

WHAT PROFESSIONALISM AND CIVILITY LOOK LIKE

These scenes are based on fact patterns from a real case, *The Florida Bar v. Schwartz*, 284 So.3d 393 (Fla. 2019) and *The Florida Bar v. Krapacs*, 2020 WL 3869584 (Fla. 2020).

Before we discuss the facts and resolution of those case, I'd like to explore some of the relevant rules and guidelines that apply.

PROFESSIONALISM DEFINED

The Florida Bar is home to the Henry Latimer Center of Professionalism which serves as an important resource.

In Florida, we define professionalism as *the pursuit and practice of the highest ideals and tenets of the legal profession*. We refer to the four Cs: *Character, Competence, Commitment, and Civility*.

Professionalism is not aspirational. It is an expectation. We have a Creed of Professionalism, and professionalism is included in our Oath of Admission to The Florida Bar--

In 2015, The Florida Bar's Board of Governors approved a document called the "Professionalism Expectations." [*FSC Order SC13-688 is shown on screen*] The Florida Supreme Court, in **Order SC13-688**, includes repeated violations of the "Professionalism Expectations" in its definition of unprofessional conduct. Therefore, unprofessional behavior is subject to discipline. It is also important that you understand that the standard of professionalism is the same on the first day of practice as it is at retirement.

CHAPTER 4. RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

Not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have the authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2 The lawyer's duty to act with responsible diligence does not require the use of offensive tactic or preclude the treating of all persons involved in the legal process with courtesy and respect.

HOW PROFESSIONALISM IS REGULATED

It is important to remember that professionalism is regulated through The Florida Bar's disciplinary system, including case law and the Rules Regulating the Florida Bar. Chapter 4 contains the Rules of Professional Conduct, and the Preamble specifically addresses civility. "The lawyer's duty to act with responsible diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."

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RULE 4-8.4 MISCONDUCT

A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule; investigation, unless prohibited by law or rule;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

The two rules that are regularly cited regarding professionalism are **Rule 4-8.4** and **Rule 3-4.3**, both dealing with Misconduct.

Rule 4-8.4 addresses misconduct regarding violating the Rules of Professional Conduct and prohibits a lawyer from committing certain criminal acts.

Rule 4-8.4(c) is directly relevant to the scene we just watched, addressing dishonesty and states: "A lawyer shall not ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation..."

Rule 4-8.4(d) is also directly relevant to the scene you just watched, addressing conduct prejudicial to the administration of justice.

"A lawyer shall not ... engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic."



RULE 3-4.3 MISCONDUCT AND MINOR MISCONDUCT

The standards of professional conduct required of members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration of certain categories of misconduct as constituting grounds for discipline are not all-inclusive nor is the failure to specify any particular act of misconduct be construed as tolerance of the act of misconduct. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise, whether committed within Florida or outside the state of Florida, and whether the act is a felony or a misdemeanor.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252), amended November 9, 2017, effective February 1, 2018 (234 So.3d 632).

Rule 3-4.3 generally addresses professionalism in the Chapter on Rules for Discipline.

All things considered, trustworthiness and candor towards the tribunal and towards others are at the core of ethical practice. Now let's look at what happened in the real cases on which this fact pattern is based.

In the real case *The Florida Bar v. Schwartz*,¹ like the scene you watched, Schwartz showed the victim two photocopied versions of lineup photos at a pretrial deposition. The exhibits also included the signature of the police officer who conducted the photo lineup.

Schwartz altered the photo lineup “by replacing his client’s image in one exhibit with the image of an alternate suspect whom witnesses other than the victim had identified as the perpetrator and by changing the client’s image in the other exhibit by imposing the alternate subject’s hairstyle on the client’s image.” The altered lineups each retained the circle and the signatures of the victim and the officer.

The prosecutor in that case filed a complaint with The Florida Bar and Schwartz was charged with violating Rules Regulating The Florida Bar 3-4.3 (misconduct and minor misconduct) and 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). A referee recommended that Schwartz be found not guilty of violating either rule. She concluded that Schwartz had not violated Rule 4-8.4(c) because he did not act with a purpose or intent to deceive. She further concluded that the altered lineups were not misleading in and of themselves or violative of Rule 3-4.3. The Bar sought Supreme Court review.

The Florida Supreme Court rejected the referee’s not guilty recommendations. Regarding Rule 4-8.4(c), the Court explained that the referee “improperly focused on Schwartz’s asserted motive, which was to provide constitutionally effective assistance of counsel, apparently by attempting to undermine the victim’s identification of Schwartz’s client.” Schwartz, 284 So. 3d at 396. But a lawyer’s subjective “motive or purpose in acting is not determinative of a Bar Rule 4-8.4(c) violation.” Rather, “the issue is whether he or she purposefully acted.” Further, the referee’s finding that the altered photos were not misleading was “unsupported by the record and patently erroneous.”



In sum, notwithstanding the referee’s findings that the lawyer’s subjective intent was not to deceive the witness, in light of his intent “in creating the deposition exhibits and the deceptive nature of the exhibits themselves,” the Florida Supreme Court concluded that his conduct violated Rule 4-8.4.

The Court remanded for a hearing on recommended discipline in front of a different referee. On October 15, 2020, a new referee report was issued. Consistent with the Florida Supreme Court opinion, the new referee recommended that Schwartz be suspended from the practice of law for 90 days followed by a one year term of probation. As terms of probation, Mr. Schwartz was required to: (i) take therapeutic treatments with a Florida Lawyers Assistance Counselor; (ii) successfully complete The Florida Bar’s Ethics School and Professionalism School within the probation period; and (iii) complete 10 hours in additional ethics CLE (over the required minimum), including The Florida Bar’s 2019 and 2020 Masters in Ethics courses. It was also recommended that Mr. Schwartz pay The Florida Bar’s costs in the case.

The Florida Bar sought review of the second referee’s recommendations, arguing that a three-year, rehabilitative suspension was warranted. In February 2022, the Supreme Court disapproved of the referee’s report and instead imposed a three-year suspension “in addition to the term of probation and special conditions thereof identified by the referee, to be completed prior to seeking reinstatement.” The Court noted that Schwartz had violated numerous Bar rules on three previous occasions in case numbers “SC11-2143, SC02-787, and SC60-90204” including those rule violations that the Court considers most serious, *The Fla. Bar v. Schwartz*, 334 So. 3d 298, 303 (Fla. 2022).

The Court stated, “Indeed, [i]n considering violations of rules 4–8.4(c) and 4–8.4(d), we have explicitly stated that basic, fundamental dishonesty ... is a serious flaw, which cannot be tolerated [because] [d]ishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members.” *The Fla. Bar v. Schwartz*, 334 So. 3d 298, 303 (Fla. 2022) (quotations and internal quotation marks omitted).

CONCLUSION

In closing, building your reputation as a highly professional lawyer should be at the very top of your list of professional goals. To help you do this I urge you to build lasting relationships with professional mentors, particularly in your practice area. In addition, The Florida Bar is here to serve you. Use your member resources. The Henry Latimer Center for Professionalism, Legal Fuel: The Practice Resource Center, and the Young Lawyers Division are all easily accessed through The Bar’s website (www.floridabar.org) and can be found on social media.

And do not forget the Ethics Hotline. Hotline attorneys are authorized to respond to inquiries from members in good standing of The Florida Bar who are asking about their own contemplated conduct regarding conflict dilemmas, confidentiality questions, communications concerns, trust accounting problems, and other ethics difficulties unique to the profession.

The toll-free number is 800.235.8619.

Thank you for your time today from The Florida Bar and the Henry Latimer Center of Professionalism.

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