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COMMENTARIES

PROFESSIONAL RESPONSIBILITY OF LAW TEACHERS

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A SYMPOSIUM HONORING THE COUNCIL ON LEGAL EDUCATION AND PROFESSIONAL RESPONSIBILITY (CLEPR) must, of necessity, focus on the subject of professional responsibility. In CLEPR's educational world, clinical legal education is not an end in itself, but rather a means to achieve a broader educational goal—the teaching of professional responsibility. It was not accidental that the words "professional responsibility" were embodied in the name of this organization which, under William Pincus' leadership, promoted direct client contact as the critical element in clinical teaching.

If one believes, as I do, that a central mission of legal education should be to convert bright students into responsible professionals, then it is essential that students, under appropriate supervision, assume personal responsibility for their advice and actions, rather than remain in the passive classroom atmosphere where, in the final analysis, the professor is responsible for almost everything. Skills can be taught by simulation. Responsibility is taught by the process of being responsible.

Important as clinical legal education is to the teaching of professional responsibility, another aspect of a student's legal education experience may be even more important—the learning of professional responsibility through the conduct of law professors. They often provide students with their first close contact with the legal profession.

Despite the "professional responsibility explosion" in legal education, a development of the post-Watergate era, very little attention has been paid to professional responsibility questions as they affect the law professor. In that respect, law teaching is one segment of the legal profession that remains "uncoded." There are compelling reasons why a code of professional responsibility should exist for law teachers, comparable to that which guides practicing lawyers and judges.[1] Professional standards established by law teachers, by their conduct in and out of the classroom, are the most effective learning tools to impart professional responsibility issues to students. We teach best by example, and

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[1] My predecessor as NYU's Dean, Robert McKay, also addressed this issue. *See* McKay, *Ethical Standards for Law Teachers*, 25 ARK. L. REV. 44 (1971). *See also* Cramton, *The Ordinary Religion of the Law School Classroom*, 25 J. LEGAL EDUC. 247 (1978); Shaffer and Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 197 (1976).

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nothing which the law teacher says in class with regard to professional standards can equal in impact the effect of the professor's own conduct.

Law teachers are in most instances the first professional role models the student encounters in his or her legal career. When entering law school, the student takes very seriously the admonition, usually uttered by the dean at the orientation program, that law school marks the first step of a professional career. The law teacher is more than the successor to the college professor at the lecture podium. He or she is usually the first example of the successful professional encountered by the law student. Moreover, the student quickly learns that the law teacher must have had a high degree of professional success in order to have earned a position on the faculty of a first-rate law school. Conduct which might be forgiven in other teaching disciplines as the accepted eccentricities of academics should not be tolerated if practiced by law professors, who have the obligation to set high standards of professional responsibility.

Unfortunately, the role model projected by the successful law teacher does not necessarily embody those qualities which good lawyers must possess. Before legal education became the exclusive domain of professional schools, the practicing lawyer, for better or worse, taught standards of professional responsibility by the manner in which he or she performed the practicing lawyer's tasks. Thus, the skills, standards and attitudes of the practitioner were also those of the teacher, because the practitioner fulfilled both roles.

The development of university-based professional schools as the core of legal education created a situation in which the classroom, not the law office, was the principal teaching forum. Indeed, the separation of law teaching from law practice meant that law school faculties were often composed of men and women who had consciously rejected the professional attitudes of the practitioner in order to pursue a very different set of daily practices and career goals. In academe, law teaching often involves skills and attitudes on the part of the teacher that may be poor role models for the student to emulate as he or she moves into the practice of law.

The overwhelming emphasis in law teaching has been on the development of analytical skills through the case method. Even with the growth of clinical legal education, the development of problem method courses, simulated advocacy programs, and seminars, the classic pose of the successful law teacher remains that of one standing before a large class, leading a Socratic discussion built around a decided appellate case, during which the student is taught to "think like a lawyer." Law teachers properly denounce the "Paper Chase" model as a grotesque exaggeration, which it probably is. But while Professor Kingsfield may be a caricature of the successful law teacher, cartoon caricatures often bear some relationship to observable physical traits.

Generally, the successful law teacher is a master of the quick

repartee, which often proves far more effective in a classroom than the careful reflective "mulling-over" of a problem. Students value the rapier-like thrust of the professor's sharp mind (provided one is not the victim) and will feel uneasy in the presence of a law teacher who prefers to "think around" a problem, thereby making the class a little dull even though the teacher is probably approaching the issue as would the experienced practitioner.

The case method, with its emphasis on principles of law rather than facts, leads to a teaching environment in which theoretical constructs are considered far more important than facts. Cases are selected for casebooks because they illustrate new legal principles, and rarely because they demonstrate how changing facts will affect the application of those principles. Moreover, professors may spend little time, if any, reflecting on how the results of the case affects the actual parties to the litigation. In such an environment, law teachers will inevitably project themselves as being far more concerned with legal principles and reasoning rather than operative facts or results. It is then but a short, and devastating, step to the conclusion that sharp thinking is far more important than careful preparation. Similarly, students may conclude that the real objective is the demonstration of one's mental agility rather than a successful resolution of a real problem for a real client.

It is probably an exaggeration, but only a mild one, to say that law teachers talk for a living, while practicing lawyers listen. In an effort to develop certain skills in students, a law teacher assumes a role which, if copied by students will impede their progress as lawyers. There is all the more reason, therefore, for law teachers to think about how they conduct themselves. If the teacher's normal classroom role requires the development of a set of skills and attitudes which are different from those required in the practice of law, this tendency could be counterbalanced by the development of a set of standards of professional conduct which, if followed by the law teacher, can project a professional image which law students should properly emulate.

Students should discover for themselves that the professor who, in class, may find it necessary to expose a student's sloppy thinking with a sharp comment, or to enliven a lethargic class with caustic wit, is the same professor who keeps appointments and respects the intellectual integrity of the student during an office visit. Failure to do so will create a model for success which the student, and the student's future clients, will come to regret.

What are the essential ingredients of the proposed code of professional responsibility for the law teacher? First, the law teacher should take seriously the subject of ethics and professional responsibility. For too long the law teaching profession regarded the entire area of professional responsibility as academically unimportant and lacking in intellectual rigor. Even worse, teachers often yield to the temptation of evok-

ing a guaranteed laugh from the class by pointing out how some ethical standard can be ignored with impunity. A class of second-year law students, for example, can easily be impressed by a professor's imitation of a lawyer who skillfully crosses the line between the rendering of legal advice and the suborning of perjury. The routine is familiar: "Now before you tell me what was in your mind at the time you gave that gift to your children, I would like you to know the factors which courts have considered in deciding whether a gift was, or was not, in contemplation of death." Law students will pay for their legal education in a coin far more precious than tuition if they are constantly exposed to a cynical attitude toward ethical issues on the part of law teachers.

One does not have to be a fuzzy-minded impractical idealist in order to convey to students a sense of the importance of adhering to ethical standards. Students can accept the fact that there are difficult borderline questions, and a professor should realistically expose them. Edmond Cahn wrote, "Doubt about dusk is not doubt about noon."[2] If a law teacher conveys the impression that the only difference between dusk and noon is a matter of degree, rather than a difference in moral values, legal education can corrode, rather than develop, the ethical fiber of the law student.

Second, law teachers should insist on students adhering to professional standards. Law school generally requires little more of students than that they do well on a written examination. This has very little to do with professional responsibility. Students should be in class on time and be prepared, or should have the courtesy of explaining to the professor why the preparation on a particular day was not possible. It is dangerous for students to assume that, in the practice of law, a brilliant brief or argument will compensate for sloppy preparation. Too often we create that attitude by the manner in which we excuse irresponsible conduct throughout a semester provided the student manages to write a good exam, which we proceed to reward.

Third, the essential *quid pro quo* for insisting on high professional standards on the part of the student is for the law teacher to demonstrate respect for students and for their time. Professors should start and end their classes on time. They should be prepared, or explain why they could not be. Law teachers should keep appointments with students as meticulously as would a successful lawyer with a valued client. Classes should not be juggled for the personal convenience of law teachers. Only a most compelling necessity should warrant imposing on students the inconvenience of re-scheduling classes. Of perhaps greatest importance to students, grades should be turned in on time. This is a clear professional responsibility of law teachers, and they should take care to block out sufficient time to enable them to meet whatever deadline is established by the school.

[2] E. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 77 (1961).

Law teachers should respond to the views of the students with the courtesy and respect accorded to fellow professionals. It is possible to be demanding and intellectually rigorous without being demeaning. And law professors should be available to students, after class or at reasonably certain hours, to discuss matters of substance arising from the class discussions or research projects. In addition, law teachers should be available to discuss other projects relating to a student's work at the law school, such as work on Law Review or other publications.

Respect for one's faculty colleagues is an important aspect of a law teacher's professional responsibility. Through the example of their professors, law students should develop habits of courtesy and respect for fellow lawyers. Why is it that law teachers who, if they were practicing law, would respond to another lawyer's views with carefully reasoned and polite replies will, nevertheless, display a surprising lack of civility in intra-faculty disputes? There is little excuse in any academic institution for the petty bickering of faculty politics. In a professional school, which seeks to set standards for the future conduct of lawyers, there is a particularly heavy responsibility on the part of the faculty to debate differences openly, civilly and without rancor. This is, after all, what we expect of participants in the adversary system. We should not expect less of law teachers.

Law teachers should not only have respect for the views of other faculty members, but also for the programs in which their colleagues may be involved. This does not mean that the programs should not be critically questioned. But a law professor teaching a traditional course should not view clinicians, writing instructors, or trial practice teachers as second-class citizens. All are engaged in the academic enterprise. If we want students to perform all of their professional tasks at a high level, whether it be a simple eviction case or a complex antitrust matter, then we should develop in our students a respect for excellence and integrity in the performance of work, whether it be classroom teaching, scholarship, or clinical teaching. While teaching students "to think like lawyers" may represent the mental mother lode of a lawyer's career, those other lawyering skills such as client interviewing, fact-gathering and preparation, writing and advocacy skills are essential in order to mine that resource. Respect for those engaged in imparting those vital skills reflects a respect for the lawyering profession as distinct from a respect for academic excellence alone. A law teacher who glorifies mediocre scholarship because it is a lofty endeavor, but who scorns the teaching of lawyering skills as pedestrian, will produce students who will be bad scholars and bad lawyers. Neither their ideas nor their skills will be worthy of attention.

Law professors have important institutional commitments, of which teaching and scholarship are paramount. Not every teacher can be a

productive scholar, but all of them must fulfill their teaching responsibilities and obligations to students. The extent to which they should be expected to fulfill other institutional obligations will often be a function of their scholarly contributions. In general, some meaningful service on committees should be expected of everyone, but productive scholars make an institutional contribution by their scholarship and may properly be expected to contribute less in other areas.

Also, members of the law school faculty should participate in programs and public functions of the school. Students will not develop the habit of commitment to the profession and to its institutions if their professors ignore law school activities, or if professors are never seen in the audience, but only on stage. At the same time, law school deans have a particular responsibility to adjust the institutional demands which may be made on faculty members in order to encourage productive scholarship, the development of new courses and the improvement of teaching techniques. Law professors cannot be expected to fulfill their professional obligations without the support of their deans.

Finally, we must address the sensitive question of outside professional activity, including the earning of income through private practice. Law professors acquire considerable benefit from their institutions, including the ability to use one's status as a law professor to earn outside income. A law professor's schedule is sufficiently flexible so that large blocks of time can be available for outside practice if the professor skimps on such obligations as scholarship, meeting with students, or general presence around the law school. Most universities impose general limits on the amount of time that a faculty member may spend on outside pursuits. These rules should be respected. Rather than focus exclusively on the amount of time that a law teacher spends on outside work, however, I prefer to approach the issue in terms of the law teacher's primary professional responsibilities. A law teacher should never engage in outside work at the expense of his or her performance as a teacher or a member of law school committees. Nor should such outside work diminish the law professor's availability to students at reasonable hours for reasonable periods of time. I do not believe that outside work by teachers should be condemned, or even discouraged. In many instances it may be an important function of the law teacher's professional development and may contribute significantly to the knowledge and attitudes which the teacher brings to the classroom. Moreover, as inflation generates intense financial pressures on all teachers, outside work by law teachers may become an inevitable, if troublesome, component of the financing of legal education. But it should be conducted so as not to undermine the essential responsibilities which every teacher owes to his or her institution.

Too little attention has been paid to the quality of a law teacher's outside activities. Remember, Ethical Consideration 2-25 establishes, as an

aspirational goal, that lawyers engage in some *pro bono* activities.[3] Law professors should set an example for future lawyers by devoting a portion of the time spent on outside work for activities which are not of a money-making nature. Law reform, improving the administration of justice, serving the disadvantaged—these tasks can be performed by tax and corporation law teachers as well as those teaching constitutional or poverty law.

Law teachers should also be aware that whenever they engage in outside practice, it is highly likely that someone, either the law teacher, the client, or a law firm, is benefiting from the professor's affiliation with a law school. This may raise certain questions concerning the positions that the law teacher takes in litigation or other forms of representation. I do not suggest that law teachers refrain from asserting positions they believe in, as long as they identify those positions as their own. I do suggest, however, that law teachers should recognize that they have more freedom than do their practicing-lawyer colleagues in picking and choosing cases and clients. Law teachers earn their livelihood primarily from their law schools and not from private practice. This economic fact should have some effect on the cases a law teacher accepts. Specifically, a law teacher who lends his or her name and, indirectly, that of the teacher's law school, to a legal cause should be prepared to accept an identification with that cause, more so than would a private practitioner.[4]

Most emphatically, I am not arguing that a law teacher should not represent Nazis, Communists, accused criminals or other unpopular individuals. Often these cases include legal issues or principles within the professor's area of expert knowledge and personal concern. Sometimes the unpopular client is having difficulty obtaining counsel. But a law teacher who handles the tax work of a wealthy distributor of pornographic films should consider whether, in light of the wider range of choices available to the professor than to the private practitioner, such representation is an appropriate use of the law teacher's specialized knowledge.

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[3] Ethical Consideration 2-25 reads, in part, "Every Lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." ABA, CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1978). *See also* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE ON THE LAWYER'S PRO BONO OBLIGATIONS (1980).

[4] Ethical Consideration 2-26 provides:

> A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

ABA, CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1978).

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It is not enough to think about the professional responsibility of the individual law teacher. There are derivative institutional concerns. The very flexibility inherent in the law school's structure increases the opportunity and temptation for professors to neglect their institutional responsibilities. Moreover, outside activities are the source of recognition and status, bestowed by fellow members of the academic community, including students, thereby further encouraging neglect of the law professor's primary responsibilities. We should, therefore, consider the institutional responsibility of the law schools to develop and enforce standards which can guide professors in allocating their time and energies.

A formal mechanism of enforcement, comparable to what exists for practitioners, is hardly consistent with accepted standards and practices of academic life. I do not suggest any such formal arrangement. Moreover, techniques will vary from school to school. Perhaps faculties can start by agreeing upon standards of professional responsibility for each other, with the understanding that peer pressure and moral persuasion will be the principal means of enforcement. Deans might also consider some accounting of the time spent by faculty members on outside practice. The publicizing of standards of professional responsibility to students and other members of the law school community would be another method of moral persuasion. Increased institutional recognition for the outstanding performance of a teacher's primary responsibility of teaching, writing, and student attention might counter-balance the status to be gained from outside pursuits. The awarding of named chairs on the basis of these factors would be helpful.

The American Bar Association and the Association of American Law Schools should include in their respective standards a requirement that law schools establish standards of professional responsibility for teachers and devise some method of enforcing them. The specific context of these standards, and the manner of enforcement, should be left to the law school.

We have come to realize the truth of CLEPR's message that the central mission of legal education is the teaching of professional responsibility. As with most educational goals, success or failure depends primarily on the teacher, whose role-model function has been too long ignored.