

*As teachers, scholars, counselors, mentors and friends, law professors can profoundly influence students' attitudes concerning professional competence and responsibility.*

*Law professors have an obligation to treat students with civility and respect and to foster a stimulating and productive learning environment in which the pros and cons of debatable issues are fairly acknowledged.*

-American Association of Law Schools

# Ethical Responsibility in Teaching Consumer Protection

Gene A. Marsh

## I. Introduction

Law students today have considerable freedom in their course selection. Although the first year at most law schools is filled with required courses, only a few required courses are seen in the second year, and the third year is often occupied entirely by elective courses. Although most law students in the second and third year choose to take certain core courses (often driven by subjects likely to appear on the bar exam and suggestions from employers), law students have more choices than ever before. Some law schools market these choices to students, highlighting an interesting array of electives, often taught by adjunct professors (often practitioners) who provide a valuable service to law students. Law school electives range from fairly mechanical subjects (real estate transactions, law office practice, legislative drafting, etc.), to such cosmic offerings as space law, sports law and trendy seminars.

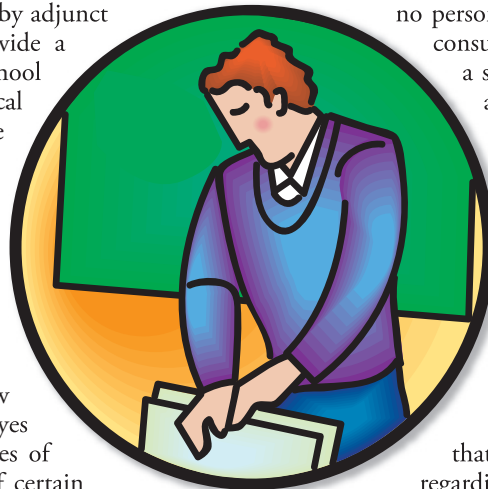
There is no question that some subjects excite law students, while others are greeted with a sigh. Although the professor at the front of the room may be titillated by a detailed inquiry into the workings of UCC §2-207, most law students take it with a giant yawn. "The eyes are the window to the soul," and the eyes of many law students during a dissection of certain

parts of the UCC or the Bankruptcy Code reflect a near-death experience.

Not so with consumer protection. Although most law students have absolutely no practical experience in many of the law school courses they take, every law student is a consumer. Every law student is a buyer of goods, a user of credit, a participant in payment systems. Many law students are tenants in a landlord-tenant arrangement. You don't have to go too far in the course on consumer protection before you'll come across a subject that invites broad participation in class discussion based on a personal experience. And even in cases where students may have

no personal experience, there are many subjects in a consumer protection class guaranteed to evoke a strong response and lively debate. Far from a fairly mechanical transactions course, consumer protection is an "advocacy" course with victims galore, fat-cat defendants (at least in the eyes of some students) and a lot of cases with what plaintiff lawyers call "heat." You don't have to be much of a teacher to whip students into a near frenzy or get a good discussion going when you've got a good case of egregious home improvement fraud, identity theft or auto sales involving lemons and "sleds."

At the same time, it is critical to realize that law students form many of their impressions regarding legal practice, the role of lawyers and



professionalism from their law school experience. A course on consumer protection provides a perfect venue to teach students that there are often two sides to every story, legitimate competing interests in the marketplace, and frequently good faith perspectives and assertions on both sides of a case. The purpose of this short piece is to discuss some of the ethical issues one encounters in teaching a subject where law, economics, politics and concepts such as good faith and unconscionability come together. It is also important to understand how law students who are looking at consumer protection for the first time in a formal way, tend to have fairly predictable positions as they first explore these subjects. It is also interesting to watch the shift in those positions as their understanding of the law increases, and their knowledge of competing interests expands. Throughout it all, the professor often has a significant impact on how the students view the consumer market, and the role of lawyers and regulators in that market.

In their special position as lawyers, teachers and scholars, law professors have a special responsibility to help the students understand the legitimate and sometimes competing interests of all the actors in that area of the law called “consumer protection.” It is good for those who teach in this area to regularly evaluate whether the presentation the students receive is balanced and reflects all the arguments the students will face as lawyers practicing in this area. A one-sided approach may be interesting and fill the room with screams and shouts, but it does little to prepare advocates for the realities of the marketplace.

## II. Check Your Politics At The Door

I have taught in the College of Commerce and the School of Law at Alabama since 1981, and I have always felt uncomfortable talking about MY POLITICS in the classroom. I have taught in mass lecture sections (250 undergraduates), down to honors programs seminars with 8 students, as well as large and small law school classes. I don't like the selling part of politics and I have lived in enough places over time, North and South, to know that labels don't mean much most of the time. I believe most politicians stand for themselves and their reelection first, and that they are for the most part like a ship without a rudder. If they are anchored, it's in whatever values are reflected in the most recent poll, but they'll be more than happy to morph and move over if the forces and winds (and bank accounts) change. I don't sport political badges or bumper stickers, and I don't make political contributions except in a rare case involving a friend in some local election. I really don't care to know your politics and resent it mightily when people try to foist theirs on me. Thus, over time, I have been able to stay on decent terms with students who become our state politicians, whether they are Democrat or Republican, liberal or conservative, plaintiff- or defendant-leaning or carry some other flag or label. I have strong beliefs, but I think professors – especially professors in publicly funded institutions – owe it to all concerned to be balanced in the way they approach issues and to make sure that people feel free to express their beliefs and hold on to them. I don't believe in “everything goes,” but I also don't believe I have the right to be the Pied Piper, enticing students to adopt my beliefs.

Some of my colleagues do not share that view, preaching their politics in the classroom, displaying names and causes all over the bumper and rear of the car, and openly latching themselves on to political campaigns and politicians. Academic freedom, tenure and in some cases, lots of time, provide both license and the opportunity to latch on to causes with far more regularity than, say, coalminers and backhoe operators. I enjoy watching the “game” of politics and the debates at the federal and state levels,

but I am especially aware of keeping the playing field level in the classrooms of public institutions. I have had students tell me over time that they were afraid to voice their opinion in another professor's class because they felt it would negatively impact their grade. Assuming the students are not being ninnies and are accurately reflecting a well-founded view of the class, I think it demonstrates my point that all professors should check their politics at the door. What a professor might view as “academic freedom” may be viewed by students as a bullying, ideological rant.

## III. Disclosure of “Conflicts” And Interests

Many professors who teach consumer protection are involved in outside litigation, lobbying efforts and in some cases, legislative drafting. I think it is important to disclose all of these activities, and anything closely related to them if they are linked to particular subjects that come up in a consumer protection class.

Students are generally thrilled to know their professors are actually involved in the “real world” of law, rather than studying law like a scholar in political science. Professors in medical school train doctors to actually administer medical treatment, not merely to dissect frogs and cadavers. My view of law school is the same. My focus is on the ACTUAL, the REAL and the PRACTICAL ELEMENTS of practice in this area of the law. I have no taste for lengthy, cosmic discussions on “unconscionability” and similar subjects. But along with a focus on real law, comes a requirement to let the students know where you have a personal, and certainly a financial interest. The standard for disclosure of involvement in matters should be hair-trigger...even the appearance of an interest should cause a disclosure to students. Although some might consider this to be an overly cautious approach, I think it is healthy and helps law students start to get sensitized to their need to disclose and screen for conflicts as lawyers and law firms. The need to be sensitive to conflicts is also mentioned in the *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* (See Appendix), which discusses responsibilities as scholars.

## IV. The Student View of the “Consumer Protection” Profession

Law students are always eager to talk about issues in the profession, and any professor worth her salt can find a way to raise these issues with students, no matter what the course content. In fact, most students rate classes highly if the presentation in the substance of the course (i.e., consumer protection) includes some interludes where the role and duties of the lawyers are discussed.

The good news is that no matter how much lawyers take a hit in the public eye, the great majority of law students hold to the notion of lawyering as a profession with responsibilities that stretch far beyond the bottom line. Students are genuinely repelled by lawyers whose focus appears to be on money and fees, with little mention of the client. A recent guest speaker in our law school caused a wave of criticism and caustic emails when he gave a presentation that focused on fees, awards, fancy cars as symbols of success, and television marketing. Conservative and liberal students alike were appalled, and they were not timid in making their views known. This lawyer cited as “the best advice

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that he ever received from a mentor,” the notion that a young lawyer right out of law school should leverage to the hilt to buy a glitzy car so folks could consider him a success, even if he hadn’t earned a dime of money (and certainly not a penny of respect).

By contrast, law students greatly appreciate and respect practicing lawyers as guest lecturers whose focus is obviously on service to the client (whether it be a business or an individual) and the ethical duties in the practice of law. If you listen closely, you may hear two very different messages from lawyers who work in litigation. Some lawyers speak only in terms of the client. Their focus is on justice for what has been done to the individual or business. However, another type of lawyer talks about money, fees, volume, finding “heat” in the case and putting the other party on the run. The first view is that of a true advocate and counselor. The second view is that of a lawyer who feeds the public image that leads to lawyer bashing.

In teaching consumer protection, I walk the students through these issues and remind them of the importance of pulling off the road from time to time to examine whether they have remained true to their core beliefs, which quite frankly are typically noble and laudatory. I tell the students that they should do this self assessment even while they are in law school.

I believe the level of professional “dissatisfaction” that gets so much attention in the legal profession is in large part caused by people who over time drift into a workday and a “way to make a living” that is not in tune with their core beliefs. I’ve watched a lot of law students graduate from the law school who are very satisfied and happy. But I also see quite a few who are terrifically unhappy, jaded and would welcome a major career shift if they could continue to make the mortgage payment. A course on consumer protection offers a good opportunity to challenge the students to think about which of the two views (admittedly oversimplified) will serve them best in the long run. One view is achieving the “image of success” by buying a fancy car, hoping the purchasing power will follow. The other is achieving a reputation by being a skilled lawyer, a wise counsel and an advocate whose word can be trusted, relying on the idea that financial stability and success will follow.

## V. Law Students Leanings on Major Issues in Consumer Protection

### A. Usury Laws

Most law students are surprised to discover that in many regards, the cost of credit has either been entirely deregulated or set at rates that are terrifically high—sometimes in a patchwork quilt of state laws that make little sense. When I walk students through the legally permissible rates for small loans, pawn shop transactions and payday loans or check cashers, they are usually stunned. I lay out the numbers without any editorial content. They still generally consider a credit card rate of 21 percent to be very high. When they hear of 300 percent APR for a pawn transaction and 400 percent or more for a payday loan, most of them are outraged. However, I also walk them through situation where they have paid equal or greater “rates” or mark-ups for purchases at a convenience store, or pay a late fee at Blockbuster. Those and similar examples tend to soften their view on whether fees are too high, but where it left up to them, we’d have usury laws across the board and they wouldn’t pass the century mark.

Law students, like most who read the news have



watched a general wave of deregulation of prices and deregulation of entry in many segments of the economy and in their lives, but they just can’t get comfortable with 300 percent interest rates. I think it’s one of those areas where you have to “do a little living” to have a greater appreciation (and sense of humor) on why people do what they do, in setting interest rates and borrowing money on those rates. I remind them that in my military barracks, many a person felt quite comfortable borrowing \$20 on Wednesday and paying back \$25 on Friday. But when we walk through the math and run the APR, it’s a learning experience for sure, but they see no evil in the military scenario.

### B. Yield Spread Premium Financing

Most law students are surprised to find that car dealers may make money off a spread in the interest rate. In their view, the car dealers should make money off the sale of the car and the lenders should make their money in the financing component of the transaction. They feel the same way about the fees that retailers keep in the sale of extended service contracts, and the percentage of the premium retained by finance companies and retailers who hawk credit insurance. When I put the industry list of “positives” of credit insurance and ESCs, the students generally remain unimpressed.

The students generally report very negative experiences in their dealings with automobile dealers, although given their age and economic position life, one would not expect that many have had much leverage and maybe little experience in those dealings. Many of them are driving a car that is not titled in their name, so they can’t add much to the discussion.

### C. Are They Worried About Check 21?

Not even slightly. This semester I polled my 68 students in Contracts (Law School) and 87 graduate students in a graduate accounting course (College of Commerce). Exactly ONE student of the 155 receives their paper check back each month, and it didn’t take Check 21 to make that happen. Most of the students write very few checks, buying goods and services and paying their bills through alternative means. These are people who also regularly receive credit card solicitations (typically with low credit limits), and who feel fairly comfortable living with student loans and consumer debts. They are generally “worldly” in a financial sense.

The critics and consumer groups who now point to a likely rise in NSF fee revenue because of the reduced “float” can’t point to my students as a source of revenue for banks, because most of my law and business school students report that they write very few checks. And after even a slight exposure to the workings of UCC Articles 3 and 4, they understand that the law has viewed checks as demand instruments for a long time, and not as a credit device.

### D. Public Regulation of False Advertising

Most students are opposed to any form of false advertising that goes beyond the usual “puffing,” but they vote NO in a raise of hands on whether state and federal governments should spend a lot of money on silly claims that cause no real harm. If a few people buy a “fat burner” pill that is a pure placebo, but eat donuts and other fried foods daily, they’d get no “consumer protection” from my law students, at least if it required the use of government money. We talk through all of the issues in favor of and against

enforcement of false claims in advertising, but my law students view the purchaser of a “fat burner” pill as being the same as someone who pays money for a tabloid at the grocery checkout stand.

## VI. Conclusion

Consumer Protection is a popular course, although relatively few students expect to make a living doing this kind of work exclusively. Many of the students who take the course are considering a career in public service or as legal advocates for the poor. But just as many have clerked for large firms which serve large banks and retailers, so their interests are to better understand the mountain of regulations in this area. If you believe in applying the “pro-business” and “pro-plaintiff” labels, my students are typically equally divided. The course is great, because they learn some law, gain a better understanding of certain markets in our economy, but also get to walk in the shoes of the party on the other side. However, in order to give the students that experience, the professor owes it to the students to make a balanced presentation, invite all viewpoints, and disclose personal interests that may drive the direction of the discussion.

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## Appendix

### Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities

American law professors typically are members of two professions and thus should comply with the requirements and standards of each. Law professors who are lawyers are subject to the law of professional ethics in force in the relevant jurisdictions. Non-lawyers, in turn, should be guided by the norms associated with their disciplines. In addition, as members of the teaching profession, all law faculty members are subject to the regulations of the institutions at which they teach and to guidelines that are more generally applicable, such as the Statement of Professional Ethics of the American Association of University Professors.

This statement does not diminish the commands of other sources of ethical and professional conduct. Instead, it is intended to provide general guidance to law professors concerning ethical and professional standards both because of the intrinsic importance of those standards and because law professors serve as important role models for law students.

In the words of the American Bar Association’s Commission on Professionalism, since “the law school experience provides the student’s first exposure to the profession and . . . professors inevitably serve as important role models for students, . . . the highest standards of ethics and professionalism should be adhered to within law schools.” (“In the spirit of Public Service”: A Blueprint for the Rekindling of Lawyer Professionalism 19 (1986).)

Law professors’ responsibilities extend beyond the classroom to include out of class associations with students and other professional activities. Members of the law teaching profession

should have a strong sense of the special obligations that attach to their calling. They should recognize their responsibility to serve others and not be limited to pursuit of self interest. This general aspiration cannot be achieved by edict, for moral integrity and dedication to the welfare of others cannot be legislated. Nevertheless, a public statement of good practices concerning ethical and professional responsibility can enlighten newcomers and remind experienced teachers about the basic ethical and professional tenets—the ethos—of their profession.

Although the norms of conduct set forth in this Statement may be relevant when questions concerning propriety of conduct arise in a particular institutional context, the statement is not promulgated as a disciplinary code. Rather, the primary purpose of the Statement—couched for the most part in general aspirational terms—is to provide guidance to law professors concerning their responsibilities (1) to students, (2) as scholars, (3) to colleagues, (4) to the law school and university at which they teach, and (5) to the bar and the general public.

## I. Responsibilities To Students

As teachers, scholars, counselors, mentors, and friends, law professors can profoundly influence students’ attitudes concerning professional competence and responsibility. Professors should assist students to recognize the responsibility of lawyers to advance individual and social justice.

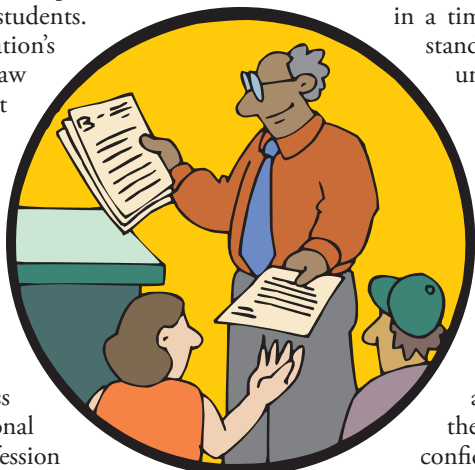
Because of their inevitable function as role models, professors should be guided by the most sensitive ethical and professional standards.

Law professors should aspire to excellence in teaching and to mastery of the doctrines and theories of their subjects. They should prepare conscientiously for class and employ teaching methods appropriate for the subject matters and objectives of their courses. The objectives and requirements of their courses, including applicable attendance and grading rules, should be clearly stated. Classes should be met as scheduled or, when this is impracticable, classes should be rescheduled at a time reasonably convenient for students, or alternative means of instruction should be provided.

Law professors have an obligation to treat students with civility and respect and 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 and colleagues. If a professor expresses views in class that were espoused in representing a client or in consulting, the professor should make appropriate disclosure.

Evaluation of student work is one of the fundamental obligations of law professors. Examinations and assignments should be conscientiously designed and all student work should be evaluated with impartiality. Grading should be done in a timely fashion and should be consistent with standards recognized as legitimate within the university and the profession. A student who so requests should be given an explanation of the grade assigned.

Law professors should be reasonably available to counsel students about academic matters, career choices, and professional interests. In performing this function, professors should make every reasonable effort to ensure that the information they transmit is timely and accurate. When in the course of counseling a law professor receives information that the student may reasonably expect to be confidential, the professor should not disclose



that information unless required to do so by university rule or applicable law. Professors should inform students concerning the possibility of such disclosure.

Professors should be as fair and complete as possible when communicating evaluative recommendations for students and should not permit invidious or irrelevant considerations to infect these recommendations. If information disclosed in confidence by the student to the professor makes it impossible for the professor to write a fair and complete recommendation without revealing the information, the professor should so inform the student and refuse to provide the recommendation unless the student consents to full disclosure.

Discriminatory conduct based on such factors as race, color, religion, national origin, sex, sexual orientation, disability or handicap, age, or political beliefs is unacceptable in the law school community. Law professors should seek to make the law school a hospitable community for all students and should be sensitive to the harmful consequences of professorial or student conduct or comments in classroom discussions or elsewhere that perpetuate stereotypes or prejudices involving such factors. Law professors should not sexually harass students and should not use their role or position to induce a student to enter into a sexual relationship, or to subject a student to a hostile academic environment based on any form of sexual harassment.

Sexual relationships between a professor and a student who are not married to each other or who do not have a preexisting analogous relationship are inappropriate whenever the professor has a professional responsibility for the student in such matters as teaching a course or in otherwise evaluating, supervising, or advising a student as part of a school program. Even when a professor has no professional responsibility for a student, the professor should be sensitive to the perceptions of other students that a student who has a sexual relationship with a professor may receive preferential treatment from the professor or the professor's colleagues. A professor who is closely related to a student by blood or marriage, or who has a preexisting analogous relationship with a student, normally should eschew roles involving a professional responsibility for the student.

## II. Responsibilities As Scholars

A basic responsibility of the community of higher education in the United States is to refine, extend, and transmit knowledge. As members of that community, law professors share with their colleagues in the other disciplines the obligation to discharge that responsibility. Law schools are required by accreditation standards to limit the burden of teaching so that professors will have the time to do research and to share its results with others. Law schools also have a responsibility to maintain an atmosphere of freedom and tolerance in which knowledge can be sought and shared without hindrance. Law professors are obligated, in turn, to make the best and fullest use of that freedom to fulfill their scholarly responsibilities.

In teaching, as well as in research, writing, and publication, the scholarship of others is indispensable to one's own. A law professor thus has a responsibility to be informed concerning the relevant scholarship of others in the fields in which the professor writes and teaches. To keep current in any field of law requires continuing study. To this extent the professor, as a scholar, must remain a student. As a corollary, law professors have a responsibility to engage in their own research and publish their conclusions. In this way, law professors participate in an intellectual exchange that tests and improves their knowledge of the field, to the ultimate benefit of their students, the profession, and society.

The scholar's commitment to truth requires intellectual honesty and open-mindedness. Although a law professor should

feel free to criticize another's work, distortion or misrepresentation is always unacceptable. Relevant evidence and arguments should be addressed. Conclusions should be frankly stated, even if unpopular.

When another's scholarship is used—whether that of another professor or that of a student—it should be fairly summarized and candidly acknowledged. Significant contributions require acknowledgement in every context in which ideas are exchanged. Publication permits at least three ways of doing this: shared authorship, attribution by footnote or endnote, and discussion of another's contribution within the main text. Which of these will suffice to acknowledge scholarly contributions by others will, of course, depend on the extent of the contribution.

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

## III. Responsibilities To Colleagues

Law professors should treat colleagues and staff members with civility and respect. Senior law professors should be particularly sensitive to the terms of any debate involving their junior colleagues and should so conduct themselves that junior colleagues will understand that no adverse professional consequences would follow from expression of, or action based upon, beliefs or opinions contrary to those held by the senior professor.

Matters of law school governance deserve the exercise of independent judgment by each voting member of the faculty. It is therefore inappropriate for a law professor to apply any sort of pressure other than persuasion on the merits in an effort to influence the vote of another member of the faculty.

Law professors should comply with institutional rules or policies requiring confidentiality concerning oral or written communications. Such rules or policies frequently will exist with respect to personnel matters and evaluations of student performance. If there is doubt whether such a rule or policy is in effect, a law professor should seek clarification.

An evaluation made of any colleague for purposes of promotion or tenure should be based exclusively upon appropriate academic and service criteria fairly weighted in accordance with standards understood by the faculty and communicated to the subject of the evaluation.

Law professors should make themselves reasonably available to colleagues for purposes of discussing teaching methods, content of courses, possible topics of scholarship, scholarly work in progress, and related matters. Except in rare cases and for compelling reasons, professors should always honor requests from their own law schools for evaluation of scholarship in connection with promotion or tenure decisions. Law professors should also give sympathetic consideration to similar requests from other law schools.

As is the case with respect to students (Part I), sexual harassment, or discriminatory conduct involving colleagues or staff members on the basis of race, color, religion, national origin, sex, sexual orientation, disability or handicap, age, or political beliefs is unacceptable.

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#### IV. Responsibilities To The Law School And University

Law professors have a responsibility to participate in the governance of their university and particularly the law school itself. Although many duties within modern universities are assumed by professional administrators, the faculty retains substantial collective responsibility to provide institutional leadership. Individual professors have a responsibility to assume a fair share of that leadership, including the duty to serve on faculty committees and to participate in faculty deliberations.

Law professors are frequently in demand to participate

in activities outside the law school. Such involvement may help bring fresh insights to the professor's classes and writing. Excessive involvement in outside activities, however, tends to reduce the time that the professor has to meet obligations to students, colleagues, and the law school. A professor thus has a responsibility both to adhere to a university's specific limitations on outside activity and to

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assure that outside activities do not significantly diminish the professor's availability to meet institutional obligations. Professors should comply with applicable laws and university regulations and policies concerning the use of university funds, personnel, and property in connection with such activities.

When a law professor resigns from the university to assume another position, or seeks a leave of absence to teach at another institution, or assumes a temporary position in practice or government, the professor should provide reasonable advance notice. Absent unusual circumstances, a professor should adhere to the dates established in the Statement of Good Practices for the Recruitment of and Resignation by Full-Time Faculty

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Although all law professors have the right as citizens to take positions on public questions, each professor has a duty not to imply that he or she speaks on behalf of the law school or university. Thus, a professor should take steps to assure that any designation of the professor's institution in connection with the professor's name is for identification only.

#### V. Responsibilities To The Bar And General Public

A law professor occupies a unique role as a bridge between the bar and students preparing to become members of the bar. It is important that professors accept the responsibilities of professional status. At a minimum, a law professor should adhere to the Code or Rules of Professional Conduct of the state bars to which the law professor may belong. A law professor may responsibly test the limits of professional rules in an effort to determine their constitutionality or proper application. Other conduct warranting discipline as a lawyer should be a matter of serious concern to the professor's law school and university.

One of the traditional obligations of members of the bar is to engage in uncompensated public service or pro bono legal activities. As role models for students and as members of the legal profession, law professors share this responsibility. This responsibility can be met in a variety of ways, including direct client contact through legal aid or public defender offices (whether or not through the law school), participating in the legal work of public interest organizations, lecturing in continuing legal education programs, educating public school pupils or other groups concerning the legal system, advising local, state and national government officials on legal issues, engaging in legislative drafting, or other law reform activities.

The fact that a law professor's income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to which practicing lawyers may be more inhibited. With that freedom from economic pressure goes an enhanced obligation to pursue individual and social justice.

Adopted by the Executive Committee,  
November 17, 1989