

Ethical Issues Faced by the Dual Professional: Lawyers as Faculty in Higher Education

Kimberly M. Tatum, University of West Florida
Susan W. Harrell, University of West Florida¹

Abstract

Lawyers who enter academe are faced with potential conflicts between the rules of professional conduct governing lawyers and ethical standards for professors. This article compares ethics codes from the American Bar Association (ABA) Model Rules of Professional Conduct and the American Association of University Professors (AAUP). It will examine inconsistencies in the policies and will offer recommendations to policy makers.

Recent statistics from the Department of Education indicate that the number of undergraduate degrees conferred in the disciplines of law and legal studies continues to increase (U.S. Department of Education, 2006). Many students in these programs decide to work in the legal profession as paralegals or as attorneys after attending law school. Most faculty who teach in these programs hold the juris doctor as the terminal degree. There are also lawyers as faculty members in other university departments where pre-law programs exist, including business, history, political science, and criminal justice (Stopp & Harrell, 1997). Since most of these faculty have come to academe from the practice of law, some continue to practice law while teaching at the university or college level. These lawyers become dual professionals, serve both the law and the academy, and are subject to two different ethical codes.

There are numerous academic articles that address the ethical duties of law school faculty,² or adjunct law faculty,³ but very few that address the roles of lawyers as full-time undergraduate faculty members in tenure-track positions. Given the

¹ Kimberly M. Tatum, J.D. is an Assistant Professor of Legal Studies at the University of West Florida. She earned her B.A. from Louisiana State University and her J.D. from the University of Florida College of Law. Susan W. Harrell, J.D. is an Associate Professor and Coordinator of the Legal Studies Program at the University of West Florida. She earned her B.F.A. from the University of Georgia and her J.D. from Cumberland School of Law at Samford University.

² See e.g. Brown, G. (2001) Should law professors practice what they teach? *South Texas Law Review*, 42, 316-343.; Harrison, J. L. (2005). Faculty ethics in law school: shirking, capture, and "The Matrix." *University of Detroit Mercy Law Review*, 82, 397; Forrell, C. (1997). What's wrong with faculty-student sex? The law school context. *Journal of Legal Education*, 47, 47-72. Kuehn, R. R. (2003). A normative analysis of the rights and duties of law professors to speak out. *South Carolina Law Review*, 55, 253

³ Hricik, D. (2001). Life in dark waters: a survey of ethical and malpractice issues confronting adjunct law professors. *South Texas Law Review*, 42, 379-419.

apparent lack of literature available to address ethical issues faced by this dual professional, it is helpful to examine the differences between the AAUP and the Model Rules of Professional Conduct to determine where there might be significant differences between the two codes of ethics governing lawyers who teach full-time. This paper will examine some important ethical issues faced by both the academic and legal professions. These issues include faculty-student sexual relationships, faculty criminal charges, and the ethical duties that arise upon learning of other improper conduct by colleagues.

Hypothetical Ethical Issues

In order to frame this discussion, it is useful to provide some context for the analysis. The following examples highlight ethical dilemmas that a college professor might face and will be analyzed under both model ethics codes later in the paper.

- 1.) Professor A is an unmarried, male tenured political science professor. He is thirty-eight years old and has been a lawyer for eleven years. He has been teaching at State University for seven years. While conducting some legal research in the library one day, he meets Student B, a female undergraduate philosophy major. Professor A has never had Student B in one of his courses. In fact, Student B has never taken any political science courses while attending State University, nor does she plan to do so. Student B is a junior and tells Professor A that she hopes to attend law school one day. Professor A suggests that Student B visit him in his office to discuss law school. Student B decides to visit the professor's office, and soon both student and professor have embarked on a friendly relationship. It turns out that Professor A studied philosophy as an undergraduate, and that the two have a lot of mutual intellectual interests. After months of friendly advising sessions in the office and in local coffeehouses, Professor A and Student B begin a sexual relationship. Does this relationship violate Professor A's ethical duties as a tenured professor? Should this relationship lead to his dismissal from the university?
 - 2.) Professor J is a female, tenured full professor in a business program at a large state university in a very small community. She has taught business law at the university for fifteen years, and she has been a licensed attorney for over twenty years. She was recently arrested for the third time in eight years for driving under the influence of alcohol, which will be a felony level offense. She claims to have an alcohol problem, but she has been to treatment several times in the past and has continued to relapse. Does this behavior violate the ethical duties of a university professor or licensed attorney? Should it lead to her dismissal from the university or discipline from the bar association.
 - 3.) Professor S is facing her tenure and promotion review after working at a university for five years. She works in a legal studies program with her colleagues, who are also both legal studies faculty and lawyers. Professor H, a
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full professor in the division, likes Professor S personally, but she knows that Professor S has not always acted appropriately outside of the classroom. In fact, Professor S told Professor H that she has, on several occasions, attended parties with current university students where they smoked marijuana and took other illicit drugs. Would Professor H be required to report Professor S's conduct under the university's code of ethics? Would Professor H be required to report the same conduct under the code of ethics governing lawyer's conduct?

AAUP History and Policies

The most recognized ethical code governing the academic profession is the American Association of University Professors's Policy Documents and Reports. Since its inception, the American Association of University Professors has established standards for university professors that address all areas of academe. The current collected policies of the AAUP appear in the *AAUP Policy Documents and Reports*, which is commonly known as *The Redbook*. In the introduction to this text, it is noted that "For eighty-five years the American Association for University Professors has been engaged in developing standards for sound academic practice and in working for the acceptance of these standards by the community of higher education. The Association has long been viewed as the authoritative voice of the academic profession in this regard" (AAUP, 2001). The topics covered by the AAUP are comprehensive and include the following sections: academic freedom; tenure and due process; professional ethics; research and teaching; distance education; discrimination; college and university government; collective bargaining; student rights and freedoms; college and university accreditation; and collateral benefits (AAUP, 2001). While not binding on individual universities, these policies have been adopted, in whole or part, by hundreds of American universities in their own faculty handbooks as ethical guidelines. As proof of the influential nature of the AAUP policies, there are numerous reported cases where the policies have been quoted in disputes between universities and professors (AAUP, 2001). Most of these cases focus on the AAUP's policies on due process in the tenure and promotion process, when plaintiffs have asserted claims of discrimination (AAUP, 2001, p. xi). Other cases address professors' claims that they were terminated improperly based on violations of their due process rights (AAUP, 2001, p. xi).

For purposes of this discussion, perhaps the most relevant AAUP standard is the Statement on Professional Ethics. The current statement was originally adopted by the organization in 1966 and was most recently revised and approved in 1987 (AAUP, 2001, p. 133). The concise Statement on Professional Ethics has five separate provisions, each of which examines the professional responsibilities of university professors in four different roles: as community citizens, as teachers, as colleagues, and as members of the academic institution (AAUP, 2001, p.133). Interestingly, in the introduction to the statement, there is an acknowledgment that the academic profession differs from both the medical and legal professions in the enforcement of the ethical standards:

In the enforcement of ethical standards, the academic profession differs from those of law and medicine, whose associations act to ensure the integrity of members engaged in private practice. In the academic profession the individual institution of higher learning provides this assurance and so should normally handle questions concerning propriety of conduct within its own framework by reference to a faculty group. (AAUP, 2001, p. 133)

The AAUP's Statement on Ethics appears to focus on the importance of local university and faculty governance in issues related to ethics. This statement also highlights the distinction between the private practice of both law and medicine versus the public practice of education. In the first paragraph of the statement, the AAUP policy clearly articulates the primary responsibility of professors, which is "to seek and state the truth as they see it." (AAUP, 2001, p. 133) But perhaps the second paragraph is even more important, because it addresses the role of professors as teachers, and explains the most basic tenets of the professor's code of professional conduct. This section states that professors must "respect the confidential nature of the relationship between professor and student...avoid any exploitation, harassment, or discriminatory treatment of students" and "protect the academic freedom" of students. (AAUP, 2001, p. 133) It is this section of the code that has been applied to a variety of cases, including cases alleging inappropriate sexual relationships between professors and students.

Most universities incorporate provisions from the AAUP into their own university codes of conduct. It is these individual codes that are binding on professors at each academic institution. At one Florida public institution, for example, the university policy on faculty-student relations reads, in pertinent part, as follows:

The University. . . is committed to a learning and employment environment free from harassment, discrimination, and unprofessional conduct. Accordingly, consenting romantic and sexual relationships between faculty and student or between supervisor and employee while not expressly forbidden, are discouraged. Codes of ethics for most professional associations forbid professional-client sexual relationships. Professor-student and supervisor-employee relationships are that of professional and client. . . . Faculty and supervisors are warned against the possible consequences of even an apparently consensual relationship. A faculty member who enters into a sexual relationship with a student (or supervisor with employee) must realize that if a charge of sexual harassment is subsequently lodged, it will be difficult to prove immunity on grounds of mutual consent. It is difficult to prove a relationship is consensual where a power imbalance exists. (UWF Policy EO-03.00-12/01)

The policy stops short of forbidding sexual relationships between professors and students. Instead, it simply "discourages" these relationships and comments on the difficulty in proving that the relationship was consensual, should an allegation of sexual harassment be made. This policy is very similar to the policies at other institutions, including one university that warns faculty in seemingly consensual sexual relationships

that in the event of sexual harassment charges, “the individual with the power in the relationship will bear the burden of accountability” (UF Policy, p. 9).

There have been several reported cases in which courts have addressed the issue of whether a university professor violated the ethical duties of the profession on the basis of sexual relationships. In one federal case, the court examined provisions of the AAUP Statement on Professional Ethics in some detail as it decided whether a professor could be terminated for sexual relationships with students. In *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir.1984), the Court of Appeals addressed the issue of whether the district court properly granted a motion for summary judgment filed by Ball State University. The initial complaint in this case was filed by Dr. Korf, a tenured university professor who had been terminated for making sexual advances towards his students. The professor claimed that the university violated his constitutional rights by terminating him for what he claimed to be “consensual sexual relations between faculty members and students.” After formal termination proceedings commenced, a university committee held investigative hearings and determined that Dr. Korf was “guilty of unethical conduct because he used his position and influence as a teacher to exploit students for his private advantage. The evidence indicates a pattern of behavior in which he frequently built a personal, friendly relationship, followed by sexual advances, often in his home.” The committee had received testimony from several students who claimed that Dr. Korf gave them money, gifts, and the promise of good grades for sexual acts. The committee cited to the second paragraph of the AAUP Statement on Ethics that was adopted by Ball State University as part of the university’s own policy, specifically the faculty handbook that reads:

As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of his students reflects their true merits. He respects the confidential nature of the relationship between professor and student. *He avoids any exploitation of students for his private advantage* and acknowledges significant assistance from them. He protects their academic freedom. Ball State University *Faculty Handbook* at II-7 (Emphasis added)

After reviewing the committee’s findings, the Ball State University’s Board of Trustees recommended Dr. Korf’s termination for committing unethical conduct by using his position to exploit his students. Dr. Korf denied the allegations of the students, but he did admit that he was sexually involved with a student, and that the relationship was consensual. In his lawsuit, Dr. Korf’s primary argument was that his substantive due process rights were violated because the AAUP’s Statement on Professional Ethics did not include a specific prohibition against “consensual sexual relationships.” He further asserted that the AAUP Statement on Professional Ethics makes no references whatsoever to sexual conduct. But the Federal Appeals Court determined that Dr. Korf’s arguments were without merit, especially regarding the

university's reliance on the AAUP. The court specifically stated: "As is the case with other laws, codes, and regulations governing conduct, it is unreasonable to assume that the drafters of the Statement on Professional Ethics could and must specifically delineate each and every type of conduct (including deviant conduct) constituting a violation." The court determined that both the university committee and the Board of Trustees' conclusions that Dr. Korf had violated both the ethical provisions of the AAUP and the university's faculty handbook were reasonable, and the court held that his constitutional rights had not been violated by his termination.

The *Korf* case is instructive because it highlights one of the major criticisms of the AAUP Policy and individual university policies, which is that these codes fail to establish a bright line ban against all professor-student sexual relationships. Instead, the policies address only those relationships that "exploit students" and leave open the significant question of whether all sexual relationships between students and professors exploit students. The omission of a bright-line ban in the ethical codes leaves some professors with the possible defense of student consent.

In another case involving a similar issue, a tenured professor's termination for cause was supported by a state court. In *Holm v. Ithaca College*, 256 A.D. 2d 986, 682 N.Y.S.2d 295 (N.Y. App. Div.1998), the New York Supreme Court held that a music professor's continued use of inappropriate sexual innuendos justified his termination for cause. The music professor's students complained that he made constant use of sexual innuendos in his class presentations, including instructing his female students to "make love" to their instruments and suggesting that students wear lingerie to class. The professor was warned by his administration and then put on a remedial plan. When his inappropriate behavior continued, the professor was fired. He challenged his firing in part by claiming that the university had fired him without cause. The court determined that the professor's conduct in this case clearly fell within the university's sexual harassment policy, found his allegations without merit, and ultimately upheld his termination.

However, in a similar case involving conduct by a tenured community college professor, a federal court held that a college's sexual harassment policy was unconstitutionally vague as applied in the professor's case. In *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), the Court of Appeals held that the college's enforcement of the sexual harassment policy against Mr. Cohen violated the First Amendment's prohibition against vague policies that limit classroom speech. In this case, a female student alleged that the professor had created a hostile learning environment by using profanity in class; repeatedly discussing controversial subjects in class, including obscenity, cannibalism, and consensual sex with children; and reading *Hustler* and *Playboy* articles to his class after stating that he had written articles for both magazines. The college's grievance committee conducted hearings and determined that the professor had violated the college's sexual harassment policy by "creating an intimidating, hostile, or offensive learning environment" and ordered him to complete several remedial tasks. These tasks included submitting his future course syllabi to the department chair for approval, attending a sexual harassment seminar, and modifying his teaching methods when necessary. While the trial court agreed with the college's actions, the Court of Appeals disagreed and determined that the way the college

enforced the policy was problematic. The court called the college's actions "legalistic ambush" and pointed out that the professor had used the same teaching techniques for over twenty years without any questions by the college. Indeed, he had been granted tenure and promotion during that time. Additionally, he was one of the first punished under the new sexual harassment policy, and the court concluded that he had no notice that the college's new sexual harassment policy prohibited his conduct. Importantly, the court did not reach the issue of whether his behavior had, in fact, created a hostile atmosphere, but the court stated that the policy needed to be clearer. The *Cohen* case is helpful because it emphasizes the importance of fairness in enforcing any new sexual harassment policy, requires such policies to be written clearly and precisely, and establishes that professors must have adequate notice of exactly what type of behavior is forbidden in order to be punished for violating the policy.

ABA Model Rules of Professional Conduct

The American Bar Association adopted the Model Rules of Professional Conduct in 1983, and these rules outline the standards of ethical conduct for lawyers. These rules were based on the Canons of Professional Ethics that the ABA first adopted in 1908 (Neuner, 1999). The model rules provide succinct guidelines governing all areas of a professional lawyer's conduct. The model rules are divided into eight broad categories: Part 1-Client-Lawyer Relationship; Part 2-Counselor; Part 3-Advocate; Part 4-Transactions with Persons other than Clients; Part 5-Law Firms and Associations; Part 6-Public Service; Part 7-Information about Legal Services; and Part 8-Maintaining the Integrity of the Profession (ABA Model Rules). While the rules have been criticized by some as simply establishing "minimum standards that have come to be regarded as the maximum statement of the prevailing ethical level," they have nevertheless been adopted in some form by all of the states (Neuner, 1999). Additionally, currently forty-seven states require lawyers to pass the Multi-State Professional Responsibility Exam, which is based on the ABA Model Rules, in order to be admitted to practice law in those states. While the language of the rules does not address specific situations, state bar associations have provided attorneys some guidance on handling ethical dilemmas. In Florida, for example, the state bar association maintains an ethics hotline for attorneys to receive advice on immediate ethical dilemmas that may not be clearly answered by the language of the ethics code. Additionally, both the ABA as well as state bar associations provide ethics opinions to member attorneys to add clarity to the rules. Finally, the courts have also weighed in on addressing the ethical behavior of attorneys.

In 2001, the American Bar Association's House of Delegates adopted a new rule, Model Rule 1.8(j), which banned sexual relationships between attorneys and clients unless the relationship existed before the start of the attorney-client relationship (ABA Model Rules). This rule change resulted from the work of the Ethics 2000 Commission, which was a group gathered by the ABA in order to examine the current rules and suggest needed revisions. The rule is succinct and unequivocal, and states: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

Some scholars have asserted that the ABA adopted this rule in order to provide clarity to courts, to improve the public's confidence in the legal profession, and to send clear messages to lawyers (Vincent, 2002). The ABA's recent bright line rule came after years of wrestling with the issue of when a sexual relationship between a lawyer and a client was improper. As late as 1992, the ABA refused to take a firm position against all such relationships and declared the following in a 1992 ABA Formal Opinion 92-364: "A sexual relationship between lawyer and client *may* involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently, and therefore may violate both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility." But since the adoption of the new rule, many states have taken the ABA's lead and have implemented similar prohibitions against most sexual relationships between attorneys and their clients (Vincent, 2002).

Comparison of the Two Policies/ Discussion

The main issue here is really how the two codes differ on the ethical dilemmas presented in the beginning of the article. How would the AAUP, and corresponding university codes, address the issues in the hypotheticals, and how might that differ from the ABA's Model Rules?

In the first scenario, Professor A does not have any direct authority over Student B. He is not her professor, and he will not be grading her or supervising her in his classes, and therefore it is relatively clear that there would be no viable *quid pro quo* sexual harassment charge. They are both adults, and it does not appear that he has forced her to undertake the relationship in order to gain some benefit he can confer on her based on his status as a professor. Under the current AAUP policy, it seems that his behavior, while not favored, would not violate the ethical tenets of the policy. In the sample university policy cited, this relationship would also simply be discouraged, but still not forbidden. It is clear that a bright-line rule like the one established by the ABA would provide much more guidance in this scenario. The ABA rule would clearly prohibit this type of relationship between a lawyer and a client, and violating this rule would likely result in the lawyer facing professional discipline from the supreme court.

So the question really becomes should a university prohibit all faculty-student sexual relationships, much like the ABA Model Rules did for attorney-client relationships, when those relationships occur between consenting adults, and when there is no allegation of *quid pro quo* harassment? There are those who assert that universities should stay out of private relationships between consenting adults, while others argue that the risk of harm to others, including the university, is simply too great (Forrell, 1997). For example, what if other students learned about this professor's sexual relationship with a student? Would these students think less of the university? Of the professor? Of the department? What about if parents learned about this? Would they believe that this university was the type of university that condoned such behavior, and that this type of attitude could lead to other faculty-student sexual relationships? These scenarios all illustrate how the private relationship can possibly cause public harm, and show why the university must be especially concerned about these

relationships. There is also the argument that faculty-student relationships can never be consensual relationships because the power imbalance always exists, and always favors the professor (Lane, 2006). Despite the fact that most college administrators and many college professors would like to deny it, faculty-student sexual relationships still seem to be quite common (Lane, 2006). The ABA adopted the ban on lawyer-client relationships in part to combat the negative public perception of these types of relationships. Implementing a bright-line ban is especially important in the context of public undergraduate institutions, where students are younger and more vulnerable. Universities should carefully consider the benefits of the ABA model rules and other professional ethics codes when drafting policies related to faculty-student sexual relationships.

In the second scenario, the tenured professor has admitted to having an addiction to alcohol and has been arrested three times. In the current arrest, she faces felony charges for driving under the influence of alcohol. Under most university policies, the professor would most likely face a committee review of her actions. The university panel would specifically look at whether or not her behavior constituted just or adequate cause for her termination from the university since she is a tenured professor (AAUP, p. 12). Since the crime relates to her alcohol addiction, many universities would likely attempt to encourage or require her to seek counseling for her behavior. Most university policies take these types of problems on a case-by-case basis and examine a variety of factors to determine the proper outcome. These factors would likely include some of the following: the seriousness of the charge; the risk of harm to the university's reputation; the potential for the professor's rehabilitation; and the professor's prior disciplinary record (UWF Policy). Once again, most ethics codes do not include a bright-line rule on the commission of felonies.

It should be noted that the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 are not implicated in this scenario. An alcoholic may be held to the same standards of job performance and behavior as other employees, even if such unsatisfactory performance or behavior is related to the employee's alcoholism. Although a university may prohibit employees from using or being under the influence of alcohol at the workplace, it cannot prohibit conduct which does not negatively affect the performance of the job (Americans with Disabilities Act, 2006).

Under the ABA model rules, the language of rule 8.4 states: "It is professional misconduct for lawyers to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" (ABA Model Rules). But there has been some disagreement about what types of crimes meet this criteria, and courts have held that there are really two levels of criminal conduct: conduct involving "moral turpitude" that could result in the attorney's disbarment, and conduct that "adversely reflects on the lawyer's fitness to practice law" that could result in some lesser level of disciplinary action. (*Georgia v. Williams*, 1996). Even though the current charge is a felony, it is not the type of charge for which the attorney would likely face disbarment. However, under the ABA model rules, the attorney would likely face disciplinary charges in order to compel her to seek alcohol counseling. The ABA has adopted a strong position against attorneys abusing alcohol and drugs in their private lives, because of the likelihood that this behavior could adversely affect their

ability to practice law and might harm clients. In effect, both ethical codes would likely handle the second scenario similarly, by balancing the concern to protect the public with the hopes of rehabilitating the professional.

In the third scenario, under the AAUP, a professor does not have an explicit duty to report a colleague's behavior under these circumstances. There is certainly an argument that she has a duty to take the behavior into consideration when voting on her colleague's tenure, but there is no duty to report the behavior under the AAUP standards. Hamilton explains that in 1998, the AAUP Council declined to adopt a formal statement "On the Duty of Faculty Members to Speak Out on Misconduct" and decided instead to leave this type of decision to each individual institution (Hamilton, 2001). Therefore, some institutions may have formal statements on a faculty member's duty to report this type of conduct, but there is no formal statement from the AAUP. Under the ABA, lawyers have a duty to report illegal conduct when it affects another lawyer's ability to practice law, according to Rule 8.3(a) (ABA Model Rules). However, some commentators suggest that despite the mandatory language used in Rule 8.3, most lawyer misconduct is not reported by one's peers, but instead by clients (Hamilton, 2001). Self-regulation is an important tenet of the legal profession, but a bright-line rule does not necessarily result in an increase in the number of reports by one's peers. Universities are already committed to self-regulation policies that protect the integrity of the profession, particularly in the tenure and promotion process where faculty members must objectively review the files of peers who are sometimes personal friends. In drafting an ethical code, it is essential to clarify obligations first and send the right message that members of the profession are also protectors of the integrity of the profession. The importance of the ethical rule requiring the reporting of serious conduct outweighs the risk that some might refuse to follow it.

Policy Arguments and Conclusions

The ABA offers more definite statements on ethical conduct than the AAUP. The most likely reasons for this difference stem from the protections associated with academic freedom (Hamilton, 2001) and the influence of faculty governance on the institutional policy-making process. The AAUP standards and the ABA rules are distinctly different in terms of implementation and application. The AAUP presents national aspirational guidelines that may or may not be adopted or enforced by individual institutions. In contrast, the ABA rules have been adopted, in whole or in large part, by every state and are enforced by the bar association or supreme court of each state.

Given the similarity of the interests discussed here, that is the need, to protect the public versus the need for some professional autonomy, it seems that there should be more similarities between the ethics codes. Both professions should be held to the highest ethical standards possible. The AAUP should be clearer in outlining appropriate conduct for professors, because this is an important first step for modeling ethical behavior for students. The AAUP should adopt a bright line rule prohibiting all faculty-student sexual relationships, and should also require faculty to report the misconduct of one's peers when that behavior is serious and threatens the academy.

However, as noted herein, institutions that seek to implement and enforce bright line tests on these issues may face difficulties because such tests may impinge upon academic freedom.

Additionally, one of the other important components of a strong code of ethics for any profession is the requirement of continuing education. Most states require attorneys to earn continuing legal education credits in ethics for every reporting period in addition to completing other substantive continuing legal education. Through the tenure and promotion process, the academy ensures faculty will remain current in their chosen discipline but it does not ensure that faculty are even aware of the ethical tenets of the profession (Klein, 2006). As many scholars have pointed out, in order to teach ethics effectively to students, faculty should begin by modeling ethical behavior as members of the academy (Chesley & Anderson, 2003). A more comprehensive academic code of ethics could help accomplish this goal.

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