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A Proposed Code of Professional Responsibility For Law Reviews

Michael L. Closen*

The law reviews of this country constitute an important part of the legal profession. Their value as a significant component of the legal system has been well documented for generations.¹ As Chief Justice Earl Warren wrote, the law reviews "have long served an invaluable function in the development of our jurisprudence."² Practicing lawyers, law teachers, and writers turn to the law reviews for research assistance, including thorough explanations of existing law and in-depth treatments of new developments. Practitioners draw upon the creative suggestions offered by law review authors for purposes of advancing plaintiffs' theories for recovery and for better protecting defendants from the onslaught of litigation. Legislators and concerned citizens use the observations and analysis of law review commentators in pursuit of law reform activities. Most notably, arbitrators, judges, and other decision-makers rely upon law review writings as persuasive authority in the process of their important judgment functions. Thus, the law reviews possess a significance that is not shared by other law student activities. The work of law students in classroom preparation and participation, moot court programs, and student organizations does not impact directly upon the law, whereas student participation in the law review program directly influences our system of law. Furthermore, unlike other student activities, a substantial part of the official work of the members of the law review is permanently recorded in writing, published, and distributed widely. Thus, the members of the law review, before they become licensed to practice and even before they graduate from law school, become a real and significant part of the legal profession.

Because the law reviews are a part of the legal system and because law review students are, therefore, members of the legal profession, the student members of the law review have the opportunity to experience real life circumstances comparable to those of lawyers and judges.³ Those students must face the competing pressures of time versus competence. That is, they must deal with the substantial burdens of their law

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1 So much has been written about the contributions of the law reviews that no attempt will be made to extensively footnote this proposition here. See, e.g., Burke, *Introduction*, 1 *LOY. L.A. L. REV.* 1 (1968); Edmunds, *Hail to Law Reviews*, 1 *J. MARSHALL J. PRAC. & PROC.* 1 (1967); *Messages of Greeting to the UCLA Law Review*, 1 *UCLA L. REV.* 1 (1953); O'Neill, *Dedication Letter*, 1 *CAP. U. L. REV.* (1972); Traynor, *To the Right Honorable Law Reviews*, 10 *UCLA L. REV.* 3 (1962); Warren, *Upon the Tenth Anniversary of the UCLA Law Review*, 10 *UCLA L. REV.* 1 (1962); Comment, *The Law Review—Is It Meeting the Needs of the Legal Community*, 44 *DEN. L. J.* 426 (1967).

2 Warren, *Introduction*, 1 *CREIGHTON L. REV.* 7, 8 (1968).

3 See generally, Cane, *The Role of Law Review in Legal Education*, 31 *J. LEGAL EDUC.* 215 (1981).

school classroom obligations and their real-life obligations (perhaps to employers, families, friends, and the like); and yet, they must diligently and analytically perform the tasks assigned to them in their roles as members of the law review. Law review students must face the pressures of outside, improper influences similar to the whole range of compromising influences confronted by lawyers, judges, and other professionals in their activities. Our society is now experiencing an especially troubled period for ethical issues, as evidenced by well-publicized scandals in government (including the judiciary), in business (particularly the securities industry), and even in organized religion. TIME magazine's cover recently read: "What Ever Happened to ETHICS. Assaulted by Sleaze, Scandal, and Hypocrisy, America Searches for its Moral Bearings."⁴ The members of the law review must respond with objective judgments based upon sound reasoning at all times in their official activities regardless of the pressures of power, politics, money, friendships, and biases. On the positive side, the experience of dealing with these difficult matters provides a fine educational opportunity for individuals while they are still students.

Human nature being as it is, history records that there have been occasions on which the members of the law reviews have succumbed to improper pressures in carrying out their official responsibilities. These instances of abuses have ranged from negligence resulting in the dereliction of minor duties on the one hand, to intentional misconduct affecting important matters on the other extreme.⁵ The cumulative consequences of such abuses can be seriously detrimental for the law reviews. If problems exist in the procedures and processes for elevating students to law review membership the most qualified candidates may not become members, resulting in a negative impact on the quality of the reviews. If there are problems in the procedures and processes for the selection and editing of articles for the reviews, again there will be a serious adverse effect upon the quality of the law review product. These remarks are by no means intended to suggest that there is any widespread disregard for ethical practices among the law reviews. Yet, the contribution of these journals to the law is simply too important to permit a haphazard approach to professional responsibility within the law review establishment.

⁴ TIME, May 25, 1987.

⁵ The following articles are just a few in which the authors complain of less than exemplary conduct by members of the law review: Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215 (1981); Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965); Murray, *Publish and Perish—By Suffocation*, 27 J. LEGAL EDUC. 566 (1975); Comment, *Plagiarism in Legal Scholarship*, 15 U. TOL. L. REV. 233 (1983). See also Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL EDUC. 188 (1955); Posner, *Goodbye to The Bluebook*, 53 U. CHI. L. REV. 1343 (1986); Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

Student-edited law reviews have existed for more than 100 years.⁶ With more than 200 such reviews now in place in the law schools,⁷ and with additional journals regularly being established,⁸ thousands of law students, attorneys, and others become involved in the process each year. The size of the law review institution alone suggests the appropriateness for consideration of a code of conduct. Furthermore, we have codes of professional responsibility for lawyers,⁹ arbitrators,¹⁰ judges,¹¹ and persons in other professions.¹² There has even been a proposal for a code of conduct for law professors.¹³ The members of the law review are neither above the level to which standards of professional conduct should reach, nor are they beyond the proper boundary to which such standards should extend. A code of professional responsibility for the law reviews should be adopted.

The purpose of this paper is to propose such a code of professional responsibility. The proposed code set out below will draw very heavily upon the codes of professional responsibility for lawyers, arbitrators, and judges.¹⁴ It is especially appropriate that the code of professional responsibility for law reviews should closely parallel these other codes, for, as already noted, the student members of the reviews will encounter many of the same ethical issues that pose themselves to lawyers, arbitrators, and judges. This proposed code is offered as a starting point or model code for consideration by the law reviews. It is hoped that the reviews will individually, and/or collectively through the National Conference of Law Reviews, devote genuine attention to the possible adop-

6 The first student-edited law journal was the Albany Law School Journal founded in 1875 (but which lasted for only about one year). It was not until 1885, with the establishment of the Columbia Jurist, followed by the Harvard Law Review in 1887, that student-edited journals became a permanent fixture in the law schools and in the legal profession. See Swygert & Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 763-769 (1985).

7 It had been said that "As we entered the 1960's we had about 207 law reviews and journals. . . ." Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228 (1965). However, that count was not restricted to student-edited publications. In 1965, there were at least 102 student run law reviews. Comment, *The Law Review—Is It Meeting the Needs of the Legal Community?* 44 DEN. L.J. 426, 426 (1967). No one seems to have ready access to the exact number of student-edited law reviews today. Each of the 174 American Bar Association accredited law schools appears to have such a journal and some schools have more than one law review. See *infra* note 8. In addition, some unaccredited schools also have law reviews. Thus, there are certainly over 200 student-edited reviews today.

8 For example, it was recently reported that an eighth student-edited law review (the Journal of Chinese Law) has been established at Columbia University and that a second review (the Software Law Journal) has been added at The John Marshall Law School in Chicago. *Journal Dispatches*, NAT'L L.J., June 29, 1987, p. 4, col. 4.

9 CODE OF PROFESSIONAL RESPONSIBILITY (1977); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981); MODEL RULES OF PROFESSIONAL CONDUCT (1983).

10 CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (American Arbitration Association 1977).

11 CODE OF JUDICIAL CONDUCT (1972).

12 See generally, CODES OF PROFESSIONAL RESPONSIBILITY (R. Gorlin ed. 1986) which includes the codes for dentists, medical doctors, psychiatrists, psychologists, nurses, social workers, teachers, librarians, accountants, architects, bankers, engineers, and others.

13 Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275, 276 (1986).

14 The author has drawn upon the ideas and language of the canons, the disciplinary rules, and the commentaries explaining them. See *supra* notes 9-11.

tion of a detailed set of standards to assist in the administration of their important role in the legal system.

CANON 1: The members of the law review should assist in maintaining the integrity of the law review and the legal system.

The members of the law review have the obligation to assist the other members of the legal profession (lawyers, professors, legislators, arbitrators, judges, and others) in furthering the system of law by providing a source of comprehensive research, thoughtful and creative ideas, and sound analysis on issues of importance. In other words, this is a duty to the law itself.

Law review students have an obligation to assist in legal education, both during and after the law school experience, by providing a source for the thorough explanation of existing law and of new developments in the law. There should be direct educational benefits to the members of the law review who experience the research, analytical, and writing opportunities afforded by law review participation and to other law students who use the journals in furtherance of their legal educations. Additionally, in a profession such as ours where continuing education is of fundamental importance, the law review should play a prominent role in keeping lawyers abreast of changes.

The members of the law review have an obligation to act with diligence in all of their official activities. Further, law review members have an obligation to act with the highest integrity and abide by the law at all times, so as to serve as models for both law students and other individuals. In this connection, the members of the law review should establish a set of standards and take all steps reasonably necessary and appropriate to assure that all of their members abide by professional standards in the conduct of their official activities. Judge Cardozo's famous statement about fiduciary duties seems fitting here in describing the high obligation of integrity that falls upon the members of the law review: "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."¹⁵

In keeping with these notions of the highest of ethical conduct, the law reviews should insist that contributors of articles disclose any interest that they may have in the issues addressed and the positions advocated. Such disclosure should appear in the first footnote of the article and should include such matters as the fact that the author is employed by a party or retained by clients with an interest in the issue, that the author was paid a fee or compensated somehow for the preparation of the article, or that the author regularly practices in the subject area addressed by the article. This obligation of full disclosure was suggested some time ago by Justice William O. Douglas of the United States Supreme Court in order to inform readers and to allow them to judge the merits of writings in a brighter light.¹⁶

¹⁵ *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

¹⁶ Douglas, *supra* note 5.

The members of the law review should report to the appropriate disciplinary authorities misconduct by student applicants for the law review, by law review members, and by lawyer-contributors to the law review that reflects negatively upon the character and fitness of such individuals to practice law. Serious misconduct by student applicants for the law review and student members of the law review (including, for instance, plagiarism or destruction of library source material for the purpose of competing more successfully with other students)¹⁷ would warrant referral to the appropriate committee of the state court system or bar association for consideration when the student applies for membership in the bar. Of course, each law review should have an internal procedure in place for dealing fairly with episodes of misconduct by its members. Similarly, if a lawyer-contributor were to be guilty of important misconduct (plagiarism, for example), such a situation should be reported to the appropriate disciplinary committee of the court system or bar association.¹⁸

CANON 2: The members of the law review should exercise independent, objective judgment in their decision making involving all official activities.

Members of the law review must exercise this professional judgment with respect to decisions involving selection and promotions of staff members and editors, selections of articles to be published, and editorial decisions which impact upon the content of articles. The loyalty of the members of the law review must be first, foremost, and exclusively to the law review and the legal system, all of which necessitate that decision making be done in a fair and detached manner. The members of the law review cannot allow the integrity of their decision making to be diluted by compromising influences, such as personal interests, friendships, money, power, or other improper pressures from outsiders (including the law faculty some of whom, feeling the pressure to "publish or perish,"¹⁹ have been known to attempt to exert pressure upon the members of the reviews to influence acceptance of articles tendered for possible publication and some of whom have been known to attempt to affect publication decisions on the basis of personally held positions on issues).

The law review should provide an open and uncensored forum for debate and airing of ideas on important issues of public policy and law. This is what academic freedom is all about. It is a part of the obligation of service to our fellow man, and this vital responsibility cannot be overstated. Respected jurists, for instance, regularly praise the law reviews for providing the important democratic service of acting as sounding boards for alternative, controversial ideas.²⁰ To publish is to endorse the

¹⁷ Unfortunately, the competitive nature of law school does lead to some hiding or destruction of source material. See, e.g., Mohr & Rodgers, *Legal Education: Some Student Reflections*, 25 J. LEGAL EDUC. 403, 420 (1973).

¹⁸ See Comment, *supra* note 5.

¹⁹ See Bruce & Swygert, *The Law Faculty Hiring Process*, 18 HOUS. L. REV. 215, 246-48 (1981); Closen, *Teaching With Recent Decisions: A Survey of Past and Present Practices*, 11 FLA. ST. U. L. REV. 289, 305-306 (1983); Turner, *Publish or Be Damned*, 31 J. LEGAL EDUC. 550 (1981).

²⁰ For example, Justice Louis H. Burke of the Supreme Court of California remarked:

Undeniably, by providing a continual source of commentary, based on logic, principle, and reason, on recent judicial decisions and by publication of analytical studies of controversial

freedom of speech. Decisions with respect to rejection or editing of articles cannot be based solely on the conclusion that such articles express unpopular views or that they advocate positions about which members of the law review or the law school administration or governing body are in personal opposition.

CANON 3: The members of the law review should act with competence in the conduct of all of their official duties.

The purpose of this standard is to maintain and foster the quality of the law review product. The members of the law review must strive to be diligent and thorough in all of their official dealings, with the result that their knowledge and understanding of issues will be enhanced thereby. Realistically, the student members of the law review should recognize and admit their limitations (for example, areas of specialty with which they do not have sufficient knowledge or understanding), and withdraw from decision making involvement in appropriate circumstances.

Law review members must show great concern for providing guidance and training to newly appointed members of the law review in order to provide continuity and to maintain the integrity of the law review in future years. The members of the law review should also have the obligation of excellence in their classroom and other law school activities, to serve as role models for other students who aspire to participate in the law review and who will, in any event, become members of the legal profession. After all, the law review represents an integral part of the law school institution.

Additionally, because substance abuse is such a serious problem in this country and in the legal profession,²¹ it cannot go unmentioned here. The members of the law review have the obligation to avoid serious substance abuse (alcoholism and drug addiction) that would diminish their capacity to serve the review, and later to serve clients or constituents. In this regard, the members of the review should be observant of the conduct of their colleagues and should take appropriate steps (perhaps including the alerting of a referral agency) in the event that it is determined with certainty that one of the review members is afflicted by serious substance abuse. The primary concerns would be the protection of the integrity of the review and the assistance of the individual in overcoming the problem. As a last resort, however, disciplinary steps to remove the individual from the review might be necessary.

legal issues written by leading members of the bar, law reviews render valuable service to those involved in the administration of justice.

Burke, *supra* note 1, at 2.

Similarly, Chief Justice Earl Warren observed:

A strong law review is a forum in which able minds subject existing legal principles to critical analysis within the context of changing conditions and in which imaginative alternatives to today's solutions are aired and tested through vigorous informal debate.

Warren, *supra* note 2, at 7.

21 In Illinois, we are fortunate to have the Lawyers Assistance Program, a successful and highly acclaimed voluntary program endorsed by the Illinois Supreme Court and supported by hundreds of lawyers and judges, to help lawyers and judges deal with and overcome substance abuse. See, e.g., *Professionals, Pragmatists or Predators?* 75 ILL. B. J. 420, 421-22 (1987).

CANON 4: The members of the law review should maintain the confidentiality of those official dealings of the law review that are private in nature.

The members of the law review must understand that some information and dealings of the law review should not be the subject of discussion and dissemination, for such matters are clearly private in nature. For example, some information about student candidates for the law review (such as grade point averages), information about rejected articles from lawyer-contributors, and information about rejected writings of student candidates for law review should be regarded as private and confidential in nature. Additionally, information regarding internal disciplinary proceedings should be treated as confidential (except in circumstances that warrant the communication of such information to external disciplinary authorities). Members of the law review should come to recognize the important duty to respect the rights of privacy and confidentiality of parties that will often arise in the course of one's life as a member of the legal profession.

CANON 5: The members of the law review should avoid impropriety or even the appearance of impropriety in the conduct of all their official activities.

The members of the law review should strive to achieve the highest standards of ethical conduct, just as they should as licensed members of the legal profession. Law review students should strive to build confidence in the system of law, which is fostered by instilling in all citizens the notion that members of the legal profession are persons of honesty and integrity. In this regard, the members of the law review should act with impartiality and fairness in all of their official dealings in order to help convey to other individuals the sense that those fundamental principles are in place at all levels of the legal profession.

CANON 6: The members of the law reviews should assist in maintaining the integrity and competence of their sponsoring law schools.

It has been said, "[T]he law review that serves as an instrument of American education also serves as a hallmark of the institution that sponsors it."²² As a quite visible representative of the law school, the law review should function to assist the school in accomplishing its purposes and to promote the standing of the school. There seems to be a direct relationship between the stature of the law review and that of the law school. They complement one another.

The members of the law review owe several duties to their sponsoring school to foster its program. The law review should be the practice laboratory for students, affording them the opportunity to engage in the study of important topics of current interest and to comment upon those subjects in analytically sound written presentations (some of which will be published in the review) and to evaluate and edit the contributions of other authors. The members of the law review have the obligation to treat their work for the review as an extension of their classroom education in order to achieve their fullest potential. This will reflect favorably

²² Samad, *Preface*, 1 AKRON L. REV. (1967).

upon the students, the law review, the school, and, ultimately, the profession. It follows that, if the law review experience produces better lawyers, the profession itself and the citizenry in general will benefit.

The law review speaks for the law school to the business, governmental, and legal communities. As previously noted, neither the review nor the school necessarily endorse the positions advocated by the articles appearing in the journal. Rather, the review and the school lend their authority to the right of the authors to advocate such positions. Further, the review and the school assure that the substance of published works has been checked for accuracy and thoroughness to the extent that such verification is possible. The law school, whose name is attached to the law review that succeeds in influencing the law somehow, will also be credited with the accomplishment.

Conclusion

This proposed code of professional responsibility contains no great surprises. Indeed, the standards suggested should be understood to exist even without reducing them to writing. Unfortunately, however, as the corruption scandals of recent date in government and business, and especially in the judiciary and the legal profession demonstrate, we cannot be assured that all individuals will have given sufficient thought to issues of professional conduct and will have genuinely accepted the kinds of propositions espoused here. Hence, the mere actions of writing, disseminating, debating, and adopting them should have some prophylactic consequences. Moreover, the propositions advanced do not have to remain as mere rhetoric. They can be adopted, honored, and enforced by the law review.

If, as suggested in this paper, the members of the law review come to appreciate their truly central status in the legal system, they should accept the challenge offered herein. That is, this proposal should serve as a basic framework for further consideration. It is just the beginning of what should amount to a substantial process of review, debate, and revision. One observer alone cannot (and should not) set out such a critically important groundwork for the guidance of future generations of law review students and their publications. The work here stands unfinished, but hopefully, not for long.