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EVERYTHING I WANTED TO KNOW ABOUT TEACHING LAW SCHOOL I LEARNED FROM BEING A KINDERGARTEN TEACHER: ETHICS IN THE LAW SCHOOL CLASSROOM

By Debra Moss Curtis*

I. INTRODUCTION

This article discusses the ethics of teaching law school. It was not until the 1920s and 1930s that full-time law teachers, rather than part-time practitioners or judges, held the main responsibility for teaching at many law schools.¹ When this shift began to occur, the field of “law professor” was born, and there arose the need for rules in all areas governing law professors, including ethics. Today, most law professors in the United States are members of both the legal and teaching professions and therefore must comply with the ethical rules of each profession.²

However they may be professionally licensed, law faculty members are teachers and, as such, subject to many ethical regulations. These regulations include those promulgated by the institutions at which they teach, as well as the industry-wide standards of the American Association of Law Schools, American Bar Association, and American Association of University Professors.³ Additionally, law faculty members who are not lawyers, but who are members of other professions, are bound by the ethical rules of their own professional disciplines as well.⁴

This article examines the ethics of teaching law school—the role of the faculty member as classroom teacher and the attendant

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1. Robert B. McKay, *Ethical Standards for Law Teachers*, 25 Ark. L. Rev. 44, 48 (1971).

2. Assn. of Am. L. Schs., *AALS Handbook, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, http://www.aals.org/about_handbook_sgp_eth.php (May 2003) [hereinafter AALS, *Statement of Good Practices*].

3. *Id.*

4. *Id.*

responsibilities that accompany that formidable task.⁵ It will consider traditional sources of guidance for law faculty regarding ethical conduct in teaching as well as some less relied upon standards of ethical teaching. In short, the article argues that law faculty members should adhere to certain ethical standards relating to their particular role as classroom teachers, just as do tens of thousands of teachers at all levels of education across the country.

Statements of faculty ethics generally discuss good ethics in the “macro,” that is, by advising faculty members about ethical considerations in many areas, including classroom teaching, interaction with students outside the classroom, scholarship, university service, relationships with colleagues, and even interaction with the public.⁶ This article, however, does not attempt to cover the broad range of ethical concerns that faculty members may face.⁷ Rather, it focuses only on the ethical standards guiding full-time law faculty in their *teaching* roles.⁸

This article also does not attempt to address any type of “moonlighting” by law professors and any related ethical implications.⁹ Faculty who are not full-time, such as adjunct faculty, clearly face other ethical questions in the balance of their professional duties and dual roles.¹⁰ In addition, those teachers who consider themselves full-time

5. Jason Ostrom, *The Competing Roles of Law Professors*, 42 S. Tex. L. Rev. 539, 543 (2001).

6. *Id.*; e.g. Monroe H. Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 Vand. L. Rev. 275 (1986) (addressing the issue of plagiarism of student work by professors); Bill L. Williamson, (*Ab*) *Using Students: The Ethics of Faculty Use of a Student's Work Product*, 26 Ariz. St. L.J. 1029 (1994) (addressing use of student work by faculty).

7. See Steven M. Cahn, *Saints and Scamps: Ethics in Academia* xiii (rev. ed., Roman & Littlefield Publishers, Inc. 1994) (explaining that despite the oft-repeated refrain that a lecture or article on “ethics in the academic world” would be a short one, there are many facets of ethics in the post-secondary academic world to consider).

8. Standard 402 of the American Bar Association's Rules of Procedure for Approval of Law Schools states that a full-time faculty member is one “who devotes substantially all working time during the academic year” to teaching, legal scholarship, law school governance and service and “whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member's capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibility as a faculty member.” Am. B. Assn. Sec. of Leg. Educ. and Admis. to the B., *Standards: Rules of Procedure for Approval of Law Schools* 29 (Am. B. Assn. 2005) (available at <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf>) [hereinafter ABA, *Standards*]. Rory K. Little debates whether the concept of “full-time law professor” is so easy to define. Rory K. Little, *Law Professor as Lawyers: Consultants, Of Counsel and the Ethics of Self-Flagellation*, 42 S. Tex. L. Rev. 345, 357–59 (2001).

9. See Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. Tex. L. Rev. 421, 422 (2001) (“[E]xamin[ing] some of the potential liabilities of professors providing legal services outside of their assigned law school duties, loss prevention considerations that should be considered and issues regarding professional liability insurance available to professors.”).

10. David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting*

faculty also may encounter certain ethical dilemmas when acting as lawyers, whether inside or outside of the law school setting.¹¹ This article does not address these types of ethical concerns. Nor does it address the unique situation of law professors who supervise students practicing law in a clinical setting.¹² Lately, there has been considerable attention on the role of the law professor as a scholar, and on the ethical implications of producing scholarly work,¹³ but the article does not consider these issues either. This article is limited to addressing the ethics of the law professor as *teacher*.

In short, this article focuses on the one role that unifies all those who consider themselves law faculty. Generally a law school faculty includes a variety of categories of teachers, including full-time faculty and adjunct faculty, tenured professors and those hoping to someday get tenure, and faculty with short term contracts, long term contracts, or no contracts. Some law teachers can vote on all matters of faculty governance and others are given no voice in such matters. While there are many differences that can divide faculty members, teaching remains the one role that unites this disparate group, and so the ethical considerations of teachers therefore apply to all who teach law school.

This article therefore surveys various sets of ethical guidelines which might be applied to teachers of the law, and points out areas in which ethical guidelines are particularly needed. Part II of the article looks at ethics from a general perspective, offering background to the more specific study of the ethics of teaching. Parts III and IV describe the ethical standards promulgated by organizations such as the American Association of Law Schools, the American Bar Association, the National

Adjunct Law Professors, 42 S. Tex. L. Rev. 379 (2001).

11. Little, *supra* n. 8, at 359; see also Graham Brown, *Should Law Professors Practice What They Teach?* 42 S. Tex. L. Rev. 316, 317 (2001) (discussing the ethical dilemmas faced by professors when they engaged in “multidisciplinary practice”).

12. For an examination of that situation, see George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher’s Duty to Intervene*, 26 Gonz. L. Rev. 415, 415–416 (1990/1991) (“The live client clinic, however, is a special hybrid, presenting pedagogical and ethical concerns not encountered in other law school settings.” (footnote omitted)).

13. Numerous ethical minefields may arise from use of work prepared by students as research assistants, ranging from blatant plagiarism, to the more subtle misattribution. Ostrom, *supra* n. 5, at 543–44. On September 26, 2004, Harvard Law Professor and graduate Lawrence Tribe gave a public apology for not properly crediting another professor’s work in his 1985 book *God Save this Honorable Court*. A nineteen-word passage was inserted verbatim from Henry J. Abraham’s 1974 book on Supreme Court appointments, *Justices and Presidents*. This apology followed another Harvard Law professor’s public apology three weeks earlier for copying six paragraphs from a Yale scholar in a recent book, and approximately one year after Harvard Law professor, Alan Dershowitz, defended against plagiarism charges. Daniel J. Hemel & Lauren A.E. Schuker, *Prof Admits to Misusing Source*, *The Harvard Crimson* (Sep. 27, 2004), <http://www.thecrimson.com/article.aspx?ref=503493>.

Education Association, and other organizations whose ethical guidelines might be applied to legal educators. Finally, Part V discusses some of the specific ethical issues that arise in the teaching of law school and considers how the various ethical guidelines might best be applied to these law school-specific situations.

II. WHAT ARE ETHICS OF A PROFESSION?

Before looking at ethical standards that may govern certain kinds of teachers, it is important to have an understanding of “ethics.” The study of ethics dates back to ancient philosophy, and this article cannot possibly serve as a thorough primer on the field. However, a basic understanding of ethics in general is a prerequisite for a discussion of the ethical considerations involved in teaching the law.

Ethics may be broadly defined as concepts of “truth, justice, honesty, right and fairness.”¹⁴ Or, from a philosophical viewpoint, ethics are a reflection of “the ideal model of the self.”¹⁵ The field of ethics has been termed “moral philosophy” and may involve, among other tasks, recommending concepts of right and wrong behavior.¹⁶

These broad concepts lead to a more specific definition of ethics as a “principle of right and wrong conduct and decisions.”¹⁷ Ethics can serve the function of dictating how people ought to act.¹⁸ “Normative ethics,” a narrower field within the broader discipline of ethics, attempts to find moral standards regulating right and wrong conduct in a particular societal setting.¹⁹

In the professional context, the significance of ethical training is on the rise. Some business and management schools include business ethics as a required part of their programs.²⁰ Some state bars require attorneys to take a certain number of credits in ethics courses as part of their post-admission continuing education requirements.²¹ However, there is little

14. Joy T. DeSensi & Danny Rosenberg, *Ethics and Morality in Sport Management* 1 (Fitness Info. Tech., Inc. 2003).

15. Joe Kincheloe, Patrick Slattery & Shirley Steinberg, *Contextualizing Teaching* 28 (Addison Wesley Longman, Inc. 2000).

16. James Fieser & The Internet Ency. of Phil., *Ethics* [¶ 1], <http://www.iep.utm.edu/e/ethics.htm> (accessed Nov. 18, 2006).

17. DeSensi & Rosenberg, *supra* n. 14, at 2.

18. *Id.*

19. Fieser, *supra* n. 16 (Other ethical subject areas include “metaethics,” the study of the origins of ethical principles, and “applied ethics,” the examination of specific controversial issues in society such as abortion or nuclear war.).

20. DeSensi & Rosenberg, *supra* n. 14, at 3.

21. For example, the Florida Bar requires attorneys with active licenses to complete thirty

systematic education about ethical issues in regard to college teaching careers.²²

Teaching or dictating ethics to professionals is not an easy task. Ethical theories about professional behavior must provide both a reasonable and consistent guide to individuals.²³ One theory maintains that “[w]ithout influencing personal ethics in people’s daily lives, the overall social effect of being truthful, fair, and right is difficult to achieve.”²⁴ However, that same theorist asserts that few people can keep their personal and professional ethical selves separate and that ethical standards neither exist in a vacuum nor are mutually exclusive.²⁵

Take for example an enterprise that I stumbled upon in my research. The Paper Store Enterprises, a company that sells completed academic papers at the web address of 1MillionPapers.com, advertises in bold, large font headlines, “Same day delivery on ALL papers!!!”²⁶ The website contains a list of paper topics available for purchase, at “Only 9.95/page + FREE bibliography!!!”²⁷ One such paper for purchase, “The Use, Development, and Definition of Ethics” is a five-page paper which “gives the definition of ethics and contrasts it with the definition of morals.”²⁸ The site also advertises that the company will perform custom research on topics not already available on the website.²⁹

At the very bottom of the website is the *extremely* small disclaimer:

Our research papers are created to be used as models to assist you in the preparation of your own term paper. Neither 1MillionPapers.com nor any website owned by The Paper Store Enterprises Inc., will *EVER* sell a research paper to *ANY* student giving us *ANY* reason to believe that (s)he will submit our work, either in whole or part, for academic credit at any institution in their own name!!!³⁰

This disclaimer, which places the burden of appropriate use on the

credit hours of Continuing Legal Education (CLE) during each three-year reporting cycle. Five of those thirty credit hours must be in approved ethics coursework. See The Florida Bar, *Member Services, CLER/BSCR, Common Questions About CLER*, [http://www.floridabar.org/tfb/TFBMember.nsf; select CLER/BSCR, select Frequently Asked Questions about CLER § 2](http://www.floridabar.org/tfb/TFBMember.nsf;select%20CLER/BSCR;select%20Frequently%20Asked%20Questions) (last updated May 16, 2006).

22. Patricia Keith-Spiegel et al., *The Ethics of Teaching: A Casebook* xi (2d ed., Lawrence Erlbaum Assocs. 2002).

23. DeSensi & Rosenberg, *supra* n. 14, at 13.

24. *Id.*

25. *Id.*

26. The Paper Store Enterprises, Inc., *1MillionPapers.Com*, [http://www.1millionpapers.com; search Definition of Ethics](http://www.1millionpapers.com;search%20Definition%20of%20Ethics) (accessed Nov. 18, 2006).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

buyer of the paper and not the seller, is at the very end of the sales pitch, in a font disproportionate to the rest of the material, making it arguably invisible to the average, casual reader.³¹

And so, when it appears that completed research papers on the very topic of ethics, are available for sale to students (with FREE bibliography!), it becomes clear that the idea of ethics cannot be isolated in a vacuum from personal behavior, whether directed to a profession, a business, or other group. Thus, in considering the ethics of teaching, we cannot ignore the meaning of ethics globally.

When viewing the ethics of a profession, one must look at the collection of individuals within an organization, and the responsibility for ethical conduct that they have undertaken.³² If “ethics” involves the articulation of good habits that members of a profession should acquire, the duties that they should follow, and the attending consequence of such behaviors, then it is clear that ethics in a profession must be viewed from both personal and business viewpoints in order to assure the highest possible standards.³³ Therefore, to shape the ethical behavior of a group of individuals practicing in business, human interests, values, and needs, as well as financial or economic criteria should be taken into consideration.³⁴

Even when ethics are narrowed to a specific field such as education, there invariably arise conflicts that must be dealt with, perhaps everyday, that are not specifically enumerated in ethical standards promulgated by these organizations.³⁵ Accordingly, an effective approach to the ethics of a profession must focus not only on specific rules or regulations, but also on raising collective and individual consciousness of the potential ethical issues that may be encountered.³⁶

31. *Id.* In a test conducted by copying and pasting the various parts of the website into Microsoft Word and measuring the fonts, the paper description and initial promise of same day delivery on papers appeared in Arial font, point size 13.5; however, the later disclaimer appeared in Times New Roman font, point size 7.5. Not only is the actual point size disparate, but the change in font further diminishes the relative appearance of the disclaimer, as changing from Arial to Times New Roman reduces the amount of space required for the same point size type. See http://www.socialscienstow.co.uk/pam/it_dtp/pagemaker%207.htm (accessed May 2, 2005) (copy on file with Author).

32. DeSensi & Rosenberg, *supra* n. 14, at 14.

33. See Fieser, *supra* n. 16 (“The field of ethics, also called moral philosophy, involves systematizing, defending, and recommending concepts of right and wrong behavior.”).

34. DeSensi & Rosenberg, *supra* n. 14, at 14.

35. Keith-Spiegel et al., *supra* n. 22, at xi.

36. *Id.* at xii.

III. ETHICAL STANDARDS FOR LAW SCHOOLS

There are several sources, both formal and informal, that discuss the ethics of professional behavior for law teachers. Out of necessity, these sources guide holistically—that is, they look at the teacher as a whole person and all the roles that a law teacher may occupy. This section focuses only on those rules and standards that deal with teaching and professor-student interaction.

A. American Association of Law Schools (AALS)

The AALS is a non-profit association of 168 member law schools.³⁷ The primary purpose of the AALS is “the improvement of the legal profession through legal education.”³⁸ This society dates back to 1900 and is open to law schools to apply for membership after five years of instruction and after graduating their third class. The AALS has published a “Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities.”³⁹ This Statement, which notes that law faculty members are subject both to the regulations of their respective institutions and to the Statement of Professional Ethics of the American Association of University Professors, is meant to provide general guidance for law professors.⁴⁰ Partly because “law professors serve as important role models for law students,” members of the law teaching profession “should have a strong sense of the special obligations” involved in the profession.⁴¹ These aspirations are not intended by the AALS to “be achieved by edict,” further, the Statement notes that moral integrity cannot be legislated.⁴² However, this “public statement of good practices” is targeted at both newcomers to the profession as well as experienced teachers.⁴³

The AALS Statement concerning ethics is divided into five sections: responsibilities to students, responsibilities as scholars, responsibilities to colleagues, responsibilities to the law school and university, and responsibilities to the Bar and general public.⁴⁴ Although much of the

37. Assn. of Am. Law Schs., *Member Schools*, http://www.aals.org/about_memberschools.php (accessed Nov. 18, 2006).

38. Assn. of Am. L. Schs., *AALS Handbook: Bylaws* §1-2, http://www.aals.org/about_handbook_bylaws.php (accessed Nov. 18, 2006).

39. AALS, *Statement of Good Practices*, *supra* n. 2.

40. *Id.* at [¶ 1].

41. *Id.* at [¶ 2].

42. *Id.* at [¶ 3].

43. *Id.*

44. *Id.* at [¶ 4].

AALS Statement covers faculty roles in other areas of professional life, the first section, focusing on work with students, is most germane to ethical considerations in the field of teaching.

This first section, regarding responsibilities to students, begins by noting that law professors can “profoundly influence” both students’ attitudes toward the legal profession and students’ own ethical responsibilities. Therefore, law professors’ service as role models requires that professors follow the most “sensitive ethical and professional standards.”⁴⁵ The Statement articulates the standard of excellence expected of law professors.⁴⁶ Professors are cautioned to master the doctrine and theory of their subject, to be prepared, and to “employ teaching methods appropriate for the subject matters and objectives of their courses.”⁴⁷ The Statement advises professors to make the objectives and requirements of courses clear to students and to be responsible with regard to the class schedule and any necessary make-up classes.⁴⁸

However, the Statement becomes less concrete as it moves from a general description of job performance to interactions between professors and students. The Statement says, “Law Professors have an obligation to treat students with civility and respect to foster a stimulating and productive learning environment in which the pros and cons of debatable issues are fairly acknowledged. Teachers should nurture and protect intellectual freedom for their students.”⁴⁹

The Statement asserts that evaluation of students’ work is a “fundamental obligation” of law professors.⁵⁰ In addition, the Statement directs that examinations and other assignments be designed “conscientiously” and that evaluations of student work be impartial.⁵¹ The university and the profession set standards as to grading, and the AALS Statement, recognizing both standards, explains that students are entitled to an explanation of an assigned grade.⁵²

The Statement also addresses the roles of professors in counseling students regarding academic, career and professional interests, and in writing evaluations of students for third parties. These aspects of law school teaching are all logical extensions of knowing students through

45. *Id.* at [¶ 6].

46. *Id.* at [¶ 7].

47. *Id.*

48. *Id.*

49. *Id.* at [¶ 8].

50. *Id.* at [¶ 9].

51. *Id.*

52. *Id.*

classroom interaction.⁵³ Of course, discriminatory conduct is blatantly unacceptable and antithetical to the hospitable community that professors should seek to facilitate.⁵⁴

The Statement specifically considers the problem of sexual harassment, both in the context of inducing a student into a sexual relationship and of creating a hostile academic environment.⁵⁵ Sexual relationships between a student and a professor not married to each other or “who do not have a preexisting analogous relationship” are deemed inappropriate if the professor teaches the student or otherwise evaluates or supervises the student.⁵⁶ Beyond direct relationships, professors are cautioned to be sensitive to “the perceptions” of other students regarding potential preferential treatment by that faculty member or others.⁵⁷ Where a professor and a student have a preexisting relationship, such as through marriage or other family connection, professors should avoid having teaching responsibility for that student.⁵⁸

B. American Bar Association (ABA)

The ABA is the recognized national agency for the accreditation of professional law schools.⁵⁹ This organization’s standards are used by many state Bars to determine approval of educational requirements for Bar admissions.⁶⁰ While extensive standards exist governing the structure, behavior and constitution of a law school, there is no single section that details the ethics of law teaching.⁶¹ Rather, ethical considerations are incorporated into various standards governing the law school function.⁶²

The ABA Standards for Approval of Law Schools outline minimum requirements “designed, developed and implemented for the purpose of advancing the basic goal of providing a sound program of legal education.”⁶³ The stated purpose of the Standards is to ensure a program that provides students with an understanding of the ethical responsibilities they will encounter as graduates. The Preamble does not

53. *See id.* at [¶ 10].

54. *Id.* at [¶ 12].

55. *Id.* at [¶ 13].

56. *Id.*

57. *Id.*

58. *Id.*

59. ABA, *Standards*, *supra* n. 8, at vi.

60. *Id.* at viii.

61. *See* ABA, *Standards*, *supra* n. 8.

62. *Id.*

63. *Id.* at viii.

specifically address the role of teachers.⁶⁴ However, the standards concerning Full-Time Faculty impose the ethical requirement that a full-time faculty member may not have outside office or business activities that unduly interfere with his or her responsibilities as a faculty member.⁶⁵

ABA Standard 404 enumerates the Responsibilities of Full-Time Faculty.⁶⁶ Responsibility for teaching course offerings, preparing for class, consulting with students, and “creating an atmosphere in which students and faculty may voice opinions and exchange ideas” is placed squarely on the full-time faculty.⁶⁷ Unlike some other ABA standards, there are no interpretations to assist with further information on this requirement.⁶⁸

C. American Association of University Professors (AAUP)

The AAUP adopts the position that membership in the academic profession carries “special responsibilities.”⁶⁹ While the ethics standards for professors are contrasted specifically with the standards involved in the practice of law, the AAUP’s Statement of Ethics does not discuss the unique ethical considerations affecting the teaching of law.⁷⁰ The Statement of Ethics, known as “The Statement,” contains five major points. Again, those highlighted in this paper focus on teaching and the student-professor relationship.

The first point in the Statement directs professors to understand and acknowledge the responsibilities placed on them as educators.⁷¹ Professors should be intellectually honest and should exercise critical judgment in teaching.⁷²

The second portion of the Statement focuses on the learning and

64. *Id.*

65. *Id.* at 29 (Standard 402).

66. *Id.* at 32.

67. *Id.* (Standard 404 also guides full-time faculty in the appropriate use of student research, acknowledging contributions of others and other ethical requirements outside the scope of this article.).

68. *See id.* at 32–33 (no interpretations are provided, whereas others, such as Standard 405, have interpretations provided).

69. Am. Assn. of U. Profs., *Statement on Professional Ethics* (June 1997) (available at <http://www.aaup.org/AAUP/pubsres/policydocs/statementonprofessionalethics.htm>) [hereinafter AAUP, *Statement*].

70. *Id.* The AAUP notes that the contrast between the practice of law and the educational profession is that the legal association seeks to “ensure integrity of members engaged in private practice,” whereas in academia the individual institution of higher learning takes on this task. *Id.* at “Introduction.”

71. *Id.* at § 1.

72. *Id.*

counseling relationship between students and professors. It encourages professors to demonstrate respect for students, and suggests that professors should “adhere to their proper roles” as guides or counselors.⁷³ The evaluation of student work should focus on merit and encourage academic honesty.⁷⁴ Information learned from counseling relationships between professors and students must remain confidential, and professors should avoid “any exploitation, harassment or discriminatory” treatment of students.⁷⁵

The third section of the Statement seeks to dictate behavior among professors as colleagues, and the fifth section discusses professors’ obligations as community members.⁷⁶ The fourth section of the Statement, however, focuses more directly on teaching, directing that “professors seek above all to be effective teachers.”⁷⁷ It further urges professors to observe the regulations of the institution of which they are a part, as long as “the regulations do not contravene academic freedom.”⁷⁸

On many levels, the AAUP Statement covers the same general concepts as the AALS Statement of Ethics for Law Professors. However, an important difference between the AAUP and AALS statements is the degree of specificity into which the Statements delve. The AAUP, with its larger audience, maintains broader phrasing, while the AALS seeks to explicitly define affirmative duties and unacceptable behaviors. While some of the ethical recommendations in the AALS Statement have the potential to be useful to professors in general, the AALS Statement is written specifically for law professors. For example, the AALS Statement defines and describes inappropriate relationships between teachers and students, dictates specific conduct to avoid, and offers suggestions on how to avoid conflicts, where the AAUP Statement merely speaks in generalities.

On the one hand, the AALS’ greater level of specificity in the area of inappropriate relationships could be due to the nature of an older student population by definition (graduate studies) and to the careful nature of lawyers in regulating conduct. However, interestingly, if the AAUP statement is more likely to apply to those teaching a larger number of undergraduates than to those teaching law students, the idea surfaces that these undergraduates, some of whom may be minors, need greater protection in the form of precise ethical guidelines for professors.

73. *Id.* at § 2.

74. *Id.*

75. *Id.*

76. *Id.* at §§ 3, 5.

77. *Id.* at § 4.

78. *Id.*

However, the AAUP Statement provides only general ethical principles rather than detailed instructions.

D. Private institutional codes

Individual universities may enact ethical rules for their teachers. Many schools incorporate existing standards, such as the AALS, ABA or AAUP. The standards adopted by the school must not be unconstitutionally vague and must be in words that ordinary people can understand.⁷⁹

These institutional rules have been debated in the courts and largely upheld, except in instances where the statement or enactment is overly vague. In *San Filippo v. Bongiovanni*, a professor who was discharged by his university brought an action against the university under the Civil Rights Act.⁸⁰ The Third Circuit Court of Appeals reversed the finding of the federal district court that the grounds set forth in the university's regulations for dismissing tenured professors were void for vagueness.⁸¹ The Circuit court agreed, however, with the lower court's decision that the university's ethical standards, which incorporated the AAUP Statement on Ethics, were not properly included in the dismissal standards of the university.⁸²

Courts have also reviewed situations where the faculty code did not specifically cover behavior or explicitly incorporate rules. In *Tonkovich v. Kansas Board of Regents*, a law professor was dismissed for violating the AALS guidelines, which prohibit sexual conduct between a professor and a student enrolled in the professor's class.⁸³ At the time, the faculty code for that law school did not expressly prohibit such relationships, although it did prohibit the exploitation of a student by the professor for private advantage.⁸⁴ The dean of the law school merely stated that the

79. *Vanderhurst v. Colo. Mt. College Dist.*, 16 F. Supp. 2d 1297, 1305-06 (D. Colo. 1998). The standards in question here were not found to be constitutionally vague because the policy contains definitions of relevant words so that "ordinary people can understand what conduct is prohibited and may act accordingly." *Id.* at 1305-1306. In addition, the court held that the standards were sufficiently specific that they would not be enforced arbitrarily or discriminatorily. *Id.* at 1306. Furthermore, even if there are no specific prohibitions listed, the standards provide a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* (quoting *Roth v. U.S.*, 354 U.S. 476 (1957)). The court also held that the code of ethics was not vague because it was written in plain language and was easily understood. *Id.*

80. 961 F.2d 1125 (3d Cir. 1992), *rev'd*, 743 F. Supp. 327 (D.N.J. 1990).

81. *Id.*

82. *Id.* at 1133-34 (agreeing with the reasoning of the lower court on the improper inclusion, and finding that this improper inclusion was a document construction problem, not a question of substantive ethical violation).

83. 159 F. 3d 504, 511 (10th Cir. 1998).

84. *Id.*

AALS guidelines were relevant to the faculty's specific code and the court held that the dean's statement provided sufficient grounds for dismissal.⁸⁵ However, the court's ruling very well may have paved the way for some institutions to look more closely at the specificity of their rules.

Another case provides an example of a faculty code which properly adopted a code of ethics. In *Korf v. Ball State University*, the professor was properly dismissed for making sexual advances on a student because the professor had "engaged in unethical conduct" under the AAUP Statement of Professional Ethics.⁸⁶ The court held that since the AAUP rules were adopted explicitly by the University fourteen years before the hearing, the professor had adequate notice of the possibility of termination for violation of these rules.⁸⁷

Universities, in addition to promulgating codes of conduct, also have begun to provide other resources to assist faculty members with understanding issues of ethics. The Center for Academic Integrity, a consortium of approximately 200 colleges, provides a definition of academic integrity, and has developed downloadable materials to assist institutions in promoting academic integrity.⁸⁸ The Markula Center for Applied Ethics at Santa Clara University offers "advice, information, and online discussions about ethical issues."⁸⁹ Ball State University—which, interestingly, has been the subject of litigation on the topic of ethics⁹⁰—has an interactive computer program that can assist faculty with "issues of academic integrity."⁹¹

In addition to the guidance professors receive from the codes of ethical conduct adopted by private institutions, it has been suggested that law professors essentially fit into a professional framework like that of attorneys.⁹² Under this framework, students become the clients of the law professors and the internal regulations of an institution are analogous to the legal profession's Code of Professional Responsibility.⁹³ This vision

85. *Id.*

86. 726 F.2d 1222, 1224 (7th Cir. 1984).

87. *Id.* at 1226-27.

88. Natl. Educ. Assn., *Thriving in Academe: Changing the Academic Culture*, *Advoc. Online* 8 (Dec. 2000), <http://www2.nea.org/he/advo00/advo0012/bestprac.html> [hereinafter NEA, *Thriving in Academe*].

89. *Id.*

90. See *supra* n. 86 and accompanying text (discussing a case in which Ball State University was a party in ethics litigation).

91. NEA, *Thriving in Academe*, *supra* n. 88.

92. Leonard Biernat, *Why Not Model Rules of Conduct for Law Students?* 12 Fla. St. U. L. Rev. 781, 785 (1985).

93. *Id.*

attempts to allow law schools to regulate themselves and acknowledges the legal structure familiar to most law teachers from their work as practicing attorneys.

E. "Ethical Standards for Law Teachers"⁹⁴ and "Professional Responsibility of Law Teachers"⁹⁵

Former Dean Robert McKay of New York University School of Law published a paper in 1971 suggesting the need for ethical standards designed for law professors. Any discussion of law professor ethics would be incomplete without mention of this definitive work. Dean McKay observed that over thirty years ago that there was not a large body of work discussing ethical considerations applying specifically to law professors.⁹⁶ In order to respond to the difficult questions that arise when a lawyer functions as a law teacher, he proposed nine Canons of Ethics for Law Teachers⁹⁷

Four of the canons cover behavior not within the scope of this article, in that they deal with ethics outside the specific role of law professors in the classroom.⁹⁸ However, the other five canons directly address the classroom role. The second canon states that the primary responsibility of the law teacher is to provide students with a sound legal education.⁹⁹ This canon is built on a foundation of the ABA Standards and Factors as well as the AALS requirement for membership and helps to define just what a sound legal education is.¹⁰⁰ Teachers must assume the obligation of knowing their subject matter and their students, and must make them their priority.¹⁰¹

To accomplish this task, Dean McKay urges consideration of teaching methods. Questions about teaching methods, raised more than thirty years ago and still debated in academic circles, include the

94. McKay, *supra* n. 1, (This important article was published by Robert McKay in 1971 and has been heavily relied upon in scholarly works dealing with ethics for law teachers.).

95. Norman Redlich, *Professional Responsibility of Law Teachers*, 29 Cleveland St. L. Rev. 623 (1980) (In this work, Redlich, former Dean of NYU Law, acknowledges the groundwork laid by his predecessor, Robert McKay.).

96. McKay, *supra* n. 1, at 45-46.

97. *Id.* at 46-47.

98. The first canon points out that codes of professional responsibility apply to law teachers who are also a member of the bar. The third canon seeks to have law teachers promote academic freedom. The sixth canon urges lawyers to work for the cause of justice. The ninth canon requires that law professors maintain a high standard of truth and candor and avoid bias with regard to published written or oral material. *Id.*

99. *Id.* at 47, 50.

100. *Id.* at 50.

101. *Id.* at 51.

usefulness of the case method and the Socratic Method, whether law professors can be trained as teachers, and what level of advising and counseling law teachers should be giving to students.¹⁰² In addition, McKay considered how grading affects students in the way it is carried out and whether a different model of testing should be employed.¹⁰³ These issues are at the heart of a law professor's role. Although these issues carry curricula and administrative overtones, they also contain an ethical component to be considered.

Canon Four incorporates the rules and procedures of the institutions in which a professor teaches and urges the respect of them.¹⁰⁴ In commenting on these institutional rules and their evolution, McKay notes the degree to which ethics have moved away from general mandates such as "acceptable conduct" to the more specific and troublesome issues that may be addressed.¹⁰⁵ Such topics include the obligation to give full performance and the lure of outside employment by law teachers. McKay states firmly that such outside work should not interfere with teachers' primary obligation to students, which has been codified in the ABA Standards.¹⁰⁶

The fifth canon suggests a split between the professor's personal or political views and the professor's role within the university.¹⁰⁷ Such views may impact teaching, depending on the course material. When teaching classes that include work on social or political issues in addition to "black letter law," a professor's viewpoint may be considered to be a significant ethical consideration in the classroom. In 2005 the Florida Legislature considered a bill limiting just such an influence; House Bill 837, the "Academic Bill of Rights in Florida," contained Section 1004.09(3) which read in part that "students have a right to expect . . . the quality of their education will not be infringed upon by instructors who persistently introduce controversial matter into the classroom or coursework that has no relation to the subject of study and serves no legitimate purpose."¹⁰⁸ The fact that the legislature considered this

102. *Id.* at 53.

103. *Id.*

104. *Id.* at 47.

105. *Id.* at 55–59.

106. *Id.* at 57; ABA, *Standards*, *supra* n. 8 at 29.

107. McKay *supra* n. 1, at 59.

108. Fla.H. 837, 2005 Reg. Sess. (Mar. 8, 2005) (available at http://myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0837_.doc&DocumentType=Bill&BillNumber=0837&Session=2005). This bill and a related bill, SB 2126, Fla. Sen. B. 2126, 2005 Reg. Sess. (Mar. 16, 2005), both died upon either second reading or in committee on May 6, 2005. *See also* Sarah Howard Jenkins, Byron R. Johnson & Otto Jennings Helwig, *God Talk By Professors within the Classrooms of Public Institutions of Higher Education: What is Constitutionally Permissible*, 25 Akron L.Rev. 289,

concept indicates that a professor must ethically consider his or her views and role within a university. In addition, a law professor who testifies as an expert in outside cases may also bring these opinions into the classroom.¹⁰⁹

Canon Seven discusses a law professor's need to bring an understanding of professional competence and ethical responsibility to students.¹¹⁰ McKay recognizes that although law school teachers have not always had a code of ethics specific to their profession, law school teachers have always agreed upon teaching ethics to students.¹¹¹ Ethically, teaching professional responsibility is a part of law teachers' responsibilities, and many professors have been, and continue to be, interested and involved in teaching ethical standards to students.¹¹² Law professors began the concept of organized American legal ethics and have taught ethics with the law for a good portion of legal history.¹¹³

Canon Eight urges law professors to respect the confidentiality of private communications with students.¹¹⁴ While no teacher-student privilege is legally recognized, the role of law teacher as counselor is a serious concern for the modern law teacher.¹¹⁵ Through his commentary, Dean McKay opened the door to discussion of ethical issues in legal education, and his concerns should be taken into consideration in any debate on ethics in the law school classroom.

Nearly a decade later, Dean Norman Redlich, successor to Dean McKay at the New York University School of Law, acknowledged that there was still a pressing need for a code of professional responsibility for law teachers.¹¹⁶ Redlich pointed out the great influence that law teachers have on students, beginning with students' first day of law school, in which they hear the dean of their school tell them that they are taking the first step of their professional careers. Faculty can exert great influence on students during this formative stage in their lives.¹¹⁷

A law professor is a role model for students. Redlich argued that "[t]he law teacher is more than the successor to the college professor at

289 (1991) (stating that "[g]iven . . . power to influence, there is an obligation to reveal one's theological and philosophical view of life to students").

109. McKay, *supra* n. 1, at 44, 60–61.

110. *Id.* at 44, 62.

111. *Id.* at 44, 62–63.

112. Biernat, *supra* n. 92, at 782.

113. Benjamin Barton, *REVIEW ESSAY: The Emperor of Ocean Park: The Quintessence of Legal Academia*, 92 Cal. L. Rev. 585, 602 (2004).

114. McKay, *supra* n. 1, at 63.

115. *Id.* at 64.

116. Redlich, *supra* n. 95, at 623.

117. *Id.* at 624.

the lecture podium. He or she is usually the first example of the successful professional encountered by the law student.”¹¹⁸ As representatives of the profession, therefore, law professors should refrain from exhibiting the eccentricities of “academics.”¹¹⁹ One of the essential ingredients for a code of professional responsibility for law teachers is that the professor should seriously approach the subject of ethics itself.¹²⁰ A cynical attitude toward the field of ethics can do students great harm.¹²¹ Second, students should be held to professional standards by professors.¹²² Rather than just performing well on examinations, students should understand that their attitude toward their work throughout the semester is also critical.¹²³ Third, law teachers should demonstrate respect for their students.¹²⁴ Professors demonstrate respect by treating students’ time as valuable as their own with prompt class start and stop times, keeping appointments and class times as promised, and reducing students’ wait for grades.¹²⁵ Fourth, professors should respect the views of students as they would other professionals.¹²⁶ Demanding a high level of performance from students does not necessitate demeaning the students.¹²⁷ In short, Redlich’s suggestions offer professors a useful starting place for the formulation of ethical guidelines for the teaching of law.¹²⁸

IV. ETHICS FOR AND BY OTHER EDUCATORS

A. National Education Association (NEA)

While educators holding various roles in the educational community have their own codes of ethics, the NEA has specific standards by which all teachers’ conduct may be monitored and judged.¹²⁹ The NEA is the “nation’s largest professional employee organization” and is “committed

118. *Id.*

119. *Id.*

120. *Id.* at 625.

121. *Id.* at 626.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 627.

127. *Id.*

128. *Id.* at 627–28.

129. Annette M. Iverson, *Building Competence in Classroom Management and Discipline* 293 (4th ed., Merrill Prentice Hall 2003) (Other educators with codes of ethics include administrators, guidance counselors, and school psychologists.).

to advancing the cause of public education.”¹³⁰ Although its slogan, “great public schools for every child,” seems to indicate that its membership is limited to those teaching in the primary and secondary grades, the NEA boasts a much wider membership, including college and university faculty and staff, retired educators, college students preparing to become teachers, and education support professionals.¹³¹

The NEA promulgates a “Code of Ethics of the Education Profession,” which is divided into two principles.¹³² The first principle details an educator’s commitment to students, while the second outlines the educator’s commitment to the profession.¹³³ In Principle I, the code recognizes that an educator’s purpose is to help each student realize his or her worth as an effective member of society and advocates that educators work to “stimulate the spirit of inquiry, acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals.”¹³⁴

To further this purpose, the educator is directed by a series of “shall” and “shall not” statements. For example, teachers are prohibited from excluding students from participation, denying benefits or granting advantage on the basis of race, color, creed, sex, national origin, political or religious belief, family, social or cultural background, or sexual orientation.¹³⁵

In the context of considering the NEA Code as a guide for law professors, several obligations of educators in Principle I stand out. First, educators “shall not deliberately suppress or distort subject matter relevant to the student’s progress.”¹³⁶ Second, the educator “shall not intentionally expose the student to embarrassment or disparagement.”¹³⁷ And third, educators “shall not use professional relationships with students for private advantage.”¹³⁸

Principle II, Commitment to the Profession, largely deals with collegial type issues excluded from the scope of this article. However, two specific obligations of the educator stand out as perhaps having relevance

130. Natl. Educ. Assn., *About NEA*, <http://www.nea.org/aboutnea/index.html> (accessed Nov. 18, 2006).

131. *Id.* The NEA has a partnership with the American Federation of Teachers, an affiliated international union of the AFL-CIO, but is not itself a union membership organization. *Id.*

132. Natl. Educ. Assn., *The Code of Ethics of the Legal Profession* (1975) (available at <http://www.nea.org/aboutnea/code.html>) [hereinafter NEA, *Code*].

133. *Id.* at § I.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

to the law teacher's ethical life. First, an educator "shall not assist any entry into the profession of a person known to be unqualified in respect to character, education, or other relevant attribute."¹³⁹ And second, the requirement that an educator "shall not assist a noneducator in the unauthorized practice of teaching."¹⁴⁰

Should these NEA standards be applied to law professors? Some of these educational standards echo the ethical guidelines of the AALS, ABA, and AAUPR or other guidelines already discussed above. For example, obligation number eight of the NEA's Principle I mandates that educators "[s]hall not disclose information about students obtained in the course of professional service unless disclosure serves a compelling professional purpose or is required by law."¹⁴¹ Dean McKay suggested a nearly identical obligation for law teachers in his eighth canon.¹⁴² Second, the NEA's ideas of separate "principles" to address the differing roles of the teacher in various specific settings is akin to the structure of the AALS Standards, which consider the many masters that a law professor may serve.¹⁴³

Finally, the principles in the preamble to the NEA Code of Ethics seem applicable to any person engaged in the profession of teaching. The preamble begins as follows:

The educator, believing in the worth and dignity of each human being, recognizes the supreme importance of the pursuit of truth, devotion to excellence, and the nature of the democratic principles. Essential to these goals is the protection of freedom to learn and to teach and the guarantee of equal educational opportunity for all. The educator accepts the responsibility to adhere to the highest ethical standards.¹⁴⁴

Such an obligation reads nearly like an oath, and the legal profession itself is not adverse to the concept of oath-taking; indeed a majority of bars require this formality.¹⁴⁵ For teachers and lawyers, adopting such a concept is clearly not contrary to the position of law teacher.

B. Five Ethical Principles

In his practical guide for teachers, David Royse of the University of

139. *Id.* at § II.

140. *Id.*

141. *Id.*

142. McKay, *supra* n. 1, at 63.

143. AALS *Statement of Good Practices*, *supra* n. 2.

144. NEA, *Code*, *supra* n. 132.

145. See US Leg. Database, *Lawyers Database! Bar Admission: An Overview* [¶ 3], http://www.uslegaldatabase.com/bar_admissions.htm (accessed Nov. 18, 2006) ("an attorney normally must take an oath declaring his or her obligations to the court").

Kentucky sets out five ethical principles that educators might apply when considering ethical problems in their teaching lives.¹⁴⁶

The first principle is that of “nonmaleficance” or doing no harm to students.¹⁴⁷ This concept relates to a teacher’s potential ability to lash out or “pay back” students who are unkind or unpleasant to their teachers.¹⁴⁸ The second principle, related to it, is “beneficence” or actively doing good.¹⁴⁹ Teachers, Royse maintains, are charged with the task of lifting up and not tearing down students, and if it is not possible to always do good, a teacher should always do the least harm to a student.¹⁵⁰ The third principle is that of “justice,” that of being fair and equitable to students.¹⁵¹ Doing justice may mean not giving preferential treatment to some students or enforcing policies listed on a syllabus.¹⁵² Royse notes that students are particularly sensitive to inequity.¹⁵³ Certainly, the idea of justice seems relevant in a law setting. The fourth principle is autonomy.¹⁵⁴ This principle requires that teachers not be “tyrants,” forcing views, values and preferences on students, whether overtly or subtly.¹⁵⁵ Finally, Royse states that without truthfulness, educators are not ethical individuals.¹⁵⁶ This last principle encompasses not just lying, but also the avoidance of making promises that cannot be kept and of creating distortions or misrepresentations.¹⁵⁷

These guidelines can be useful in some of the everyday situations encountered by law professors as well as other teachers. Law students, like other students, clearly benefit from being treated with dignity and respect. In addition, Royse suggests a framework for educators in dealing with ethical issues. He urges educators to start by determining if an issue relating to a student is a professional ethics issue, usually recognizable by the imbalance of power between the people involved or the possible appearance of a conflict of interest.¹⁵⁸ Second, teachers should list and

146. David Royse, *Teaching Tips for College and University Instructors: A Practical Guide* 312 (Allyn & Bacon 2001).

147. *Id.* at 312.

148. *Id.* at 313.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 321.

consider alternatives and ramifications of certain responses.¹⁵⁹ Third, they should consult with respected, experienced, and trusted mentors.¹⁶⁰ Fourth, teachers are reminded to consult their applicable codes of ethics, including professional codes and the AAUP Code.¹⁶¹ Fifth, the teacher should consider his or her role as an employee and the obligations that may arise from that role.¹⁶² Sixth, Royse urges consultation with academic ombudsmen or attorneys.¹⁶³ Seventh, teachers should think about any potential public scrutiny their decisions and behavior may need to withstand.¹⁶⁴ Eighth, Royse asks teachers to look at situations from students' point of view and to consider the scenario from that perspective.¹⁶⁵ Finally, teachers are strongly cautioned against making impulsive decisions.¹⁶⁶ These concrete steps can be quite helpful to law professors, who generally appreciate such well-organized reasoning, in considering some ethical problem that arises in the teaching of law students.

V. ETHICAL CONSIDERATIONS IN THE LAW SCHOOL CLASSROOM: WORKING THE STANDARDS TOGETHER

With regard to the widespread application of educators' ethical rules to law professors, one question that arises is whether the semantic difference—and the implications that follow—between the words “teacher” and “professor” presents an obstacle. Why the difference in nomenclature? Do these two job titles really come from two worlds that are completely apart? The origin of the words is historical, although some recent sources use the word “educator” to mean the entire profession as a whole.¹⁶⁷

What is the traditional definition of a “professor?” One definition says that a professor is “one who professed, or publicly teaches, any science or branch of learning; especially, an officer in a university, college, or other seminary, whose business it is to read lectures, or instruct students, in a particular branch of learning; as a professor of

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. See Royse, *supra* n. 146.

theology, of botany, of mathematics, or of political economy.”¹⁶⁸ The definition begins with general terms that would include any teacher, but then quickly narrows to exclude all those not at the college or university level. In the modern university, most professors are held to an even higher standard; to qualify as “professor” one must hold a terminal degree in the field taught, such as a J.D. in a law school or a Ph.D. in other fields of study.¹⁶⁹

The history of teacher training may illuminate other differences between teachers and professors. Dating back to the colonial period in America, a teacher in a “lower school” needed only a small amount of knowledge and a willingness to teach.¹⁷⁰ In the mid-17th century—when girls were rarely educated—teachers were, almost exclusively, middle class males.¹⁷¹ In the early 18th century, teaching had finally become a recognized job rather than a part-time occupation that supplemented other full-time careers.¹⁷² By the early 1800’s, teacher training became part of the curriculum of academies, equivalent to today’s secondary schools.¹⁷³ The first post-high school training institute for elementary school teachers was created in 1823. During that same time period, secondary school teachers were trained by programs in liberal arts colleges.¹⁷⁴ Graduate studies in education were first founded late in the 19th century.¹⁷⁵

It is important to remember that law school professors, university professors, and primary and secondary school teachers have different educational backgrounds. The general recruitment requirement for law schools is that professors must have, at a minimum, a J.D. degree, the terminal degree granted upon graduation from a school of law.¹⁷⁶ By comparison, those teaching on the primary and secondary grade levels have generally obtained a higher education than merely passing the grade

168. BrainyMedia.com, *BrainyDictionary*, *Professor*, <http://www.brainydictionary.com/words/pr/professor207058.html> (accessed Nov. 18, 2006).

169. NationMaster.com, *Encyclopedia*, *Attorney at Law*, “Education and Training,” <http://www.nationmaster.com/encyclopedia/Attorney-at-law/Specialization> (accessed Nov. 18, 2006).

170. HighBeam Research, Inc., *Teacher Training*, “History in the United States,” <http://www.encyclopedia.com/html/t/teachert.asp> (accessed Nov. 18, 2006).

171. Kincheloe, Slattery, & Steinberg, *supra* n. 15, at 129. When girls were taught at all in this era, they were instructed with very young boys who then went on, without the girls, to Latin grammar schools. *Id.* at 115.

172. *Id.* at 130.

173. HighBeam Research, Inc., *supra* n. 170.

174. *Id.*

175. *Id.*

176. Some law professors have gone on to obtain an L.L.M. in law, or even an S.J.D. (Scientum Juris Doctor) but these are not considered universal requirements. NationMaster.com, *supra* n. 169.

or subject that they teach. A second grade teacher, for example, needs more than an elementary school education to be qualified to teach. Likewise, a high school teacher must have done more than graduate from high school.¹⁷⁷ These teachers are usually required to have specific education in the field of teaching; they have been taught *how to teach*. Even undergraduate university professors hold terminal degrees in their particular specialty, such as history or mathematics, and generally have either formal teaching education or a mentored teaching experience, such as being a teaching assistant while a graduate student.¹⁷⁸

Second, while the realms of K–12 education and higher education do to some extent occupy the same world, it has been said that “there are very real differences in the way the teaching and learning are organized and experienced” for the respective students.¹⁷⁹ Thus, the application of a single ethics code to both educational realms may be misplaced.

However, the distinction between “teachers” and “professors” is not as great as some members of those fields may think. K–12 education and higher education are directly connected, particularly in terms of responsibilities to students.¹⁸⁰ They both serve the same students, just at different times in the students’ lives.¹⁸¹ In some programs, K–16 collaborations are succeeding, blurring the lines of distinction between the two realms.¹⁸² If the lines between K–12 education and higher education are being blurred in the teaching and learning approach, it follows that the guidelines and ideas dictating the behavior of teachers also should be considered together. In many situations, the ethics of “teachers” and “professors” are in accord; in others, they deviate sharply because of the differing needs of the students.

Even having been trained specifically in teaching does not guarantee knowledge in the field of ethics, or, for that matter, any specific

177. U.S. Dept. of Lab. Bureau of Lab. Statistics, *Occupational Outlook Handbook, Teachers—Preschool, Kindergarten, Elementary, Middle, and Secondary*, <http://stats.bls.gov/oco/ocos069.htm>; select Training, Other Qualifications, and Advancement (accessed Mar. 15, 2006).

178. Chris M. Golde & Timothy M. Dore, *The Survey of Doctoral Education and Career Preparation, The Importance of Disciplinary Contexts*, in *Path to the Professoriate: Strategies for Enriching the Preparation of Future Faculty* 23, 25 (Donald H. Wulff, Ann E. Austin & Assocs. eds., Jossey Bass 2004).

179. Sandra Feldman, “Only Connect”: *Professors and Teachers with a Common Mission*, 85 *Academe* 22, 22 (Jan./Feb. 1999) (available at http://www.aaup.org/publications/Academe/1999/99jf/fel_jf99.htm).

180. *Id.*

181. *Id.*

182. *E.g. id.* (In New York, the College Preparatory Initiative is coordinating a higher standard of achievement with admission to City University of New York; other programs are also being launched.).

preparation for the life of a teacher.¹⁸³ Some critics of pedagogical education believe that teachers could learn more from being with and observing good teachers rather than through more formal forms of education.¹⁸⁴ However, good teaching is more than just good intentions combined with the distribution of information, and so training is critical.¹⁸⁵ This training should include ethical considerations in teaching. This section details several aspects of student/teacher interaction that should be considered in giving ethical training to law professors.

A. *The Classroom*

1. *The Socratic Method*

The recent backlash against the Socratic Method has been considerable, and most of the criticism has been centered on the difficulty it causes with students' willingness to participate in the classroom.¹⁸⁶ The focus of the outrage is the concept that the professor deliberately obscures information, known as "hiding the ball."¹⁸⁷ The question is: is the Socratic Method ethical? Many scholars have considered its efficacy as an instructive tool; however, its effectiveness cannot be evaluated by grade point averages alone. Rather, the Socratic Method should be considered in terms of the ethical responsibility of teachers in helping students learn.

A critical role of teachers is that of a guide to direct the learning process.¹⁸⁸ Teachers must not only decide which material is to be studied, but must present it in the best order and know how individual students can proceed most productively.¹⁸⁹ One author noted that good use of the Socratic Method is about the students, and helping them learn to work through problems, while "[b]ad Socratic Method is about how smart the

183. See Susan Ohanian, *On Stir-and-Serve Recipes for Teaching*, in *Educational Foundations: An Anthology of Critical Readings* 113 (Alan S. Canestrari & Bruce A. Marlowe eds., SAGE Publications 2004).

184. *Id.* at 115.

185. See *id.* at 116.

186. Barton, *supra* n. 113, at 590.

187. *Id.* at 590 (citing Nira Hativa, *Teaching Large Law Classes Well: An Outsider's View*, 50 J. Leg. Educ. 95, 99 (2000)); See also Andrew J. McClurg, *The Ten Commandments of [The First Year Course of Your Choice]*, in *Techniques for Teaching Law* 29, 31 (Gerald F. Hess & Steven Friedland eds., Carolina Academic Press 1999); Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. Rev. 1681 (1996). Not all law school professors advocate "hiding the ball." See Sophie Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 Mich. St. L. Rev. 1, 5 (Spring 2004) (suggesting improving grading by "being more explicit" about what goes into grading)

188. Cahn, *supra* n. 7, at 9.

189. *Id.*

professor is.”¹⁹⁰ When a professor uses the Socratic Method to ask a student a question that they cannot answer and then proceeds to impress students with their own superior knowledge, the professor does little more than lose the trust of the students.¹⁹¹

One ethical problem with the Socratic Method is the potential for embarrassment. One main source of this is the participation of students in class, a necessary element of teaching via the Socratic Method. One hypothetical case, though directed at the undergraduate level, resounds to anyone who has been in the law school setting. Here, a particular Professor is noted for praising students whose questions and comments he viewed as intelligent, but “blasting” students whose remarks are “obtuse or off-target,” including “telling a young man that he came to class without having packed his brain, and asking a woman if her IQ exceeds room temperature.”¹⁹² Humiliating students is ethically indefensible.¹⁹³ Fear of answering questions incorrectly and then being humiliated in front of one’s peers is fairly commonplace in law school.¹⁹⁴ “Humiliation” has been defined as involving shame or degradation.¹⁹⁵ It is unethical for educators to intentionally embarrass or disparage students in class, but it is a common by-product of the Socratic Method.¹⁹⁶

A second potential problem with the Socratic Method arises when considering the NEA rule that educators should not “deliberately suppress or distort subject matter relevant to the student’s progress.”¹⁹⁷ Is that not the same as hiding the ball? The Socratic Method, by its nature of asking questions and not giving direct answers, both suppresses and distorts subject matter. If so, is it unethical to teach that way? Teachers, not students, are responsible for the content of the classroom and for imparting knowledge.¹⁹⁸ There are some who may argue that the Socratic Method does not impart knowledge, but rather draws out knowledge that students already have. In fact, teachers must be authorities on their

190. Barton, *supra* n. 113, at 591.

191. *Id.* at 585, 592.

192. Keith-Spiegel et al., *supra* n. 22, at 6.

193. *Id.*

194. Steven Emmanuel, *Some Thoughts About the First Year of Law School*, http://www.pinoylaw.com/library/some_thoughts.htm (accessed Jan. 11, 2006).

195. Lexico Publ. Group, LLC, *Dictionary.com*, <http://dictionary.reference.com/browse/humiliation> (accessed Nov. 18, 2006).

196. See Iverson, *supra* n. 129; NEA, *Code*, *supra* n. 132 (“The educator [s]hall not intentionally expose the student to embarrassment or disparagement.”).

197. NEA, *Code*, *supra* n. 132.

198. Cahn, *supra* n. 7, at 9.

subjects—the true experts in the classroom.¹⁹⁹ However, where does the Socratic Method cross the line from useful tool to too obnoxious authoritarianism?²⁰⁰ Showing off superiority may do more than just create a negative classroom atmosphere; it may even be unethical. Teachers, by their job descriptions, should know more than the students on a topic, therefore justifying their authoritative position in the classroom.²⁰¹ Does this mean they can know more and not share more? Does it mean that they can share knowledge by pulling it from the students through questioning, or must they actually demonstrate that expertise through a more direct method?

A further ethical problem with the Socratic Method is its overuse without regard for the various learning styles in a diverse classroom.²⁰² Great teaching must “[place] the learner’s needs and interests first.”²⁰³ The AAUP Statement of Ethics charges professors to “seek above all to be effective teachers.”²⁰⁴ If effective teachers are those that consider learning styles and the different ways to reach students and law professors are *only* teaching with the Socratic Method, one conclusion that could be drawn is that law professors are not meeting their ethical responsibilities by using this teaching method.

On the other hand, the idea of teaching through questions has pedagogical stamina outside of the tradition of law teaching when handled properly. According to the Florida Performance Measurement System, “if a teacher acknowledges and amplifies student responses, uses their ideas, but organizes the lesson around the teacher’s questions, and maintains academic focus, then learning is increased.”²⁰⁵ In addition, one suggested technique for implementing great teaching is to avoid telling students any answers for a period of time, thus shifting the burden onto them.²⁰⁶ This technique is considered worth the effort because it enhances intellectual activity for students. These techniques would

199. *Id.* at 10.

200. *Id.*

201. *Id.*

202. See Barton, *supra* n. 113, at 595 (“[S]tudents learn in different ways, and different teaching styles are necessary to keep both the professor and the students fresh.”).

203. Robert DiGiulio, *Psst...It Ain't About the Tests: It's Still About Great Teaching*, in *Educational Foundations: An Anthology of Critical Readings* 120, 121 (Alan S. Canestrari & Bruce A. Marlowe eds., SAGE Publications 2004).

204. AAUP, *Statement*, *supra* n. 69, at § 4.

205. Panhandle Areas Educ. Consortium, *Domains: Florida Performance Measurement System: Knowledge Base of the Florida Performance Measurement System* 107 (3d ed. 2002) [hereinafter PAEC].

206. Neil Postman & Charles Weingartner, *So What Do You Do Now?* in *Educational Foundations: An Anthology of Critical Readings* 126–27 (Alan S. Canestrari & Bruce A. Marlowe eds., SAGE Publications 2004).

support the Socratic Method as an effective and ethical teaching tool when used properly.

One interesting analogous situation to a law school Socratic Method class, presented in a recent text about ethical teaching, is the case in which questions are unwelcome in the classroom. The hypothetical considers an undergraduate professor who seldom provides opportunities for students to ask questions or make comments during class time, insisting that class periods are needed to present all lecture material.²⁰⁷ The professor has regular office hours during which he is available to answer questions.²⁰⁸ The ethical discussion asserts that if the class presentations are “clear and well-crafted,” then the policy of no questions during class is not blatantly unethical.²⁰⁹ It may not be pedagogically sound, as students generally need time within the context of subject material to clarify and confirm information, but it would not constitute unethical conduct.²¹⁰ As in this hypothetical situation, a professor using the Socratic Method might not allow class time for questions nor give the students time to clarify or confirm their new knowledge. If the situations are viewed as parallel, then this Socratic-driven practice would be ethical, if not always effective, as long as the professor was in fact available outside of class to answer questions.

Specific to the ABA’s charge to legal educators, the Socratic Method may hinder proper professional training rather than enhance it. The Preamble of the ABA Standards for Law School Approval dictates that a basic goal is “providing a sound program of legal education.”²¹¹ It has been argued that a sound program includes the teaching of practice skills.²¹² Since the “case method”—the reading of cases usually brought to the classroom through the Socratic Method—focuses on general principles of law, the emphasis in the teaching environment falls on the theoretical rather than the practical aspects of law.²¹³ In addition, a “successful” Socratic method, which keeps a class interested and engaged, consists of quick repartee from the professor rather than a careful, reasoned approach from the podium.²¹⁴ Such a demonstration may be

207. Keith-Spiegel et al., *supra* n. 22, at 5.

208. *Id.*

209. *Id.*

210. *Id.*

211. ABA, *Standards*, *supra* n. 8, at viii.

212. Am. B. Assn., *An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* pt. IV.C.6, 12. (July 1992) (available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>) (selected excerpts from the MacCrate Report).

213. Redlich, *supra* n. 95, at 623–25.

214. *Id.* at 624–25.

actually contrary to what is needed in a practitioner.²¹⁵ To the extent that the Socratic Method results in a demonstration of how *not* to act like a lawyer, it may actually be both unethical in the short term and potentially ineffective in the long run.²¹⁶

2. Management of the Classroom

Law professors are renowned not only for their demands in class, but for the structure of their classes as well. Some law professors have steep penalties for tardiness including considering the late student absent for the day.²¹⁷ One ethical hypothetical posited that if a student arrived even a few seconds past the start of class time, the Professor would not allow the student to enter the room, even if the tardiness was caused by parking troubles or another class running late.²¹⁸ This is not unusual in the law classroom. In addition, some law school professors attach additional penalties to lateness, such as counting lateness as an absence, which may then lower the student's final grade in the course.²¹⁹

Ethically, the idea of late students disrupting the class should be considered holistically and dealt with in ways that do not impact the learning of all students, including the student who arrives late. One suggestion for dealing ethically with latecomers is to minimize the disruption by reserving seats near the door for those who enter class during the lecture or using the first few minutes of class for informal commentary and announcements.²²⁰ The educational reason for this less stringent approach, rather than a "lock-out" approach, is the great potential for harm to students who do intend to attend class but are deprived of the opportunity.²²¹

Many law professors would argue that allowing such lateness is

215. *Id.*

216. *Id.*

217. See e.g. Florida Coastal School of Law, *Lawyering Process I, Preparation for Class*, "Class Attendance," http://www.fcsl.edu/academics/spring_2002/classes/boeckman_lp1/index.asp (accessed Nov. 18, 2006) ("[e]xcessive lateness to class may also be treated as an absence"); Stetson University College of Law, *International Business Transactions*, "Scheduled Class Times," <http://lawschool.westlaw.com/manage/homepage.asp?courseid=30173&OpenHomePage=Y> (Fall 2005) (requiring attendance at 80% of classes).

218. Keith-Spiegel et al., *supra* n. 22, at 6-7.

219. See e.g. Lisa Eichhorn, *Syllabus: Advanced Legal Writing 1-2*, <http://www.lwionline.org/publications/advanced.asp>; select Lisa Eichhorn (Spring 2003) (syllabus for Advanced Legal Writing course at the University of South Carolina); Stephen M. Everhart, *Evidence 5*, <http://www.law.stetson.edu/faculty/everhart/syllabus.pdf> (Fall 2002) (syllabus for Evidence course at the Stetson University College of Law).

220. Keith-Spiegel et al., *supra* n. 22, at 7.

221. *Id.*

setting a bad professional example for future attorneys, arguing that “a judge wouldn’t be kept waiting.” The reality of practice, however, may be different. While attorneys should certainly not be habitually late to court, most attorneys practicing in the same courts for a period of time have gradually established reputations. Should an attorney get caught in traffic once, not be able to locate parking, or be delayed due to weather, it is likely that the attorney would be able to notify the judge’s chamber of their few minutes detainment without being “locked out” of the proceeding. While lateness is not a habit to be cultivated in students or attorneys, the habitual latecomer could certainly be dealt with differently than a student who is almost never late. Students should be given the opportunity to establish their reputations before being treated to a blanket, radical, “all or nothing” decision by the authority figure. An ethical exception to this rule could be when the classroom event is structured in such a way that the class itself is hampered by late arrivers, such as interviewing simulations or group work.²²² In those scenarios, other students would be directly disrupted or held up by lateness. Finally, it is very important from an ethical standpoint that faculty members inform students of their policies and adhere to them.²²³ The AALS Statement specifically advises professors that class requirements, including attendance requirements, should be “clearly stated.”²²⁴

Another classroom management issue is that of an overactive class participant, one who “uses questions to mask a vehicle for lecturing her classmates.”²²⁵ Since the AALS emphasizes the responsibility of the professor in creating a productive learning environment,²²⁶ classroom management may also be a key ethical consideration. Professors should begin by setting rules in the syllabus on classroom expectations of participation, again in accordance with AALS guidelines on clarity to students.²²⁷ Students become frustrated with an instructor who cannot control an unruly or over talkative student, and such frustration, because it is contrary to effective teaching, must be avoided.²²⁸ While tact and respect of the offending student is required under ethical guidelines for dealing with students, hints to stop the behavior simply may not work, and a private conversation may be required.²²⁹ While teachers are

222. *Id.*

223. *Id.*

224. AALS, *Statement of Good Practices*, *supra* n. 2.

225. Keith-Spiegel et al., *supra* n. 22, at 15–16.

226. AALS, *Statement of Good Practices*, *supra* n. 2.

227. Keith-Spiegel et al., *supra* n. 22, at 16.

228. *Id.*

229. *Id.*

charged by the AALS with the nurturing and protecting of students' intellectual freedoms, such disruptions do not serve the overall educational good.²³⁰ In a private discussion with a time-monopolizing student, the professor should explain that long comments disrupt coverage of the material and inhibit the ability of other students to speak.²³¹ Sharing with the student the professor's own ethical responsibility of providing a sound legal education to all students may assist in this difficult conversation. Of course, the professor also must be careful not to discriminate against the student on the basis of "race, color, religion, national origin, sex, sexual orientation, disability or handicap, age, or political beliefs."²³² The professor might, however, ask the student to be more selective in making comments.²³³

Another scenario often seen in the law school setting: a professor, who, frustrated with students' lack of preparation, becomes irate, yells at the students that they should not waste his time, and disappears from the classroom for the remainder of the class period.²³⁴ If effective teaching is the goal, professors must understand that students react favorably with positive verbal and non-verbal communication, which potentially increases their achievement.²³⁵ In other words, such behavior does not further effective teaching and thus may be unethical. Considered by itself, a professor has a basic obligation to remain civil, and storming out, with its side effects, is inappropriate.²³⁶

A last classroom administration problem may occur where teachers influence student behavior in ways that they may not have considered. For example, the ways that teachers handle classroom situations, such as changing from one activity to another, or handling concurrent events in the classroom, may affect the conduct of students.²³⁷ For example, a teacher's awareness of what students are doing in class might be called "teacher with-it-ness."²³⁸ A teacher should stop disruptive behavior in the classroom by identifying the source of the unruliness, not a later student in the chain of events, and offering appropriate ramifications and alternative behaviors for that offending student.²³⁹

230. AALS, *Statement of Good Practices*, *supra* n. 2.

231. Keith-Spiegel et al., *supra* n. 22, at 16.

232. AALS, *Statement of Good Practices*, *supra* n. 2.

233. Keith-Spiegel et al., *supra* n. 22, at 16.

234. *Id.* at 43.

235. PAEC, *supra* n. 205, at 191.

236. Keith-Spiegel et al., *supra* n. 22, at 43.

237. PAEC, *supra* n. 205, at 32.

238. *Id.* at 36.

239. *Id.* at 37.

One relatively new type of classroom distraction in the law school setting has developed as a result of modern technology. Many classrooms now either permit or require laptop computers and maintain wireless networks.²⁴⁰ As long as there have been crossword puzzles, there has always been at least one student in a classroom doing something other than paying attention in class. Laptop computers raise the stakes of classroom distractedness as students do work for other classes, check email, browse the web, and even distract other students through the use of instant messages (IM). Students instant message each other either about unrelated events or about the class discussion, even “feeding” a student who is “on-call” but struggling for an answer. How a law professor deals with these disruptions carries ethical implications. If students are sending and receiving instant messages in class, whom should the professor target as responsible—the sender of the message, or the receiver who properly should have had the IM program turned off (“but it comes on by itself when I turn on my computer, Professor”)? In situations where the wireless network may be shut down by request in a classroom, does the blame lie with the Professor?

There is no doubt that this new technology presents pedagogical challenges. However, any technology that distracts professors from effective teaching and causes classroom management problems is one that must be carefully considered by a law professor. Ignoring the proliferation of distractions is equivalent to not managing the classroom, and thus constitutes unethical behavior. Overreacting to the problem by including all students in a reprimand also is mismanagement of the classroom and thus unethical. One solution is to include a policy on laptop use in the syllabus, thus giving students notice of such policy, and then to strictly enforce it. For example, being “caught” using a laptop for any non-class related purpose might be considered akin to being unprepared, with corresponding consequences. The important issue here is not the policy, but rather the effective and ethical management of the student classroom experience.

3. Use of Teaching Assistants

One common experience in law school is the use of upper-class law students to assist with first-year class teaching. Unlike graduate students teaching undergraduates, this scenario places students who have not yet obtained a law degree in the position of working with students only a

240. See James L. Hoover, *A Vision of Law Schools of the Future*, 1 J.L. Sch. Computing 7, ¶ 4 (Jan. 1999), <http://cnt.kentlaw.edu/jlsc/hoover.html> (students have liberal access to the Internet in law school classrooms).

year or two behind them in the same field of study. Two commonplace settings where this occurs are in Legal Writing programs and Academic Support Programs.²⁴¹

First, upper-class students are used in some first-year legal writing programs to assist with the sometimes tedious and voluminous task of teaching basic skills to first year students. Upper class students are used in teaching or grading citation assignments, reviewing law or facts in connection with a memorandum, or assisting with teaching oral argument skills. Also, upper-class students often are used by professors in formal or informal academic support programs. In these programs, upper-class students who have done well in a first-year course are invited to teach a review session for that class on a weekly basis. The material in these review sessions could include giving practice problems, reviewing outlines, or going over work that students have received back from a Professor.

The practice of hiring TAs may have ethical implications as well. Firstly, the practice of having TAs involved in the grading process may violate the Family Educational Rights and Privacy Act (FERPA), the purpose of which is to protect the privacy of students' educational records.²⁴² Secondly, the NEA Standards for teachers specifically charge that an educator "[s]hall not assist a non-educator in the unauthorized practice of teaching."²⁴³ Second and third year students obviously are not educators. Are they therefore engaged in the "unauthorized" practice of teaching? The answer depends on who may properly give the authority and what is actually happening in the classroom sessions in which students are doing the teaching. With the tight reign that accreditation agencies generally keep on who is doing the teaching at schools, it seems that the practice of using upper-class, non-degreed students slips under the authorization wire in that the school may say it is okay, without actually getting authorization from accreditation agencies for such programs. In addition, schools and teachers may be authorizing these students to carry on one form of peer education, such as presenting

241. See e.g. University of Baltimore School of Law, *Academic Programs*, <http://law.ubalt.edu/academics/other/teachmoot.html> (accessed Mar. 17, 2006) ("teaching assistants play a vital role" in the first-year writing courses); University of Missouri-Kansas City, *Graduate & Professional, School of Law. Academic Support and Success*, <http://www.umkc.edu/umkc/catalog-grad/html/law/0700.html> (accessed Nov. 18, 2006) (Upperclassmen lead first-year students in academic support groups.).

242. *Family Educational Rights and Privacy Act of 1974*, 20 U.S.C. § 1232g (2005). The purpose of FERPA has been defined broadly as "protect[ing] the privacy of students and their parents by limiting access to student educational records maintained by an educational institution." *Bauer v. Kincaid*, 759 F. Supp. 575, 578 (W.D. Mo. 1991).

243. NEA, *Code*, *supra* n. 132.

hypotheticals, when in reality, the student teaching assistant is really sharing his or her outline of the course, tips for getting on the teacher's good side, or past exam questions that he or she has obtained. Such a scenario does not seem outside the scope of what is feasible in this scenario, but would clearly be outside of what the student is authorized to do. In such a situation, a professor would in fact be assisting a non-educator in unauthorized teaching.

In sum, a law professor should have some general ethical guidelines for the classroom. These guidelines can help ensure effective teaching and classroom management. Law professors are obligated to plan their classes and begin those classes on time.²⁴⁴ They should be present at every class session and not run late or extend class without notice.²⁴⁵ Law professors should learn the names of their students and be available to them outside of class for further instruction and clarification.²⁴⁶ These basic steps can help ensure that basic ethical obligations in regard to teaching are met.

B. Examination and Review of Student Performance

1. Final exams and Feedback

One exam at the end of the semester, upon which an entire semester grade rests, is the established norm for assigning grades in many traditional law school courses.²⁴⁷ However acceptable that procedure may be under the norms of the profession, it is not ideal for learning.²⁴⁸ The question is whether it is ethical. The AALS Statements of Good Practices mandate that evaluating student work is "one of the fundamental obligations of law professors."²⁴⁹ Exams are key tools for determining whether students are making progress in the learning process.²⁵⁰ The purpose of an exam "is to assess the scope and depth of a student's knowledge" and to determine whether or not they are in

244. Cahn, *supra* n. 7, at 19.

245. *Id.*

246. *Id.*

247. Susan R. Schick, *Creating Lawyers: The Law School Experience*, 13 *The Compleat Lawyer* 46, 47 (1996); Donald H. Stone, *What Law Schools are Doing to Accommodate Students with Learning Disabilities*, 42 *S. Tex. L. Rev.* 19, 38 (2000).

248. Keith-Spiegel et al., *supra* n. 22, at 78. The Florida Performance Measurement System notes that "if academic feedback is specific, evaluative, and/or provides corrective information, then achievement will increase." PAEC, *supra* n. 205 at 112. This seems to apply to the grading feedback areas.

249. AALS, *Statement of Good Practices*, *supra* n. 2.

250. Cahn, *supra* n. 7, at 21-22.

complete control of the material.²⁵¹

The question is whether the one-exam approach so common in law schools meets the ethical charge of adequately evaluating student work. A single exam per semester is not the norm in K–12, undergraduate studies or even in graduate programs for other disciplines, nor are lawyers generally assessed on one case, one trial, or one brief. Can one three- or four-hour exam which attempts to test a whole semester of work truly be “conscientiously designed,” as is suggested by the AALS?²⁵² Does the practice of giving only one exam per course “reflect each student’s true merit,” as charged by the AAUP?²⁵³

On the other hand, pressure is inherent in situations in which individuals must prove competency, so having a high pressure exam situation may be justified.²⁵⁴ Teachers must determine when students progress and how to measure it.²⁵⁵ Lawyers must pass one final hurdle after law school—the Bar examination—to be licensed to practice law in most states. Since the Bar is a timed exam given at the end of three years of studies, a clear argument can be made that law school examinations are practice for this ultimate test, and therefore, under ABA guidelines, meet the goal of providing a sound program of legal education.²⁵⁶

In any kind of examination situation, professors should take time to explain assignments to the class rather than letting written instructions suffice, although any written instructions must also be clear and direct.²⁵⁷ The examination material should always be “representative of the course material.”²⁵⁸ The exam should present sharply focused, challenging questions, but not be so long that finishing it overtakes the substance of the material being tested.²⁵⁹ It should require students to respond with detailed answers that allow them to demonstrate their knowledge so they can be evaluated with merit.²⁶⁰

251. *Id.* at 22.

252. AALS, *Statement of Good Practices*, *supra* n. 2, at ¶ 9.

253. AAUP, *Statement*, *supra* n. 69, at § 2; *see also* McKay *supra* n. 1, at 53.

254. Cahn, *supra* n. 7, at 22.

255. *Id.* at 9.

256. ABA, *Standards*, *supra* n. 8, at 4 (listing as one of the “[b]asic [r]equirements for [a]pproval” of a law school that the school “shall demonstrate that its program is consistent with sound legal education principles”).

257. Cahn, *supra* n. 7, at 24.

258. *Id.* at 23.

259. *Id.* at 23–24.

260. *Id.* at 23; *see also* AAUP, *Statement*, *supra* n. 69, at § 2.

2. Grading and Feedback

There are several ethical issues that may arise in the area of grading and feedback. The first is the impact that distribution of and feedback on assignments have on students. The second issue involves reviewing exams with students and whether that review should include the opportunity for grade change. The final issue is the entire paradigm of grading scales and curves frequently used in law schools.

While many courses, as discussed above, have only one course-ending exam with final grades being distributed after the course has been completed, there are other situations in the law school environment in which there is not one final exam for one class grade. Most legal writing courses are structured with multiple assignments throughout the semester, and some non-skills courses incorporate writing assignments or mid-term examinations.

The first issue to consider is the distribution of assignments and instruction regarding exams. In classes that involve multiple assignments throughout the semester, professors should inform students about both the requirements and relative weight of each assignment. For exams, the professor should instruct students on the relevant weight of each question in the grading of an exam.²⁶¹ The AALS Statement advises professors to make “objectives and requirements of their courses” clear to students.²⁶² This clarity could include informing students of the professor’s grading schema.

Law professors should also consider their ethical responsibility to the students when handling the returning of assignments. If assignments are graded and returned before the end of the course, then assignments should be returned both within a reasonable time and with detailed comments.²⁶³ Professors should be sensitive to the distress students may experience when grades are not returned in a timely fashion.²⁶⁴

Professors are charged with evaluating student work impartially,²⁶⁵ leading many schools to require anonymous grading.²⁶⁶ This is a good start. Without safeguards to promote impartial grading, professors can veer into a dangerous ethical zone where grades are based on something other than performance, such as a “student’s [gender], race, religion, nationality, physical appearance, dress, personality, attitudes, . . . [or]

261. Cahn, *supra* n. 7, at 25.

262. AALS, *Statement of Good Practices*, *supra* n. 2, at [¶ 7].

263. Cahn, *supra* n. 7, at 18–21.

264. Keith-Spiegel et al., *supra* n. 22, at 97.

265. *Id.*

266. *Id.*

previous academic record.”²⁶⁷

Anonymous grading, however, does not necessarily ensure impartial grading. Many law professors have heard their colleagues talk of classes they simply dislike—whether it was the collective behavior of students, the bad behavior of just a few, or a perception that a class was merely not “up to snuff” compared to other classes. In such instances, the professor can easily take the attitude and feeling from the whole semester into account in the grading of the assignment. It could be easy for a professor who disliked a class to prejudice that no one in that class could have possibly earned an “A.” The anonymous nature of the exams does nothing to dispel this possible prejudice. Such behavior is clearly unethical as it does not provide for an honest, impartial evaluation of students’ work as required by the ethical standards of the AALS and AAUP.²⁶⁸

A second ethical issue is the concept of grade review. The term “grade review” has two distinct meanings. On the one hand, it can mean that students get explanations of their grades from the professor. On the other hand, it is the idea that a student may review an exam and seek a grade change. Students are very concerned with “due process” in grading. Grades have an enormous influence on a student’s future; they may pave the way to opportunities, encourage students on their learning paths, or even feel like a punishment.²⁶⁹ Under the usual approach of the “all or nothing” grade, few law professors are willing to admit to an error in grading and change a grade.²⁷⁰ In fact, many faculty codes prohibit grade changes.²⁷¹

Many professors teach large classes of a hundred or more students. All law professors are aware that it is tiring to grade so many exams. Ideally, professors structure their grading so that each exam is given the same attention as the first exam. But are professors so confident in their grading techniques that they think they cannot make errors? With this question in mind, two perspectives on grade review must be considered.

Grade review in order to inform students as to their strengths and weaknesses is universally considered to be positive. Informative feedback to students regarding tests can increase motivation and learning and

267. Cahn, *supra* n. 7, at 29.

268. AALS, *Statement of Good Practices*, *supra* n. 2, at [¶ 12]; AAUP, *Statement*, *supra* n. 69, at § 2.

269. Royse, *supra* n. 146, at 312.

270. Freedman, *supra* n. 6, at 275, 282.

271. It has been pointed out in various sources that a law faculty usually makes its own codes, so the very professors who claim that their hands are tied because of this rule may have the power to change it.

allow a teacher to be able to adjust teaching to the needs of the classroom.²⁷² Since “evaluation of student work is one of the fundamental obligations of law professors,” according to the AALS, it seems that professors have an ethical responsibility to go over not only the grade, but also the substance of exams with students.²⁷³

Additionally, grades can function as an evaluation of a professor’s instruction. Grade review may help a professor determine if the performance of students is related to the effectiveness of his or her instruction or the effectiveness of the curriculum.²⁷⁴ In law school, the effectiveness of course material can hold particular importance as students set out to prepare for the Bar exam. By reviewing an exam with a student and receiving the student’s input on an exam question, professors can gain valuable feedback. Professors can analyze the weaknesses spotted during the review process to see if other changes should be made. Such changes could alter the way students are taught in a course, or conversely, could make individual students aware of their own weakness in a subject matter or exam-taking strategy that those students should address before taking the Bar exam.

While the subject of reviewing grades for a grade change has been approached in scholarship regarding whether it provides due process to students and whether empirically grade review works, the subject has an ethical component as well.²⁷⁵ If no examinations are reviewed for grade assessment, the ethical ideal of impartiality is met. After all, only a student request would trigger such a review, and if not all students are available to request a review (i.e. summer employment; graduation) then impartiality is compromised when some students receive a review for a grade change and some do not.

In addition, one professor suggests that “we law professors have a need to be invulnerable to criticism,”²⁷⁶ which may be true—but is it ethical to maintain the idea that law professors are *always* right? The ABA Standard 404 mandates that full-time faculty “creat[e] an atmosphere in which students . . . may voice opinions and exchange ideas.”²⁷⁷ Should this idea extend to grades? Generally, the classroom, and not the grade book, seems to be the target audience for this standard.

272. PAEC, *supra* n. 205, at 217.

273. AALS, *Statement of Good Practices*, *supra* n. 2, at [¶ 9].

274. See Peter F. Oliva, *Developing the Curriculum* 381 (6th ed., Pearson Education 2005) (notes on accessing instruction).

275. Freedman, *supra* n. 6, at 282–85.

276. *Id.* at 286 (quoting Alan A. Stone, *Legal Education on the Couch*, 85 Harv. L. Rev. 392, 404 (1971)).

277. ABA, *Standards*, *supra* n. 8, at 32.

The other responsibilities are given in the context of the classroom, such as teaching and preparing. However, no express statement says that Standard 404 should not apply to grading. If the ethical standard is that students are to be allowed to voice opinions, then from an ethical perspective should they be allowed to do so in connection with their evaluations?

A third concern in grading is that if the evaluation of student work is fundamental, as it is in the view of the AALS, then the entire law school grading system fails the ethical standard.²⁷⁸ The purpose of a grade is “to represent an expert’s judgment of the quality of a student’s work.”²⁷⁹ Some would say that grading on the curve is a misuse of the grading system because it takes into account uncontrollable factors such as the performance of other students.²⁸⁰ Many law schools have mandatory curves, grade point distributions, or grade means for classes, particularly in the first year of law school. The rationale for these policies is to “even out” grades among sections, so that no one section produces a greater proportion of top percentile students, thus giving them greater access to law reviews, moot court and job opportunities. However, there are potential ethical concerns with the mandatory curve system in that students are not evaluated solely on the quality of their individual work, but rather on others’ work as well. Unregulated grading may be more ethically responsible, as it allows teachers to give feedback to individuals rather than forcing them to compare students.

Another ethical concern with grades arises where a professor is unwilling to award high grades, taking “a pride in rigor.”²⁸¹ An “A” should stand for the notion that the student has done excellent work from the perspective of reasonable expectations. Law school students are frequently told that they need to think, act, and perform like lawyers. Thus, an honest evaluation of a student’s work takes place, and a teacher may not meet his or her ethical duty to the student. In sum, the reality of grading in the law school environment involves many questionable ethical scenarios when viewed in light of various ethical standards.

278. Not all law professors are ignoring the function of feedback. See Sophie Sparrow, Presentation, *Teaching Metacognition: Coaching Students to Learn about Their Learning*, (Shepard Broad Law Center, Nova Southeastern University, Ft. Lauderdale, Fla. Apr. 11, 2005) (copy on file with Author) (advocating the use of metacognition, or learning about how one learns in debriefing exercises after assignments and exams).

279. Cahn, *supra* n. 7, at 26.

280. *Id.* at 29–30.

281. *Id.* at 30.

C. *Passing/Failing Students*

One further area of concern related to grading, but on a more general scale, is that of passing or failing students. In deciding whether to pass or fail students, several factors should be considered. In addition to the actual work turned in, the entire course requirements must be considered, as well as the consequences of failing a student.

First, the course requirements must be examined. The concern about tailoring assignments to students with special needs or tailoring the passing requirement to a certain student is not new. As an ethical issue, it has been debated and argued forcefully on both sides.²⁸² However, the debate truly becomes an ethical crisis upon consideration of whether to ultimately pass a student in a course. For example, some students have other significant responsibilities, particularly in schools which carry part-time or evening programs, in which students likely hold other full-time jobs. From an ethical perspective, it is difficult to determine whether course requirements, including reading, homework and in-class participation, should be altered for these students, or whether a professor should excuse some course requirement when one of these students experiences a crisis in connection with their other responsibilities. On the one hand, students probably are told clearly when they enter a part-time program that this program should be their priority and that outside interference will not be excused. However, due to the nature of the program, it is likely that in addition to holding full time “day” jobs, these students also may be parents, therefore effectively juggling three jobs. When a student had a job review at work or had to tend a sick child, should that student be excused for not being prepared in class?

The quick answer is “no.” Students who undertake law school should have adequate back-up systems to ensure that they do not fall behind at work or in school. However, ethically, it may be more appropriate to take an individual’s personal situation into account. One argument against such leniency is that students would be treated unequally in the same class. However, if a professor makes it a policy to give each student in the class “a break” when needed, that argument fails. A second argument is that the customization of an evening class to cater to students’ other needs makes the evening class entirely different from the same course

282. See Sharon C. Kimble & Jeff Dorman, Jr., *The Dialogue Question: Should Professors Customize Assignments for Students Who Work?* *Advoc.* Online 12 (June 2003), <http://www2.nea.org/he/advo03/advo0603/dialog.html> (The “yes” perspective rests on the idea that customized education is an integral part of education because of the diversity of students. The “no” perspective argues that it is unethical and unfair to give different assignments to different students in the same course.).

taught earlier in the day to full-time students. This argument fails as well. Different sections of classes are already different from each other. One class may meet three times a week; one may meet twice a week. One professor may use one book, with a hornbook, while another has chosen another text and no supplemental material. It is impossible to make each section exactly the same, and so this argument against customization does not succeed. A third argument is that compassion shown by a professor sets an inappropriate standard of expectation for students in their future practice of law. This argument also should fail. These part-time students are presumably enrolled in the law program because they want to make a permanent shift in their employment. At some point, these students will be able to consolidate their professional lives rather than being pulled in so many directions, and thus the likelihood that such an emergency will frequently arise in their post law school lives is not so pressing. Since professors are ethically charged with setting a professional standard and considering that they may profoundly influence student's attitudes regarding lawyering, as noted in the AALS Statement,²⁸³ is compassion such a terrible standard to set?

The overall dilemma of passing a student plays out differently on different levels of teaching. In the lower school levels, decisions to retain students in a grade by not passing them have great implications, and teachers have differing views on the topic.²⁸⁴ Some teachers believe all students should pass, regardless of grades, because keeping a child back a grade can be "detrimental to a student's social and mental well-being."²⁸⁵ Other teachers believe that if students did not perform to the required standards of a grade level, they should not advance.²⁸⁶ Still other teachers believe that passing a student who has not performed at the proper level does the student a disservice.²⁸⁷ Other implications arise on the elementary or middle school level though, where some teachers feel that by advancing an unqualified student to the next grade they are "passing [their] problem on to the next teacher."²⁸⁸ Other considerations include the relationship between being held back and future academic performance and age appropriateness in grade levels.²⁸⁹

Although law school professors must make similar ethical judgments

283. AALS, *Statement of Good Practices*, *supra* n. 2, at [¶ 5].

284. David M. Moss et al., *Portrait of a Profession: Teaching and Teachers in the 21st Century* 96 (Wendy J. Glenn & Richard L. Schwab eds., Praeger 2005).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

in deciding whether to pass a student, there are some differences between making this decision regarding students in a graduate program and similar decisions in K–12 education. The first is that, unlike in pre-collegiate decisions, the decision to give a law student a passing grade likely will not affect the advancement of the student from one year to another. While the failure of a required course may alter the student's schedule for the next year, as they will have to retake the class, that grade alone will not necessarily change the student's projected graduation date. Second, the decision to fail a student for a single course does not generally affect that student's social or emotional development as it might in the primary grades. Students of many ages complete law school, so even where a graduation date is postponed by a semester or two for failure of some courses, there is no developmental implication.

However, the decision to pass a student for a course has serious implications for the student's future and for the teacher's own ethics. If the course is one whose subject matter appears on the Bar exam, the decision to give a student "a break" with a D instead of an F actually can do a student a disservice in the long run. For example, a student who fails Torts will be required to take it again to graduate and hopefully will better grasp the material, thus giving the student the sound legal education that the ABA demands of law schools. Conversely, the student who is given a "mercy" D in the class will not be required to retake the course and may well head into the Bar exam with inadequate knowledge.²⁹⁰

A student who fails a high-credit course, such as one of the first year required courses, may be in danger of being academically dismissed by a law school under its academic code. A typical academic code generally requires that students who do not obtain higher than a certain grade point average will be expelled. While dismissal seems a harsh penalty, law professors have the ethical responsibility to give appropriate grades so that those who seek to enter the profession by qualifying to sit for a Bar exam are, in fact, qualified. Under the NEA standards, educators are obligated to "not assist any entry into the profession of a person known to be unqualified in respect to . . . education."²⁹¹ While this standard is specifically applied to those entering the teaching field, it is easily analogous to law students entering the legal profession, and should be construed as an ethical responsibility applying to teachers of future lawyers.

290. This analysis presupposes that it is the job of a law professor to prepare students for the Bar examination, which is not universal belief among law faculty.

291. NEA, *Code*, *supra* n. 132, at § II.3.

In sum, professors should consider the ethical implications and consequences of passing students in a course when they may not have earned the grade, rather than just the practical implications of grade curves or class size. Grading decisions, as a fundamental responsibility of teachers, go to the very heart of effective teaching.

D. Student/Teacher Relationships

Educators should always be aware of the power they hold over students. Students are socialized to yield to the authority of teachers.²⁹² Students may not give a great deal of thought or consideration to ethical dilemmas that law professors may face, but they do pay attention to their behavior.²⁹³ The relationship between a professor and a student at the law school level may be more intense than at the undergraduate level because a graduate student is focused on training for a specific career.²⁹⁴ It has been posited that this intense focus on career-specific training creates a dependence on professors unlike any undergraduate student-professor relationship.²⁹⁵

Because a law professor is potentially the first representative of the legal profession that a law student may encounter, professors must recognize that their ethical behavior thus may heavily influence students' understanding of ethics in the entire profession.²⁹⁶ Along with learning the law, students observe their professors' ethical behaviors and may incorporate that behavior into own professional practice when they graduate.²⁹⁷ This is "imitation as the sincerest form of flattery" and presents a heavy burden for law teachers.

One author asks whether law professors owe an ethical duty of confidentiality to their students.²⁹⁸ Under the AALS, AAUP, and NEA Standards, and Dean McKay's proposal, keeping student confidences is paramount.²⁹⁹ Besides the seriousness of the modern teacher's counseling role, the law school scenario presents another compelling reason for confidentiality. If law teachers model professional behavior for future lawyers (whether they want to or not), although no teacher-student privilege is actually recognized, this model can help students

292. Royse, *supra* n. 146, at 312.

293. Ostrom, *supra* n. 5, at 539-40.

294. *Id.*

295. *Id.* at 539-40.

296. *Id.* at 540.

297. *Id.*

298. *Id.* at 542.

299. AALS, *Statement of Good Practices*, *supra* n. 2, at [¶ 10]; AAUP, *Statement*, *supra* n. 69, at § 2; McKay, *supra* n. 1, at 62-63; NEA, *Code*, *supra* n. 132, at § I.

understand the attorney-client privilege. Students will observe this ethical behavior of their professors who thereby meet a standard proposed by Dean McKay: to “impart to . . . students an understanding of, and belief in, high standards of ethical responsibility.”³⁰⁰ Thus, the keeping of student confidences (except when otherwise required by law or regulation) is a key aspect of ethical behavior by teachers.

A second consideration is the intimate relationships that may form between students and professors and the effect those relationships may have on the student body.³⁰¹ The AALS Standards directly address this issue, but the NEA standard is more vague, stating only that professors should “not use professional relationships with students for private advantage.”³⁰² However, not all teachers agree with the prohibitions in place. In a recent symposium on the subject of law school ethics, one panelist presented the view that intimate relationships between law students and professors were acceptable if there was no “implication of sexual harassment” by the professor.³⁰³ Justification for this position includes the maturity of law students and the “limited social options” of professors.³⁰⁴ However, not all participants in the symposium agreed with this proposition, recognizing the more traditional view that a professor carrying on an intimate relationship with a student is not able to maintain objectivity and impartiality.³⁰⁵

There are many inherent ethical pitfalls when there is a group of professionals who interact primarily with young adults who have limited experience and accomplishments.³⁰⁶ Teachers should be friendly without becoming friends; professors should care about the progress of their students, but remain dispassionate, evaluating students fairly and without having a personal interest in the outcome.³⁰⁷ It is an important ethical standard that no student should receive preferential treatment for any reason,³⁰⁸ as would likely occur in many intimate student-professor relationships.

300. McKay, *supra* n. 1, at 62–63.

301. Ostrom, *supra* n. 5, at 542.

302. AALS, *Statement of Good Practices*, *supra* n. 2, at [¶ 13]; NEA, *Code*, *supra* n. 132, at § 1.7.

303. Ostrom, *supra* n. 5, at 542.

304. *Id.*

305. *Id.*

306. Cahn, *supra* n. 7, at 33.

307. *Id.* at 36–37.

308. *Id.* at 37.

VI. CONCLUSIONS

A major guiding principle for educators' ethical considerations should be the demonstration of respect for all students.³⁰⁹ Despite the assertion in a recent tome that "education is useless," there are thousands of students currently enrolled in law school, and the interaction between students and their professors is of major import.³¹⁰ Thus, professors and educational institutions must give careful thought to the subject of ethics.

The first step that should be undertaken in law school institutions is the review, or creation, of an institutional code of ethics. Nearly all broad ethical standards, such as the AALS, AAUP, and NEA standards in some way refer to or urge deferral to a private institution's code. A law school should consider *all* sources of ethical guidance for creation or revision of its code, rather than just the traditional sources such as the AALS or the lawyer's Model Code of Professional Responsibility. In short, law schools should consider faculty members not just as *lawyers who are teaching*, but as *teachers of the law*. This shift in focus will help the institutions and faculty members who make the guidelines to put the emphasis on the proper role—that of professor—and enable the institution to see ethical duties broadly.

Next, faculty members and administration should give serious consideration to school policies for students, and to teaching, examining, and grading methods utilized in the law school, and evaluate them for ethical behavior under this broad code. This is not an easy task. It may mean revision or alteration of long-standing habits or ways of conducting business. However, the task is crucial if the institution and the members within it are to reach their ethical goals.

Finally, schools must consider periodic training and discussion of ethical responsibilities of law teachers. As new teachers join faculties, or as a school sharpens its focus on what constitutes ethical behavior for its teachers, faculty members should not be left in the dark to individually ponder these goals if, in fact, they are even aware of them. Ethical behavior by teachers is so critical to successful education that it must be given high priority by all educational institutions.

309. Royse, *supra* n. 146, at 311.

310. See Daniel Cottam, *Why Education Is Useless* (U. of Pa. Press 2003). Cottam says education is "useless" because it destroys common sense, leads people away from practicality, and distances us from real life. *Id.* at passim. While some educational experiences may do this, the professional nature of law school may be an exception to some of the concerns raised in this book.