Using Ethics Experts
(Reflections of an Ethics Expert)
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Reflections of an Ethics Expert

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Introduction

In the past two decades the legal profession has seen the rise of a new area of focus both for practitioners and academics: the “ethics expert.” Increasingly, experienced lawyers, retired judges, and academic lawyers are devoting a large portion of their time to studying, advising about, and testifying in relation to the Rules of Professional Conduct. In addition, the American Bar Association now has established a Center for Professional Responsibility which ABA members may join, which publishes a series of publications including the an annotated edition of the Model Rules, and which also provides research services [at a charge] for lawyers dealing with professional responsibility problems. A revised third edition of the Kansas Bar Association’s Handbook on Legal Ethics has recently been published and similar volumes are either in print or in the works in most states.

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1 John H. & John M. Kane Distinguished Professor of Law, University of Kansas; B.A., M.A., Haverford College, M.A., PhD, University of Cambridge, J.D., Yale Law School.
2 There are multiple online sites that now provide references to lawyers and academics willing to serve as an ethics expert; see, for example, the JurisPro site, http://www.jurispro.com/category/legal-ethics-s-422/.
3 http://www.americanbar.org/groups/professional_responsibility.html.
and local bar associations and their ethics committees continues to publish many ethics advisory opinions and, of course, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility is also active in publishing both formal and informal advisory opinions. Complaints against lawyers certainly have also maintained their pace. In Kansas the annual total of disciplinary complaints filed against lawyers often approaches 1,000. My own sense, from reading current litigation in which ethics violations by lawyers are alleged, is that the Rules of Professional Responsibility continue to appear frequently in a wide range of cases, most often, of course, in cases alleging legal malpractice. The fact is, that lawyers now operate in a complex professional environment in which disciplinary rules proliferate both in number and complexity. Few lawyers have the time to master the rules to such a degree that they can claim expertise. Thus, when issues of professional responsibility arise in the course of their professional lives, they need to call upon an ethics expert.

The author of this paper has been a faculty member at the University of Kansas for more than two decades, served as dean of two law schools, and has taught and written extensively about legal ethics and related matters. I have worked on a number of cases over the past ten years as an ethics expert in several jurisdictions. In addition, I have taught courses on professional responsibility, legal malpractice and law practice management at the University of Kansas. For many years.

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5 Interview with Stan Hazlett, Esq., Kansas Disciplinary Administrator, 18 March 2014. On the increase in legal malpractice suits, see, D. Richmond, Why Legal Ethics Rules are Relevant to Lawyer Liability, 38 ST. MARYS L. REV. 929 (2007).
Reflections of an Expert

Practice Management

The old cliché that “the best defense is a good offense” applies to the field of professional responsibility. The Rules of Professional Conduct are often quite complex and, in my experience, many lawyers do not realize the wide scope of their coverage. In many situations proper law practice management techniques can avoid unintentional ethics violations that may have serious professional consequences. The Rules provide a framework within which every lawyer should shape his or her practice, although far too few do so. For the past several decades, providing advice on law practice management issues as they relate to legal ethics has been one of the areas in which I have consulted and taught.

For instance, Rule 1.6 on confidentiality must play a significant role in law office architecture and furnishings. An example I often use in my law practice management class is that lawyer offices in which confidential documents will commonly be used and may be left unsecured for any period should never be directly open to the public. The best arrangement is one in which a lawyer, in fact, secures his office at all times, even for short absences, if there are confidential papers in the office. If this is not done, then, at the least, such offices should not be open to public view or traffic and, if possible, access to these offices should be secure. Similarly, file rooms, in which client papers will be stored or computer equipment on which client files may be stored digitally should always be in a secure location to which only authorized personnel have access and steps should be taken

6 MRPC 1.6.
to ensure that these files are safe from unauthorized access via the Internet. Concern about law firm security and confidentiality has, in fact, given rise to a new legal service, firms which will come in and do a “security audit” both of the physical and virtual spaces use by a lawyer or law firm. Several years ago, my colleague, Mike Davis and I published an article in the Kansas Bar Journal we titled “Preventative Ethics” in which we provide suggestion on how every lawyer and law firm can and should do such audits, not only of their space, but also of all of their law firm practices.7 In order to ensure that office practice, including design, conforms with the requirements of the Rules of Professional Conduct it is often valuable to hire and ethics expert, either alone or as part of a team provided by a third party security firm.

An example of how even a careful law firm may run afoul of the Rules inadvertently that I use in my class is a medium size firm with standard office design. There is a staffed reception area in the front and lawyers and secretaries are behind this area through a door. The lawyers’ offices are on the outside so that the lawyers have windows. The secretarial spaces run around the inner wall of the corridor. Secretaries do not have private offices. Instead, secretaries have cubicles fronted by three foot partitions with a counter in top so that they may have clear vision of the corridor and so that they may communicate with lawyers without getting up. Although the lawyers tend to keep their offices secure and lock their files and their offices when they leave at night, it is common practice for the lawyers to leave documents on the counters at the secretarial stations for the secretaries to begin

work on the next morning, since secretaries often arrive before the lawyers to whom they are assigned. The firm as a whole is locked at midnight.

In this scenario the lawyers feel perfectly safe leaving papers out on counters for their secretaries over night because they know that the firm offices will either have a receptionist guarding the inner working spaces or the firm will be locked up so that nobody can enter and access the documents they have left out. Unfortunately, this assumption is false because the firm has a cleaning service come into the office each night and the cleaners have full access to all of the spaces, including the secretarial stations with unsecured confidential documents. This is clearly a violation to preserve confidential client papers required by Rule 1.6.

In recent years many law firms, particularly larger firms, have appointed one member to serve either as the firm’s general counsel who also acts as the firm’s in-house expert ethics advisor or a special in-house ethics counsel who does nothing but ethics work for the firm.8 This permits lawyers in the firm to have easy access to ethics advice whenever it is needed, eliminates concerns about going outside the firm and, thereby, raising Rule 1.6 questions if client information is involved [see the discussion below] and also allows the in-house lawyer to institute regular ethics training session for both legal

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and non-legal staff\textsuperscript{9} Even smaller law firms can designate one member of the firm to serve as the primary resource for all other lawyers and non-lawyer assistants on ethics questions, albeit on a part-time basis. I believe that law firms can easily avoid the need for outside experts simply by appointing such an internal ethics counsel. I have advised a number of law firms to do just this, even though it effectively eliminates the need to call me in.

Another situation in which a lawyer should retain an ethics expert is when the lawyer finds himself in a position where he believes that he may be in a position in which a proposed course of action may involve an ethics violation. Of course, KRPC 1.2(e) and 8.4(a) prohibit a lawyer from violating the Rules of Professional Conduct. If a lawyer believes that he may have done so or may do so, that is the time to seek expert advice. One potential problem is seeking this advice is that if the lawyer’s actions involve a client, then his ability to disclose relevant information necessary to gain such advice may be limited by KRPC 1.6 on client confidentiality. Happily, the ABA Standing Committee on Ethics and Professional Responsibility has issued a useful advisory opinion on this very issue. In Formal Opinion 98-411, the ABA Committee suggested that a lawyer could seek ethics advice from a third party so long as he satisfied certain conditions. The Opinion advises that in order to comply with Rule 1.6:

\textsuperscript{9} See, esp., MRPC 5.3(a), and, especially, Comment 2 requiring lawyers to ensure that non-lawyer assistants act in compliance with the KRPC and recommending that law firms institute ethics instruction for non-lawyer assistants].
1. A lawyer should only disclose those facts that are absolutely necessary and that his presentation of the facts should be in hypothetical form so that the expert cannot identify;

2. A lawyer should seek permission from the client and get the client’s “consent after consultation” [i.e. informed consent] to the lawyer’s seeking the expert advice;

3. A lawyer should seek an agreement from the expert he wishes to consult that the expert will keep all disclosures confidential [I would suggest that this be in writing];

4. A lawyer should seek out an expert for consultation who is likely not to have a conflict with the lawyer’s client.10

The Opinion also notes that in many cases described the consulting lawyer may have a professional responsibility to seek the advice of an ethics expert under the Rule 1.1 competency requirement.11

When seeking prophylactic advice, who should a lawyer seek out as an expert? My suggestion is to find a retired judge or senior established lawyer who has practical experience in the area of law in which the problem has arisen and also has both the knowledge and the experience in interpreting the Rules. Often, this will be a very senior member of the Bar whose practical experience can be a huge advantage. These are not situations in which theoretical knowledge of the Rules will be enough, in my opinion. Thus, I generally decline to offer advice or opinions in such cases and do not ordinarily recommend that those who come to me seeking out such advice retain a non-practitioner such as a law professor unless that individual had extensive practical experience prior to

11 Ibid.
becoming an academic. It is the nature of current law school hiring practice that most law professors have had very little actual experience of the full time practice of law before entering the professoriate [often three years or less] so that while they may well have extensive knowledge of the Rules, they may not necessarily also have knowledge of the full complexity of the day to day practice of law.

I generally decline to give prophylactic opinions to practicing lawyers both because I do not feel that I am qualified to do so in many cases, but, also, because I take very seriously the criticisms made against this practice by Professor William Simon is his article “The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example.” In this well-known and often debated article Professor Simon takes academic legal experts, including some of the best known, to task for, in effect, selling opinions to clients. Precisely because I am an academic lawyer without staff and without the ability to do significant independent investigation, I feel that it would be dangerous for me to attempt to give a lawyer advice on a proposed course of action, particularly when the facts involved are complex or difficult to verify. In my opinion, it is very difficult for a law professor to do sufficient due diligence to be comfortable with giving actionable advice to a practicing lawyer. I find this particularly problematic if the lawyer seeking an opinion demands confidentiality thereby making verification of all the facts even more difficult.


13 I am also concerned with potential conflict of interest issues within my faculty were I to act in such a capacity; see, Hoeflich and Badgerow, OP. CIT., n. 9, above.
To indulge in another cliché, “a physician who has himself as a patient, has a fool for
a patient.” I believe that much the same said may be said of a lawyer who attempts to deal
with a disciplinary problem himself without expert advice. There are few more difficult and
upsetting situations faced by a lawyer than receiving a complaint letter from the
Disciplinary Administrator. The psychological trauma alone is often enough to incline the
recipient to delay formulating an answer to the initial query, delay that may itself give rise
to a disciplinary violation. Unfortunately, the odds of receiving such a letter at least once
in one’s career have become a fact of life for most lawyers, no matter how careful they may
have been about observing the requirements of the Rules of Professional Conduct in their
practices. The question is really not whether a lawyer who is the target of a disciplinary
complaint should hire an ethics expert to advise him and, possibly, defend him against the
complaint, but, rather, at what point in the disciplinary process should a lawyer seek out an
ethics expert for such advice and/or representation?

In Kansas, the disciplinary process proceeds in carefully measured steps. The first
step for most lawyers will be receipt of a letter from the Disciplinary Administrator telling
the lawyer that a complaint has been received and outlining the basic facts of the
complaint. The lawyer then must respond to this letter stating his version of the questioned
events and activities. Such response is normally a factual one, either admitting the facts or

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14 According to Stab Hazlett, Kansas Disciplinary Administrator, this is a problem with which he
has had to contend on a number of occasions, Interview, 18 March 2015.
denying them in whole or in part. If there is a question of the applicability or interpretation of the KRPC it may be wise to retain an ethics expert at that point. This is especially important because in Kansas the Disciplinary Administrator is not required to allege specific Rules that have been violated, but, instead, the DA need only allege facts that may give rise to a Rules violation.15 The reasoning for this is that all lawyers are held to have full and complete knowledge of the Rules of Professional Conduct. In reality, of course, many lawyers will not have such knowledge and may well not perceive all of the possible Rule violations contained in the factual allegations of the complaint. This may well cause the lawyer responding to the complaint to fail to allege relevant facts, a failure which may push the complaint further into the disciplinary process. In many cases a simple factual narrative informed by a full knowledge of the Rules may well end the matter once the Disciplinary Administrator’s office has all the facts. Thus, I would argue that the best time to call in an ethics expert is when the initial letter of inquiry is received. If this is not done and the matter does not end at this point and further investigation is initiated, then, I generally strongly suggest retaining expert help with no further delay. The disciplinary process is fraught with emotional and professional stress. It is also a specialized procedure with rules of its own. Having an objective expert on your side is just common sense and may be the difference between professional success and disaster.

Who should a lawyer retain as an expert in such situations? Once, again, I would suggest that a lawyer under investigation should seek out someone with both extensive practical knowledge of the disciplinary process as well as expert knowledge of the Rules of Professional Conduct. Generally, this means seeking out a senior lawyer or a retired judge

who has served on disciplinary hearing panels or has appeared before such panels on behalf of clients. This is why I do not take on such cases. Since I am not a member of the Kansas Bar, I have not served on Kansas tribunals and my knowledge of them is only secondary. In addition, I also suggest to those who seek me out in such matters that they do not want to retain someone who is simply a general practice litigator but, rather, they should retain someone who has extensive knowledge of this specialized field. There are a number of attorneys in most states who handle such cases on a regular basis. I also advise that they not seek out another legal academic unless that academic also has extensive experience in the actual discipline process. Very few law school courses on professional responsibility touch on the details of disciplinary processes and, therefore, few academic experts will, in fact, have the procedural expertise on needs in these situations.

**Legal Malpractice**

In Kansas and in most states, legal malpractice actions will be brought as negligence actions in tort, as breach of contract actions, and/or as breach of fiduciary duty actions. Generally, both sides will retain experts to testify as to the standard of care lawyers ordinarily exercise on the matters in contention in the jurisdiction in which the action is brought. Under general tort principles, courts have held that in order to testify as to the ordinary standard of care an expert witness in a legal malpractice action must be admitted to and in good standing as an attorney in the jurisdiction. The standard of care expert is

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testifying on facts, i.e. the ordinary standard maintained by lawyers in the jurisdiction. The ethics expert, however, is not directly testifying on facts as to the standard of care. Thus, as we shall see, the expert need not necessarily be admitted in the jurisdiction in which the action is brought. The ethics expert is testifying on law, i.e. on the Rules of Professional Conduct as adopted and interpreted in the jurisdiction, perhaps, on the Rules as adopted and interpreted in other jurisdictions, on the concept of fiduciary duty, on the history of the ethical rules, etc. Thus, the ethics expert may, for instance, be a law professor who is not admitted in the jurisdiction. It is, in fact, these types of cases in which I have primarily served as an expert. Of course, since the ethics expert is testifying on the law and not on the facts, a judge may well decide that such testimony is unnecessary and that the judge herself can provide all of the legal information needed by the court. Similarly, a lawyer may decide that having an ethics expert who is admitted in the jurisdiction may provide a strategic advantage. For instance, an experienced practitioner who has served on disciplinary panels in Kansas may well be more convincing on what the KRPC says and means than a non-admitted academic expert in a Kansas trial court. In some cases in which I have served as an expert the lawyer has also retained a second expert to testify as to the relevant Rules, not an academic, but a lawyer or judge who is admitted in the jurisdiction and had substantial practicing experience. I have never objected to sharing the burden with such a second expert. Indeed, I welcome it.

More important, perhaps, in deciding whether to retain an ethics expert to testify in a legal malpractice action, in my experience, is the realization of the fact that a standard of

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17 This has led to the growth of a small group of highly regarded academic experts who testify in cases across the nation. The best known of these are Prof. Geoffrey Hazard, Prof. Charles Wolfram, and Prof. Ronald Rotunda, among others.
care expert is necessary to prove the factual basis of the negligence or breach of fiduciary
duty claim, while an ethics expert’s testimony is not absolutely necessary. Over the years I
have heard a number of lawyers cite the Scope section of the Rules of Professional Conduct
as adopted as the reason why an ethics expert is not only not necessary but, in fact,
inappropriate to a legal malpractice case. For instance, in Kansas, the relevant portion of
Comment 20 to the Scope section reads:

Violation of a rule should not itself give rise to a cause of
action against a lawyer nor should it create any presumption
in such a case that a legal duty has been breached.

I believe that this is an incorrect reading of the Preamble Comment.¹⁸ A proper
interpretation of this statement is that a violation of the Rules of Professional Conduct
cannot, on its own, stand as a basis for an action. The Scope section of the Rules makes it
clear that one cannot allege a breach of the Rules as a cause of action in a complaint. But
this does not mean that testimony as to whether a lawyer has violated one or more Rules is
not relevant and should not be admitted. On the contrary, I believe that the KRPC Rules of
Professional Responsibility as adopted in every jurisdiction represent the declaration of
the highest authority in the jurisdiction and that the rules represent the minimum standard

¹⁸ On this, see, above all, D. Richmond, Art. Cit., n. 5, above; see, also, Sluga & Christian, Art.
Cit., n. 21, below.
of behavior acceptable for admitted attorneys in that jurisdiction. It would be both illogical and absurd to argue that the ordinary standard of care in a state is, in fact, lower than what is ethically required of lawyers by the Rules. In a recent case in which we served as an ethics expert, the opposing parties made a motion to have my testimony excluded on the basis of the Scope section of the Rules. The trial judge ruled on this issue in a pre-trial motion:

Both Missouri and Kansas are similar in that a cause of action does not arise solely because of a violation of a Rule of Professional Conduct. However, this does not mean that any discussion of the Rules is completely irrelevant. These rules create a background for the actions of attorneys, and, although the rules do not create a duty element for a cause of action, a breach of the rules can be a breach of the duty an attorney owes to his or her client. Whether a violation of the Rules of Professional Conduct is a breach of an attorney’s duty to his or her client is an issue for the jury to determine. Likewise, if a lawyer complies with his duties as a lawyer under the Rules of Conduct, an expert testifying otherwise to a breach of that lawyer’s duty of care may be hard pressed to withstand examination.

As for Mr. Hoeflich, although he does not make any conclusions regarding the standard of care, he will still be allowed to testify as to the Rules of Professional Conduct. The purpose of experts is to help the jurors understand difficult issues in a case. Even if he is unable to give an opinion as to the standard of care, his testimony
regarding the Rules of Professional Conduct will still be helpful to the jury. 19

When to Hire an Ethics Expert

If one accepts my interpretation of the Rules’ relevance to malpractice actions, there is still the question of whether a lawyer should retain an ethics expert in addition to an expert on standard of care in the jurisdiction. From one perspective, the decision to retain an ethics expert is an expensive “belt and suspenders” decision. On the other hand, while having separate standard of care and ethics experts testify may be redundant, an ethics expert with substantial expertise and impressive credentials may be more persuasive to a jury than an ordinary practitioner serving as a standard of care expert. Second, an ethics expert who has specialized knowledge about the history of particular rules or concepts [like fiduciary duty] or about the rules as adopted in other jurisdictions may add extra dimensions to the testimony of the standard of care expert. I believe that this is something that I, as an academic who has studied not only the Rules but also the history of legal ethics in this country as well as in England and the on the continent, can do something unique for a case. These are the cases in which I feel that I can be most useful. They are also the cases

that I find most rewarding from a scholarly perspective. And these are the cases in which I have served as an ethics expert.

To some degree, the choice of whether to have both types of expert will rest upon whether the case will go before a jury, how complex the issues are, how well the standard of care expert can explain the relevant issues, and whether the judge is inclined to value separate ethics expert testimony in any case. I have testified as an ethics expert in cases in which the judge has allowed my testimony but in which, in my own opinion, I did not add a great deal to the case of the lawyer who retained me. In other instances, I believe that I have been quite helpful. Also relevant, I would suggest, is what the other side chooses to do. If one party to an action has both standard of care and ethics experts, most often the other party will do the same. This, of course, can produce a “battle of the experts” which may result in quite high litigation costs. The most notable example of this in Kansas was the famous case of In re Estate of Koch, in which one side hired Professor Geoffrey Hazard, longtime professor at the Yale Law School and Executive Director of the American Law Institute, and the other side hired Prof. Charles Wolfram, longtime professor at the Cornell Law School, author of the leading treatise on legal ethics, and one of the architects of modern American legal ethics. Whether the testimony of these experts was worth the cost is certainly up for debate.

The Role of the Ethics Expert

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Having served as an ethics expert for more than a decade I have thought a great deal about when a lawyer should retain an ethics expert, particularly an academic expert. If a lawyer does decide to retain an ethics expert in a legal malpractice case, what can be expected and what problems may arise? Here, again, a Formal Opinion of the American Bar Association Standing Committee on Ethics and Professional Responsibility is of great utility. In Formal Opinion 97-407 (1997) the ABA Committee considered the proper role and consequences following therefrom of the use of a lawyer as an expert witness. This Formal Opinion provides a basic framework within which to understand the role of an ethics expert. The Opinion specifically considers whether a lawyer serving as an expert witness is subject to the conflicts rules [Rules 1.7-1.9] of the Rules of Professional responsibility. To answer this question the Committee distinguishes between a “testifying expert” and an “expert consultant” or “consulting expert.” A consulting expert, according to the Committee, is a lawyer who acts as a lawyer, i.e. advocates for a client, applies the law to specific client facts and thereby advises the client, etc. A testifying expert, however, which is the role that would normally be played by an ethics expert retained in a legal malpractice case, is not acting as a lawyer, does not advocate for a client, does not give advice to a client, and, thereby, does not form a lawyer-client relationship with a client.21

In the words of the Opinion:

21 ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 97-379 (1997). This opinion on its face deals only with conflicts of interest and does not provide explicit guidance as to whether a lawyer who is serving as an ethics expert will be subject to all of the other Rules in this role. For instance, is such a lawyer expert required to deposit a retainer paid solely for her service as an expert witness into her client trust account per Rule 1.15? I believe that the proper answer is that a lawyer acting as a testifying ethics expert is not required to do so under the analysis of Formal Op. 97-379.
A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness. The testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm’s side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates.

Thus, normally an ethics expert who is a “testifying expert” will, to the best of her ability, be neutral and provide “objective testimony” on the subjects upon which she is opine in court. As I have made clear, it is this role that I find most comfortable and which I believe is most suitable for a legal academic. Many a lawyer who has retained an ethics expert has discovered that the expert will not “deliver” the opinion he so ardently desires because the expert cannot do so and “provide truthful and accurate information.” When I have been retained as an ethics expert I have always told the lawyers who retained me at the outset that I cannot and will not advocate for their clients nor can I promise to deliver an opinion 100% to the lawyer and her client’s liking. Indeed, I have rarely been able to give a lawyer precisely what she has wanted from me in an opinion or testimony. On the
other hand, I also explain that, in my opinion, this approach, outlined by ABA Formal
Opinion 97-407, significantly increases my credibility in court. Indeed, in one case in which
I was testifying before a jury, the judge thanked me at the conclusion of my testimony for
being fair and balanced. I have to admit that I am not sure that the lawyer who had retained
me was exceptionally happy that I received that praise from the judge, but I felt that I had
done precisely what I had been retained to do and what I had promised to do.

How an ethics expert manages to achieve a semblance of neutrality in giving
testimony is always an issue. I have encountered some experts who attempt this by simply
giving opinions phrased as hypotheticals, eg. “if x and y occurred, then the following Rule
was violated.” I believe that such testimony is not satisfying either to the lawyers who
retain an expert not to judges or juries. On the other hand, as I mentioned earlier, I do not
have the ability to do due diligence nor is my role that of a trier of fact. Thus, I do not
feel comfortable testifying in a purely declaratory manner, i.e. “x and y occurred, therefore the
Rules were violated.” Instead, I take a middle ground. I insist on seeing not only the
complaints, but also all relevant evidence including witness depositions before I testify.
When there are uncontroverted facts, I will give a declaratory opinion as to how those facts
and the Rules interact. When there are controverted facts, I give an opinion in the form of
“assuming the truth of the facts as stated by x,...” I assume the truth of the fact in the
evidence presented to me by the lawyer and client who have retained me [unless they are
absurd or impossible]. When asked why I assume the truth of these facts rather than the
facts presented by the other side, I explain that the opposing party’s expert may assume the
facts as provided by the lawyer and client who retained her and that she may give her
opinion based on those assumptions. I have found this approach acceptable to both the lawyers who have retained me and to the court in which I am testifying.

On this point I must comment again, albeit briefly, on Professor William Simon’s article, “The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example.” While Professor Simon focuses to a large extent on consulting experts rather than testifying experts, I would argue that, in my experience at least, there are flaws with his arguments as applied to testifying experts. First, it has been my experience in regard to legal malpractice actions that in many cases the most questionable opinions of testifying experts have come not from academics but rather from senior lawyers and retired judges. I have often found myself reading reports produced by practicing lawyers and judges in cases in which I am involved in which the interpretations of the Rules challenges logic in order to arrive at the opinion desired by the lawyer who has retained them. While I do not suggest that these experts “sold” their opinions to the lawyers who retained them, I would suggest that, in many cases, professional solidarity and the hesitation to find fellow members of the Bar guilty of legal malpractice often sways, perhaps unconsciously, the expert opinions of practitioners and retired judges. As an academic I do not depend upon the same professional networks that practicing lawyers and judges do and, therefore, I believe that I can be more objective than many practicing lawyers and judges. I would also suggest that it is much harder for practitioners in particular to cast off the role of advocate and assume the role of “objective” commentator in such situations in spite of the strictures of ABA Formal Opinion 97-407. Academic ethics experts, particularly

22 Simon, OP. CIT., n. 13, above.
those who do not depend upon their expert testimony as a primary income source, are, I believe, far more likely to be able to assume the objective viewpoint mandated by Op. 97-407 than practitioners who will have to continue to work with and socialize with the defendants in legal malpractice actions long after the expert’s testimony is concluded. I would also suggest, contrary to Professor Simon’s opinion, that academic ethics experts who teach at universities do have to conform to normative ethical standards, even if these standards of truth-seeking and truth-telling. Do not carry specific sanctions. Relevant here is the AAUP Statement on Professional Ethics, Section 1:

Professors, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognize The special responsibilities placed upon them. Their primary responsibility to their subject is to seek and state the truth as they see it.\(^{23}\) [emphasis added]

I do not believe these are empty words and while the AAUP Statement on Ethics is not *per se* authoritative it is my experience that it is observed at every serious university and its principles adopted, either implicitly or explicitly, into every serious university’s code of behavior for faculty.

One of Professor Simon’s criticisms of academic ethics experts is that they often operate behind a veil of confidentiality. First, of course, I would note that ABA Formal

Opinion 97-407 suggests that the confidentiality requirements of Rule 1.6 will not apply to a testifying expert. Nevertheless, Professor Simon argues that in many cases a retaining lawyer may insist on an ethics expert’s maintaining confidentiality about his opinion and the bases for it. This may well be a problem in regard to opinions given in a non-litigation context. However, in my experience, such confidentiality is much less an issue in a litigation situation. I have been an expert in proceedings in which the record has been sealed. However, even in such cases, I am very much aware that my opinion and testimony will be read and heard by a judge and by lawyers on both sides. I value my reputation for honesty and objectivity and would not allow this to be tarnished even in such a small group context.

In Kansas the identity of all experts retained by a party must be disclosed both to the court and opponents and the expert must prepare a report on the testimony which the expert expects to give [in Missouri, by contrast, a report is optional]. Certainly, the retaining lawyer can work with the ethics expert in the production of the expert’s report, but, in my opinion, it would generally be unwise for the retaining lawyer to attempt to write or even significantly shape the opinions expressed by the expert beyond the expert’s comfort level for fear that this will not only compromise the credibility of the expert’s testimony [in my experience as a testifying expert I have almost always been questioned on this subject by opposing counsel during my deposition] but, also, may well convert the expert from a “testifying expert” into a “consulting expert”. The ramifications of this are explicitly stated in Opinion 97-407:

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24 See, n. 22, above.
25 see, KANSAS RULES FOR DISTRICT COURTS, RULE 14: “RULES REGARDING EXPERT WITNESSES.”
The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice. The testifying expert may sometimes become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case.

When this blending of roles occurs, the lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the law firm’s client. The lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer’s expert testimony by undermining its objectivity. The lawyer also is bound by the Model Rules relating to conflicts of interest and imputed disqualification with respect to service as expert consultant. 26

This, too, serves as a restraint on an ethics experts’ opinion and testimony and lessens the concerns voiced by Professor Simon.

Conclusion

The decision to hire an ethics expert should not be taken lightly. First is the question

26 See, n. 22, above.
whether one needs such an expert at all. In my opinion, many times lawyers will hire an ethics expert when this is not required. Second, if one does decide to hire an ethics expert then it is crucial to hire the right expert and to decide what the best profile of such an expert will be, i.e. should the expert be an academic, a retired judge, a senior practitioner. Consideration of these and other issues that I have touched upon today will help lawyers make the best use of ethics experts.