Reflections Of An Ethics Expert And A Lawyer Who Retains Him

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I. 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 Model Rules of Professional Conduct ("Model Rules"). In addition, the ABA has established a Center for Professional Responsibility that ABA members may join, which publishes a series of publications—including the 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 was recently published, and similar volumes are either in print or in the works in most states. State and local bar associations and their ethics committees continue to publish many ethics advisory opinions and, of course, the ABA’s Committee on Ethics and Professional Responsibility ("ABA Committee") 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 

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1. There are multiple online sites that now provide references to lawyers and academics willing to serve as an ethics expert. See, e.g., Legal Ethics Expert Witness, JURISPRO, http://www.jurispro.com/category/legal-ethics-s-422 (last visited Feb. 15, 2016).
2. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2013).

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complaints filed against lawyers often approaches 1000. Our own sense, from reading current litigation documents in which ethics violations by lawyers are alleged, is that the Model Rules 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 authors of this Article come from different backgrounds but have worked together over the past decade on a number of cases involving issues on fiduciary responsibility and professional ethics. Each Part below is written in the voice of one of the authors. The academic expert 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. The practicing lawyer has been practicing law for more than three decades and has specialized in contingent fee litigation and, in the past decade, legal malpractice cases as plaintiffs' counsel. He was primary counsel for the plaintiffs in Burrow v. Arce—a landmark case on legal malpractice and fee disgorgement. The authors have worked together on a number of cases over the past ten years as plaintiffs’ counsel and ethics expert. In addition, the authors have co-taught courses on legal malpractice and law practice management at the University of Kansas.

II. REFLECTIONS OF THE EXPERT

A. Practice Management

The old cliché that “the best defense is a good offense” applies to the field of professional responsibility. The Model Rules 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 help lawyers avoid unintentional ethics violations that may have serious professional consequences. The Model Rules provide a framework within which every lawyer should shape his or her practice, although far too few do so. For the past several

6. 997 S.W.2d 229 (Tex. 1999).
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 lawyers' offices containing confidential documents that 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 her 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 where 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 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 that will come in and do a "security audit" both of the physical and virtual spaces used by a lawyer or law firm. Several years ago, my colleague, Mike Davis, and I published an article in the Kansas Bar Journal that we titled Preventative Ethics, in which we provided suggestions 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. In order to ensure that office practice, including design, conforms with the requirements of the Model Rules, it is often valuable to hire an 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 Model Rules inadvertently can be illustrated by using a medium-size firm with a 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 on top so that they may have a clear vision of the corridor and so that they may communicate with lawyers without getting up. Although the lawyers

7. Model Rules of Prof'l Conduct r. 1.6.
8. For instance, one of my former students at Kansas University School of Law started such a firm in Lawrence, Kansas, called Toto Labs.
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 overnight because they know the firm offices will either have a receptionist guarding the inner working spaces or the firm will be secured 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 conduct is clearly a violation of the duty to preserve confidential client papers, which is required by Rule 1.6.\textsuperscript{10}

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.\textsuperscript{11} This permits lawyers in the firm to have easy access to ethics advice whenever it is needed and eliminates concerns about going outside the firm, thereby raising Rule 1.6 questions if client information is involved. It allows the in-house lawyer to institute regular ethics training sessions for both legal and non-legal staff.\textsuperscript{12} Even smaller law firms can designate one member of the firm to serve as the primary ethics resource for all other lawyers and non-lawyer assistants, albeit on a part-time basis. We 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 consult an outside expert. However, it should be noted that the law regarding privilege for in-firm communications is “in flux.”\textsuperscript{13}

\begin{itemize}
\item \textsuperscript{10} MODEL RULES OF PROF’L CONDUCT r. 1.6(c).
\item \textsuperscript{12} See MODEL RULES OF PROF’L CONDUCT r. 5.3 cmt. 2 (requiring lawyers to ensure that non-lawyer assistants act in compliance with the Rule and recommending that law firms institute ethics instruction for non-lawyer assistants).
\item \textsuperscript{13} Susan Saab Fortney, The Role of the Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 112, 142 (2014). The authors thank Professor Susan Fortney for this observation.
\end{itemize}
Another situation in which a lawyer should retain an ethics expert is when the lawyer finds herself in a position where she believes that a proposed course of action may involve an ethics violation. Of course, Model Rule 8.4(a) prohibits a lawyer from violating the *Model Rules*.\(^\text{14}\) 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 in seeking this advice is that, if the lawyer’s actions involve a client, then his ability to disclose the relevant information necessary to gain such advice may be limited by Rule 1.6 on client confidentiality.\(^\text{15}\) Happily, Model Rule 1.6(b)(4) provides that a lawyer’s communication “to secure legal advice about the lawyer’s compliance with these Rules” is an exception to the confidentiality requirements of Rule 1.6.\(^\text{16}\) This exception is a codification of the ABA Committee’s formal opinion on this issue.\(^\text{17}\) In the opinion, the ABA Committee suggested that a lawyer could seek ethics advice from a third party so long as he satisfied certain conditions.\(^\text{18}\) The opinion advises that in order to comply with Rule 1.6:

- a lawyer should only disclose those facts that are absolutely necessary and his presentation of the facts should be in hypothetical form so that the expert cannot identify the client;
- 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;
- 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); and
- a lawyer should seek out an expert for consultation who is likely not to have a conflict with the lawyer’s client.\(^\text{19}\)

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.\(^\text{20}\)

When seeking prophylactic advice, whom 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

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\(^\text{14}\) *Model Rules of Prof’l Conduct* r. 8.4(a).
\(^\text{15}\) *See id.* r. 1.6.
\(^\text{16}\) *Id.* r. 1.6(b)(4).
\(^\text{18}\) *Id.*
\(^\text{19}\) *Id.*
\(^\text{20}\) *Id.*
experience in interpreting the Model 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 Model 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 consult me seeking out such advice retain a non-practitioner, such as a law professor, unless that individual had extensive practical experience prior to 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 while they may well have extensive knowledge of the Model 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 (that is, opinions on what actions to take) to practicing lawyers both because I do not feel that I am qualified to do so in many cases and, 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.21 In this well-known and often debated article, Professor Simon takes academic legal experts to task—including some of the best-known—for, in effect, selling opinions to clients.22 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.23 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, if factual verification is necessary.

22. See generally Simon, supra note 21.
23. I am also concerned with potential conflict of interest issues within my faculty if I were to act in such a capacity. See Hoeflich & Badgerow, supra note 11, at 859-62.

http://scholarlycommons.law.hofstra.edu/hlr/vol44/iss2/9
B. Disciplinary Proceedings

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 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.24 Unfortunately, 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 Model Rules in their practices. The question is really not whether a lawyer who is the target of a disciplinary complaint should hire another lawyer to defend him against the complaint, but, rather, at what point, if any, in the disciplinary process should a lawyer seek out an ethics expert for such advice or representation or both?

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.25 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 denying them in whole or in part. If there is a question of the applicability or interpretation of the Kansas Rules of Professional Conduct (“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 District Attorney need only allege facts that may give rise to a rules violation.26 The reasoning for this is that all lawyers are held to have full and complete knowledge of the KRPC.27 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

24. According to Stan Hazlett, Kansas Disciplinary Administrator, this is a problem with which he has had to contend on a number of occasions. Telephone Interview with Stan Hazlett, supra note 5.
26. See, e.g., id. at 644-45.
disciplinary process. In many cases a simple factual narrative informed by a full knowledge of the KRPC 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 without 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 and expert knowledge of the Model Rules. 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 disciplinary 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 the needs in these situations.

C. 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.\(^{28}\) 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

\[^{28}\] AM. BAR ASS’N PROF’L LIAB. COMM., THE LAW OF LAWYERS’ LIABILITY 172 (Merri A. Baldwin et al. eds., 2012) (citing PATTERN INSTRUCTIONS KANSAS, CIVIL 4TH § 123.40 (2008)).
legal malpractice action must be admitted to practice and be in good standing as an attorney in the jurisdiction.\textsuperscript{29} The standard-of-care expert is testifying on facts: that is, 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, the expert need not necessarily be admitted in the jurisdiction in which the action is brought.\textsuperscript{30} The ethics expert is testifying on law—that is, on the \textit{Model Rules} as adopted and interpreted in the jurisdiction, perhaps, on the \textit{Model Rules} as adopted and interpreted in other jurisdictions, on the concept of fiduciary duty, on the history of the ethical rules, and so on. 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.\textsuperscript{31} 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 \textit{KRPC} say and mean 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-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 \textit{Model Rules}, as adopted, as the reason why an ethics expert is not only unnecessary but, in fact, inappropriate in a legal malpractice case. For

\begin{itemize}
  \item \textsuperscript{29} See, e.g., Wilson v. McNeely, 705 S.E.2d 874, 877 (Ga. Ct. App. 2011).
  \item \textsuperscript{30} See, e.g., Walker v. Bangs, 601 P.2d 1279, 1282 (Wash. 1979). 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 Professors Geoffrey Hazard, Charles Wolfram, and Ronald Rotunda, among others.
  \item \textsuperscript{31} See, e.g., Watkins v. Sheppard, 278 So. 2d 890, 892 (La. Ct. App. 1973); see also Marvin Franklin, Comment, \textit{Expert Testimony in Legal Malpractice Actions}, 6 J. LEGAL PROF. 293, 295 (1981) (explaining that a judge is qualified to act as an expert witness).
\end{itemize}
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.32

I believe that this is an incorrect reading of the Preamble Comment.33 A proper interpretation of this statement is that a violation of the Model Rules cannot, on its own, stand as a basis for an action. The Scope section of the Model Rules makes it clear that one cannot allege a breach of the Model Rules as a cause of action in a complaint.34 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 Model Rules, as adopted in every jurisdiction, represent the declaration of the highest authority in the jurisdiction and that the Model Rules represent the minimum standard 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 Model Rules. In a recent case in which I 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 Model Rules. The trial judge ruled on this issue in the context of 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 of Professional Conduct] 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 [Professional] 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

32. KANSAS RULES OF PROF’L CONDUCT r. 226 cmt. 20 (KANSAS SUPREME COURT 2014).
34. See KANSAS RULES OF PROF’L CONDUCT r. 226 cmt. 20.
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.35

D. When to Hire an Ethics Expert

If one accepts my interpretation of the Model Rules’s 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 Model 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 Model Rules but also the history of legal ethics in this country, as well as in England and mainland Europe, 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 experts 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.

35. Tilzer v. Davis, No. 04 CV 3239 (Johnson Cty., Kan. Civil Dep’t 2d, Jan. 16, 2014) (order denying defendants’ motion to exclude plaintiffs’ experts) (footnotes omitted); see also Sluga & Christian, supra note 33.
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 ABA
Committee is of great utility. In Formal Opinion 97-407 (or “Formal
Opinion”), the ABA Committee considered the proper role and
consequences following therefrom of the use of a lawyer as an expert
witness.36 This Formal Opinion provides a basic framework within
which to understand the role of an ethics expert. The Formal Opinion
specifically considers whether a lawyer serving as an expert witness is
subject to the conflict rules (Rules 1.7 to 1.9) of the Model Rules.37 To
answer this question, the ABA Committee distinguishes between a
“testifying expert” and an “expert consultant” or “consulting expert.” A
consulting expert, according to the ABA Committee, is a lawyer who
acts as a lawyer: that is, advocates for a client, applies the law to specific
client facts, and thereby advises the client, and so forth.38 However, a
testifying expert, which is the role that would normally be played
by an ethics expert retained in a legal malpractice case, does not act as a
lawyer, advocate for a client, give advice to a client, and thereby form a
lawyer-client relationship with a client.39

In the words of the Formal Opinion:

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

37. Id.
38. Id.
39. Id. The Formal 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 Model 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 the Formal Opinion.
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.\textsuperscript{40}

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 opining 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 the lawyer who had retained me was exceptionally happy that I received this praise from the judge, but I felt that I had done precisely what I was retained to do and what I 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, such as, “if x and y occurred, then the following rule was violated.” I believe that such testimony is not satisfying to the lawyers who retain an expert, to judges, or to 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, such as, “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 Model 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 facts 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

\textsuperscript{40} Id.
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, at least in my experience, there are flaws with his arguments as applied to testifying experts. First, it is my experience, with 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 former judges in cases in which I am involved where the interpretations of the Model Rules challenge logic and 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 hesitance 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 former 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 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 the Formal Opinion than practitioners who will have to continue to work and socialize with the defendants in legal malpractice actions long after the expert concluded her testimony. I would also suggest that, contrary to Professor Simon’s opinion, 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 are not part of a formal

41. Simon, supra note 21.
REFLECTIONS OF AN ETHICS EXPERT

I do not believe these are empty words and, while the AAUP Statement on Professional Ethics is not per se authoritative, it is my experience that it is observed at every university and its principles are adopted, either implicitly or explicitly, into every 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 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 the ethics expert maintain confidentiality about his opinion and the bases for it. This may well be a problem with 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 was 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 it 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 that 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

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42. Id. at 1572.
44. Simon, supra note 21, at 1572-75.
46. Simon, supra note 21, at 1560, 1575.
47. See KANSAS LOCAL RULES OF SIXTH JUDICIAL DIST. r. 14 (2015); MO. RULES CIV. P. 62.01(10) (2013).
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 the Formal Opinion:

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.48

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

III. REFLECTIONS OF A LAWYER WHO RETAINS ETHICS EXPERTS

My reflections are tied to the particular litigation in which I have been involved, and so, my comments must be grounded there. Most of my "lawyering litigation" has involved aggregate settlements, and I will focus my comments on what I have learned in those cases.

It is my belief that the unethical use of aggregate settlements has become commonplace. Saying this, I must confess that because I have no access to systematically recorded data, my conclusions are necessarily anecdotal. Nonetheless, in twenty-five years of litigating aggregate settlement cases from Houston to Newark, with stops in between, I have discovered that many leaders of the bar, both lawyers and judges, have developed an acceptance of the way things are done in making aggregate settlements that is at odds with Rule 1.8(g), as it is written.49 Fundamentally, these lawyers and judges feel the aggregate settlement rule is simply impractical, and that it is inconsistent with the reality of the pressures of mass tort litigation and the logistics of multiple representations. Furthermore, paternalistically, they believe

49. MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2013).
lawyers are more qualified than clients to make settlement decisions. Finally, lawyers who have invested significant time and resources in a complex matter believe, in fairness, that their investment has earned them the right to make fundamental settlement decisions. Like any capitalist, having made a capital investment, they believe capital should have its way. Consequently, I find that lawyers often attempt to avoid the rule by attempting to delegate their fiduciary duties to third parties, by legalistically attempting to paper around the aggregate settlement rule’s requirements, or by simply ignoring the rule altogether.

It is my conclusion that the prevalence of this practice undermines public trust in the legal profession. I have interviewed hundreds of clients whose claims participated in aggregate settlements. An overarching theme from these interviews is the client perception that the tort system was created by, and is operated solely for the benefit of, lawyers. Rarely will a client know that the lawyer has breached an obligation to make required disclosures as to the essential terms of the aggregate agreement before seeking client consent. Nor will a client often have any understanding of the conflicts of interest that arise from aggregate settlement agreements. But, clients nonetheless sense that they have not been fully informed, and they feel manipulated, kept ignorant, and powerless. Clients express frustration at the lack of individualized attention to their cases; the absence of any, let alone meaningful, contact with a lawyer; and the sense that they have been processed through an assembly line. Even when the settlement is done in abject violation of the rule, clients never suspect illegality but tend, rather, to chalk their dissatisfaction with the process up to what they assume is a system that is mysterious, unjust by design, and quite simply intended to benefit lawyers. Infrequently, these frustrations lead clients, long after the ink has dried on the settlement documents, to seek advice from another lawyer. The case gets to me when the new lawyer happens to know me, and knows that I have previously had something to do with aggregate settlements. Infrequently, a lawyer will find the Burrow v. Arce case and from that source, search me out.

I do not mean to suggest that aggregate settlements are never properly done, but I can say that when asked to review particular settlements, I have never found an aggregate settlement that complied with the disclosure requirements of the rule. Because I assume that many aggregate settlements are made with proper client disclosures, I am left to consider the possibility that I only see the bad cases because participants in properly-executed settlements are sufficiently satisfied that they have not been motivated to seek help.
Rule 1.8(g) is not conceptually difficult. The difficulty is in taking the time needed to develop client relationships and evaluate each participating case, making it possible for the lawyer to provide clients with the information they need to understand and compare their settlement allocations. Unfortunately, this is difficult to accomplish at the end when the money is already on the table.

A. Developing Expert Testimony

1. A Special Application

Non-class aggregate settlements are prohibited transactions governed by the special conflict of interest rule, Rule 1.8(g), which has been adopted in every state. When two or more persons make a joint settlement of their claims, conflicts of interest arise that must be resolved before a lawyer can ethically participate, or advise a client to participate, in the transaction. On the basis of my particular myopathy, few lawyers understand or follow Rule 1.8(g) when making aggregate settlements. For the past twenty-five years, from the start of the litigation in Burrow v. Arce, which began in 1990 and continued through 2015, I represented clients suing their former lawyers for malpractice arising from such mass tort settlements.

Aggregate settlement malpractice cases require the development of the standard of care and ethical expert testimony on a number of issues. Indeed, on the basis of my experience, there is no area of malpractice litigation more dependent upon expert testimony. Expert testimony is required to prove each element of the claims of negligence and breach of fiduciary duty that arise in this context. Ordinary people need expert guidance to understand duty, breach, causation, and damages. Indeed, and surprisingly, judges often have no less a need for expert guidance, though in states in which I have practiced, they are presumed to be experts in each of these areas.

51. Moore, supra note 49.
54. Sluga & Christian, supra note 33.
2. Duty and Breach of Duty

Confusingly, and counterintuitively, paragraph 20 of the Scope section of the Model Rules states: "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."\(^{55}\)

I say this is counterintuitive because all lawyers are expected to know and follow the ethics rules. We expect each other to do so. Indeed, today the Multistate Professional Responsibility Examination ("MPRE") is required for admission to practice in all but three states.\(^{56}\) Ignorance or unwillingness to comply with ethical duties is simply not consistent with qualification to advise and represent clients. Thus, it is not hard to develop testimony that the Model Rules are a part of the standard of care and are incorporated into the standard of care. I have emphasized the word "itself" from paragraph 20 because it is the basis for arguing that evidence of a violation, when supported by expert testimony, can form a basis for lawyer liability.

On malpractice (negligence and breach of fiduciary duty) issues covered by the Model Rules, it is necessary to develop expert testimony that the standard of care incorporates a particular rule, that it is a rule intended to protect the client, and that it is foreseeable that a violation of the rule will cause harm to the client. In the context of aggregate settlement litigation, it is necessary to find a lawyer who has experience in handling complex cases involving multiple claimants to establish that the particular ethical rule is a part of the duty owed to the client.

The development of standard-of-care testimony in "lawyering" cases is never easy. To begin, each of us practice within the cocoon of professional relationships, school and bar relationships, particular venues, and particular specialties. This is particularly true in the narrow world of mass tort litigation. Earlier in my career, I defended, and then sued, doctors in medical malpractice cases. I learned quickly that it was much easier to find expert witnesses to defend local doctors than to criticize local doctors' care. The problem with bringing a suit against a prominent plaintiffs' lawyer is magnified because plaintiffs' lawyers don't like to sue each other, particularly those who have achieved significant success, and are not eager to testify against each other. Of course, the defense bar is already arraigned against the claim, and oftentimes local courts have been involved in the challenged settlement

\(^{55}\) Model Rules of Prof'L Conduct Scope ¶ 20 (Am. Bar Ass'n 2013) (emphasis added).

and are not completely disinterested. When approaching potential expert witnesses, one often approaches as a pariah.

In such cases, there is always a voluminous record to be reviewed by the expert. Before engaging in the process of negotiating the testimony of the expert, I attempt to put the record into as easily digested a state as possible. I try to organize it to narrow the focus and narrow the review. I attempt to approach the witness with a formulated theory and supporting expert conclusions. There is always a tension in the process of developing the final opinions. Good experts don’t just say what you initially think you want them to say, and the give-and-take process of developing the opinion usually leads to something better in any event. The changes in the Federal Rules of Civil Procedure that protect discovery of communications that do not form a part of the factual basis for the opinion have been helpful in promoting a dialogue with the expert leading to the formulation of a final opinion.57 It is my experience that a give and take with the expert helps me refine my theories while at the same time enabling the expert to reach a comfort level.

Professor Hoeflich, in his portion of this Article, distinguishes between the fact-based opinions of standard-of-care experts and the law-based opinions of ethics experts.58 I believe the distinction is apt. In every case I have designated ethics experts—typically law professors—as expert witnesses. I have not yet had a court reject a professorial ethics expert. But, I have never been comfortable with the idea. My view is that an ethics expert, as Professor Hoeflich suggests, is testifying as to the law. But, at the end of the case, it is the province of the court to instruct the jury concerning the law of the case. Consequently, it is my view that the proper posture for the trial court to take on all issues of law is to accept briefing and argument, and to then rule and instruct the jury as to the court’s rulings. I must confess that I am not sure ethics experts should be permitted.

3. Causation

In every jurisdiction with which I am familiar, causation in legal malpractice cases must be established by expert testimony.59 It is necessary to develop expert testimony to support both the but for and


58. See supra Part II.

59. See, e.g., Carlson v. Morton, 745 P.2d 1133, 1137 (Mont. 1987); see also Sluga & Christian, supra note 33.
legal foreseeability elements of causation.\textsuperscript{60} Again, this will have to come from a lawyer who has experience handling multi-plaintiff cases. It is probable that it will be necessary for the expert lawyer to become intimately familiar with the legal theories and the evidence that supported the settled claims.

4. Damages

In aggregate settlement litigation, damages are measured by the loss to the plaintiff of value as a result of the way in which the settlement was done.\textsuperscript{61} In \textit{Burrow v. Arce}, the Texas Supreme Court said that this could be proved by expert testimony.\textsuperscript{62} The Kansas District Court has also recently recognized that damages can be proved by expert testimony.\textsuperscript{63} We have done this by having a lawyer who is familiar with valuations of claims in mass tort cases review the underlying record and express opinions as to aggregate value, as well as to allocations.

V. CONCLUSION

In this Article, we adopted a somewhat unusual format. Rather than speak as objective commentators analyzing and critiquing the work of other scholars and the decisions of judges, we have chosen to reflect upon our own experiences as an expert and a retaining lawyer. We believe that our experiences reflect the experiences of ordinary lawyers and ethics experts rather than that of the national "stars" who participate in major litigation and who advise clients on large transactions. Our perspectives were formed by years of working in state and local courts in the Heartland where the cases have, for the most part, involved ordinary people and lawyers who have had unfortunate interactions. These are the cases that courts throughout the United States deal with all of the time. These are cases that do not attract the attention of the press or of the academic community, although they have major impact on the lives of the litigants involved.


\textsuperscript{61} See, e.g., Tilzer v. Davis, Bethune & Jones, LLC, 204 P.3d 617, 627 (Kan. 2009); see also Simon, supra note 21, at 1602.

\textsuperscript{62} 997 S.W.2d 229, 235 (Tex. 1999).
