

## To the Forum:

I have always been curious about what conduct outside of legal practice could potentially affect my ability to practice law. Recently, for whatever reason, I have done a number of things that some people have told me are unbecoming. For example, last year my home suffered damage after Super Storm Sandy. My insurance claim listed not only items of direct loss, but also some items that needed repair even before the storm, but which “may” have been exacerbated by it. In addition, I currently own real estate for investment. Several of these properties display numerous building code violations and fines. Lastly, a month or so ago, I submitted an application for a bank loan, and I may have said on the application that I attended Yale Law School, rather than my true alma mater, “Yala” Law School.

My question for the Forum: Do any of these constitute violations of the Rules of Professional Conduct that could lead to disciplinary charges?

Sincerely,  
Risk E. Behavior

## Dear Risk E. Behavior:

Although we suspect that there are some who may believe that a firm divide should exist between the personal and professional lives of an attorney, the fact is that we are officers of the Court with specific ethical and legal responsibilities. Attorneys should know that they are representatives of our profession and that conduct outside the practice of law can result in disciplinary action.

While this may seem basic, lawyers should be mindful of Rule 8.4 of the Rules of Professional Conduct which states that “a lawyer or law firm shall not engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer . . .” See Rule 8.4(b). Furthermore, “a lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .” See Rule 8.4(c).

The question whether an attorney’s conduct outside of a professional practice can be subject to disciplinary action has been subject to much debate. In New York, conduct or dishonesty in an attorney’s business or personal dealings may give rise to a level warranting professional discipline. See Hal R. Lieberman, *Discipline for ‘Private Conduct’: Rationale and Recent Trends*, N.Y.L.J., Feb 19, 2013, p. 3, which gives several examples where attorneys were disciplined for certain acts of misconduct outside of their respective legal practices, including:

- falsely accusing a state trooper of having uttered anti-Semitic slurs against him, and reaffirming those accusations on more than one occasion, in an attempt to get out of a speeding ticket;
- willfully refusing, in violation of court orders, to timely pay child support;
- pursuing vexation litigation as a “party-litigant, not as an attorney”;
- telling the coexecutor under a will executed by the lawyer’s uncle that the lawyer needed a power of attorney (“POA”) from the uncle to reinstate dormant bank accounts but instead used the POA to restructure, and to attempt to restructure, his uncle’s accounts for the lawyer’s personal benefit; and
- fraudulently occupying a rent-regulated apartment for two years after the death of the tenant of record.

*Id.* (internal citations omitted).

Suspensions were deemed an appropriate sanction for an attorney who pled guilty to possessing and engaging in the distribution of narcotics (see *In re Silberman*, 83 A.D.3d 95 (1st Dep’t 2009)) as well as for another attorney who pled guilty to operating a motor vehicle under the influence of alcohol and leaving the scene of an accident (see *In re Clarey*, 55 A.D.3d 209 (2d Dep’t 2008), cited in Lieberman, *supra*, at p. 3). A more drastic penalty –

immediate disbarment – was imposed where an attorney was convicted of forging a medical prescription form (see *In re Felsen*, 40 A.D.3d 1257 (3d Dep’t 2007)); in another case an attorney’s conviction for felony assault resulted in automatic disbarment (see *In re Ugweches*, 60 A.D.3d 125 (1st Dep’t 2009)). Lieberman, *supra*.

This year, an attorney was disciplined for impersonating someone on a dating website that resulted in criminal charges (see *In re O’Hare*, 968 N.Y.S.2d 394 (1st Dep’t July 17, 2013)), and another for disregarding an order of protection by sending text messages to an estranged spouse (see *In re Knudsen*, 109 A.D.3d 94 (1st Dep’t 2013)). Outside of this state, one disciplinary authority cited an attorney for violating the equivalent of Rule 8.4(c) by misrepresenting the condition of his home in connection with alleged water damage which occurred in his basement. See Edward J. Cleary, *Accountability or Overkill: Disciplining Private Behavior*, available

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at <http://www.mnbar.org/benchandbar/2001/feb01/prof-resp.htm>.

The situations presented in your inquiry, though perhaps not as egregious as the conduct noted above, could potentially subject you to disciplinary action. Here's why.

"[A]ny lawyer who commits a 'serious crime,' as defined in the statute, is subject to professional discipline whether or not the conviction has anything to do with the attorney's law practice." See Hal R. Lieberman and Richard Supple, *Private Conduct and Professional Discipline*, N.Y.L.J., July 23, 2002, p. 20; see also Judiciary Law § 90(4)(d).

Judiciary Law § 90(4)(d) defines the term "serious crime" as

any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

Inflated insurance claims are likely a crime under New York Penal Law §§ 176.00 – 176.35. Whether it is a misdemeanor or a felony will depend on the amount of money involved but should you be convicted of a felony, you would be subject to automatic disbarment under Judiciary Law § 90(4)(a). At a minimum, there is also the possibility of automatic suspension from practice under Judiciary Law § 90(4)(f), which provides that

[a]ny attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction

until a final order is made pursuant to paragraph g of this subdivision.

Lawyers should not submit inflated insurance claims. It subjects you to possible disciplinary action, almost certainly jeopardizing your professional career in the short term and possibly permanently.

Turning to your real estate with numerous building code violations and fines, although your obvious neglect of these properties may not be something that would get you prosecuted for a serious crime, why are you taking the risk that someone might file a complaint against you? The kind of conduct you describe could be viewed as conduct reflecting on your "honesty, trustworthiness or fitness as a lawyer." Therefore, if you do engage in a business which would subject you to scrutiny by administrative authorities, you would be well advised to comply with all necessary regulations, especially building codes.

The false statement in your loan application that you went to Yale Law School instead of "Yala" Law School is something that you most certainly realize was not the right thing to do. Obviously, you know that you had an obligation to be completely accurate when you applied for a loan and that any material misstatement in the application could be a federal criminal offense (see 18 U.S.C § 1014 (2013)), which would be likely to result in disciplinary action. Furthermore, as discussed above, at a minimum, an act of misrepresentation, fraud or deceit qualifies as a serious crime under Judiciary Law § 90(4)(f) that would subject you to automatic suspension from practice and could even result in automatic disbarment under Judiciary Law § 90(4)(a). As we have stated above, you would be wise not to engage in any action of misrepresentation, fraud or deceit, such as misstating where you went to law school, since it would place your professional career at risk.

Although this should go without saying, an attorney should never make any inaccurate disclosure of information concerning himself or herself

because even an attorney's misrepresentation of his or her own professional background can result in discipline. Indeed, one jurisdiction has disciplined an attorney for misrepresenting which law school he attended on the resume he sent to a prospective employer. *In re Hadzi-Antich*, 497 A.2d 1062 (D.C. 1985). In another jurisdiction, an attorney was suspended from practice for three years for falsifying grades on his law school transcript. *In re Loren Elliotte Friedman*, 2009 Ill. Atty. Reg. Disc. LEXIS 75, *aff'd*, 2010 Ill. Atty. Reg. Disc. LEXIS 126 (Ill. 2010).

Attorneys "should know better" even when acting outside the office. We are not setting an unreachable bar, but only wish to remind attorneys that when dealing with others, even outside of the attorney-client relationship, it is necessary for attorneys to always act with common sense and candor in their dealings outside of their professional world.

Sincerely,

The Forum by

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## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have always been curious if there are any specific ethical considerations that one needs to comply with when conducting or defending depositions. I know that court rules exist in New York which specify how an attorney is supposed to conduct or defend a deposition, but I have found that a number of my adversaries do not follow these rules. In addition, I have noticed various examples of bad behavior by attorneys in the context of depositions. What rules do I need to be aware of and what behaviors should I avoid the next time I am either conducting or defending a deposition?

Sincerely,

Conscious Counsel