Law School Faculty, LLP: Law Professors as a Law Firm

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I. INTRODUCTION

Law school professors have a “regular” job, that is, to teach and prepare students and to research and write articles and books. Law professors were hired, presumably because of their specialized expertise, which qualifies them to share with future lawyers and to teach them so that those students might be adequately prepared to enter the profession themselves. Obviously, the law schools that employ these professors expect this expertise to be put to this use.

Many law professors, however, also practice “outside” the law school. They consult and advise lawyers and clients on transactions, legislation and litigation; they assist in researching and briefing legal issues in litigation; they appear in court on motions, in trials and on appeals; and serve as expert witnesses. The professor’s academic position and background add credibility and recognition, especially where a specialized area of the law is involved. Indeed, the professor’s unique position as a recognized “expert” in the field—and her association with the law school—may well form the basis for his hiring by outside clients and law firms in the first place.

Law faculty have access to research resources, as well as to research assistants. They also can use classroom discussion as a sounding board for theories and strategies. Law faculty have lower personal overhead, because their office space, computers, and library are provided. On the other hand, it is difficult (or not reasonably possible) for law faculty to advertise or overtly to promote their “outside” practice.

Given that many law professors do “practice law,” how does law

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practice by the law faculty compare to the practice of law in a law firm? When taking on work for an outside law firm or client, what concerns face a law professor, for example, in the areas of conflicts of interest, engagements, scope of work, confidentiality, and management of the work done? Are there ethical concerns facing a law professor embarking on an “outside practice” career offering legal services to clients or other law firms, while maintaining his profession as a law school professor?

The threshold question is whether professors within in a law school are part of a “law firm” or an “office sharing” arrangement for purposes of the rules of ethics and professional responsibility. And depending on the nature of the relationship between and among the faculty, and between the faculty and the law school, how would the rules of ethics and professional responsibility apply differently to each?

In addition, some law professors form alliances with a law firm, to serve as “of counsel” while still part of the faculty. This poses additional questions, particularly as they pertain to the professor’s relationship with his law school employer.

The purpose of this Article is to explore the ethical rules and considerations which confront law professors engaging in law practice outside the university, to explore how those issues are handled in outside law firms, and then to suggest similar applications to the law faculty practicing law. There appears to be little difference between lawyers practicing in a firm and lawyers practicing from the Groves of Academe, and the rules ought to be applied in the same way to each.

These issues pose concerns in at least the following areas:

1. Law firm general counsel have a number of tasks and areas of concern to address, as pointed out in each of the topic areas discussed below.

2. Law schools should consider the application of the same rules of professional conduct to their professors who practice law, and law schools may consider the appointment of law school general counsel to prepare and then enforce policies to protect the law school from exposure to liability.

3. Law school professors should consider the application of these rules to their own practice and be guided accordingly.

4. Lawyers and clients hiring law school professors as counsel, co-counsel, consulting experts or testifying experts should consider the application of these rules and ask the right questions before venturing into a relationship which could result in disqualification, discipline and/or malpractice claims.

5. Law firm general counsel should consider setting up procedures and safeguards to account for these considerations in those situations
where law firm lawyers are hiring professors.

6. Law students should ask questions about these issues when accepting assignments from professors to work on outside representations, and when interviewing with or being employed by a law firm.

II. **IS THE LAW FACULTY A “LAW FIRM” OR AN “OFFICE SHARING” ARRANGEMENT—OR JUST A LOOSE CONFEDERATION OF INDEPENDENT CITY-STATES?**

Law school professors generally have their offices in the same building as the rest of the faculty and administration. They share office staff. They use a common copy machine. They maintain files on a common computer network. They use the same library, and they may have access to the same cadre of research assistants. On the other hand, the income received by each professor from outside legal work is not pooled into a common account and then distributed. Law professors usually do not band together to promote themselves as a group for outside legal services. Indeed, it is the individual qualifications of a particular professor that draw clients to him, individually.

So, should professors practicing from a single law school faculty be considered a “law firm”? Or is the relationship more closely akin to an “office sharing” arrangement? And, depending on the answer, what are the implications for the professor and the law school?

The Official Comment to the Model Rules of Professional Conduct (“MRPC”) Rule 1.10 loosely defines a “firm” as including “lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization.” The comment does not reference office sharing arrangements, but acknowledges that whether a group of lawyers constitutes a firm will depend on the specific facts of the situation and the ethics rule being applied. Such a determination requires the examination of several factors: (1) do the lawyers “present themselves to the public in a way suggesting that they are a firm”; (2) do the lawyers “conduct themselves as a firm”; (3) do the lawyers have mutual access to confidential information; (4) the terms of the agreement between the lawyers; and (5) the purpose of the Rule involved.

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2. *Id.*
It is unclear whether a court or disciplinary authority would find a
group of law professors at a law school to be a firm or simply an office
sharing arrangement, and such determination would most likely vary de-
pending on the ethics rule involved. If found to be in solely an office
sharing relationship under a specific rule, then the professors will be
treated as unrelated parties and as if they are members of separate law
firms; however, if found to be a firm for the purpose of a certain rule,
then they will be held to the standards of a law firm for compliance with
that rule.

The remainder of this Article will focus on the rules applicable to
“outside” practice by a law school professor, from promoting and getting
the business through checking conflicts, engaging in the work, receiving
information, and then handling it. This Article will address the applica-
tion of those rules in both a law firm and facility practice setting. The
discussion focuses mainly on the Model Rules of Professional Conduct
adopted in Kansas, as well as to the Third Restatement of the Law Gov-
erning Lawyers. The Kansas Model Rules are based on the MRPC.
Thirty-eight states and the District of Columbia have adopted all or sig-
nificant portions of the MRPC.

III. GETTING BUSINESS

A. Applicable Rules

The modern MRPC permit lawyers to advertise their services
through public media, including telephone directories, legal directories,
newspapers and other periodicals, and the Internet. Even outdoor adver-
tising, as well as radio and television promotion are acceptable. Of
course, this permission runs contrary to the common tradition that law-
yers, members of a dignified profession, should not promote themselves.

Advertising involves an active quest for clients, contrary to the tradi-
tion that a lawyer should not seek clientele. However, the public’s need
to know about legal services can be fulfilled in part by advertising. This
need is particularly acute in the case of persons of moderate means who

4. To date, Kansas has not adopted the changes to the ABA Model Rules of Professional Con-
duct suggested in the Ethics 2000 Report. This Article discusses the model rules as they existed
prior to those modifications, but will indicate discrepancies between those versions where applica-
ble.
6. LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 01:3 (NOV. 17, 2004).
have not made extensive use of legal services. The Rules hold that the interest in expanding public information about legal services ought to prevail over considerations of tradition.\textsuperscript{8}

Rather than being limited by constraints of dignity or taste, which may involve "matters of speculation and subjective judgment,"\textsuperscript{9} the Rules' limitations on lawyer advertising are somewhat more objective: advertisements shall not be "false or misleading,"\textsuperscript{10} by containing "material misrepresentation[s] of fact or law," creating "unjustified expectations about results," or making unjustifiable comparisons to the services of other lawyers.\textsuperscript{11}

Direct solicitation of clients is also limited by Rule 7.3, which prohibits direct in-person or live telephone contact\textsuperscript{12} with prospective clients with whom the lawyer has no family or prior professional relationship.\textsuperscript{13} While this Rule appears to be more observed in the breach, it should guide the practitioner in deciding how far to go in promoting prospective services.

\textbf{B. Law Firm Application}

In law firms, there should be a person assigned by the firm management or the general counsel to review all advertising and promotional materials. That person should be familiar with the particular iterations of Rules 7.1, 7.2 and 7.3 in each of the states where the law firm practices. The designated advertising counsel should review the advertising materials, before they are published, and consider whether they contain any material misstatements of fact.\textsuperscript{14} This may involve a discussion with the lawyers involved in the area of practice being promoted in the advertising.

Advertising review counsel should also consider whether the proposed advertising could create any unjustified expectations, by implying

\textsuperscript{8} R. 7.2 cmt. 1.


\textsuperscript{10} The Ethics 2000 modifications define "false or misleading" only as "contain[ing] a material misrepresentation of fact or law, or omit[t][ing] a fact necessary to make the statement . . . not materially misleading." MODEL RULES OF PROF'L CONDUCT R. 7.1 (2002).


\textsuperscript{12} Ethics 2000 adds "or real-time electronic contact" and also adds lawyers and people with whom the lawyer has a close personal relationship to the list of people exempted from this rule. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2002).


\textsuperscript{14} See, e.g., In re Franco, 275 Kan. 571, 66 P.3d 805 (2003).
the likelihood of particular results or costs.\textsuperscript{15} The advertising should be reviewed to ensure that it does not make objectively unverifiable comparisons to the services offered by other lawyers or law firms.\textsuperscript{16}

The designated advertising reviewer should also keep in mind the requirements of Rule 7.2(b), which requires that copies of all advertising materials (including web and Internet advertising) be maintained for two years after the advertising has been published.\textsuperscript{17}

\textbf{C. Faculty Practice}

Law faculties, since the general assumption is that they are not law firms, have no administrative person assigned to deal with advertising. Generally, law faculty do not overtly advertise their services. Indeed, such advertising would raise questions as to whether a faculty member were “full-time” under the accreditation rules of the American Bar Association.\textsuperscript{18} Law faculty will, on occasion, have business cards printed for their consulting practice. If so, these cards—and any other advertising they might use—will be subject to the same ethical limits as they would be were the law professor in private practice.

Increasingly, law faculty members are maintaining individual web pages at their law school web sites. One does find, on occasion, language on these individual web pages that might be construed as advertising. For instance, a professor might say in the personal statement on his web page that he is an experienced appellate litigator and will handle such litigation for private clients. In such cases, the professor’s web page, in our opinion, ought to be construed as an advertisement and, therefore, subject to the ethical rules to which any other advertisement might be subject.\textsuperscript{19}

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\textsuperscript{15}See, e.g., \textit{In re Wamsley}, 725 N.E.2d 75 (Ind. 2000).
\textsuperscript{16}See, e.g., Medina County Bar Ass’n v. Grieschuber, 678 N.E.2d 535 (Ohio 1997).
\textsuperscript{17}Model Rules of Prof’l Conduct R. 7.2(b) (1998). \textit{See also} 2 Hazards & Hodges, \textit{supra} note 3, \S 7.2:101. This requirement was removed in the Ethics 2000 modifications.
\textsuperscript{19}An interesting question is whether the law school, as an entity, will have any liability for such advertising on web sites it maintains.
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IV. CHECKING CONFLICTS

A. Applicable Rules

Rule 1.7(a) prohibits conflicts of interest with current clients. This means that a law firm cannot take on the representation of one client, if that representation would be adverse to another existing client.\textsuperscript{20} The purpose for the rule is obvious: if a lawyer or his firm attempts to represent one client adverse to another client, neither client can be sure of undivided loyalty.\textsuperscript{21}

Rule 1.7(b) prohibits conflicts between a current client and the lawyer’s own interests, for example, where the lawyer’s interest would be better served by a bad result for the client or where the lawyer’s personal interest runs contrary to that of the client.\textsuperscript{22} For example, a client wishing to sue a corporation may not be well-served by a lawyer who is a major shareholder in that corporation.\textsuperscript{23}

Rule 1.9 prohibits conflicts with the interests of former clients, if the adverse representation of the new client is in a matter that is the same as or substantially related to the prior matter on which the lawyer or his firm represented the “former” client.\textsuperscript{24} In addition, even if the lawyer or his firm is representing a new client against the interests of a former client in a matter that is not the same as that which was involved in the prior representation, the lawyer cannot use or disclose confidential information about the former client, if that information was learned in the context of the former representation.\textsuperscript{25}

Of course, if the lawyer takes on adverse representation in violation of these rules, the result is often disqualification of the lawyer and his firm.\textsuperscript{26} Even if the representation is not taken on by the particular lawyer in the firm who represents the other “current client” or who personally represented the “former client,” Rule 1.10(a) provides for “imputed” dis-

\textsuperscript{21} See In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 162 (3d Cir. 1984); In re Johnson, 84 P.3d 637, 639 (Mont. 2004).
\textsuperscript{26} See Chispens, 257 Kan. at 771–73, 897 P.2d at 121–23.
qualification, such that where one lawyer has brought a conflict with him to the firm based on prior representation of another client in the same or substantially related matter, the entire firm is disqualified from the representation of the new client. The lawyer's former law firm, on the other hand, would not be precluded from taking on a representation adverse to the former lawyer's client, as the former lawyer takes the conflicts with him when he leaves.

Conflicts of interest may be waived, under certain limited circumstances. (1) In order even to request a waiver, the lawyer must have the actual (subjective) and reasonable (objective) belief that the representation of one client adverse to another current client, or adverse to a former client in a matter which is the same or substantially related to the matter on which he previously represented the former client, will not adversely affect the lawyer-client relationship with either client, and (2) both clients must consent, (3) after “consultation,” meaning a full listing and description of all the negative things which might occur as a result of the adverse representation. Based on these stringent requirements, the opportunities for a waiver are rare, and the actual giving of knowing consent after adequate consultation are even rarer.

B. Law Firm Application

In order to ensure compliance with the requirements of these rules, it is necessary for a law firm to implement procedures to ensure that all new clients and matters are cleared before they are formally accepted for representation by the law firm. In many firms, these procedures include the following:

The law firm should generate a data base which includes all the clients of the firm, throughout its history, are listed. This data base must be retrievable and legible. It also should include backup mechanisms to check multiple spellings of surnames or corporate names, to aid in a broader search. While it is possible for such a data base to be created and maintained manually, on hard copy paper files, it is the more generally accepted approach to place this data base on a searchable computer records program.

28. R. 1.10(b).
The law firm should establish a policy requiring a new client work sheet to be prepared for all new matters, disclosing full information, including the names and addresses of all of the prospective clients; corporate officers, directors, and major shareholders, as well as similar information for adverse parties and counsel.

The new client form should then be checked against the data base of current and former clients, and any cross-references should be flagged and then discussed with the responsible attorneys reflected for the names which arise. Through discussion, it can be determined whether the other client is a current client or a former client, and if it is a former client, there can be discussion of whether the new matter is substantially related to the former matter.

If, after checking, conflicts appear to exist, then an evaluation may be made as to whether the conflict may be waived and, if it can, who should present the issue to the client/former client to make the full disclosure and to request the waiver. The "bad things" which can happen should be fully explained, and the waiver either obtained or refused.

The data base should be updated each time there is a change in the parties to a particular matter, with all new names being checked against the firm’s data base, and any conflicts cleared as outlined above.

Of course, whenever there is a conflict and that conflict is either not waiveable or not waived, the representation of the new client cannot continue. If there are no irreconcilable conflicts, then the representation of the client may proceed.

C. Faculty Practice

The authors know of no law faculties that maintain the various institutional safeguards against conflicts routinely maintained by law firms. If a law faculty were to be considered subject to the conflict of interest rules, as the authors believe may well be appropriate, such an absence of institutional safeguards is very dangerous. There are several cases of potential conflicts in the law faculty context that are particularly worrisome:

1. Most accredited law schools maintain clinical programs in which law students provide legal services to “live” clients under the supervision of a licensed attorney on the faculty. Generally, law clinics operate as mini-law firms and do have institutional safeguards against potential conflicts among the clinical faculty and enrolled students. 30 But what if a

30. Peter A. Joy, The Law School Clinic as a Model Ethical Law Office, 30 WM. MITCHELL L.
non-clinical faculty member has a conflict with a client represented by a law school clinic? If the law faculty were to be considered to be a law firm for this purpose, then such a conflict could lead to disqualification and disciplinary action (as well as malpractice liability). At the very least, law faculties should have institutional safeguards in place to protect against such conflicts between non-clinical faculty and clinic clients.

2. The absence of institutional safeguards against conflicts in the law school context means that faculty will rarely know of potential conflicts among their private clients until it is too late. It is relatively easy to imagine a situation in which two faculty members, particularly on large faculties, may represent opposing clients. If a court were to deem the law faculty a firm for this purpose, once again disqualification and disciplinary action could result.

3. A special problem may arise in the case of law professors who act as expert witnesses. Once again, it is easy to imagine a situation where two professors on the same faculty may be expert witnesses for opposing clients. Depending on whether the professors serve as “consulting experts” or “testifying experts” they may be deemed to have a lawyer-client relationship with those who employ them.31 In such cases, if they are considered to represent their client and the law faculty is deemed to be a law firm, they may well find themselves in a conflict.

Given the very real dangers of the situations posed, it would make eminently good sense for law faculties to institute conflict safeguard procedures and mechanisms equivalent to those used by law firms.

V. ENGAGEMENT

A. Applicable Rules

Once it is determined that no irreconcilable conflicts exist, the representation may begin. As noted below, no confidential information should be received or accepted before that time, in case the representation does not proceed.

After discussions with the new client have reached the point of an agreement for the lawyer to represent the client, the lawyer and client should discuss the engagement and the basis for the fee. The lawyer’s fee must in all instances be “reasonable,” based on the facts and circum-

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stances at the time. Rule 1.5 lists no less than fifteen factors to be considered in determining whether a fee is reasonable, under the circumstances. Contracts for a contingency fee must be in writing, and the distribution of proceeds and fees based on a contingency fee agreement must also be set forth in writing, explaining to the client how the proceeds were divided.\(^{32}\)

B. Law Firm Practice

Many lawyers choose to send an engagement letter, setting forth the terms of the relationship between the lawyer and client. Indeed, written engagement letters are required by the version of the MRPC issued by the ABA's Ethics 2000 Commission.\(^ {33}\) Such a letter helps to avoid disputes later as to the scope of the representation and the basis of the fee. Rule 1.2 provides that the client determines the scope of the representation.\(^ {34}\) Later disputes about what the client expected the lawyer to do can be avoided, or at least reduced, by a clear letter setting forth the agreed scope of what the lawyer is expected to do.

C. Faculty Application

Law faculty who take on private clients should follow precisely the same rules as they would if they were not academics.


\(^{34}\) MODEL RULES OF PROF'L CONDUCT R. 1.2 (1998). The lawyer is obligated to abide by the client's decisions concerning the "lawful objectives" of the representation and shall consult with the client as to the means for pursuing those objectives. See, e.g., In re Friesen, 268 Kan. 57, 991 P.2d 400 (1999).
VI. WORK ON FILE

A. Competence

1. Applicable Rules

Rule 1.1 requires a lawyer to represent a client competently. This means that the lawyer will exercise "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."36

2. Law Firm Practice

In practice, the required proficiency for many matters "is that of a general practitioner."37 In matters which require special expertise, the lawyer may take them on even if they are currently beyond his expertise, if "it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field,"38 or if "the requisite level of competence can be achieved by reasonable preparation... through necessary study."39

Often, these requirements are met through consulting with partners, office associates, or mentors. And thoroughness of preparation is required in every case as a part of competence.40

3. Faculty Application

The question of law faculty competence is a very sensitive one. On the one hand, simply by being a law professor, a faculty member is presumed to be an expert. By this fact alone, the standard of competence may be raised. But more troubling is the question of whether law faculty who do not practice on a regular basis are, in fact, competent. Of course, this will very much depend upon each individual. However, one aspect of competence must be current knowledge. In many fields, where practice and techniques change rapidly and are not described in the scholarly

36. R. 1.1.
37. Id. cmt. 1.
38. Id.
39. Id. cmt. 4.
40. Id. cmt. 2.
41. Id. cmts. 5–6.
literature (for example in many transactional areas), law faculty may not be entirely up to date. In these cases, a question of competence to practice may arise.

A second area of concern regarding law faculty competence is resources. Law faculty rarely have the personnel nor other resources available to full-time lawyers. Faculty must be very careful when taking on private clients to recognize their resource limitations and decline representation if they cannot meet resource needs.

B. Confidentiality

1. Applicable Rules

   Rule 1.6 prohibits a lawyer from revealing “information relating to representation of a client unless the client consents after consultation.”\(^{42}\) Other exceptions include disclosures

   - which are impliedly authorized to carry out the representation, such as admitting facts which cannot be controverted or disclosing facts in negotiations in order to facilitate a successful conclusion to a matter;\(^{43}\)

   - which are reasonably necessary to prevent the client from committing a future crime;\(^{44}\)

   - which are necessary to comply with court orders or rules of law, such as in answering pleadings or interrogatories;\(^{45}\)

   - which are necessary to establish a claim against a client or defend against a claim made by the client in any proceeding against the lawyer.\(^{46}\)

   This Rule requires the lawyer to be diligent in maintaining the confidence of information regarding the client or the representation. In this way, the client will trust that his disclosures will remain confidential, and thus will make more complete disclosure of the facts. That fuller disclosure, in turn, will allow the lawyer to give better and more complete advice, thereby fulfilling the societal goal of ensuring that clients get good legal advice. A fear of possible disclosure would necessarily chill the free exchange of information between client and lawyer, thereby reducing the effectiveness of legal representation, and eventually eroding the institution of the lawyer-client relationship.

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43. *Id.* cmt. 7.
44. R. 1.6(b)(1) & cmt. 13.
45. *Id.* cmt. 20.
46. R. 1.6(b)(2) & cmts. 18–19.
2. Law Firm Practice

In the law firm, procedures should be established to maintain the confidentiality of client information. Files should be maintained in a closed area, with no access by outsiders. If one shares space with other lawyers not in a law firm, those files should be kept in locked cabinets with access only by the lawyer and his personnel. And no client information should be included in any network to which others are permitted access, including home computers or networks in an office-sharing arrangement.

Facsimile transmissions and electronic mail communications should include a warning legend that the communication is confidential. Care should be taken that letters are properly addressed.

There should be no discussion of client matters outside of the law firm, even in casual conversation. Sometimes lawyers are tempted to talk about client matters, because they are interesting and exciting, or because they are sometimes, after all, matters of "public record." Even then, any non-public information should not be disclosed.

One may also wish to consult with another lawyer about a matter. In such circumstances, client-identifying information should not be disclosed, and confidentiality should be maintained.

3. Faculty Application

Confidentiality is one of the most serious problems for practicing law professors. If law professors use law school resources in their private practice (assuming such use is permitted by the law school) they must be sure to maintain the same standards of confidentiality as they would if they were full-time practitioners. Law professors rarely have their own copy machines. Often they will use law school computers that are networked to other faculty computers and will use a common facsimile machine as well. This is exceptionally dangerous. If law faculty members use law school resources they should, at a minimum, take the following steps:

They should not use copy machines, facsimile machines, computer printers, or other devices in common use unless they can ensure the security of their work.

Faculty should not use networked computers for private client work. This is the only certain way to ensure confidentiality since network administrators—who will not be within the "zone of confidentiality"—will be able to view confidential documents. Further, it would be most prudent not to use a law school-owned computer at all, since if the computer
must be serviced or returned at some point, confidential material on the
computer, even if deleted, will generally be subject to recovery by pro-
fessionals. At the very least, if a professor uses a law school computer,
she should remove the hard drive and retain it before turning over the
machine to the law school.

In many law schools faculty offices are not secure. Thus, any confi-
dential client materials should not be left unattended nor in an insecure
cabinet. The use of locked cabinets would be the prudent practice.

Law professors may wish to use law school secretaries or law student
assistants to work on private client matters. If they do, for purposes of
extending the “zone of confidentiality” they should, at the least, ensure
that they employ and compensate these assistants separately from the law
school. They should also consider the potential for client conflicts that
might arise by such use as described above.

C. Law Firm Management

1. Applicable Rules

Rule 5.1 requires a partner in a law firm to “make reasonable efforts
to ensure” that the law firm has in place policies and procedures to make
sure that all lawyers in the firm comply with the Rules of Professional
Conduct.47 Further, a lawyer with “supervisory authority” over a lawyer
or a non-lawyer assistant must “make reasonable efforts to ensure” that
the lawyer or assistant complies with the Rules of Professional Con-
duct.48 Even then, a lawyer is responsible for a violation committed by
another lawyer or a non-lawyer assistant, if the lawyer orders the con-
duct, ratifies the conduct, or—knowing about the conduct—fails to take
remedial action at a time when consequences from the conduct can be
avoided.49

2. Law Firm Practice

In practice, these rules mean that a law firm should establish policies
to require compliance with the rules of ethics, and procedures to ensure
that compliance. Partners need to keep apprised of the applicable rules
of ethics, and changes in those rules as they develop. Many firms ac-

47. MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (1998).
48. R. 5.1(b), 5.3(b).
49. R. 5.1(c), 5.3(c).
complish this by designating an "in-house" lawyer, responsible for implementing and overseeing the firm's policies.\textsuperscript{50}

Those policies should include recurrent training, to re-emphasize a focus on the rules which prohibit conflicts of interest, which require confidentiality, and which require diligence and competence. In addition, early intervention with clients who raise issues with the firm's representation or quality can help to alleviate those issues before they become complaints or malpractice lawsuits.

Another mechanism to help address potential problems is an internal advocate or "ombudsman," by which any employee—lawyer, legal assistant, secretary, librarian, computer tech, or anyone—can report, on a no-fault, confidential basis, any matters of concern observed by the employee. This could include possible issues of chemical or alcohol reliance, gambling addiction, diligence or client communications problems, sexual harassment of clients or staff, or any matters that could develop into problems for the firm. Early intervention can be the best method to avoid more serious problems later.

3. Faculty Application

a. Faculty who utilize law students as assistants in their private practices must, of course, comply with Rules 5.1 and following. Of particular importance in this context are Rules 5.1(b) and 5.3(b) regarding the supervisory responsibilities of lawyers for non-lawyer activities and Rules 5.1(c) and 5.3(c) regarding lawyer liability for ethical lapses of such assistants under certain circumstances. This may well require either that faculty members using law students as assistants instruct their assistants about ethical pitfalls themselves or insist that any students working for them have taken a course in professional responsibility. In addition, faculty members in this situation must be sure to instruct their student assistants to query them in cases of uncertainty so that the faculty member can either prevent a potential ethical violation or, at the very least, do whatever is necessary to remedy such a violation.

b. Further, faculty members who become aware of a violation by either a law student or a clerical assistant may well be required to report this violation to the relevant disciplinary authorities.\textsuperscript{51} Moreover, student

\textsuperscript{50} Another benefit of the in-house lawyer is to provide a central recipient of information that can be cloaked with the attorney client privilege.

assistants, if they are deemed subject to the disciplinary rules, as would be the case in a clinical setting, may have an obligation to report faculty violations. Such reporting obligations may well interfere with the professor-student relations and may impede the educational mission of the law school as a result.

c. If a law faculty is deemed to be a law firm for disciplinary purposes then the dean of the law school may find that she is held responsible for the ethical lapses of her faculty members under Rules 5.1 and 5.3. She may also have a reporting obligation under Rule 8.3 if aware of the lapse.

D. Sharing Fees with Non-Lawyer, No Partnership with Non-Lawyer

1. Applicable Rules

Rule 5.4 provides that a lawyer or law firm shall "not share legal fees with a non lawyer" except for payment related to work previously done by a lawyer now deceased or as part of a compensation profit sharing or retirement plan for employees. More importantly, the Rule prohibits a "partnership with a non lawyer if any of the activities of the partnership consist of the practice of law" (a so-called Multiple Discipline Practice). And a referral source, or someone paying for the lawyer’s services (like the client’s liability insurance carrier) cannot be allowed to "direct or regulate the lawyer’s professional judgment in rendering" legal services to the client.

2. Law Firm Application

These rules should impel a law firm to adopt policies which insure the independence of professional judgment for clients, and which prohibit the sharing of fees with non-lawyers. Fees or profits may be

to the firm for purposes of the investigation), with McCormick, Barstow, Shepard, Wayte & Carruth, 81 Cal.Rptr.2d 30 (1998) (holding the privilege denied because lawyer was not designated as general counsel; communications were just partner-to-partner).

53. R. 5.4(b).
54. R. 5.4(c). See also R. 1.7 cmt. 10 ("A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty to the client."); R. 1.8(f): A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6.
shared, but only with employees. Therefore, independent contractors should only be paid an agreed, set compensation on an hourly or other basis. Of course, non-lawyer referral sources should not be paid a fee for referrals.

3. Faculty Application

These rules will apply equally to law faculty members engaged in private practice.

E. Law Firm Name and Letterhead—Use of University Name

1. Applicable Rules

Rule 7.5 prohibits a lawyer from using a firm name or letterhead that is false or misleading in violation of Rule 7.1, and a law firm’s trade name cannot “imply a connection with a government agency.”

2. Law Firm Application

In practice, lawyers should be careful not to mislead the public by the adoption of a firm or trade name, such as one which might create unjustified expectations of results, or which makes unsubstantiated comparisons to the services of other lawyers. Words like “best” or “winners” should be avoided.

3. Faculty Application

Law faculty should not, in general, use law firm or university letterhead for private practice activities. Such use could be construed to suggest some connection of the law school or the university to the representation, which would generally not be true and which would, therefore, be misleading. Additionally, the use of the faculty member’s academic title in private practice documents may also pose the danger of being

55. Lawyers may be paid a fee for referrals. “A division of a fee,” which may include a portion designated for referral of a matter, “between lawyers who are not in the same firm may be made only if . . . the client is advised of and does not object to the participation of all the lawyers involved; and the total fee is reasonable.” MODEL RULES OF PROF’L CONDUCT R. 1.5(e) (1998).

56. Id. R. 7.5(a).

57. In the case of law schools that are part of public universities, the use of the law school or university name or address in practice documents may also be construed to fall afoot of Rule 7.5(a).
confusing and misleading to clients and should, therefore, either be avoided or, the documents should include a disclaimer indicating that the title is used for information purposes only. Similarly, a faculty member engaging in private practice should be very careful when giving a law school address to a private client because this, too, may give the false impression that the law school or university is involved in the representation.

VII. STANDARDS OF CONDUCT

A. Applicable Rules

In Rule 8.4, the authors provided for general rules of misconduct which are not specifically covered under other rules, such as criminal acts which reflect on honesty, trustworthiness or fitness to practice, as well as dishonesty, fraud, and deceit, general misconduct which is "prejudicial to the administration of justice," and "any other conduct that adversely reflects on the lawyer's fitness to practice law."58

B. Law Firm Practice

In practice, these problems can usually be avoided by adopting the practices and procedures outlined above, including designation of an in-house counsel, with procedures to keep lawyers up-to-date on evolving rules of ethics and policies to compel compliance, as well as designation of an ombudsman to receive and address potential problems early in their development.

C. Faculty Application

One of the more difficult questions that may arise in this context is whether a violation of university rules in the course of private practice by a faculty member may give rise to a disciplinary charge under Rule 8.4 when no other rules of professional responsibility are violated and where no criminal activities are involved. A prime example of this is plagiarism. Does a professor violate Rule 8.4 if he plagiarizes a portion of a brief prepared for a client, if such plagiarism, arguably, does not violate any other rules? Plagiarism of limited amounts of material is common in

law practice in the United States and, in general, is not penalized. If such plagiarism were found in an academic publication, most universities would discipline a faculty member for a breach of academic ethics. Should a law faculty member who is disciplined for such a breach of academic ethics also be liable to professional discipline by legal authorities? A second example of such a case might be one where a law professor engages in a consensual intimate relationship with a student. As long as the student was an adult and the relationship was consensual, it would violate no criminal statute nor any rule of professional responsibility, with the possible exception of Rule 8.4. On the other hand, such a relationship would violate internal ethics rules of many universities and, in many cases, could lead to dismissal. Should Rule 8.4 be interpreted so as to make such a violation of university ethical standards also a violation of Rule 8.4?

VIII. PARTNERSHIP AND OF-COUNSEL RELATIONSHIPS

Some law professors form relationships, including partnerships and “of-counsel” agreements with outside law firms.

Although such relationships do not violate the Rules of Professional Responsibility, they are often disfavored and, on occasion, prohibited by internal law school rules. In such cases does violation of such rules open up the possibility of a violation of Rule 8.4, above? And, if a law professor declines such a relationship, does he put himself at risk of violating Rule 1.1, as discussed above for lack of adequate resources?

IX. CONCLUSION

It will have become obvious by this point that law faculties share many of the same obligations under the Rules of Professional Responsibility as do law firms. It is also clear, at least anecdotally, that few law faculties have seriously considered these issues or taken appropriate measures to ensure compliance with the various rules of professional responsibility. If law faculty members are to serve as proper role models for their students, such non-compliance is wholly unacceptable and should be remedied immediately.

Nor are these concerns limited to the law faculty. Those outside the law school who employ professors as co-counsel or as expert witnesses

59. One might also point out that judges often plagiarize, in the strict sense, material written by judicial clerks, or by litigants' counsel in their briefs.
would do well to inquire about the professors’ and the school’s compliance with the applicable rules of professional conduct, or risk disqualification or worse, ignoring the Rules at their peril.