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Reflections on the Ethics of Legal Academics: Law Schools as MDPs; or, Should Law Professors Practice What They Teach Symposium: Ethics of Law Professors

Bruce A. Green

*Fordham University School of Law, bgreen@law.fordham.edu*

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REFLECTIONS ON THE ETHICS OF LEGAL ACADEMICS: LAW SCHOOLS AS MDPs; OR, SHOULD LAW PROFESSORS PRACTICE WHAT THEY TEACH?

BRUCE A. GREEN*

[A member of the House of Commons said in Samuel Johnson's presence] that he paid no regard to the arguments of counsel at the bar of the House of Commons, because they were paid for speaking. JOHNSON. 'Nay, Sir, argument is argument. You cannot help paying regard to their arguments, if they are good. If it were testimony, you might disregard it, if you knew that it were purchased. There is a beautiful image in Bacon upon this subject: testimony is like an arrow shot from a long bow; the force of it depends on the hand that draws it. Argument is like an arrow from a cross-bow, which has equal force though shot by a child.]

What law professor would spurn the opportunity, afforded by this symposium, to offer personal reflections on the ethics of law professors? Day after day, by profession, we hold a mirror up to the law, legal institutions and lawyers. Now, we are invited to hold a mirror up to ourselves and our colleagues. Anyone at all reflective would jump at the chance. But, on further reflection, what law

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* Louis Stein Professor, Fordham University School of Law. Gratitude is expressed to Teresa Collett and the other organizers of, and participants in, the Symposium on the Ethics of Law Professors at South Texas College of Law for which this contribution was prepared, to participants in the Fordham Faculty Workshop who offered their suggestions prior to the symposium and to Cathy Horta, Fordham Law '02, who provided valuable research assistance.

1. IV JAMES BOSWELL, LIFE OF SAMUEL JOHNSON, L.L.D. 281 (Yale University Press, 1994).
professor would willingly engage in this enterprise? Any problem we describe will be presumed to come from our own experience. Any criticism we level is sure to be turned back on us.

To resolve this dilemma, I offer the reflections of a pseudonymous law professor. It should be understood that any problem described in this work is entirely fictional. It should also be understood that whatever views are expressed in this work do not necessarily coincide with my own. In any case, like the arrow from a cross-bow, the force of an argument should be the same regardless of who sets it forth.

**Law Schools as MDPs; Or, Should Law Professors Practice What They Teach?**

**Holden Gray**

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He who can, does. He who cannot, teaches. —George Bernard Shaw.¹

I. **INTRODUCTION**

The subject of law professors' ethics lies at the intersection of academic ethics and legal ethics. To focus on "law professors' ethics" as a distinct area of concern is to recognize not only that law professors' problems of academic responsibility may be different from those of other academics because they are lawyers, but also that law professors' problems of attorney conduct may be different from those of other lawyers because they are academics. What makes law professors' ethics different and interesting, however, is not simply the

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interrelationship and possible tension between academic and legal ethics. It is also that law professors’ problems of professional conduct arise in an interesting and complex setting—namely, a law school. As the legal profession debates whether lawyers should be allowed to participate in multidisciplinary practices ("MDPs"), it should be recognized that a law school is an example of an MDP and is potentially prone to the kinds of problems that MDPs present.

The term MDP covers various ways in which lawyers might combine with non-lawyers to offer a mix of legal and non-legal services. Several disciplinary rules currently forbid lawyers in private practice from participating in some forms of profit-making MDPs. These rules are said to reflect at least three concerns. The first is that


3. It has been argued, for example, that partnerships of lawyers and accountants should be able to offer corporate clients a range of professional services, including legal advice. See Hon. Charles L. Brieant, Is It the End of the Legal World as We Know It?, 20 Pace L. Rev. 21, 29-31 (1999); Ronald A. Landen, The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-Speaking Countries, 13 Emory Int’l L. Rev. 763, 819 (1999); Greg Billhartz, Can’t We All Just Get Along? Competing for Client Confidences: The Integration of the Accounting and Legal Professions, 17 St. Louis U. Pub. L. Rev. 427, 447-50 (1998). Some would say that the “Big 5” accounting firms are already doing so, in disregard of existing disciplinary restrictions. See Gary A. Munneke, A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm, 20 Pace L. Rev. 1, 7 (1999) (observing that when lawyers charge that accountants are engaged in the unauthorized practice of law, the accountants argue that they are not practicing law but engaging in business planning which necessarily includes some legal elements); Morello, supra note 2, at 190-92 (noting that, in countries that prohibit MDPs, the accounting firms have circumvented the rule by forming alliances and agreements with law firms).

4. Among them are disciplinary rules which restrict lawyers from entering into partnerships with non-lawyers, see MODEL RULES OF PROF’L CONDUCT R. 5.4(b) (2000), from splitting fees with non-lawyers, see id. R. 5.4(a), from being employed by corporations to represent third parties, see id. R. 5.4(d), from aiding non-lawyers in the unauthorized practice of law, see id. R. 5.5(b), and from compensating a non-lawyer for referring a client, see id. R. 5.4(c). For a discussion of the restrictions’ origins, see Bruce A. Green, The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate, 84 Minn. L. Rev. 1115, 1133-40 (2000).

5. Because profit-making MDPs have been forbidden since early in the 20th century, there is limited empirical evidence about how for-profit MDPs would function in
clients of an MDP may be misled or confused about whether they are being assisted by a lawyer or a non-lawyer and whether they are receiving legal or non-legal assistance.\(^6\) Additionally, lawyers may be influenced to apply the wrong professional norms because they are in an environment where different professional work is done (including, possibly, by the lawyers themselves) in accordance with different, and possibly conflicting, professional expectations.\(^7\) Finally, both the lawyers and the non-lawyer professionals may be unduly influenced by their stake in the success of the other’s work.\(^8\)

At bottom is a problem of ambiguity in the lawyer-client

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practice and whether the disciplinary rules are really necessary to protect against the various possible harms. Some point to what they perceive as recent abuses, however, to justify retaining the rules in their present form. See, e.g., Lawrence J. Fox, Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs, Too, Plus Other Ruminations on the Issue of MDFs, 84 MINN. L. REV. 1097, 1103–04 (2000).

6. The fear is that clients may think they are receiving legal assistance from a lawyer who is employing legal skill and comporting with the norms governing lawyers in legal practice. But clients may not be getting what they expect, either because they are assisted by a non-lawyer in the MDP or because they are assisted by a lawyer who believes that he is providing a non-legal service, such as business advice, and therefore does not feel bound to abide by the standards of conduct governing the practice of law. See, e.g., N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 557 (1984) (expressing concern that if a lawyer and accountant entered into a partnership to engage in tax planning, clients might be misled to believe that the accountant was providing legal services); cf. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 687 (1997) (opining that a lawyer acting as an insurance broker must take steps “to clarify that in recommending insurance products, [he] will not be functioning as a lawyer and, thus, will not be exercising professional judgment as a lawyer on behalf of the purchaser”).

7. The traditional fear is that lawyers will be pressured overtly by the non-lawyers in the MDP who are driven exclusively by a profit motive and are unconcerned about lawyers’ obligations to their clients and the public. See In re Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910).

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client . . . . His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law.

Id.

A more subtle danger is that the lawyers will simply assimilate the less demanding ethics of the non-lawyers and apply it to all aspects of their work.

8. For example, if lawyers and accountants are partners, the lawyers may refer their clients to the accountants, and the accountants may refer their clients to the lawyers, regardless of whether the other professional services are needed and whether the other professionals are best qualified to render them. This concern, in part, underlies the disciplinary rule forbidding a lawyer from compensating non-lawyers for referrals. See MODEL RULES OF PROF’L CONDUCT R. 7.2(c) (2000).
relationship. Although the most frequently discussed problem of ambiguity is, "Who is the client?", the problem here is, "Who is the lawyer?" In some contexts, ethics opinions and disciplinary restrictions respond to this ambiguity by directing lawyers to be clear about whether they, and others with whom they work, are serving as lawyers or in some other professional role (e.g., as accountant or real estate broker). In other contexts, the rules categorically forbid lawyers from allying with non-lawyers so as to prevent the possibility that the public might be misled or that lawyers might come under the improper influence of non-lawyers.

For the most part, however, the restrictions are directed at lawyers working in for-profit settings. Not-for-profit MDPs are permitted. For example, a battered women's shelter whose principal mission is to provide social services to its clients may establish a law office to render legal assistance as well. Disciplinary rules and other legal provisions that restrict for-profit MDPs are inapplicable or provide an exception for not-for-profit institutions of this sort.

A law school is one form of not-for-profit MDP. Its principal business is to provide a non-legal service: legal education. However, through legal clinics, a law school's professors and students also provide legal assistance to clients. The law professors who oversee these clinics serve in a dual capacity as teachers and lawyers.

The array of legal and non-legal services provided within the law school setting are not confined to the law school clinic. Law professors are expected to engage in at least one other non-legal pursuit in addition to teaching—namely, legal scholarship. Students at the law school, besides being consumers of legal education, may themselves render law-related services, including through volunteer student groups that work in areas (e.g., welfare or unemployment proceedings) where non-lawyers are permitted to render assistance.

9. See, e.g., N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 687 (1997) (indicating that a lawyer licensed as insurance broker may sell insurance to clients as long as the lawyer makes it clear that, in the particular transaction, "he or she is acting exclusively as an insurance broker and not as a lawyer").

10. See MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (2000) (providing that a lawyer may not practice law in a partnership with a non-lawyer).


13. Raymond H. Brescia et al., Who's in Charge, Anyway? A Proposal for Community-Based Legal Services, 25 FORDHAM URB. L.J. 831, 844 n.64 (1998) (noting that volunteer organizations at law schools often allow students to represent indigent
In their individual capacities, law professors who are licensed to practice law may render legal services to clients. Indeed, they may be encouraged to do so on a pro bono basis in order to serve as role models for students who, it is hoped, will render pro bono services themselves after they are admitted to the bar.

As far as MDPs go, law schools are unusual in at least one respect. Ordinarily, an MDP would be expected to offer legal and non-legal services to the same clientele. For the most part, however, law schools offer their legal and non-legal services to different groups. That is certainly true in the law school clinic, where the law school serves clients who are typically unaffiliated with the school while educating its students. In this setting, the school's dual mission may, at times, become dueling missions. The clinical legal scholarship acknowledges the complexities for clinical faculty, who may experience a tension between their duty as lawyers to ensure that the clinic's clients are competently represented and their mission as legal educators to help students learn "by doing," including, at times, by doing things poorly.¹⁴

Even outside law school clinics, law faculty may encounter questions arising out of the law school's role as an MDP and out of their own dual role as lawyers and teacher-scholars. This article raises three of these questions. First, do law professors, as lawyers, have an obligation to supervise the law-related work of law students when it is performed under the auspices of the law school? Second, may law professors give advice to students who have law-related problems and, if so, in the role as lawyer? Finally, what are the risks that the professor's work as a lawyer will adversely affect the integrity of his

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¹⁴ David Chavkin, Am I My Client's Lawyer? Role Definition and the Clinical Supervisor, 51 SMU L. REV. 1507, 1527–28 (1998) (describing how a clinical supervisor may refrain from intervening in a student's mistake so that the student will learn from it); James E. Moliterno, In-House Live-Client Clinical Programs: Some Ethical Issues, 67 FORDHAM L. REV. 2377, 2388 (1999) (explaining how, when faced with the decision of whether to intervene in a student's case, a clinical supervisor is really deciding whether the student's education is more important than the client's representation); Conference Transcript: A Teacher's Trouble: Risk, Responsibility and Rebellion, 2 CLINICAL L. REV. 315 (1995) [hereinafter, A Teacher's Trouble] (presenting different hypotheticals in which the clinical supervisor is faced with a conflict between the client's needs, the student's needs, and the supervisor's own professional duties to the law school, the bar, and the clinic's clients).
work as a scholar and teacher, and how should the professor respond to these risks? These questions are variants of the ones that lawyers might expect to encounter in for-profit MDPs.

This article elaborates on these questions in the context of an almost completely made up, fictional, hypothetical story. The story illustrates the problems that law professors who are also lawyers may encounter because of the multi-disciplinary nature of the law school setting. This article does not set out to resolve the ethical questions raised by the law school as an MDP and the law professor's dual role. For the most part, its ambition is limited to calling attention to these questions, underscoring their significance for law faculty and offering some ways of thinking about them.

II. THE STORY

A. The Student's Dilemma

Professor Brown teaches legal ethics at New Upright School of Law, a large metropolitan law school. New Upright takes a broad view of its teaching mission. In addition to teaching legal analysis and legal writing and research, imparting legal knowledge in core areas, and encouraging students to take interdisciplinary approaches to legal problems, New Upright strives to assist students in developing basic legal skills (e.g., interviewing, negotiating, counseling, and advocacy) through clinical courses, lawyering simulation courses, or internships. The school also endeavors to train students in legal ethics and to impart core professional values. Among the values that the law school holds important is providing legal services to those who cannot afford to pay for them. New Upright encourages unpaid service, in part, through its Public Interest Support Center ("PISC"), which houses a variety of student volunteer programs, many of which provide direct services to low-income individuals with legal problems. The work of these volunteer groups is loosely overseen by the director of the PISC, who is not himself a lawyer, and by a faculty committee, the Student-Faculty Public Service Committee, which meets twice each semester to hear reports from the groups' student directors.

New Upright takes an equally broad view of its faculty's mission. Its professors are expected to strive to be excellent teachers who devote time to students outside as well as inside the classroom. New Upright professors are also expected to be dedicated scholars. They are expected to serve the law school through participation in faculty
governance. And, they are expected to serve the community in some way, whether it be through involvement in bar association activities, pro bono work, drafting amicus briefs, or other personal or professional contributions. Needless to say, the life of New Upright School of Law, and the lives of its students and faculty, are busy ones.

At New Upright, Professor Brown teaches and writes primarily in the area of legal ethics. He serves on the Student-Faculty Public Service Committee. He also serves on a bar association committee that deals with legal ethics questions and occasionally serves as an expert witness or consults with lawyers about such questions. Each year, Professor Brown invites his legal ethics students, if they ever have a legal ethics problem, to seek his advice. Over the years, his graduates have occasionally taken him up on the offer. Sometimes, his current students do so as well.

One day, Professor Brown receives a visit from JB, a third-year student enrolled in his legal ethics class. She is one of several directors of the Public Housing Advocacy Project ("PHAP"), a student organization housed in the PISC that assists public housing tenants in eviction proceedings. Under state law, public housing tenants may be assisted by a non-lawyer in administrative proceedings before the Housing Authority's Administrative Law Judge ("ALJ"). Law students, the PISC believes, may therefore provide this service without a lawyer's supervision.

JB asks Professor Brown whether she may speak to him privately, and, of course, he agrees. She explains that, one day earlier, she accompanied AC, a second-year student, to an administrative hearing. The Housing Authority sought to evict the Project's client, Mrs. P. on the ground that her teenaged son had stolen a neighbor's television set, which was discovered outside Mrs. P's apartment. AC's principal argument was that, because Mrs. P's son was now in juvenile detention and might well remain there, there was no need to evict Mrs. P, even assuming her son had stolen the television. Therefore, AC did not call his client as a witness. However, the Housing Authority's lawyer did so and asked her whether her son had stolen the television. She denied having any knowledge of the theft and asserted that her son was not at home at the time the television was stolen.

When the two students were alone after the hearing, JB expressed concern that the ALJ did not appear to believe Mrs. P, whereupon AC acknowledged that Mrs. P's testimony was false. According to AC, at his first meeting with Mrs. P, she told him that she came home one day, learned from her son that he had taken the
neighbor's television, and insisted that he return it. He did not do so but left it in the hallway outside the apartment. AC told Mrs. P that if she gave that account at a hearing, she would lose her apartment. JB got the impression from AC that he deliberately encouraged Mrs. P to lie.

JB is outraged at AC and asks Professor Brown for advice about what to do. She is concerned, on one hand, that the ALJ might erroneously credit Mrs. P’s false testimony and, on the other, that the ALJ might reject an otherwise deserving legal argument because he perceives her to be dishonest. JB thinks that Mrs. P might be most sympathetic if she is revealed to be the victim of AC’s bad advice. JB wants to know whether she has some duty to correct Mrs. P’s testimony, since the ALJ has not yet ruled. Even if she has no obligation to do so, she wonders whether she may tell the ALJ that Mrs. P had been encouraged to lie. She wonders whether she should do so or whether she has some duty to keep quiet about what she learned. JB is also infuriated that AC has betrayed the PHAP and the law school and would like to see him kicked out of school and banished from the legal profession. She wants to know whether she can and should report AC’s possible misconduct to the law school administration and/or to the state’s licensing authorities. Professor Brown asks for some time to think about the problem and suggests that JB return the next day.

B. The Professor’s Dilemma

Professor Brown is uncertain what advice to give. For starters he is not sure whether AC acted in a professionally or legally improper manner. Certainly, AC could not properly encourage Mrs. P to give false testimony; doing so would, in all likelihood, make AC an accessory to perjury. Under criminal law, even a non-lawyer is forbidden from knowingly assisting in the creation of false testimony. It is unclear from JB’s second-hand account that AC did so, however.

Whether or not AC meant to encourage Mrs. P to lie, once she testified falsely, did AC have a duty to the public or to the administrative tribunal to correct the record? If he were a lawyer, he might. At the very least, he would have a duty to try to convince Mrs. P to correct her false testimony. But the disciplinary rules are written

18. See id. R. 3.3(a)(4).
for lawyers, and AC is not (yet) a lawyer. Non-lawyers are not personally subject to sanction for violating the disciplinary rules.\footnote{19}{The disciplinary rules of a given jurisdiction apply of their own force only to lawyers who are licensed or practicing in the jurisdiction. Therefore, in the ordinary course, they do not apply to law students. Where law students or other non-lawyers act in the employ of lawyers who are rendering legal services, the lawyers must take steps to ensure that the non-lawyers act consistently with the lawyers’ professional obligations. See, e.g., \textit{Model Rules of Prof’l Conduct} R. 5.3(a) (2000). As employees the non-lawyers would have a fiduciary duty to comport with the applicable disciplinary rules as directed by the lawyers who supervise them in the course of the representation.

When students render legal services in a law school clinic, the court rules that authorize them to do so may require them to comport with the disciplinary rules. Insofar as they act as an agent of a law professor or other lawyer in a matter, they may similarly have such an obligation even if no such rules apply. One might argue that, when law students render law-related services in contexts where non-lawyers are permitted to serve (e.g., certain administrative proceedings or small claims court), they should be held to the standards of conduct governing lawyers in a legal representation. Arguably, a gross deviation from certain professional standards might reflect that the student lacks the requisite “character” to practice law and might therefore justify denial of admission to the bar. At present, however, it is uncertain whether, absent a voluntary undertaking, law students must comport with the professional standards when they perform law-related work independently of a clinic or law office. \textit{Cf.} Leonard Biernat, \textit{Why Not Model Rules of Conduct for Law Students?}, 12 FLA. ST. U. L. REV. 781, 804-23 (1985) (presenting proposed model rules of conduct for law students, taken partly from the ABA rules and partly from the codes of conduct of individual law schools); Adrienne Thomas McCoy, \textit{Student Advocates and Conflicts of Interest}, 73 WASH. L. REV. 731, 731-33 (1998) (proposing a rule that applies attorney conflict of interest rules to law students working in legal clinics or legal advocacy groups).
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\footnote{20}{See \textit{Model Rules of Prof’l Conduct} R. 5.3(a) (2000).}

\footnote{21}{See id.}

\footnote{22}{See id. R. 5.3(c).}

\footnote{23}{\textit{Cf.} Hansen v. Kynast, 494 N.E.2d 1091, 1092 (Ohio 1986) (holding that a student who attends a university of his choice, receives no scholarship or compensation, voluntarily becomes a member of the university lacrosse team which engages in intercollegiate contests with other universities for which games no attendance fee is charged, who purchases his own equipment and who receives instructions from a coach while preparing for and playing such games, but is not otherwise controlled by the coach, and who participates in the game as a part of his total educational experience while attending school, is not the agent of the university at the time he is playing the game of lacrosse).}
not act through its law students, and its law students have no fiduciary
duty to the school. Must New Upright nevertheless police its students’
conduct when they are rendering assistance under the auspices of law
school volunteer programs, to ensure that the law students are
comporting with the norms that would ordinarily apply to lawyers?
Would the public, the courts, or law-school accrediting authorities
reasonably expect it to exercise such oversight? Even if the law school
did not explicitly require its student volunteers to hold themselves to
the professional standards governing lawyers, did AC have some
implied obligation to the law school to do so?

What about AC’s duty to Mrs. P? AC has not acted with the skill
that one would ordinarily expect of a lawyer. A competent lawyer
would take steps to prevent a client from testifying falsely, not
encourage the client to do so.24 Of course, AC is not a lawyer.
Presumably, he told Mrs. P that he was not a lawyer when they first
met. But is that enough to prevent an unsophisticated client from
reasonably expecting him, as a law student, to provide better quality
assistance than she would receive from a neighbor or friend who has
no legal training? Surely, a person who received medical care at a
teaching hospital from a medical student would expect essentially the
same level of care as she would receive from a doctor. Regardless of
whatever disclaimers are made, wouldn’t someone in need of legal
assistance who receives help from a law student at a law school expect
to receive the same quality of assistance that she would receive from a
lawyer? If so, is the law school in some sense responsible for
misleading Mrs. P? Does it have a responsibility now to step in and
make amends, as well as to protect other members of the public from
being ill-served by its students in the future? Or is it sufficient that, on
average, tenants served by the PHAP are better off than if they had to
represent themselves, which is their likely alternative?

What about JB’s obligations? May she correct Mrs. P’s false
testimony or report AC for failing to do so? Must she do so on the
theory that she, too, ought to comply with the disciplinary rules, which
might require a lawyer in her position to correct the record?25 Was
Mrs. P her client, either because she accompanied AC in the role as
“co-counsel” (or its equivalent) or because she is a member of the
PHAP, the “law office” (or its equivalent) responsible for
representing Mrs. P? If so, is she obligated to keep what she learned
confidential, on the theory that if she were a lawyer, her reporting

24. See Bruce A. Green, Lying Clients: An Age-Old Problem, 26 LITIG. 19, 24 (1999).
obligation would be trumped by her duty not to disclose information about the client? Are the answers to these questions governed by the standards of conduct that apply to lawyers? If not, what is the applicable standard? And, assuming that JB has some options, what should she do?

In the past, Professor Brown has thought about the reporting rule in various other contexts. He has consulted with lawyers, sometimes for a fee but often not, about whether they must report another lawyer’s apparent misconduct. He has addressed this question in the course of his work with a bar association committee that gives advice to lawyers with ethics questions. Of course, he has addressed this question in his teaching, including in continuing legal education programs for practitioners. His reflections are influenced by his prior work, although, he muses, this is a different situation. Assuming JB is subject to the disciplinary rules, including the reporting rule, is the rule inapplicable because AC is not a lawyer, or might there be a duty to report to the admissions authorities? Would the rule be inapplicable because AC’s transgression does not call his fitness to practice law into question? Is JB barred from reporting AC’s conduct because she has a duty to Mrs. P to keep what she knows confidential? Is she, in effect, co-counsel for Mrs. P? If not, does she nevertheless have some confidentiality obligation to AC, given his likely expectation that he could confide in her? Even if she might otherwise have been obliged to keep the confidence, may she disclose what she learned to prevent a fraud on the tribunal?

On one hand, Professor Brown thinks, JB is not a lawyer; she is therefore not subject to the state’s disciplinary provisions, and so she can do whatever she wants. On the other hand, Professor Brown identifies reasons why she might be obligated to act consistently with the applicable provisions or, even if not obligated to do so, might want to. As a law student who assists clients with legal problems under the auspices of a law school volunteer program, she may have impliedly undertaken to act consistently with the applicable professional standards. Perhaps, when she was initially trained to do this work, she explicitly agreed to comport with the professional standards. Perhaps she is, loosely speaking, acting under the supervision of faculty who are lawyers and for that reason might have to act according to the

26. See id. R. 1.6(a).
27. Id. R. 8.3(a).
28. See id.
29. See id. R. 1.6(a).
30. See id. R. 3.3.
legal profession’s norms.

Professor Brown is concerned about JB’s interests as well as her obligations. He worries that if she reports AC’s conduct, she will become embroiled in unpleasant proceedings and become a pariah in the legal community. But, if he advises her not to do so, will she become cynical about how lawyers (and future lawyers) conduct themselves and about the standards governing lawyers’ conduct?

Professor Brown is also concerned about the law school’s interests. He worries that, if AC’s conduct is discovered, the reputation of the law school and its public interest program will be seriously harmed. He worries that, if the law school does not intervene, and its failure to do so is later discovered, it will come under even greater criticism for countenancing professional misconduct.

Professor Brown is also concerned about the interests of justice. He worries that, if Mrs. P’s false testimony is not corrected, the administrative proceeding may be influenced unfairly, because, contrary to JB’s expectations, the ALJ may believe it. If the false testimony is corrected, the ALJ may order Mrs. P’s eviction, notwithstanding that her lies were encouraged by a law student in whom she had placed her trust. JB may be naive to think that the ALJ will weigh this information in the client’s favor.

Professor Brown briefly reflects that he does not feel very concerned about AC’s interests, but he wonders whether he should. Professor Brown has never met AC; it is easy to think of him as a faceless abstraction. But, Professor Brown muses, AC is a student of the law school. The law school must take account of his interests. Must a law professor do so as well? Must he seek out AC, listen to his side of the story, and offer him advice? Professor Brown is inclined to think that he already has his hands full.

Assuming that neither AC nor JB take any action, Professor Brown wonders whether he will have a personal obligation to call the problem to someone’s attention. Perhaps the law school administration would want to know. Besides the possibility that the law school might have an institutional responsibility or desire to correct the record in the administrative proceeding, it might want to consider taking disciplinary action against AC or calling his possible misconduct to the attention of the licensing authorities when he applies for bar admission so the authorities consider whether he has the requisite character to practice law. Additionally, if it were aware of AC’s conduct, the law school might reevaluate the PISC and the work of volunteer groups. Perhaps it would require students to be
trained and supervised more closely by attorneys. Perhaps it would require the volunteer groups to take exquisite care in advising clients to make sure no client expects them to act as capably as lawyers or to adhere to the legal profession's norms. Of course, such advice might impair the groups' effectiveness by undermining their clients' confidence in the students.

In mulling over what steps he personally might take, Professor Brown considers whether he is under any obligation to keep what JB told him confidential, unless she later authorizes him to disclose it in some fashion. In JB's understanding, was she coming to him as a lawyer, a teacher, neither, or both? It is not unlikely that JB regarded him as a lawyer. His students know that, on occasion, he gives advice to lawyers about their professional problems.

If JB came to him as a lawyer, Professor Brown wonders, does he owe her a duty under the disciplinary rules to keep her information confidential? Or would she have understood that the law school is, essentially, a "co-client" with whom he would be permitted to share what she told him? Even if JB approached him only as a teacher, Professor Brown thinks he might be morally bound to keep JB's information secret because he agreed that she could talk in private. Alternatively, he considers whether, as an employee of the law school, he has a fiduciary duty to disclose what he has learned to the law school administration because the information may be important to how the law school functions, including how it supervises students and how it carries out its responsibility to the licensing authorities.

Further, Professor Brown considers whether the nature of the advice he provides should differ depending on whether he is serving as JB's teacher, as JB's lawyer, or simply as a concerned acquaintance. As a teacher, he might be influenced by the law school's institutional interests or by his own interests as a scholar. Certainly, teachers are entitled to bring these interests to bear in their role as teachers. But, if he is acting as a lawyer—JB's lawyer—he owes her a duty of undivided loyalty. He must give advice designed to serve her interests exclusively, not those of his law school or his own.

Then he wonders, if JB has come to him as a lawyer and is expecting to receive legal advice, can he advise her at all? Isn't there too great a risk that whatever advice he provides will be influenced,

31. See id. R. 1.6.
32. See Am. Special Risk Ins. Co. v. Delta Am. Ins. Co., 634 F. Supp. 112, 121 (S.D.N.Y. 1986) (recognizing that, ordinarily, co-clients understand that information imparted to the lawyer by one client may be shared by the lawyer with the other client).
33. See RESTATEMENT (SECOND) OF AGENCY § 387 (1958).
even if in subtle and unconscious ways, by the interests of the law school, to whom he owes fiduciary duties as an employee, by his own interests as a legal ethics teacher, and by his own interests as a scholar who might one day write about JB’s problem? There is a possibility that his advice will be influenced in one direction or another by his concern for the law school’s various interests, including its reputation. There is a danger that, as a legal ethics professor, he will be influenced to urge the “high-minded” course—namely, disclosure—even if JB will suffer as a consequence. As an academic, he may be tempted to urge a course of conduct that leads to public disclosure, thereby reducing the need to keep the whole story confidential.

In hindsight, Professor Brown thinks that perhaps he should have made it clear to JB that he was not going to give her advice as a lawyer. He considers whether it is too late to make that clear now. If he is to function as a lawyer, should he advise JB about his conflict of interest? Even if she understands and still desires his advice, may he provide it?

C. The Professor’s Response

Professor Brown does his best to respond appropriately to the problem presented by JB’s visit to his office.

D. The Professor’s Post-Script

Some time later, Professor Brown receives an invitation to participate in a symposium on law professors’ ethics. He finds himself reflecting on AC’s conduct, JB’s predicament, and his own and wondering whether it might be useful to others or cathartic for himself if he were to explore aspects of this problem in a law review article.

He muses that the situation raises a host of difficult questions of personal, professional, and institutional ethics. Examining it in writing would provide an opportunity to draw on his experience as a teacher—and, apparently, a lawyer—for the benefit of his scholarship. Surely, his treatment of this problem will be richer for his having experienced it first-hand. And his discussion of the problem might benefit those who encounter it later, or even influence law schools and law faculty to develop ways to avoid the problem that he encountered. Thus, an article on the subject might have some practical utility.

Professor Brown wonders, however, whether he can address this

34. See MODEL RULES OF PROF’L CONDUCT R. 1.7 (2000).
situation in a scholarly way with sufficient scholarly objectivity. He knows that he had limited time in which to respond to JB's dilemma. He certainly did not have as much time to reflect on the problem, to turn it over in his head and explore it from every angle, as he will now have when he approaches it from a scholarly perspective. But will he be unduly influenced by the quicker judgment that he previously made? When he discusses the problem with other professors and receives their critiques, will he ignore their criticisms out of a desire for self-vindication?

It occurs to Professor Brown that he would not want to disclose in an article that the problem actually arose at his own institution, much less that he personally grappled with it. If he did so, JB might feel betrayed or embarrassed, and his law school might be embarrassed as well. If he offers a hypothetical to make the issues concrete, he might have to alter his experience in various ways and make clear that the story is an almost completely made up, fictional, hypothetical one. But might he be accused of intellectual dishonesty if he does so? Would he have an obligation to disclose that some views expressed in the article were previously developed in the course of advising JB or in the course of assisting others who sought advice about whether to report another lawyer's misconduct?

Professor Brown decides to avoid the need for disclosure by withholding his own views. He will simply raise questions and identify arguments without endorsing any. Over the course of the ensuing weeks, he produces the following draft.

**SHOULD LAW PROFESSORS PRACTICE WHAT THEY TEACH?**

**GRAHAM BROWN**

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I. INTRODUCTION

Imagine the following scenario. One day, Beth Jackson ("BJ"), a law student, comes to the office of Professor White, her legal ethics professor. She appears upset. BJ asks to speak privately, and he agrees. She then explains that she works with another student, Charles Albright ("CA"), in a volunteer program where students without lawyer or faculty supervision assist applicants for social security benefits in administrative hearings. She has learned that CA encouraged a client to submit a false affidavit. BJ does not know what to do. After hearing the full story, Professor White asks for time to give the matter some thought and arranges to meet with BJ the following day.

In this scenario, does Professor White have any personal responsibility to respond to what he has been told about CA's conduct? How should he advise the student who requested his help? And, when the matter is resolved, may he draw upon this experience in his teaching and scholarship? All of these questions emerge out of the law school's status as, in effect, a multidisciplinary practice ("MDP") in which a mix of legal, law-related, educational, and scholarly activities take place, as well as the law professor's status as, in effect, a "dual practitioner." The answers may be less certain than they initially seem.

II. THE ROLE OF NON-LAWYERS (I.E., STUDENTS) AS LEGAL PROVIDERS: DO LAW PROFESSORS HAVE A DUTY TO PROTECT THE PUBLIC FROM THEIR STUDENTS?

It is tempting for law professors to view themselves as entirely autonomous—as independent contractors who in their teaching, scholarship, and legal work have professional independence from others at the law school and, at the same time, have no responsibility for the work performed by others in the law school setting. The first half of this conception seems almost reasonable, if overstated. Certainly, insofar as they engage in private law practice on the side, law professors are independent. Unless they are affiliated in some way with a law office outside the law school, they are solo practitioners'
and, in either case, are independent of the law school administration and academic colleagues. As scholars law professors have autonomy—that is, “academic freedom”—to decide what views to espouse. Even as teachers, law professors have considerable freedom, although the law school may impose various obligations and constraints in light of the law school’s own responsibility as an educational institution.

It is not clear, however, that law professors are equally free to ignore the conduct of others within the law school. Law professors, after all, participate in the governance of the law school and have a responsibility as professors to do so. Insofar as law schools have responsibilities to their students and the public—including a responsibility to ensure that its graduates are qualified to become lawyers—law professors have some responsibility to govern the school in a way that enables it to fulfill these responsibilities. To what extent, however, do law professors, because they are lawyers, have different or additional responsibilities to supervise the conduct of others? If one views the law school as something akin to an MDP, do law professors, as lawyers, have some responsibility to ensure that law students properly conduct their work for clients, just as law firm partners must take steps to ensure that both lawyers and non-lawyers at the firm properly conduct their work? If so, to what standard should students be held?

The answers are not entirely clear even with respect to law school clinics, where students are supervised by lawyers who are licensed to practice in the jurisdiction and who may serve as co-counsel in the case. Even if the students represent clients in administrative contexts in which non-lawyers are permitted to appear on a party’s behalf, the law students in the clinical setting are expected to exercise the customary skill of lawyers and to comport with the rules of professional conduct applicable to lawyers. Law professors teaching in the clinic have a direct supervisory responsibility as teachers and lawyers to see that the students do so. At the same time, one might expect the law faculty as a whole to have a general responsibility to ensure the proper functioning of the clinics. However, it is not entirely clear how extensive that responsibility is or how it can be carried out in the face of clinical professors’ claim, as professors, to academic freedom, and the obligation of the clinics, as law offices, to preserve themselves to private solo practitioners who share a suite of offices, a common library, conference room, copying facilities, and the like.

lawyer independence and client confidentiality.\footnote{See \textit{id.} R. 1.6, 5.4.} Perhaps the answer is that, as long as the faculty hires qualified clinical professors and no problems later come to its attention, it has discharged its responsibility.

The faculty’s responsibility is even less clear with respect to the work of students in a volunteer program. Must law schools require student volunteers to conduct themselves as lawyers, even while disclosing to “clients” that they are not, in fact, lawyers? If so, must law schools make sure that the students are adequately trained and supervised? If so, what are the responsibilities of the law faculty to see that this occurs?

For any number of reasons, law schools may be inclined to allow students to run volunteer programs with minimal supervision from lawyers. The law school may lack the resources to provide the level of supervision that is customary in a clinic. Further, the law school may believe that subjecting students to a lawyer’s supervision will undermine student interest and initiative. Therefore, the law school may take the view that, as long as the students are not holding themselves out as lawyers and as long as they are providing assistance in administrative settings in which non-lawyers are permitted to appear, the students should run the show. In that way, the law school can provide an expanded number of pro bono opportunities—including opportunities for first-year students who are not yet eligible to take clinical courses—and encourage an appreciation of pro bono service that, ideally, will last a professional lifetime.

One problem that this poses is that the law students may not serve their clients very well. They may give bad advice, conduct inadequate investigation, present the client’s case poorly in the administrative proceeding, or entirely neglect the matter. Clinical law professors are familiar with these risks and can take steps to avert them.\footnote{See David Chavkin, \textit{Am I My Client’s Lawyer? Role Definition and the Clinical Supervisor}, 51 SMU L. REV. 1507, 1527–28 (1998) (explaining that clinic supervisors have a responsibility to make sure that the students do not make serious mistakes in a client’s representation); James E. Moliterno, \textit{In-House Live Client Clinical Programs: Some Ethical Issues}, 67 FORDHAM L. REV. 2377, 2388 (1999) (describing three situations in which a supervisor may have to intercede in a student’s representation of a client: the first, where the student fails to intercede in a student’s representation of a client; the first, where the student fails to account for the statute of limitations on a client’s claim; the second, where the student in her research has misinterpreted a case that seriously affects the representation; and the third, where the student treats a client with disdain and insensitivity).} It is doubtful that these shortcomings are as easily avoided in the student volunteer setting. Another problem is that the students
may not serve in accordance with the legal profession’s ethics standards. Indeed, they may not even abide by the law.

Is any of this the law school’s problem? It may be, for at least two reasons. First, the students are operating under the law school’s roof. The fact that the students are working in a law school setting may give rise to expectations on the part of the client, the administrative law judges, and lawyers with whom the students interact, and the public in general. Even if everyone knows that the students are not licensed to practice law, others may expect them to function as skillfully and ethically as lawyers, and this expectation may well be a fair one. The law school may have a moral responsibility to take whatever steps are reasonable to ensure that its students meet these expectations. If a malpractice case is ever brought, the law school may discover that it has a legal responsibility as well.

Second, a law school has a responsibility to the licensing authorities to identify students whose conduct may call into question whether they have the requisite character to practice law. A law school may not turn a blind eye when a student submits a plagiarized paper or engages in other academic misconduct. Nor may it ignore that a student has acted deceitfully or engaged in other conduct that would be regarded as serious professional wrongdoing. If the law school knew that its student knowingly submitted a false affidavit in an administrative proceeding, it would surely have a responsibility to notify the licensing authorities when the student applied for admission to practice, if not to institute internal disciplinary proceedings.

Assuming this is the law school’s problem, it may also be the professor’s problem. This is most obviously so when the professor learns of a particular wrongdoing within the volunteer program. Assuming the professor is a lawyer, he is subject to disclosure obligations of his own. Whether or not a disclosure obligation has been triggered, as a law professor generally or as a legal ethics professor in particular, he may be disposed to act with a high degree of “professionalism,” including by voluntarily promoting the sound functioning of the justice system and the lawyer admissions process. This may mean taking steps to alert a tribunal to a possible fraud or to notify the licensing authorities of possible misconduct on the part of a future applicant, even when the professor has no legal responsibility to do so.

Additionally, the professor is an employee with fiduciary responsibilities to the law school. Professors may be expected to

disclose information that the law school needs to carry out its own responsibilities. From the law school’s perspective, receiving this information may be of legal and practical importance. For at least some legal purposes, the institution’s “knowledge” is the sum of what its officers and employees know. If this is so, then the professor’s knowledge may be imputed to the law school, whether or not the administration is aware of it.

The more difficult question is whether law professors, individually and collectively, have an affirmative obligation to learn what law-related work is being performed within the law school and to ensure that it is being done ethically. If one analogizes a law school to a law firm, and a law professor to a law firm partner, law professors would seem to have a responsibility to oversee students in their law-related work, just as partners must oversee the conduct of non-lawyer personnel. Are these analogies fair ones? From the perspective of the volunteer program’s client, the students’ work may not appear to be distinct from that of the law school which enrolls them, educates them, houses them, and provides them computers and telephones. Further, insofar as the law school itself has a responsibility for students’ work, it seems questionable whether law professors, given their shared role in law school governance, can entirely abdicate this responsibility to the law school administration any more than can individual partners abdicate to the law firm’s managing partners. Even assuming that law professors have some professional or, at least, moral responsibility to oversee students’ law-related work, to what standard should law students be held? Must law students do anything more than comply with the law? In a law firm, non-lawyers must act consistently with the professional obligations of the lawyer, but that is because they are acting as the lawyers’ agents. If law students are acting on their own, it is unclear whether they must act consistently with the law profession’s standards.

At bottom the notion of law student public-interest organizations seems paradoxical. On one hand, unless the student organizations are supervised closely by lawyers, the law school and its faculty cannot fulfill whatever obligation they may have to protect the public by ensuring, among other things, that the students make it clear to prospective clients that they are not licensed practitioners and will not

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7. See MODEL RULES OF PROF’L CONDUCT R. 5.3 (2000).
8. Cf. id. R. 8.4(a) (providing that a lawyer may not violate the rules of professional conduct through the acts of another).
9. See infra, Part II.
necessarily be rendering the same quality of assistance as a lawyer would. On the other hand, the more closely the law students are supervised, the more reasonable it is for clients to expect the law students to be supervised well, to be qualified to render assistance in the particular matters, and to do so essentially as a lawyer would. Given the vast unmet legal needs of the low-income communities, there is a strong impulse to encourage law students to voluntarily serve low-income clients in matters where non-lawyers are permitted to render assistance. The challenge for law schools and law faculty is to determine how best to support students’ volunteer work in a manner that faces up to the problems and the risks this work poses.

III. The Role of Law Professors as Lawyers: May Law Professors Advise Students with Legal Problems?

When a student comes to a lawyer-professor for advice relating to a legal problem, does the student expect the professor to serve as a lawyer? Does the student expect the professor to serve as a teacher—or, to use Teresa Collett’s phrase, as a “professor-mentor”? Or does the student simply regard the professor as a concerned and caring older person who is possessed of uncommonly good judgment? How does the professor himself envision the role? And what are the implications of adopting one role or the other? These questions may come up in any number of contexts, and sometimes the context will suggest what role the professor is, or should be, adopting. 10

These questions may arise in the classroom setting. For example, students encountering personal legal problems may ask the professor a question during or after class. If the student does not disclose that the question relates to the student’s personal concerns, the professor will fairly understand that the student is approaching him as a teacher, not a lawyer. Therefore, the student cannot fairly rely on the answer, apply it to her own problem, and, if the answer turns out to be unhelpful, complain that the professor has acted incompetently as a lawyer or engaged in legal malpractice. The law professor’s role is less clear, however, if the student indicates that the question relates to a real legal problem. There is a danger that, if the professor provides the requested advice, the student may think that she can fairly rely on it. The professor may inadvertently have created a lawyer-client


11. It should be recognized that similar questions may arise when law professors are consulted by their colleagues. Those questions are not addressed here, however.
relationship by implication, with the result that the professor may be accountable if the student relies on the advice to her detriment because the advice is erroneous, incomplete, or inapplicable to her actual problem.

These questions may also arise in the clinical setting. For example, a program presented several years ago by clinical professors and legal ethics professors discussed the scenario in which a student seeks advice from a clinical professor concerning both the student's possible malpractice in the clinic and the misconduct of a different clinical professor who is her supervisor. Several participants in the program noted the uncertainty about the student's expectations and suggested that the professor should clarify, preferably at the outset, whether the student was seeking the professor's help as a lawyer or as a teacher-mentor. Among other things, the professor's latitude to address the problem might be different depending on her role: as a lawyer, the professor could not disclose the student's information without her permission, while as a teacher, the professor would have no clear professional obligation to keep the student's information confidential.

It might be argued that in the clinical setting, however, the professor does not have the option of serving as the student's lawyer and that the student should not reasonably perceive the professor to be serving in that role. The situation might be compared to one in which a law firm associate, troubled by a case on which she is supervised by another lawyer, seeks advice from a senior lawyer in the firm. The associate would understand that the senior lawyer has responsibilities to the firm's clients and fiduciary responsibilities to the

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[a] lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled or misadvised).
15. See id. at 325–26 (quoting Vanessa Merton).
16. Further, as an employee of the law school, the professor may have an affirmative duty to report the colleague's misconduct to the law school administrators. See id. at 330 (quoting a speaker from the audience).
17. Cf. id. at 333 (quoting Ted Schneyer's observation that, in role play where student confides in professor, the professor should not think of herself as being in an attorney-client relationship with the student, although she may nevertheless feel an "obligation of confidentiality just because of the general expectation that this wouldn't go any farther").
firm. Absent some agreement to the contrary, she could not reasonably expect the senior lawyer to act as her own lawyer with undivided loyalty to her. 18 Likewise, the law professor should be understood to have obligations to the law school and to the law school clinic’s client. 19 One difference, however, is that, in the law school clinic, the student is not only a lawyer but also a recipient of a service—namely, legal education—and, therefore, the clinical faculty have responsibilities to her as well as to the clients. Another difference is that law students lack the sophistication of lawyer-associates. It may therefore be understandable that, in the law clinic, the student seeking advice from a professor may be confused about the professor’s role and the professor’s responsibilities to her. 20

The scenario described at the outset of this article presents the question in a different context—neither in the classroom nor in the law school clinic, but in the office of a law professor whose legal practice is independent of the law school. In this scenario, BJ, the student, expects to receive disinterested personal advice about a problem that has legal implications and, from the student’s perspective, has nothing to do with the professor himself. Is BJ coming to Professor White because he is a lawyer or because he is a trusted teacher? The risk of confusion is evident. Until she is asked, she may not be clear in her own mind whether she is seeking legal or

18. Further, even by agreement, it is doubtful that the senior lawyer could represent her independently of the law firm. The senior lawyer has duties to the firm, which in turn has duties to the client. If the associate discloses that the firm’s client had been misrepresented or that another lawyer in the firm had engaged in misconduct, she should ordinarily expect the senior lawyer to use the information for the benefit of the firm’s client (e.g., by correcting the error) and the firm. The situation would be different where advice is sought concerning the law firm’s legal or professional obligations. See, e.g., Geoffrey C. Hazard, Jr., Foreword: The Legal Profession: The Impact of Law and Legal Theory, FORDHAM L. REV. 239, 247 (1998) (“A lawyer confronting something that seems to be an ethics problem should consult a colleague about whether there is such a problem and, if so, how she should go about resolving it.”). In that situation, disclosures would ordinarily be confidential vis-a-vis the law firm. Cf. United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996) (holding that the attorney-client privilege attaches when a law firm assigns its own lawyers to perform legal services for the firm as long as the firm’s intent was to receive legal advice). The situation would similarly differ when a lawyer represents another lawyer in the firm regarding a matter that does not implicate the firm’s interests (e.g., the lawyer’s will or divorce), in which case the lawyer would be entitled to expect that confidences would be preserved.

19. Cf. A Teacher’s Trouble, supra note 10, at 329 (quoting Jane Aiken’s observation that, in role play, information disclosed by student to clinic professor has implications for the clinic and its other students).

20. Cf. id. at 31 (quoting Bob Dinerstein’s description of role play, involving student who tells clinical professor of another professor’s misconduct, as “a learning opportunity for the student”).
non-legal advice.

The professor's role has considerable significance. As a lawyer, the professor would be obliged to keep the student's confidences and to render legal advice that is competent. As teacher, in contrast, Professor White will not be legally obligated and may not feel morally obligated to keep the student's information secret. He may not feel compelled to render "legal" advice at all, much less competent legal advice.

Likewise, the professor's role will determine whether he may properly take interests other than those of the student into account. If Professor White is serving as a lawyer, he must avoid conflicts of interest and represent the student with undivided loyalty. If he is serving as a mentor, he is subject to whatever standards of ethics apply generally to academics and to his own personal moral standards. Presumably, he may take into account the law school's interests as well as his own. In any case, the standards applying to the teacher-mentor will be less well defined than the legal profession's standards and less likely to be enforceable.

Finally, whether the professor is serving as legal advisor or mentor may affect the nature of the assistance he provides. If Professor White is acting as a lawyer, he may see his task as identifying BJ's options, analyzing the legal implications of each option, identifying her relevant non-legal interests, and guiding her to the option that is both legally acceptable and most consistent with her perceived interests. If he is acting as a teacher, he may take an altogether different approach. Professor White may see this encounter as a teaching opportunity—an opportunity to assist BJ in identifying, researching, and analyzing the relevant issues. Rather than placing BJ in the role of a client, he may place her in the role of a lawyer who, as is often the case, is substantially responsible for resolving her own ethical problems.

Given the significance of the distinction between the two possible roles, the legal profession's norms would suggest that, in the very least, the professor has an obligation to clarify his role, especially if he does not intend to serve as a lawyer. In general a lawyer may not mislead someone to believe that the lawyer represents her or deliberately exploit her misconception. For example, when corporate lawyers deal with corporate officers and employees, they may have to

21. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2000).
22. See id. R. 1.1.
clarify that they do not represent the officer or employee personally.\textsuperscript{24} Similarly, lawyers who serve in non-lawyer roles—for example, insurance brokers or real estate agents—may have to make clear to the prospective client that they are not offering to provide legal services.\textsuperscript{25} If Professor White is disinclined to serve as a lawyer and to provide legal assistance, he may have to make that clear to his student and discuss the implications of his role as mentor rather than lawyer.

Further, in the event that Professor White is willing to provide legal advice to his student, he must consider how the legal profession's conflict of interest rules apply.\textsuperscript{26} Professor White has fiduciary duties to the law school. Absent some understanding with the law school administration, the professor may have a duty to disclose information learned from students that would be important to the operation of the school.

A law school may, of course, authorize or even encourage its faculty to serve as its students' legal advisors by stipulating that professors do not owe the law school a disclosure obligation or an obligation to act in the law school's interests when giving advice to students. But it is unclear whether such a provision is desirable for the law school. Unlike a situation where a professor represents a client who is unconnected with the law school, a law school might consider it inappropriate for professors to represent students. The professional relationship between a professor and student may affect the teacher-student relationship, causing the professor to favor the student or, if the relationship is disclosed, causing other students to perceive favoritism.\textsuperscript{27} The law school may also worry that the professor will appear to be rendering assistance to the student in his capacity as a

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\item[24.] See Model Rules of Prof'l Conduct R. 1.13(c) (2000).
\item[25.] See, e.g., New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 687 (1997) (requiring lawyer acting as insurance broker to clarify role to avoid inadvertently creating an attorney-client relationship). If the lawyer does not make this clear, then the client may expect, for example, that what she says to the lawyer will be protected by the attorney-client privilege.
\item[26.] See Model Rules of Prof'l Conduct R. 1.7, 1.8, 1.9 (2000).
\item[27.] Similar, but more serious, concerns are presented by intimate relationships between professors and students. See Margaret H. Mack, Regulating Sexual Relationships Between Faculty and Students, 6 Mich. J. Gender & L. 79, 82–84 (1999) (arguing that student-faculty sexual relationships can create favoritism in the classroom setting and affect the dynamics of a class); Caroline Forell, What's Wrong with Faculty-Student Sex? The Law School Context, 47 J. Legal Educ. 47, 57 (1997) (explaining that many graduate students have described that their sexual relationships with professors have included some amount of coercion). The risk that the professor will exploit the unequal teacher-student relationship, which is likely to be present in the case of an intimate relationship, is less likely to be present when the professor serves as the student's lawyer.
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law professor, in which event the law school might fairly be blamed if the professor poorly serves the student. Even if the school would otherwise be willing to allow faculty to represent students in some contexts, it might be too difficult to identify what those contexts are.  

Even if the professor owes the law school no conflicting professional obligations, he may take the law school’s interests to heart. The professor will not know whether and to what extent these interests are implicated until the student’s story unfolds. If the student’s problem involves, for example, difficulties that she is having settling a parent’s estate, these other interests are unlikely to be implicated, and the conflict of interest rules are unlikely to apply. Professor White’s situation is quite the opposite, however. Wholly apart from BJ’s interests and legal obligations, out of concern for the law school and what he understands to be its interests, Professor White might be inclined to urge BJ to act consistently with the law school’s interests. He may also have personal interests that will affect his approach to BJ’s problem. For example, Professor White may be influenced by concerns about his professional relationship with colleagues and administrators or by his interest in writing about the situation.

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28. A school might be inclined to allow its professor to represent a student only if the matter does not implicate the law school’s interests. For example, the law school might be unconcerned if a law professor drafts a student’s will or handles a student’s divorce. On the other hand, if a student confides to Professor A that she submitted a plagiarized paper to Professor Z or that she made misrepresentations on her law school application, the student would benefit from legal advice about whether she should turn herself in and, if so, what further steps she should take; but it is questionable whether the law school would want its own professor to provide this advice. Likewise, the law school might not permit a professor to advise a student regarding a claim against the school—e.g., a personal injury claim for injuries sustained from slipping on ice outside the school’s front entrance.

29. Cf. A Teacher’s Trouble, supra note 10, at 329 (quoting Jane Aiken’s observation that, in role play involving junior professor to whom student confided information about a colleague’s misconduct, junior professor has personal interests that may be affected by his course of conduct).

30. Courts have recognized that contracts allowing attorneys to publish articles and books about their clients may present the danger that the lawyer’s representation will be adversely affected by the lawyer’s interest in the publication, particularly in high-profile criminal cases in which the lawyers may earn a substantial income from the publication. See United States v. Hearst, 638 F.2d 1190, 1199 (9th Cir. 1980) (remanding for a hearing on whether F. Lee Bailey’s contract to write a book about Patricia Hearst affected his representation of her); Ray v. Rose, 491 F.2d 285, 289 (6th Cir. 1974) (addressing the possibility that James Earl Ray’s attorneys were more interested in profiting from their articles about the case than competently representing their client); People v. Corona, 80 Cal. App. 3d 684, 720-21, 727, 145 Cal. Rptr. 894, 915-16, 920 (1978) (holding that a conflict of interest was created when the client waived his attorney-client privilege and granted attorney exclusive rights to the client’s life story); see also MODEL RULES OF PROF’L CONDUCT R. 1.8(d) (2000) (providing that “[p]rior to the conclusion of
If other interests or obligations might undermine his ability to competently advise the student, the professor must consider whether, from an objective perspective, he can give disinterested assistance notwithstanding these other demands and pressures. If it is not clear he can do so, he cannot serve BJ as a lawyer.\(^3\) Even if he is reasonably confident that he can give BJ disinterested legal advice, Professor White must advise her of the risk that his judgment may be affected by various interests other than her own and secure her informed consent before proceeding to assist her.\(^3\)

Further, even if Professor White eschews the role of lawyer, he may be constrained in his ability to provide advice to his student about matters implicating the law school's interests. He is, after all, a representative of the school. Would it be fair for a representative of the law school to serve as the student's advisor? Arguably, the school's interests might be better served if the professor were to be detached. CA, the student accused of wrongdoing, may have a different account of what happened and feel that the professor and, by extension, the school acted unfairly in forming a judgment without hearing his side of the story. Professor White might better serve the school as a neutral fact-finder, a role that would be inconsistent with serving as BJ's advisor.

No doubt, law faculty are conditioned to answering students' questions, both within and outside the classroom. Some questions are about the law—e.g., the meaning of decisions studied in class. Some questions relate to how the students should conduct themselves—e.g., how to study for exams, what courses to take, what jobs to seek, and the like. In most situations, the professor is clearly serving as a teacher only. On occasion, however, students seek advice relating to personal legal problems and/or problems that implicate the institutional interests of the law school. In such situations, there may be a question of whether the professor can give advice at all and, if so, in what role. Further, it may be unclear, when the student first sits down with the professor, what role the professor will assume, what advice the professor should give about his role, and whether the conversation will veer off into entirely forbidden territory. Given the complexities, should law professors entirely refrain from giving their students advice? Law professors, of course, have a strong impulse—and

representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation\(^3\)).

31. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2000).
32. See id.
perhaps even a responsibility—to serve as mentors for students. The question is how to fulfill this function in a manner that confronts its complexities.

IV. THE ROLE OF LAW PROFESSORS AS NON-LAWYERS (I.E., SCHOLARS AND TEACHERS): MAY LAW PROFESSORS BRING THEIR LEGAL EXPERIENCE TO BEAR ON THEIR SCHOLARSHIP AND TEACHING?

If one believed, like Shaw, that those who cannot do, teach, it would be professionally impermissible for law professors to practice law. Wholly apart from the standards of academic ethics, the legal profession’s standards are clear: a lawyer may not represent a client ineptly. If, as some may suspect, law professors teach law because they cannot “do” law, then law professors must keep away from clients to avoid “doing” law badly. Thus, in the scenario at the outset of this article, Professor White would have to avoid giving his student legal advice because, although licensed to practice law, he was not qualified to do so.

Apparently, however, the legal academy does not accept Shaw’s aphorism as invariably true. The clearest proof is that the academy has endorsed law school clinics. If clinical professors were assumed to be invariably bad lawyers, no one would let them loose on clients. Likewise, the employment of some quite distinguished practitioners as adjunct professors suggests that law teachers are not presumed to be bad lawyers. Of course, one possible rejoinder is that good lawyers make bad teachers.

There is plenty of anecdotal evidence that even law professors who work primarily outside the clinic are not necessarily bad lawyers. Some non-clinical professors are outstanding lawyers, and some are reputed to be outstanding lawyers, teachers, and scholars at the same time. Laurence Tribe, Kathleen Sullivan, and Michael Tigar are among those who come readily to mind. Indeed, it is only relatively recently that legal academia seems to have become a separate career path for individuals with a scholarly bent who are incapable of practicing law, and some would argue that, even today, law schools should remain receptive to hiring individuals who, besides having potential to be excellent scholars and teachers, are also (imagine!) good lawyers. Some might even indulge the heretical notion that

33. See, e.g., id. R. 1.1 ("A lawyer shall provide competent representation to a client.").
experience in practicing successfully is an important credential for a law professor, because a law school's *raison d'être* is to prepare students to practice law, and it is therefore necessary for a law teacher to have first-hand knowledge of what it means to practice law well. And, at the risk of being burned at the stake (at least, metaphorically), one might even extend the argument further to suggest that, since law professors' memories of their pre-academic experience may fade or become increasingly irrelevant as the nature of law practice changes, there may be reason to encourage law professors to dip their toes back in the water from time to time.

Of course, there are some legal academics—and here, the word "academics" might be stressed—for whom actual practice is anathema. They identify more strongly with academia than with the legal profession. They do not regard law schools as professional schools but as academic units within universities whose primary mission is the development and dissemination of knowledge, useful or otherwise. Often, they see teaching as the price to pay for the opportunity to be handsomely supported (much better, of course, than their peers in other departments of the university) while they engage in scholarship and attend scholarly conferences and colloquia. (When it comes to justifying their higher salaries, however, they would not be above pointing out that their law school classmates are making much more money in practice and that, without higher salaries, they might be tempted to enter law practice as well—a dubious proposition!) These tend to be professors who are teaching at ivy league or otherwise top-ranked schools, or who wish they were. Their attitude is responsible, in part, for what Judge Harry Edwards, himself a former law professor, once termed "the growing disjunction between legal education and the legal profession."  

This group of professors has some antipathy toward law practice by law professors. It is bad enough that their graduates have to do it. But perish the thought that their colleagues should practice law! It is to reduce an academic department to the rank of a trade school! Other professors who do not entirely share this antipathy may have some ambivalence about whether law professors should be practicing what they teach.

The antipathy or ambivalence about law professors practicing law

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may or may not explain periodic expressions of concern about the impact of law practice on legal scholarship. In any case, the concern ought to be weighed seriously regardless of what may motivate those who raise it. The concern is, in essence, that law practice will pollute one’s academic scholarship, at least insofar as one practices in an area that has some bearing on one’s scholarship. The concern may be cast in terms of academic ethics: a professor’s academic objectivity is diminished when he engages in scholarship on subjects relating to his law practice.

This can be understood as another aspect of the law school as an MDP. There may be a clash between the professional norms and obligations of legal scholars, on one hand, and lawyers, on the other. When professors move back and forth between roles—teaching and scholarship, on one hand, and legal practice, on the other—they may apply the wrong norms. Or they may let the interests of their law practice affect how they perform their non-lawyering work.

This concern was expressed in Rebecca Eisenberg’s 1993 article *The Scholar as Advocate*, published in the Journal of Legal Education, followed by responses by Stephen Gillers, John R. Kramer, and Robert Pitofsky. This concern was also the impetus for

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36. Another concern, unrelated to the concern about academic objectivity, is that law professors who have both a teaching and publishing load may not devote sufficient time to either, so both will suffer. See Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 385 (1990).

37. Rebecca S. Eisenberg, *The Scholar as Advocate*, 43 J. LEGAL EDUC. 391, 392–93 (1993). Eisenberg espoused the view that law professors' work as lawyers may negatively affect their scholarly work: “The role of advocate calls for constructing persuasive arguments that will generate favorable outcomes for clients. This is very different from the function they perform as scholars—the function that justifies their academic freedom—of saying what they think” to please existing clients or to attract new ones. *Id.* at 393. Another is that the lawyer may find himself changing his opinions or beliefs, convinced by his own arguments, without even realizing it is happening. *Id.* at 393–94.

Eisenberg proposed that scholars disclose if they are writing on behalf of a client or organization:

An advocate admittedly speaks on behalf of a client, while a legal scholar usually purports to speak for herself, whatever her underlying values may be. At the very least, if a legal scholar’s views are in fact the product of a client’s interests, her audience will want to know that.

*Id.* at 397. She urged the scholarly community to adopt these disclosures as norms, even though clients may protest. *Id.* at 399–400. See also Paul T. Hayden, *Professional Conflict of Interest in "Good Practice" in Legal Education*, 50 J. LEGAL EDUC. 358 (2000).


39. John R. Kramer, *Comment on Rebecca Eisenberg’s "The Scholar as Advocate,"* 43
a program of the Association of American Law Schools ("AALS") in January 2000, which centered on a proposed amendment to the AALS Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities (the "Statement" or "AALS Statement"). The current Statement calls for

42. See id. The current Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities contains the following paragraph about academic integrity in scholarship:

A law professor has a responsibility to preserve the integrity and independence of legal scholarship. Sponsored or remunerated research should always be acknowledged with full disclosure of the interests of the parties. If views expressed in an article were also espoused in the course of representation of a client or in consulting, this should be acknowledged.


Additionally, along the same lines, the current Statement provides that "[i]f a professor expresses views in class that were espoused in representing a client or in consulting, the professor should make appropriate disclosure." Id.

The proposed Draft Statement would require additional disclosures, as follows:

A law professor has a responsibility to preserve the integrity and independence of legal scholarship, teaching, and all other activities undertaken in the professorial capacity. A law professor should disclose the material facts relating to any personal economic interest that the professor has in any book, article, other written work of any length, press interview, conference presentation, and classroom or other teaching that the professor undertakes in that capacity. If views expressed in a written work, interview or conference presentation, or teaching were also espoused in the course of representation of a client or in consulting, this fact should also be disclosed, whether or not the work was compensated.

Disclosure of material facts relating to an economic interest should include, at a minimum, disclosure of (1) the amount of money received (or to be received) directly or indirectly, in connection with the writing, interview or conference presentation, or teaching, or in connection with the espousal or research of ideas expressed within the written work, interview or conference presentation, or teaching from any source; (2) the identity of any such funding source, including any relationship with the topic that the funding source has, which would not be apparent to the reader, listener, or student; (3) any conditions imposed or expected by the funding source on future writing, interviews or conference presentations, or teaching. As to money which the professor reasonably expects to receive but which has not been received at the time a written work is published, an interview given, a conference presentation made, or teaching undertaken, she should make a good faith estimate of the total, provide a range of possible payment amounts, or describe the payment method to be used to calculate her compensation.
disclosure whenever research is financially supported as well as whenever, in academic writing or law school teaching, law professors express views that "were also espoused in the course of representation of a client or in consulting." The revised version would, in addition, require extensive disclosure concerning any economic interest that the professor has in a written work or presentation. Like model rules of professional conduct, the AALS Statement serves only as a guideline unless it is adopted by individual law schools to govern the conduct of their faculty. But law schools might feel some pressure to adopt the AALS Statement, since they recently assumed an obligation under American Bar Association ("ABA") accreditation rules to adopt policies on faculty responsibilities, and the AALS Statement offers an obvious model.

One short answer to the problem addressed by both the present AALS Statement and the proposed additions might be, "who cares whether legal scholarship is objective?" Legal scholarship that is not objective might be pretty good nonetheless. Laurence Tribe, for example, argues constitutional questions as an appellate advocate. He also authors a treatise on constitutional law. The existing AALS Statement assumes that, if he addresses the same constitutional question in both contexts, his experience as an advocate may shape the views he offers in his treatise. The revised Statement assumes that the prospect of receiving royalties from the treatise may also influence his views. If so, doesn't the evidence suggest that the influence is not negative, but to the good? Professor Tribe is one of the nation's most highly regarded constitutional advocates, and his treatise is regarded as one of the most outstanding scholarly works in the field.

Of course, it is unfair to offer up Professor Tribe as the typical lawyer-scholar. But even for many lesser lights in legal academia,

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To the extent possible, all disclosures discussed in this draft policy should be made by the professor when she first submits a written work for publication or begins an interview, conference presentation, or relevant class discussion. When a professor is invited to produce written work for a publication or is invited to participate in a conference or other oral presentation, the professor should make the disclosures discussed in this draft policy at the earliest possible time.

Committee Proposing New Statement of Good Practices, supra note 41.

43. THE STATEMENT, supra note 42.

44. ABA Standard 404(a) of ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS provides that "[a] law school shall establish policies with respect to a full-time faculty member's responsibilities in teaching, scholarship, service to the law school community, and professional activities outside the law school," and requires that the policies address, among other things, "[r]esearch and scholarship, and integrity in the conduct of scholarship . . . ."

45. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).
there may be an advantage to thinking about law and legal institutions from the perspective of a lawyer as well as a scholar. Professors who practice may be in a position to offer better, more credible understandings of the law, legal processes, and legal institutions. Pure scholars may be more inclined to espouse views that are fanciful, extreme, or otherwise ungrounded in reality. A law professor who has to develop a view when there is something at stake may better understand the relevant considerations, may have more empathy for those whose interests are implicated, and may work harder to get the right answer. Further, having experienced the lawyer’s perspective, the professor may have a fuller appreciation of the problem when he later analyzes it from a scholarly perspective. For example, if Professor White were to write about the ethical obligations of law professors, law students, and law student volunteer organizations, he might have a richer perspective after advising BJ about these subjects than he would have had before she came in his door. Further, regardless of whether his scholarship would be better for having considered these questions as a lawyer, his scholarship would be different, and might therefore make a different and additional, contribution to the body of academic literature generated by non-practitioners dealing with the same subjects.

One might argue, further, that good legal scholarship is not necessarily objective in the sense that the AALS Statement seems to presuppose. Does anyone think that when law professors begin to examine questions from a scholarly perspective, they do so without a legal philosophy or a point of view? Even judges, though required to be unbiased, are permitted—even expected—to have a judicial philosophy, perhaps even one shaped by their experience in practice before assuming the bench.

46. It might be supposed that professional experience will not only improve a professor’s scholarship, but also his teaching, since he can bring his own personal experiences into the classroom. Kramer writes in his response to Eisenberg’s article: “I brought [my] experiences and values back to class and talked about them openly. I didn’t need war stories when I had real hypotheticals to dangle before the students in my role as advocate-teacher. I had frontline constitutional questions to translate from the classroom into law.” Kramer, supra note 39, at 404.

47. See Pitofsky, supra note 40, at 414.

48. Philip J. Grib, S.J., The Ethical Foundations of Judicial Decision-Making, 35 CATH. L. W. 1, 15–16 (1991) (describing how judges, like everyone, make decisions based on a variety of factors, including personal ones); Donald C. Nugent, Judicial Bias, 42 CLEV. ST. L. REV. 1 (1994) (noting how difficult it is for an attorney to have a judge disqualified for personal bias or prejudice); Cheryl L. Wade, When Judges Are Gatekeepers: Democracy, Morality, Status, and Empathy in Duty Decisions (Help from Ordinary Citizens), 80 MARQ. L. REV. 1, 17–25 (1996) (noting that judges’ life experiences and
Law is not, after all, a science. Law professors are not performing experiments in a laboratory, recording the results, and analyzing them. Their research is almost always from publicly available material such as judicial decisions, statutes, administrative regulations, legislative history, and secondary literature. Their research is therefore easy to replicate, and their raw material is easily understandable so that readers need not rely on the objectivity of law professors when they report and analyze their data. Further, given the accessibility of these materials, law professors can easily be caught if they misrepresent the writings on which they rely and, therefore, have a strong disincentive to do so.

Nor is there a risk that readers will put undeserved weight on law professors’ analyses based on the understanding that, as may be the case in scientific research, an objective analysis should yield a single result. Like judges, law professors formulate opinions based on the raw material of the law. No one believes that disinterested, objective law professors and judges should always come to the same opinion, however. The tools of legal analysis do not work the same as those of mathematical or, arguably, scientific analysis. Consequently, from their first days of law school, lawyers are trained to read skeptically. We call the output of judges “opinions” for a reason. Judicial decisions are sometimes put in casebooks precisely because the casebook authors believe they are wrongly decided and would be good teaching tools, not because they are exemplars of legal reasoning. If judges are expressing an opinion on the law, legal academics are doing so all the more. There is little risk that readers will be misled to believe that a law professor’s opinion is gospel.

Like judges, law professors in their scholarship and teaching should strive to be “objective” in the sense that they should form their views without regard to whether they or another party will profit by them. Like judges, however, objective and disinterested law professors will often form different views on tough questions of law. It is unclear whether prior professional work, whether or not for pay, will skew (as opposed to “inform”) law professors’ scholarship. We do not assume that judges are impermissibly biased when they decide cases relating to legal issues they addressed in their prior practice. Nor, for that matter, do we require judges to disclose when legal views expressed in their opinions were previously espoused on behalf of clients.

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49. An exception might be made for law professors who are legal historians and social scientists.
When a law professor's previous role was as advisor or expert witness, ideally, the earlier views themselves will have been objective, in the same sense in which legal scholarship is objective. When the previous role was as litigator, the previously advocated views will not have been objective, but neither will they necessarily be the lawyer's own views. The professional norms assume that lawyers can advocate viewpoints for clients that they do not personally share and develop and preserve viewpoints different from those of their clients. As Dr. Johnson observed,

Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation; the moment you come from the bar you resume your usual behavior. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet.

Of course, if a law professor genuinely comes to sympathize with views espoused on behalf of a client, it is uncertain why those views should then deserve less weight than views arrived at by a different route. Law professors come to their views in various ways, including in response to experiences whose impact may not be obvious even to the professor. Why single out one set of experiences? As long as academics espouse their genuine beliefs, the process by which they form them might seem to be beside the point.

Perhaps in part for these reasons, no one to my knowledge has concluded that all law professors must refrain from practicing law or that, if they practice law, they must practice exclusively in areas different from those in which they write and teach. (Indeed, a professor's value as a lawyer or consultant would be vastly diminished if he were confined to practicing outside the areas in which he became especially knowledgeable through teaching and scholarship.) Undoubtedly, some law professors have decided not to practice law, even though they may be qualified to do so, out of concern about the impact of their law practice on the quality of their academic work. But, it appears to be generally accepted that there is a place in legal

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51. See, e.g., N.Y.C. Ass'n B. Comm. Prof'l Jud. Ethics, Op. 1997-3 (allowing a lawyer to lobby for or against legislation or otherwise publicly espouse a personal viewpoint adverse to the interests of a present client in a pending matter as long as client confidences and zealous representation of the client are not compromised).
academia for practicing lawyers.

Instead, the discussion has focused on whether and to what extent law professors should have to disclose in their writings and classes that they are addressing subjects that relate, in any of various ways, to their work as lawyers. Law professors have largely been governed by their own good sense and discretion, as guided (if they are aware of it) by the AALS Statement. The current proposal would encourage more extensive disclosure, not with the avowed aim of discouraging law professors from practicing law, but as an expression of what is thought to be required of all law professors as a matter of candor. The idea is that, absent broader disclosure, the lawyer-professor will be withholding information that readers and students are entitled to know when they evaluate the professor's views.

No one would dispute that, from the perspective of legal ethics as well as academic ethics, disclosure sometimes should be made. In particular, law professors should not mislead readers about the capacity in which they are writing. They should be clear about whether they are writing as a lawyer on behalf of a client, or as an expert witness retained by a client, rather than in their independent capacity as a scholar. Generally, however, the law professor's role will be sufficiently clear from the context. When a professor signs a legal brief, for example, it is ordinarily clear whether or not he represents a party. Likewise, when a professor testifies as an expert witness, it is ordinarily clear whether he has been retained by a party. When professors put their name on a book or academic article, it will ordinarily be understood that they are expressing their independent professional views and have not been retained by a client. If that is not true, a law professor should make a disclosure. Thus, if a client hires a lawyer (whether for pay or otherwise) to write an article taking a particular position on a subject, the law professor should make that clear, even if the views expressed in the article happen to coincide with the law professor's independent views. The obligation to avoid misleading the reader would seem to be required as a matter of legal ethics, if not academic ethics. Likewise, if a law professor serves in a dual role in a case, he should disclose both roles and make clear in what capacity he is serving when he writes or speaks about the case. For example, when a law professor writes an article about a case in

53. For example, if a lawyer testifies in the legislature on behalf of a client, the lawyer must make that plain; otherwise, it will appear that the lawyer is appearing on his own behalf. See MODEL RULES OF PROF'L CONDUCT R. 3.9 (2000). The same principle should apply in legal academic writing.
which he represents a party, he should disclose that he serves in a lawyer capacity.\textsuperscript{54} Even if the professor is not being paid to write the particular article, his duties of loyalty\textsuperscript{55} and confidentiality\textsuperscript{56} would limit his ability to write with candor and objectivity concerning a current client. If the writing relates to a pending matter in which one represents a client, the professor’s duties as a lawyer restrict him from taking a position harmful to the client’s position. Therefore, an article specifically addressing a pending matter in which the law professor represents a party is, almost perforce, a work of advocacy.\textsuperscript{57}

The question is how far the disclosure obligation should go. Suppose a party commissions a law professor to write a paper on a subject but says, “Write whatever you believe to be true.” Suppose a party says, “Write a paper on anything you want, and we’ll give you financial support.” Must the professor disclose? Does the answer depend on whether the party has a stake in the outcome of the research—e.g., whether the support is coming from the professor’s university or law school, from the government, from a foundation, or from a corporation? Here, the concern is that money changes everything. One might be influenced by the money to take a particular view, even if the ground rules are that the professor can take any view he wants—even an objective one. A reader, it might be argued, is entitled to know that the lawyer is being supported, because the reader will then read the work more carefully or skeptically or entirely discount it.


\textsuperscript{55} \textit{See Model Rules of Prof’l Conduct R. 1.7} (2000).

\textsuperscript{56} \textit{See id. R. 1.6.}

\textsuperscript{57} Recently, the faculty of Fordham University School of Law adopted a Faculty Responsibilities Code that largely incorporated the existing AALS code but did not include the obligations to disclose whenever views expressed in teaching and scholarship were previously espoused in a representation. Instead, the faculty adopted a narrower requirement, as follows: “If views expressed in an article or other writing relate to a pending matter in which the professor has represented a client and the writing may affect the client’s interests in the matter, the professor’s role as counsel should be acknowledged.” Fordham University School of Law, Faculty Responsibilities Code (2000). My understanding is that the provision was proposed by a professor, Bruce A. Green, who was then engaged in scholarship on the question of whether law professors should be required to disclose prior legal work that bears on their scholarship and teaching. History does not record whether, at the time he proposed the provision, Professor Green made adequate disclosure that his conduct in faculty governance implicated his ongoing work as a scholar.
Some might argue that the disclosure obligation should be extended further. Any present or prior associations that might make the writing other than objective must be disclosed, regardless of whether it expresses views that were previously "espoused" in prior work. Is the professor writing on criminal law or procedure after having served as a prosecutor or defense lawyer, on civil procedure or evidence after having served as a civil litigator, or on administrative law after having served in an administrative agency? Has the professor attended seminars at which other participants advocated viewpoints relevant to the professor's scholarship or, even worse, has the professor formed a friendship with individuals holding relevant views? Is the professor's law school funded by any organization that might have an interest in the professor's scholarship or, of even greater moment, has such an organization funded the professor's chair or academic center and thus, at least indirectly, the professor's scholarship? If so, the argument goes, the professor's views may be distorted; so the reader must be told.

And why disclose only to readers? What about to students? It may be supposed that they are expecting an objective disquisition on the law. They might be misled to believe that their professors are objective—e.g., that Monroe Freedman is a tabula rasa on issues of litigation ethics or that Alan Dershowitz has no prior views on questions of criminal procedure. Therefore, whatever disclosure rules apply to legal scholarship must apply equally to classroom teaching.

The debate in the pages of the Journal of Legal Education was a healthy one which encouraged law professors to consider whether, as a matter of independent moral judgment, they should disclose certain potential influences on their scholarship. The recent AALS program performed a similar function. This approach is consistent with the view of legal ethics scholars such as William Simon, that lawyers in general ought to be encouraged to engage in independent moral decision making. It is also consistent with an understanding of the importance of discourse on contested questions of professional conduct as a way of developing better understandings of how

58. See supra note 37 and accompanying text; supra note 38; supra note 39; supra note 40.

professionals should behave.\textsuperscript{60} And it reflects an appreciation that determining the most appropriate course of conduct may require, in any given situation, a nuanced judgment, rather than the application of a categorical rule.\textsuperscript{61} On the other hand, a rule (whether or not enforceable) that divests law professors of discretion may carry unintended costs.

To begin with, there are costs for legal academia and legal scholarship in general. A rule requiring a law professor to disclose when views expressed in teaching or scholarship were previously "espoused" in the professor's legal work will discourage law professors from drawing on their prior professional work. That is because the disclosure rule will be read as an expression of a consensus within the legal academy that views developed by law professors in a professional capacity are suspect and less worthy of respect than views developed by scholars in a professional vacuum. Initial disclosure made pursuant to such a rule, rather than voluntarily, will carry with it the implication that, from the legal academy's perspective, the views that follow should be discounted.

Whether views expressed in prior legal work are entitled to less weight is highly questionable, however. One might even argue the opposite—that law professors serving as consultants are likely to form views that are more deeply considered and more genuinely believed, knowing that their views will be relied on by a client, whereas a law professor engaged in teaching or scholarship will feel freer to take an extreme or speculative approach. Likewise, one might argue that law professors as expert witnesses will take greater care, knowing that they will be subject to cross-examination. Even if the professor takes equal care in any context, when the law professor elaborates on the views that originated in professional work, the resulting lecture or scholarly writing may be richer for having a personal appreciation of the context in which the issues arise. Until there is clearer proof that teaching and scholarship that occur in a vacuum are invariably superior, it may seem wrong for the AALS to derogate work that draws on professors' law practice.

Additionally, there may be costs for law professors individually. There may be legitimate reasons why law professors might be disinclined to identify the professional work that may have helped

\textsuperscript{60} See, e.g., Bruce A. Green & Nancy Coleman, Ethical Issues in Representing Older Clients, 28 CLEARINGHOUSE 658, 961, 980 n.57 (1994).

shape their understanding of the legal issues about which they write and teach.

As a lawyer, a professor may feel an obligation to his clients to avoid discussing their legal problems in a way that may embarrass or otherwise upset them. For example, in the earlier scenario, Professor White may be concerned that his student will feel that he has abused her trust if, in the course of writing or lecturing about the questions raised by her experience, he calls attention to the fact that he dealt with these questions in his work as a lawyer. To be sure, there are many law professors, including many clinicians, whose scholarship refers explicitly to their former clients, who may be disguised by the use of pseudonyms or initials. And clients, if they know that their lawyer writes and teaches on the subject of the representation, might anticipate that legal issues in the representation may later find their way into his lectures or scholarship. Even so, law professors may feel that in some circumstances it is unfair to the client to call attention to the prior representation.

Additionally, the professor may feel uncomfortable putting himself, and his professional biography, at the center of his scholarship and teaching. The reason may not be that the professor seeks to cultivate a false sense of objectivity. It may simply be that the professor is more modest than most.

The professor may also feel that, at best, the inclusion of biographical data will distract the reader or student from his ideas. At worst, referring to his prior professional work, with the implication that his objectivity has been compromised as a result, will invite readers and students unfairly to ignore or discount his arguments by attributing them to personal or professional bias, rather than encountering his arguments on their own terms. Granted, there is a

62. Indeed, a whole body of legal academic scholarship has developed around the question of the proper use of client narratives in legal scholarship. See, e.g., Cathy Lesser Mansfield, Deconstructing Reconstructive Poverty Law: A Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement, 61 BROOKLYN L. REV. 889, 891–93 (1995). This body of scholarship provides another example of self-referential inquiry into the general subject of law professors' ethics. It is perhaps not too uncharitable to suggest that writings on the subject of "reconstructive poverty law" and "the theoretics of practice," insofar as they focus on the proper scholarly use of client narratives, do not do much to break down barriers between legal academia and the profession.

63. See Carol Shields, Writers on Writing: Opting for Invention over the Injury of Invasion, N.Y. TIMES, Apr. 10, 2000, at E1 (urging writers to write fictional characters, rather than thinly disguise their family and friends in fiction, in order to avoid conflicts and hurt feelings).

64. By way of example, in a recent book about the legal profession and legal ethics, the authors discuss the effort to persuade the American Law Institute to adopt a provision
fair likelihood that a professor’s scholarly views are influenced by his prior experience, including what he has been taught, what he has read, where and for whom he has worked, and maybe even with whom he has intimate encounters. The professor’s scholarly views may also be influenced by his interests, desires, and motivations—for example, the interest in being published in a top-flight journal or being invited to a particular academic conference. If the professor later becomes famous—e.g., if he is later appointed to the Supreme Court—all this will be fair game for future biographers. In the meantime, however, the professor may believe that his readers and students are not entitled to engage in the intellectual equivalent of an archeological dig—or, at least, that they are not entitled to his assistance if they undertake to do so. He may believe, philosophically, that it is unfair to a scholar to focus on his motivations rather than the ideas he expresses and that no scholar is obliged to invite readers and students to derogate his ideas by identifying possible influences that can be used to explain the ideas away.65

A professor who was disinclined to disclose prior professional work might either ignore the AALS Statement altogether or read its

in the RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS that would favor insurance companies. RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER 139 (1999). As they describe,

[L]awyers wrote articles and position papers in various journals expressing their views. Primary among them was Professor Charles Silver of the University of Texas, a recognized expert on insurance law whose work was funded by two insurance organizations.

Id. at 139. The reference to Professor Silver’s source of funding might be read to imply that he either did not believe his own views and was passing them off as genuine when they were really bought and paid for, or that he was influenced by the insurance companies’ funding to adopt views that, although genuine, were not the ones he would have formed if he were writing without any expectation of financial compensation. It is at least as likely, however, that Professor Silver was entirely uninfluenced by the funding in forming his views, and that the companies decided to fund his research because they knew that his independent beliefs were generally consistent with their own. In any case, the book’s reference invites readers to discount the professor’s views without analyzing them and determining why they may be unworthy. See also id. at 187 (discussing Harvard law professor Arthur Miller’s views about secret settlements and noting that his work was supported by a foundation of the Product Liability Defense Council).

65. It is, of course, quite common in the public sphere to attack a person’s views by derogating their imagined motivations and supposed biases and to identify elements of a person’s background to which motivations or biases might be ascribed. See, e.g., John M. Broder, A TRIAL LAWYER WHO IS LINKED TO JESSE HELMS, N.Y. TIMES, June 24, 2000, at A8 (after prosecutor recommended that an independent counsel be appointed to investigate Vice President Gore, Democratic party officials questioned his impartiality based on his prior contribution to a conservative Republican candidate). The desire to avoid being subject to this inquisition might explain why some lawyers, including law professors, avoid the public sphere.
disclosure provision narrowly. The current AALS Statement calls for disclosure only when views expressed in scholarship were previously "espoused" by the professor in the course of prior professional work. Professor White might conclude that, although any article he writes will have been influenced by his experience in helping BJ with her problem, his current views were not "espoused" in the course of providing such assistance, and therefore no disclosure is necessary.

Alternatively, a professor may attempt to avoid expressing personal views in writing and teaching. Suppose, for example, that Professor White were invited to participate in a symposium on law professors' ethics and wanted to draw on his earlier experience. One way to do so would be to attribute any views expressed in his article to a pseudonymous law professor in order to underscore that the views were not necessarily his own. So, for example, Professor White, after an explanatory preface, might offer the contribution of a fictional counterpart—say, a Professor Green—and begin with an appropriate reference to Boswell (referring to Johnson (referring to Bacon)), as follows.

**Reflections on the Ethics of Legal Academics: Law Schools as MDPs; Or, Should Law Professors Practice What They Teach?**

**Bruce A. Green**

[A member of the House of Commons said in Samuel Johnson's presence] that he paid no regard to the arguments of counsel at the bar of the House of Commons, because they were paid for speaking. JOHNSON. 'Nay, Sir, argument is argument. You cannot help paying regard to their arguments, if they are good. If it were testimony, you might disregard it, if you knew that it were purchased. There is a beautiful image in Bacon upon this subject: testimony is like an arrow shot from a long bow; the force of it depends on the hand that draws it. Argument is like an arrow from a cross-bow, which has equal

66. The Statement, supra note 42.
force though shot by a child.”