or official contrary to Model Rule 8.4(e).[226] In connection with this observation, the Standing Committee endorsed the position expressed in a treatise that under Model Rule 8.4(e), "[a] lawyer may not make any suggestion that he or she can or will attempt to improperly influence a public authority, including a court or judge."[227] Departing from the *Model Rules* and relying on earlier ABA informal ethics opinions, the Standing Committee asserted that "the title 'Judge' should not be used at all in the courtroom, or otherwise in connection with legal proceedings, to refer to a former judge who is appearing on behalf of a client or as an expert witness."[228]

The Standing Committee did permit former judges who are practicing law to tell clients and prospective clients about their prior judicial experience.[229] In doing so, however, they "must not convey an implication of special influence."[230]

It is easy to conclude that former judges returning to appellate or trial practices cannot introduce themselves as "Judge" to a tribunal, or to a jury during voir dire or opening statement.[231] They cannot otherwise use their previous judicial titles when appearing as an advocate before a tribunal, when engaged in pre-trial or post-trial litigation activities, or when serving as expert witnesses.[232] There is no

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222. *Id*.
223. *Id*.
224. ABA Formal Op. 95-391, *supra* note 215, at 1.
225. *Id*.
226. *Id*. at 2.
227. *Id*. (quoting LAW MAN. PROF. CONDUCT § 101:701) (alteration in original).
228. *Id*. (citing Comm'n on Ethics & Prof'l Resp., Informal Op. 1006 (1967); ABA Comm'n on Ethics & Prof'l Resp., Informal Op. 1448 (1979)).
229. *Id*.
230. *Id*.
231. *See id*. at 2.
232. *Id*.

legitimate reason for the use of the honorific in any litigation-related context in which the former judge is representing a party.

Likewise, Model Rule 8.4(e) prohibits lawyers who serve as judges *pro tempore* or who hold similar judicial offices from using their judicial titles when representing clients in adversary proceedings or when serving as expert witnesses.[233] Again, there is no valid reason for the lawyers' use of their judicial titles when acting in these or other advocacy roles.

Former judges who return to law practice may, however, accurately refer to their prior judicial experience in circumstances where the usage does not imply the ability to improperly influence government agencies or officials.[234] For example, lawyers may refer to prior judicial experience in curricula vitae or résumés, law firm biographies, and typical professional announcements without tripping over Model Rule 8.4(e).[235] Lawyers who truthfully identify or describe their previous judicial experience in marketing themselves as third-party neutrals do not violate Model Rule 8.4(e) in the process.[236]

May lawyers who serve as judges *pro tempore* or who fill other part-time judicial roles accurately refer to their judicial service in any context so long as they do not state or imply the ability to improperly influence government agencies or officials? The Ohio Board answered this question "no,"[237] but that position seems extreme insofar as Model Rule 8.4(e) is concerned in at least some situations. It should not be the case, for example, that lawyers' reference to their service as judges *pro tempore* in their résumés or law firm biographies, standing alone, is construed as implying the ability to improperly influence courts or other government agencies or officials. Of course, even if Model Rule 8.4(e) does not apply in this context, lawyers who serve as judges *pro tempore* or who occupy other part-time judicial positions while also practicing law may be prohibited from referring to their judicial service by state codes of judicial conduct.[238] For example, the Ohio Board concluded that acting judges' use of their judicial title in the practice of law, law-related activities, business ventures, charitable endeavors, or

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233. *See* Ohio Adv. Op. 2013-3, *supra* note 213, at *7 (applying Rule 8.4(e) to "Acting Judges" in Ohio municipal courts).

234. *See* ABA Formal Op. 95-391, *supra* note 215, at 3; Fla. Eth. Op. 87-9, 1987 WL 125124, at *1 (Fla. State Bar Ass'n, Comm. on Prof'l Ethics 1987) ("Accordingly, it would not be ethically improper for the former justice to identify himself as a former chief justice of the Florida Supreme Court below his signature on letters to attorneys and other professionals regarding matters unrelated to the practice of law."). Lawyers' *inaccurate* description of their prior judicial experience may violate Model Rule 7.1, which, again, prohibits a lawyer from making a "false or misleading communication about the lawyer or the lawyer's services." MODEL RULES R. 7.1.

235. Ohio Adv. Op. 2013-3, *supra* note 213, at *8.

236. ABA Formal Op. 95-391, *supra* note 215, at 3.

237. Ohio Adv. Op. 2013-3, *supra* note 213, at *7.

238. *See* MODEL CODE OF JUDICIAL CONDUCT R 1.2 (AM. BAR ASS'N 2011) (requiring judges to avoid the appearance of impropriety); *id.* R. 1.3 (stating that a judge "shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others").

community or government service would abuse the prestige of the office in violation of Rule 1.3 of the Ohio Code of Judicial Conduct.[239]

CONCLUSION

Statements by lawyers for President Trump regarding their relationships with Special Counsel Robert Mueller uniquely highlighted the potentially broad reach of Model Rule 8.4(e), which provides that lawyers cannot state or imply an ability to influence improperly government agencies or officials. Although those lawyers were never charged with misconduct, they lacked the ability to influence Mueller that they arguably claimed, and their statements may be seen by many other lawyers as mere professional posturing, none of those factors lessens the illustrative value of their conduct when it comes to this under-appreciated rule of professional conduct. In fact, those factors increase the illustrative value of their actions. As the relatively few cases and ethics opinions applying Rule 8.4(e) demonstrate, the rule applies to a surprising range of statements and conduct by lawyers, and it attaches even where the lawyer whose conduct is scrutinized is unable to influence the government agency or official in question or never attempts to do so. Unsuspecting lawyers may find themselves facing allegations of violating Rule 8.4(e) as a result of edgy advocacy tactics, ambitious business development efforts, or attempts to appease unworthy clients.

Although it is periodically criticized on vagueness grounds, Model Rule 8.4(e) importantly addresses the threat that lawyers' stated or implied ability to improperly influence government agencies or officials will harm the legal profession and undermine public confidence in the legal system. Lawyers and courts alike need to understand the rule and apply it properly. Those are not necessarily easy tasks given the relative lack of related case law and ethics opinions. With luck, this Article will help fill that void.

239. Ohio Adv. Op. 2013-3, *supra* note 213, at *7.