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Death by Bluebook

Erik M. Jensen
Case Western Reserve University School of Law

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Law Firm Management and Professional Responsibility

Douglas R. Richmond*

I. INTRODUCTION

Assume that you are a partner at a regional law firm and, at a partners' meeting, your managing partner, Ed, brings up his strong desire to add a lateral partner in your tax group, who we will call Ken. Ed reports that the firm is in the final stages of negotiating Ken's lateral move and tells you and the other assembled partners that he expects Ken not only to add considerable depth and expertise to your firm's tax practice – which, according to Ed and the other members of the executive committee, the firm desires – but also that Ken will bring with him roughly $900,000 in portable business. When you look at the financial information that Ed distributes, however, you see that Ken has consistently produced around $400,000 in annual business. In the one year when he did approach $900,000, it was because of a contingent fee case referred by a family friend. When questioned on Ken's expected contribution, Ed angrily defends his addition to the firm by saying that at your larger and more prestigious firm Ken is certain to be the kind of producer Ed has represented him to be.

Ken is ultimately elected to partnership. Of course, he never produces anything close to the business Ed represented, and he goes so far as to tell you privately that he told Ed and others on the firm's executive committee not to trumpet his business devel-

* Partner, Armstrong Teasdale LLP, Kansas City, Missouri. J.D., University of Kansas; M.Ed., University of Nebraska; B.S., Fort Hays State University. This Article sometimes uses the masculine pronoun "he" for simplicity's sake; it does not evidence any sort of gender bias. The views expressed here are the author's alone.

opment skills. He told them that he would not produce near the business they represented. Had you known this before, neither you nor your other partners would have supported Ken's lateral move, or at least you would have insisted on much lower compensation than that which the firm negotiated based on business that Ken admittedly (and obviously to you) never had.

Another scenario: your firm's executive committee decides that there is money to be made by way of ancillary businesses. Accordingly, the firm forms an ancillary business to provide human resources and employee benefits consulting. The employees of this new business will also be members and employees of the firm – partners, associates and support staff – who devote part or all of their time to the ancillary business. The ancillary business will be conducted out of the firm's offices. The executive committee assures the partnership that the business is sure to be a success; there is a need for this kind of consulting in the community, one that cannot be filled by lawyers in their traditional roles as lawyers.

At the firm's first partnership meeting of the new year, Ed boasts that the business is everything that the firm hoped it would be and, indeed, it is already showing a profit. The numbers you see in the firm's annual report tell a different story, however. True, the business is generating decent revenue. With respect to the lawyers and staff involved in the new business, however, the firm has allocated none of their compensation to the business, nor has it allocated any of their overhead to the new business. All of those costs are still being treated exclusively as firm costs. Were proper accounting principles followed, the ancillary business would have expenses that exceed its revenues. It would, in other words, be a money loser. When you question why the firm is not following generally accepted accounting principles which would, in fact, reveal an accurate picture of the ancillary business's finances, Ed tells you simply to trust the firm's leaders, suggesting that their collective judgment cannot be seriously questioned.

Finally, your law firm forms an ancillary business to engage in environmental consulting called Universal Management (UM), again, staffed by the firm. The business prospers. However, because the firm's executive committee desires to boost partner income yet higher, it decides that UM will start investing with clients and entering into other business ventures in an attempt to

generate new revenues. This is possible because UM's articles of incorporation state broadly that one of the purposes for which the business is being formed is to "engage in any lawful business" and that it may "buy and sell property," among other things. Accordingly, UM enters into a series of risky real estate ventures and conflict-laden business transactions, many of them with existing firm clients, but all of them potentially quite profitable. Ed and another partner on the executive committee handle all of the related legal work. Neither Ed nor anyone else on the executive committee ever tells you or your partners what UM is, in fact, doing, even though UM's business dealings may expose the firm to liability. You believe that it is engaged solely in environmental consulting, for that is why it was formed.

Have the law firm's managing attorney or members of its executive committee committed any ethics violations? How could they not have? After all, "it is the responsibility of every attorney at all times to be truthful,"[1] and Ed and the other members of the committee have been anything but that. While perhaps they were motivated by a desire to benefit the firm and thought that any dissent would prove hurtful, or perhaps they simply were paternalistic leaders who believed that they alone knew what was best for the firm, the fact remains that they were not honest with their partners. If their lies were "white lies," they were lies nonetheless. In other instances, their silence was deceitful.

If these scenarios seem unreal, they ought not; such dishonesty is nothing new. In the late 1980s, for example, the executive committee of the Baltimore law firm of Weinberg & Green allegedly concealed a fraudulent billing scheme (for which all of the partners could be held personally liable) from the partners of the firm for several months.[2] Moreover, law firms and law practices are businesses.[3] Events in the business world at places such as Enron, Global Crossing, Sunbeam and WorldCom demonstrate that senior executives are quite willing to deceive shareholders and other constituents in the pursuit of profit.[4] Why should we be-

1. Kalil's Case, 773 A.2d 647, 648 (N.H. 2001).
2. JAMES L. KELLEY, LAWYERS CROSSING LINES 89-90 (2001).
3. EDWARD POLL, THE BUSINESS OF LAW 3-5 (2d ed. 2002).
4. *See generally* Joseph E. Murphy, *Can the Scandals Teach Us Anything?*, BUS. LAW TODAY, Jan./Feb. 2003, at 11 (noting the scandals at Adelphia, Enron, Tyco, ImClone, Rite Aid, Xerox, WorldCom and other

lieve that lawyers who hold high-ranking leadership positions in their law firms necessarily are different? It is therefore time to examine some professional responsibility aspects of law firm management. Part II of this article will discuss the rules for lawyers from the *2003 Model Rules of Professional Conduct*[5] (Model Rules) and the *Model Code of Professional Responsibility*[6] (Model Code) which are relevant to a law firm leader's duty to the other partners in the firm. Part III will explore the cases and controversies in which courts have applied these rules. Part IV will examine the practical ramifications of such cases and will propose approaches to evaluating scenarios like those discussed in this introduction.

II. SOME BASIC PRINCIPLES

Both the Model Rules and the Model Code are clear on lawyers' duty of honesty. Model Rule 8.4(c) provides that it is "professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[7] DR 1-102(A)(4) of the Model Code uses identical language, stating that a lawyer "shall not" engage in conduct "involving dishonesty, fraud, deceit, or misrepresentation."[8] The only question is one of intent; that is, must a lawyer intend to be dishonest, to deceive or to defraud in order to violate these rules, or will lesser conduct suffice? While it is clear that merely negligent conduct does not violate Model Rule 8.4(c),[9] any further answer to this question depends on the jurisdiction. Some states hold that a lawyer's false statements must be

corporations, and observing: "Although the cases involve a variety of industries, . . . one striking similarity is the level of the individuals involved. These cases do not appear to involve the 'rogue' employee off on an individual frolic. . . . Instead, we see high-profile corporate executives and even corporate lawyers at the center of these cases."); John A. Byrne, *Fall From Grace*, BUS. WK., Aug. 12, 2002, at 50, 51 (reporting that the scandals that enveloped Sunbeam, Waste Management, Enron, Global Crossing, Qwest and WorldCom have cost investors more than $300 billion).

5. MODEL RULES OF PROF'L CONDUCT (2003) [hereinafter MODEL RULES].

6. MODEL CODE OF PROF'L RESPONSIBILITY (1969) [hereinafter MODEL CODE].

7. MODEL RULES R. 8.4(c).

8. MODEL CODE DR 1-102(A)(4).

9. *In re* Cardwell, 50 P.3d 897, 901 n.5 (Colo. 2002).

intentional to constitute an ethics violation,[10] while others hold that lawyers may violate these rules by way of "misstatements made with reckless disregard for the truth or falsity thereof."[11] Even in those states applying an intent standard, however, lawyers may easily run afoul of courts and disciplinary authorities, for a dishonest statement is intentional for purposes of Model Rule 8.4(c) and DR 1-102(A)(4) of the Model Code if it is deliberately or knowingly made.[12]

But do the ethics rules apply between law firm leaders and their partners? After all, the three instances of offending conduct described in Part I did not truly relate to the practice of law, and it does not appear as though any clients were harmed. Nevertheless, the answer to this question clearly is yes. First, lawyers may violate ethics rules through private conduct. Courts routinely discipline lawyers for conduct unrelated to the daily practice of law.[13] Indeed, lawyers' fitness to practice law may be determined by their character.[14]

Second, it is irrelevant whether clients are harmed as a result of misconduct. The determination of whether an attorney has

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10. *See, e.g.*, Fla. Bar v. Mogil, 763 So. 2d 303, 309-11 (Fla. 2000) (quoting Fla. Bar v. Fredericks, 731 So. 2d 1249, 1252 (Fla. 1999)) (discussing Florida version of Rule 8.4(c)).

11. Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 445 (Pa. 2000) (discussing Pennsylvania version of Rule 8.4(c)); *see also In re Cardwell*, 50 P.3d at 901 n.5 (indicating that reckless conduct will violate Rule 8.4(c)).

12. Fla. Bar v. Forrester, 818 So. 2d 477, 483 (Fla. 2002) (quoting Fla. Bar v. Fredericks, 731 So. 2d 1249, 1252 (Fla. 1999)) (interpreting Florida version of Rule 8.4(c)).

13. *See, e.g.*, People v. Rishel, 50 P.3d 938, 941-45 (Colo. 2002) (relying on Rule 8.4(c) to disbar lawyer who misappropriated funds given to him by fellow members of baseball season ticket pool); *In re* Flannery, 47 P.3d 891, 892-97 (Or. 2002) (reprimanding lawyer who misrepresented his place of residence so that he could renew his expired driver's license in time to rent a car at a conference); *In re* Spencer, 58 P.3d 228, 230-31, 236-37 (Or. 2002) (suspending lawyer who helped friends illegally register their motor home in Oregon, and thus helped them avoid California tax liability); Att'y Grievance Comm'n of Md. v. Childress, 758 A.2d 117, 122-24 (Md. 2000) (involving attorney who used the Internet to solicit sex from young girls); State *ex rel.* Okla. Bar Ass'n v. Foster, 995 P.2d 1138, 1139-40 (Okla. 2000) (reprimanding lawyer who viewed the breasts of friends' minor daughter and made inappropriate comments to her following the incident).

14. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Mulford, 625 N.W.2d 672, 683 (Iowa 2001).

committed an ethics violation does not turn on harm to a client.[15] At most, the absence of harm to a client is a factor to be accounted for when selecting the discipline to be imposed.[16] Beyond that, clients *were* potentially harmed in each scenario. In the first scenario, Ken's lateral move may have harmed clients at his former firm who depended on him but who remained behind for some reason. Ken's move may also harm clients at both his old firm and his new firm if his move turns out to create conflicts of interest. In the second scenario, if the ancillary business is ultimately determined to be a loser and the firm decides to close it, clients of the firm, who also employ the ancillary business, may be harmed when they lose services on which they depend. In the third scenario, clients of the firm that do business with UM may suffer from conflicts of interest that have not been fully disclosed. Potential harm to clients certainly justifies professional discipline.[17]

III. CASES AND CONTROVERSIES

There is a dearth of case law addressing misconduct by law firm leaders regarding their fellow partners or professional shareholders.[18] There are, however, a number of cases in which courts have disciplined lawyers who defrauded their fellow partners or professional shareholders and law firms because of their dissatis-

15. *See, e.g.*, *In re* Baker, 758 N.E.2d 56, 58 (Ind. 2001) (disciplining lawyer for violating Rule 4.2 even though no harm resulted from the prohibited communication); *In re* Mayeux, 762 So. 2d 1072, 1075-76 (La. 2000) (disciplining lawyer for conversion even though client never actually suffered financial loss and there was no danger of loss because of lawyer's line of credit and other accounts); *In re* Disciplinary Action Against Wentzell, 656 N.W.2d 402, 408-09 (Minn. 2003) (suspending lawyer for numerous false, inconsistent and inaccurate statements in bankruptcy proceeding even though his clients were unharmed).

16. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(C) (2001); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.5.2, at 119 (1986).

17. *See, e.g.*, *In re* Morris, 953 P.2d 387, 392 (Or. 1998) (discussing violation of rule prohibiting conduct "prejudicial to the administration of justice").

18. One of the very few reported cases dealing with a law firm managing attorney's responsibilities vis-à-vis his fellow lawyers is *In re* Bailey, 821 A.2d 851 (Del. 2003). In *Bailey*, the Delaware Supreme Court suspended for six months a law firm managing partner who failed to supervise the firm's employees to ensure compliance with Rule 1.15, which deals with the safekeeping of property. *See id.* at 866-67.

faction with firm culture or leadership.[19] In *In re Siegel*, for example, New Jersey lawyer Steven Siegel converted funds belonging to his law firm, McCarter & English (M & E), by "submitting false requests for disbursements drawn against 'unapplied retainers,' [which are] monies collected and owned by M & E as legal fees but not yet transferred from clients' files to [M & E's] accounts."[20] Siegel attributed his misconduct to "disillusionment" with the firm culture at M & E.[21] He argued that other partners were using the firm as a source of personal funds for meals with friends, travel expenses and convention attendance. When his complaints to firm management fell on deaf ears, he vented his frustration by lining his own pockets. All of this, Siegel alleged, was a mitigating factor when it came time to impose professional discipline for his misconduct.[22]

The New Jersey Supreme Court disbarred Siegel for violating Rule 8.4(c). While the state's Disciplinary Review Board had recommended against Siegel's disbarment because his thefts did not involve client funds, the court determined otherwise, observing: "We see no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners."[23] As for Siegel's frustration and disillusionment with his firm's culture, neither those feelings nor dissatisfaction with his pay excused the misuse of partnership funds.[24]

Siegel illustrates that courts will not tolerate dishonesty by lawyers just because the dishonest conduct, or its effects, are confined to a law firm. While the case did not involve dishonesty by a law firm leader or manager, the principles announced there transfer easily to situations and conduct that do.

The lawyer in *In re Busby*, Richard Busby, was of counsel to the firm of Green & Thompson.[25] Unfortunately, Green & Thomp-

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19. *See, e.g.*, Rogers v. Miss. Bar, 731 So. 2d 1158 (Miss. 1999); *In re* Maier, 664 S.W.2d 1 (Mo. 1984); State *ex rel.* Neb. State Bar Ass'n v. Fredericksen, 635 N.W.2d 427 (Neb. 2001); *In re* Siegel, 627 A.2d 156 (N.J. 1993); *In re* Busby, 855 P.2d 156 (Or. 1993).

20. 627 A.2d at 157 (N.J. 1993).

21. *Id.* at 161.

22. *Id.*

23. *Id.* at 159.

24. *Id.* at 161.

25. 855 P.2d 156, 156 (Or. 1993).

son was slow to collect its bills, which deprived Busby of fees due him from the firm's clients. Busby was also dissatisfied with the quality of his secretarial services and, when Green & Thompson experienced problems with its computerized billing system, Busby was unable to bill his own clients for two months.[26] Accordingly, Busby did not report to the firm all of the fees paid to him by one of his clients, Gibraltar Savings, thus depriving the firm of money owed it under Busby's compensation formula.[27] When the firm's office administrator asked about the increasing balance apparently owed by Gibraltar, Busby lied, saying that he would talk to the client about the situation.[28] Busby's scheme came to light when the office manager contacted Gibraltar about its apparent delinquency and learned that, in fact, it had paid the bills in full, but Busby had not turned over all of the monies paid to the firm.[29]

The Oregon Supreme Court found that Busby had engaged in conduct involving dishonesty, fraud, deceit and misrepresentation.[30] In doing so, the court noted: "'Although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition . . . against dishonesty, fraud, deceit, or misrepresentation.'"[31] The court also concluded that Busby violated an Oregon statute prohibiting willful deceit or misconduct in the legal profession.[32] He did this by lying to Green & Thompson's office administrator, by lying to Gibraltar when it inquired about its bills, and by withholding the income itself.[33]

In determining the appropriate sanction, the *In re Busby* court noted that while Gibraltar suffered no actual injury, Busby's conduct created the "potential for injury to the client."[34] There was, after all, the potential that Green & Thompson would initiate some sort of action against Gibraltar for its delinquent payments. When Busby tried to minimize his misconduct by branding it a mere business dispute, the court tersely noted that his dissatisfac-

26. *Id.* at 157.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 158.
31. *Id.* (quoting *In re* Smith, 843 P.2d 449, 452 (Or. 1992)).
32. *Id.* (quoting OR. REV. STAT. § 9.527(4) (1987)).
33. *Id.*
34. *Id.*

tion with Green & Thompson's performance under their of counsel agreement "did not justify his dishonest behavior."[35] The court accordingly suspended Busby from practice for four months.[36]

In *In re Cupples*, the Missouri Supreme Court was required to evaluate the conduct of a lawyer as he prepared to withdraw from his law firm, Deacy & Deacy.[37] Two senior partners at Deacy & Deacy, Thomas Deacy, Jr. and Spencer Brown, learned that Gary Cupples, also a partner in their Kansas City law firm, had leased office space to start his own practice. They confronted Cupples, who, while admitting that he had leased the office space, denied that he intended to use it to practice law.[38] Nonetheless, they all agreed that Cupples should withdraw from the firm at the end of the month.[39]

Very soon thereafter, the members of Deacy & Deacy learned that, contrary to the firm's tracking and billing protocol, Cupples had not registered with the firm some twelve to fifteen cases assigned to him by the firm's largest client, State Farm Insurance. Cupples also failed to report his work on these cases at weekly firm meetings.[40] Brown thus confronted Cupples again. After initially lying about possessing the files, Cupples admitted that he had them and said that he planned to split the fees with the firm.[41] After persistent inquiry, Cupples returned six more State Farm files. These he returned, apparently because State Farm told him that it intended to keep its business with Deacy & Deacy; Cupples never told State Farm that he had been hiding files from his firm.[42] Deacy & Deacy later filed a disciplinary complaint against Cupples.

A local bar committee concluded that Cupples had violated Rule 8.4(c). The Missouri Supreme Court agreed. This he did in the first instance regarding State Farm.

> By secreting the State Farm files from the Deacy firm prior to his withdrawal and by removing State Farm files

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35. *Id.* at 159.
36. *Id.*
37. 952 S.W.2d 226, 228 (Mo. 1997).
38. *Id.* at 229.
39. *Id.*
40. *Id.*
41. *Id.* at 230.
42. *Id.*

> from the Deacy firm after his withdrawal, without appropriate State Farm consent, Cupples materially altered the nature of the representation. Instead of receiving the full services of a law firm that had represented it for years, State Farm was being represented by an individual lawyer without the various systems of support that had previously assisted him. State Farm had a right to be informed of the change in the nature of the representation and of Cupples' withdrawal from the Deacy firm. State Farm had a right to determine who would continue to perform its legal work. By secreting State Farm's files and concealing the change in the nature of the representation, Cupples violated *Rule 4-8.4(c)*.[43]

Cupples also violated Rule 8.4(c) by breaching his fiduciary duties to his partners to be fair, to be honest, to not put his own interests ahead of those of Deacy & Deacy, and to not compete with the partnership in its business.[44] The court explained:

> By secreting the State Farm files from the Deacy firm and by failing to honestly appraise [sic] the firm of the legal work he was handling for State Farm, Cupples violated his duties to the firm. The firm had developed a method to properly manage the representation of its oldest and largest client and Cupples purposefully evaded that system. His actions exposed his partners to potential malpractice liability. When caught, Cupples, at best, was not forthright about his intent to withdraw from the firm and not forthcoming with cooperation in the process of assisting State Farm in determining who they would choose to handle the matters on which he had been working. Cupples'[s] violation of his duties to the Deacy firm directly affected and endangered the quality of representation the firm provided to State Farm.
>
> Cupples['s] action[] in this regard was misconduct in violation of *Rule 4-8.4(c)*.[45]

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43. *Id.* at 235.
44. *Id.* at 235-36.
45. *Id.* at 237.

The court disciplined Cupples by publicly reprimanding him. It did this over a vigorous dissent, with the dissenting judge arguing for suspension.[46] In arguing for harsher discipline, the dissent observed that "[h]onesty is, perhaps, the most essential quality for a lawyer."[47]

In *State ex rel. Nebraska State Bar Ass'n v. Fredericksen*,[48] Omaha lawyer Mark Fredericksen became increasingly disenchanted with his partnership compensation after working long hours and spending considerable time away from his family. He therefore retained for his own use some $15,000 in fees that were paid directly to him by one of his firm's clients.[49] He ultimately was overcome by guilt and reported his conduct to disciplinary authorities.[50]

There was no question that Fredericksen had violated DR 1-102(A)(4); the question was what sanction to impose. In settling on a sanction, the *Fredericksen* court noted, somewhat remarkably, that "no harm came to the public because of Fredericksen's actions,"[51] and further that his actions harmed no client.[52] The court thus suspended Fredericksen from practice for three years, rather than disbarring him.[53]

Fredericksen is not the only case in which a court has reluctantly been drawn into an internal law firm dispute and has, therefore, looked at events differently when it came time to discipline a lawyer for conduct that would surely warrant disbarment were a client involved.[54] Among the leading cases in this line is *In re Disciplinary Proceedings Against Rice*.[55] Kenneth Rice, the lawyer charged with misconduct, was accused of taking legal fees for work he had performed and keeping those fees for his own use

46. *Id.* at 237-39 (Covington, J., dissenting).
47. *Id.* at 238 (Covington, J., dissenting).
48. 635 N.W.2d 427 (Neb. 2001).
49. *Id.* at 430.
50. *Id.*
51. *Id.* at 433.
52. *Id.* at 437.
53. *Id.*
54. *See, e.g.*, Lawyer Disciplinary Bd. v. Ford, 564 S.E.2d 438, 440 (W. Va. 2002) (admonishing rather than suspending a lawyer who converted fees paid to his law firm and, in deciding on a lesser punishment, noting that his misconduct "involved duties owed not to a client, or to the public, or to the legal system, but rather duties owed to his partners").
55. 661 P.2d 591 (Wash. 1983).

rather than turning them over to his firm. A state disciplinary board recommended that Rice be suspended for six months.[56] The Washington Supreme Court disagreed with the board's recommendation, stating:

> This is not a case involving misappropriation of client funds, therefore the need for discipline is less clear. Because protection of the public and preservation of the public's confidence in the legal profession are the primary purposes of attorney discipline, the misappropriation of client funds usually warrants a severe sanction. These interests are not served, however, in the resolution of internal problems of a law firm. Resolution of a dispute between members of a law firm is usually sought in a civil suit.[57]

Declining to involve itself in "intrapartnership accounting disputes,"[58] the *Rice* court found no violation of Washington disciplinary rules.

The *Rice* court's reasoning is suspect at best, and downright dangerous at worst. While it is true that law firm partners can resolve misappropriation disputes through civil litigation, so too can clients sue lawyers who misappropriate their funds. Why should dishonest lawyers be immune to professional discipline because they cheated their partners rather than their clients? Why are "accounting disputes" between partners any less serious than "accounting disputes" between lawyers and their clients when claims of misappropriation or theft are involved? Public confidence in the legal profession is no less harmed when a lawyer steals from his partners rather than from a client. As the *In re Greenberg* court explained:

> Law firms are the vehicles through which clients retain individual attorneys and the cultures in which those individual attorneys function once retained. It is the law firm's reputation – the sum of the reputations of the lawyers practicing together – that attracts clients and that suggests the lawyers in the firm can be trusted with the

56. *Id.* at 592.
57. *Id.* at 593 (citations omitted).
58. *Id.* at 594.

> clients' most difficult problems and with the clients' assets. Lawyers who betray their partners betray that trust.[59]

Furthermore, the approach taken by the *Rice* court seriously undermines the established ideal of the law as a self-regulating profession, and it discourages lawyers from reporting their colleagues' professional misconduct to disciplinary authorities by immunizing wrongdoing that occurs within a firm. Though some firms may prefer to handle such matters internally, it is, from a public policy perspective, in the general public interest for all transgressions to be punished, regardless of the identity of the victim.

In short, while many intra-firm conflicts can be resolved internally or through civil actions, and the lawyers involved should not casually threaten professional discipline to gain leverage, involvement by disciplinary authorities is perfectly appropriate where the intra-firm dispute raises questions about a lawyer's fitness to practice.[60] Dishonesty and deceit certainly are behaviors that call into question lawyers' fitness to practice, and thus, dishonest law firm partners, shareholders and leaders ought not be able to avoid professional discipline simply because their misconduct is ostensibly an internal firm matter.[61]

IV. Analysis

It should be clear that law firm leaders are bound by disciplinary rules at all times, just as are all other lawyers. A managing partner cannot justify making misrepresentations to his partners by claiming that he knows what is best for the firm or by reasoning that his dishonest conduct will actually benefit the firm in some way. To the extent that law firm managers' dishonest conduct actually harms their fellow partners or shareholders, the fact that the dishonest conduct is confined to the firm is irrelevant.[62]

In all of the scenarios described in Part I of this article, the partners suffered actual or potential financial harm because of Ed's deception or that of the executive committee. Money that was

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59. 714 A.2d 243, 251 (N.J. 1998).
60. *In re* Kazanas, 96 S.W.3d 803, 809 (Mo. 2003).
61. *Id.* at 808-09.
62. *See In re* Siegel, 627 A.2d 156, 159 (N.J. 1993).

paid to Ken, the underachieving tax partner, or that the firm poured into an unprofitable ancillary business, is money that our hypothetical partners did not receive in the form of profits. Nor did they have that money available to develop their practices by cultivating prospective clients or funding attendance at professional conferences. While it might be more polite or civilized to lose that money by way of management shenanigans, as compared to embezzlement, the effect is the same. Courts have not hesitated to suspend or disbar lawyers who have stolen from their firms or employers by way of false expense reimbursements and the like,[63] and they often severely sanction lawyers who otherwise convert firm funds for their own use.[64] Law firm leaders who deprive those they lead through dishonest management should be treated no differently. Deceit and dishonesty remain even where the offending lawyer believes that those he deceives or misleads will someday profit as a result. Thus, Ed and his executive committee colleagues (who fail to disclose the conflict-laden business transactions and real estate deals they transact on behalf of the firm) should be treated no differently for deceiving the other partners than they would be if they deceived a client.

A law firm leader accused of the sort of dishonest conduct described here may attempt to defend his actions by arguing that because he will also feel any financial detriment experienced by his fellow partners, he has either committed no misconduct, or he should not be disciplined for any alleged misconduct. The obvious problem with such arguments is that they ignore the real problem,

63. *See, e.g., In re* Brown, 931 P.2d 664 (Kan. 1996) (disbarring lawyer who admitted submitting false travel and meal expenses to his firm); *In re* Disciplinary Action Against Leon, 524 N.W.2d 723, 724-25 (Minn. 1994) (disbarring lawyer who cashed law firm expense check for out-of-town travel after related deposition cancelled and lawyer was not required to make trip, and who pocketed fees intended for his firm); *In re* Greenberg, 714 A.2d 243, 253 (N.J. 1998) (disbarring lawyer who misappropriated law firm funds in the form of fictitious deposition fees and other scams); *In re* Disciplinary Proceedings Against Davison, 640 N.W.2d 508, 509-10 (Wis. 2002) (suspending lawyer who falsely billed state public defender by charging fees not actually incurred).

64. *See, e.g., In re* Kelly, 713 So. 2d 458, 459-60 (La. 1998) (suspending lawyer who deposited payments by clients into his personal account rather than turning them over to his law firm); *In re Leon*, 524 N.W.2d at 724-25 (disbarring lawyer who, among other things, misappropriated fees intended for the law firm where he worked as an associate).

which is the lawyer's dishonesty.[65] Furthermore, a dishonest lawyer's willingness to accept any financial risk that accompanies his decisions is not a license to force that risk on others.

Courts, disciplinary authorities and lawyers must reject any notion or suggestion that dishonesty, fraud, deceit or misrepresentations are any less reprehensible when they occur within a law firm and thus leave clients unharmed.[66] A partner's duties to his fellow partners include a basic duty of fairness and a duty not to subordinate the partnership's interests to his own.[67] It is universally recognized that partners are fiduciaries to one another, and thus, owe their fellow partners duties of utmost good faith and integrity in all partnership affairs.[68] Furthermore, legal commentators recognize that "partners are entitled to rely on the representations of their co-partners without any need to investigate related facts."[69] While it is true that partners' breaches of their fiduciary duties typically are resolved by way of civil litigation, such breaches may also have disciplinary consequences.[70] As the Iowa Supreme Court observed in *Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. McClintock*, law firms "are founded upon a total trust and confidence among the partners. A breach of this exceedingly close relationship merits disciplinary action."[71]

Breaches of trust within a law firm are particularly troubling where the offending partner is a law firm leader. Partners,

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65. *See* Kalil's Case, 773 A.2d 647, 648 (N.H. 2000) (stating that "it is the responsibility of every attorney at all times to be truthful"); Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186, 1193 (Pa. 1994) (stating that "a license to practice law requires allegiance and fidelity to truth").

66. *See, e.g.*, State *ex rel.* Okla. Bar Ass'n v. Stutsman, 990 P.2d 854, 860 (Okla. 1999).

> A lawyer's mishandling of funds belonging to a law firm, where that lawyer is employed, is not to be treated differently from misappropriation or conversion of funds belonging to the lawyer's client. In each case, the lawyer violates the basic professional duty of trust, not only as counsel but also as fiduciary.

Id. (footnotes omitted).

67. *In re* Cupples, 952 S.W.2d 226, 235-36 (Mo. 1997).

68. JACOB A. STEIN, THE LAW OF LAW FIRMS § 5:1 (1994 & Supp. 2000).

69. JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 6:8, 147 (2d ed. 1996).

70. *See In re Cupples*, 952 S.W.2d at 236.

71. 442 N.W.2d 607, 608 (Iowa 1989).

charged with law firm management, share a special relationship with those they lead.[72] A lawyer with management responsibility must discharge his duties to his firm "faithfully and diligently."[73] In other words, law firm leaders may be deemed to share a relationship with their fellow partners that requires fidelity and candor even beyond that required by the fiduciary relationship that characterizes partnership.

Furthermore, it is but a small step from being dishonest with one's partners to being dishonest with clients. Just as partners are fiduciaries to their fellow partners, so are they fiduciaries to their clients.[74] If law firm leaders will deceive their co-partners or misrepresent matters to them in obvious violation of their fiduciary duties, why should anyone believe that they are not similarly cavalier about their fiduciary obligations to clients? Indeed, lawyers who practice together in a partnership or professional corporation convey a message of trust to the public,[75] and lawyers who betray their partners or fellow shareholders necessarily betray that trust.[76] Thus, and because the lawyer disciplinary process has as one of its primary goals the protection of the public and the inspiration of public confidence in the legal system,[77] lawyers whose ethics violations superficially appear to be intra-firm matters may have to be sanctioned to protect broader interests.[78]

Law firm leaders and managers who are dishonest with the lawyers to whom and for whom they are responsible obviously violate the Rule 8.4(c) and DR 1-102(A)(4) prohibitions on conduct "involving dishonesty, fraud, deceit, or misrepresentation."[79] Neither rule is in any way limited or restricted in its application. Dishonest law firm leaders and managers should also be found to

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72. *See In re* Bailey, 821 A.2d 851, 864-65 (Del. 2003) ("A lawyer who accepts responsibility for the administrative operations of a law firm stands in a position of trust vis-à-vis other lawyers and employees of the firm.").

73. *Id.* at 865.

74. Brush v. Gilsdorf, 783 N.E.2d 77, 80 (Ill. App. Ct. 2002) ("A fiduciary relationship exists as a matter of law between an attorney and his client.").

75. *In re* Greenberg, 714 A.2d 243, 250-51 (N.J. 1998).

76. *Id.* at 251.

77. Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation,* 12 GEO. J. LEGAL ETHICS 175, 175 n.4 (1999).

78. *See In re* Kazanas, 96 S.W.3d 803, 808-09 (Mo. 2003); *In re* Smith, 843 P.2d 449, 452 (Or. 1992).

79. MODEL RULES R. 8.4(c); MODEL CODE DR 1-102(A)(4).

violate Model Rule 8.4(d) and DR 1-102(A)(5), both of which prohibit conduct that is "prejudicial to the administration of justice."[80] While courts typically apply Rule 8.4(d) and DR 1-102(A)(5) to litigation misconduct, neither rule is so limited.[81] Because the public "rightfully expects lawyers to conduct their daily affairs with integrity,"[82] intra-firm dishonesty and breaches of fiduciary duties are necessarily prejudicial to the administration of justice.[83] Additionally, in those states adhering to the Model Code, dishonest conduct by law firm leaders and managers may violate DR 1-102(A)(6), which provides that a lawyer shall not engage "in any other conduct that adversely reflects on his fitness to practice law."[84] At least one court has held that a law firm partner's breach of his fiduciary duties to his co-partners adversely reflects on his fitness to practice law.[85]

Of course, not all law firms are structured as partnerships. Many law firms are organized as professional corporations, or are structured as limited liability companies.[86] The distinction between a partnership and a professional corporation or company does not matter for present purposes, however. Lawyers who are shareholders in the same professional corporation or company "continue to conduct themselves as law partners between them-

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80. MODEL RULES R. 8.4(d); MODEL CODE DR 1-102(A)(5).

81. *See* Richmond, *supra* note 77, at 194 (discussing Model Rule 8.4(d)); *see, e.g.*, Attorney Grievance Comm'n v. McLaughlin, 813 A.2d 1145, 1169 (Md. 2002) (holding that a lawyer who improperly retained funds paid to him for his mother's health care benefits violated Rule 8.4(d)); *In re Kazanas*, 96 S.W.3d at 808-09 (disbarring lawyer, who diverted client fees paid to law firm because he thought they were rightly owed to him as compensation, for violating Rule 8.4(d), among other rules).

82. *In re Smith*, 843 P.2d at 452.

83. *See, e.g.*, *In re Kazanas*, 96 S.W.3d at 808-09 (disbarring lawyer who diverted client fees paid to law firm). *But see* Rogers v. Miss. Bar, 731 So. 2d 1158, 1170-71 (Miss. 1999) (holding that shareholder in professional corporation who converted law firm funds through an after-hours real estate and loan closing practice did not violate Rule 8.4(d) because his actions "were not related to a judicial proceeding or a matter connected to a judicial proceeding").

84. MODEL CODE DR 1-102(A)(6).

85. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. McClintock, 442 N.W.2d 607, 607 (Iowa 1989).

86. *See* Robert R. Keatinge, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279, 280, 286-87 (1998).

selves,"[87] and the structure of a law firm as a corporation or professional company rather than a partnership "does not affect the ethical responsibilities of the attorney stockholders."[88] Moreover, an officer or director of a professional corporation or company–as a senior law firm leader or manager is almost certain to be–owes a duty of utmost good faith and loyalty to the firm by virtue of his position.[89] This is a fiduciary relationship and, accordingly, is attended by the same ethical obligations that inhere in partnership.[90]

Another concern is the situation in which the dishonest leader ostensibly stands alone; that is, other members of the firm's executive committee or similar governing entity know of but do not participate in the dishonesty, fraud, deceit, or misrepresentation, and they do nothing to prevent or remedy the misconduct.[91] Returning to our earlier examples, executive committee members might not attempt to prevent or remedy dishonest conduct by Ed, the firm's managing partner. Such acquiescence by other leaders is unacceptable in light of Rule 5.1, entitled "Responsibilities of Partners, Managers, and Supervisory Lawyers," which provides:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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87. STEIN, *supra* note 68, at § 2:2.

88. *Id.* § 2:3.

89. *See* Rogers v. Miss. Bar, 731 So. 2d 1158, 1168 (Miss. 1999) (quoting Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332 (Miss. 1979)).

90. *See id.* at 1167-68.

91. This article does not address the difficult issue of whether law firm partners or shareholders must report dishonest leaders to disciplinary authorities under Model Rule 8.3(a). Rule 8.3(a) provides that a lawyer "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." MODEL RULES R. 8.3(a). For a discussion of the Rule 8.3(a) reporting requirement, see Richmond, *supra* note 77, at 184-202. Furthermore, there is a serious question as to whether intra-firm reports of serious misconduct will be made. *See id.* at 202-03.

> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
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> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> > (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> >
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[92]

While Model Rule 5.1 is often viewed as applying to relationships between supervisory and subordinate lawyers, that view is only partially correct; section (a) also imposes on law firm partners and shareholders a duty to make reasonable efforts to ensure that their peers act ethically.[93] Lawyers within the scope of Rule 5.1(c)(2) are liable for other lawyers' misconduct if they learn of the misconduct in time to prevent it or to mitigate its consequences, and fail to do so. Rule 5.1 does not create or impose vicarious liability.[94] When a lawyer violates ethics rules and another partner or shareholder is called to account for those violations, the issue is whether the second partner or shareholder satisfied his own professional responsibilities under Rule 5.1. A partner or shareholder who fails to meet the professional obligations imposed by Rule 5.1 may be sanctioned independent of any sanctions imposed on the original offender.[95]

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92. MODEL RULES R. 5.1.

93. *Id.* R. 5.1(a) (imposing on partners and lawyers with comparable managerial authority in a law firm the obligation to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that *all lawyers in the firm* conform to the Rules of Professional Conduct") (emphasis added).

94. *In re* Anonymous Member of the S.C. Bar, 552 S.E.2d 10, 12 (S.C. 2001).

95. *Id.*

CONCLUSION

Recent events in the business world have demonstrated that the leaders of respected companies are quite willing to mislead their constituents in the pursuit of profit. There is no reason to believe that law firm leaders are so different from their counterparts in the corporate world that they are beyond conducting their affairs dishonestly or deceitfully. Indeed, anecdotal evidence suggests that some law firm leaders are willing to deceive and mislead their fellow partners out of a misguided belief that they simply know what is best for their firms and, therefore, the circumvention or suppression of debate and disagreement justifies their actions. So long as their decisions are motivated by a desire to increase firm profitability and do not appear to harm clients, any misrepresentation or reckless disregard for the truth is often excused.

This is, of course, all nonsense. Ethics rules prohibiting dishonesty, deceit, fraud and misrepresentation apply to lawyers in all contexts. Dishonesty is dishonesty even if clients are not affected. Moreover, law firms depend upon a close relationship and total trust between the partners or shareholders in order to function. Law firm leaders who breach or abuse that relationship by dishonest conduct must be held accountable by disciplinary authorities.