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Moonlighting Sonata: Conflicts, Disclosure, and the Scholar/Consultant

JEFFREY L. HARRISON & AMY R. MASHBURN[†]

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ABSTRACT: Although the impact of conflicting interests is of constant concern to those in legal education and other fields, a recent scholarly article and an extensive analysis in the New York Times suggest the problem is more pressing than ever. In the context of legal scholarship the problem arises when a professor is, in effect, employed by two entities. Disclosure of possible conflicts is the most commonly proposed response. The article argues that disclosure is merely a risk shifting device that does not fully address the issue of bias. It draws on comparisons with products liability and legal ethics to suggest that many conflicts should simply be avoided.

KEYWORDS: *Conflicts of Interest; Disclosure; Ethics; Legal Practice; Risk Shifting*

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1. INTRODUCTION

Although the impact of conflicting interests is a constant concern for those in legal education and other annexed fields, a recent scholarly article¹ and an extensive analysis in the New York Times² suggest the problem is more pressing than ever. In the context of legal scholarship the problem arises when a professor is, in effect, employed by two entities. One of these employers, the academy, and the broader profession in which it is positioned, academia, have legitimate expectations of true scholarly work that reflects open-mindedness and objectivity with respect to topic selection, analysis, and positions taken, if any.³ In this context, the goal for the professor/scholar is to discover truths, inconvenient and otherwise.⁴ In effect, the professor is comparable to the employee of a think tank.

The other employer, the retaining firm in which expertise is sold to those with relatively deep pockets, certainly places great importance on clear thinking but, ultimately and most often, has a desired end result in mind that may shape the efforts and expressions of the professor. The goals of the academy and the desires of retaining firms are in conflict at least some of the time. Professors facing such conflicts are advised that resolution can occur by

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¹ Robin Feldman, Mark A. Lemley, Jonathan S. Masur & Arti K. Rai, *Open Letter on Ethical Norms in Intellectual Property Scholarship*, 29 HARV. J.L. & TECH. 339 (2016).

² See Eric Lipton, Nicholas Confessore & Brooke Williams, *Think Tank Scholar or Corporate Consultant? It Depends on the Day*, N. Y. TIMES (Aug. 8, 2016), <http://www.nytimes.com/2016/08/09/us/politics/think-tank-scholars-corporateconsultants.html>.

³ An example is found in the University of Florida regulations:(d) Statement on Professional Ethics. I. The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibilities devolving upon members of the profession. The professor's primary responsibility to his or her field is to seek and to state the truth as he or she sees it. To this end, the professor devotes himself or herself to developing and improving his or her scholarly competence. The professor accepts the obligation to exercise critical self-discipline and judgment in using, extending and transmitting knowledge. The professor must never seriously hamper or compromise anyone's freedom of inquiry.

⁴ This is in accord with every dictionary definition of "scholar."

being mindful of the dangers and making full disclosure to their readers.⁵ In the context of faculty scholarship, this means disclosing to readers any and all information that would assist a reader in assessing the reliability of the scholar's work.

This solution is inadequate for several reasons. First, the notion that one may be sufficiently mindful of a conflict to offset its negative effects (some of which may be very subtle) is flawed because it fails to account adequately for the impact of optimism bias. The mindfulness approach assumes that professors can "cure" such conflicts and prevent them from having an impact on their scholarship by consciously paying attention to the possibility that conflicts are, in fact, having an impact on their research and publication. The ability to perceive the danger of an impact, however, will in many cases be clouded by an unconscious bias that will lead the scholar to believe that such effects are either, not occurring or are under his/her control. Any approach to conflicts that relies excessively or exclusively upon self-policing will suffer from this problem.

Second, reliance upon disclosure as a cure seems to excuse the scholar from responsibility for the effects of the conflict simply because the reader has been forewarned. The ethical and practical implications of an easy out for the scholar are troubling. The burden of conforming to the academy's scholarly

⁵ See A.A.L.S. Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities: "A law professor shall disclose the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professorial capacity. A professor is deemed to possess an economic interest if the professor or an immediate family member may receive a financial benefit from participation in the covered activity. Disclosure is not required for normal academic compensation, such as salary, internal research grants, and honoraria and compensation for travel expenses from academic institutions, or for book royalties. Disclosure is not required for funding or an economic interest that is sufficiently modest or remote in time that a reasonable person would not expect it to be disclosed. Disclosure of material facts should include: (1) the conditions imposed or expected by the funding source on views expressed in any future covered activity; and (2) the identity of any funding source, except where the professor has provided legal representation to a client in a matter external to legal scholarship under circumstances that require the identity to remain privileged under applicable law. If such a privilege prohibits disclosure the professor shall generally describe the interest represented. A law professor shall also disclose the fact that views or analysis expressed in any covered activity were espoused or developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor. Disclosure is not required for representation or consultation that is sufficiently remote in time that a reasonable person would not expect it to be disclosed. Disclosure should include the identity of any client, where practicable and where not prohibited by the governing Code or Rules of Professional Conduct. If such Code or the Rules prohibit a professor from revealing the identity of the client, then the professor shall generally describe the client or interest represented or both." <http://washburnlaw.edu/facultystaff/otherpolicies/aalsgoodpractices.html>

ideal should, as a normative matter, stay with the scholar because it is an essential component of his/her academic job and at the heart of the scholarly function. The obligation to avoid conflicts and their negative effects should also stay with the scholar because the cumulative effect of the widespread abdication of responsibility for addressing conflicts through easy out disclosures will, as a practical matter, result in available research being less reliable. As serious as these problems are, however, they are not the core problem with the disclosure approach.⁶

This essay addresses the problem which is whether shifting the risk of conflicted scholarship to those who pay the scholar's salary and to the consumers of his or her work is appropriate. The disclosure approach essentially shifts the risk of those conflicts to readers, listeners, and to academic employers who have reasonable expectations of objective and open-minded scholarship. Notably, by shifting the risk in this manner, the professor is then able to serve two masters (and collect two paychecks).

In the next section, we will discuss the sources of conflicts and we will note that many are not avoidable, but some are. These "moonlighting" activities can prove to be intellectually and financially rewarding for scholars. In section III we will examine other instances -- products liability and legal ethics -- in which disclosure is and is not regarded as sufficient to address "conflicted" scholarship and compare those with the standards in academia. Next, we will search for a rationale, other than self-interest, for the approach taken in academia. The final section argues that the "disclosure as risk-shifting" approach is flawed because it does not have an apparent or articulated rationale, but instead seems to reason backwards from a conclusion that dual employment and compensation should be facilitated and justified. We conclude that, in general, scholars should make a choice between scholarly integrity and accepting payment above expenses for efforts outside that sphere.

⁶ A third possibility is that the availability of paid opportunities outside the academy may influence the fields pursued and teaching preferences inside the academy.

2. SOURCES OF CONFLICT

2.1. INHERENT

Some biases are inherent. Some of those we try to neutralize and others we embrace. For example, everyone's life experience will create in them preferences about the way things should be as a normative matter. Even the most ardent scholar cannot escape some influences that may prevent him or she from being what might be called the "perfect scholar."⁷ In fact, if disclosure happens in its full-blown form, every author would reveal his or her, age, gender, race, socioeconomic background, education, employment experience, and more. All of these factors impede the scholar's ability to remain objective. For example, a lower socioeconomic class person may be reluctant to report that terminable-at-will employment has an upside and a downside in terms of the welfare of those less well off.⁸ Although no one can become the perfect scholar, the concept can be an aspirational ideal that requires awareness of the pervasiveness of influences that may affect scholarship and a commitment to keeping an open mind. Absent this awareness, the author's personal life experience may become a cause and scholarship less objective. In these circumstances, scholars, rather than being searchers for and reporters of the truth, may become convinced they already know the truth and write what may be more accurately viewed as persuasive briefs rather scholarship. Those known "truths" (and the scholars themselves) may thus become more akin to clients, rather than scholars.

2.2. AMBITION BASED

In the academic setting scholarship can have two purposes. One is to convey information. The other one is to convey information about the author. These two objectives may seem inseparable but for the ambitious law professor (or one merely seeking to qualify for tenure), there can be a difference. In addition, authors write for a number of audiences. These include second or

⁷ The perfect scholars would be free of biases of any kind. This is, of course, an impossible ideal and probably not uniformly desirable.

⁸ One of the authors comes from a lower socioeconomic class and struggled for years about whether to write an article that assessed the impact of limiting terminable at will employment after realizing that some of the cost of the change would be borne by those the changes was generally thought to benefit. The article was written and was followed by letter questioning the author's motives. See Jeffrey L. Harrison, *Wrongful Discharge: Toward a More Efficient Remedy*, 56 IND. L. J. 207 (1981).

third year students on law reviews, professors to whom the work may be referred and, finally, the general public which includes attorneys and judges.

An untenured scholar is in a difficult position. In some areas of legal scholarship, such as, for example, antitrust,⁹ and environmental law,¹⁰ particular approaches and viewpoints dominate. This dominance produces a priori assumptions and accepted “truths.” Young scholars write with the awareness that their work must be reviewed by other law professors, many of whom will likely be adherents to the dominant approach. Thus, particularly early in their careers, scholars may shape their work to appease reviewing professors whom they fear will be too quick to examine whether the young scholar has adhered to known the “truths” of a prevailing approach or dominant viewpoint. One concern is that the works of scholars who do not conform to prevailing viewpoints will be subjected to greater and more negative scrutiny than works that, in effect, “preach to the choir.” In this way, the desire for tenure and a longer term career may conflict with expressions based on objective findings. This effect cuts both ways. The young scholar may choose to “preach to the choir” and overstate the support for convention or avoid confronting convention.

This conflict is hardly only experienced by young scholars. Mobility in the profession is largely dependent on scholarship. That scholarship is first assessed by second and third year law students and, on occasion, by professors in specific areas. This creates a tension between the findings of a researcher and his or her beliefs about what a second or third law student or a professor to whom the work is referred may find appealing. For example, if influential people in antitrust are unreceptive to behavioral economics,¹¹ as a matter of professional strategy, it may be unwise to write about how behavior economics might inform antitrust law. Moreover, in a context where impact is sometimes

⁹ The so called Chicago approach stressing consumer surplus and allocative efficiency as opposed to merely deconcentrating of economic power has been the mainstay of antitrust for nearly fifty years. Lately it has come under increasing scrutiny.

¹⁰ Scholarship in environmental law starts with the premise that nearly all environmental measures should lean toward protecting the environment.

¹¹ See, e.g., Joshua D. Wright & Judd E. Stone, *Misbehavioral Economics: The Case Against Behavioral Economics*, 33 *CARDOZO L. REV.* 1517 (2012).

equated with frequency of citation,¹² the choice of topics and positions taken may be a function of career aspirations as much as actual long term benefits of the scholarship. In short, the conflict thus created is between long term advancement in a discipline in which there are dominant beliefs and an objective, open-minded presentation of ones ideas.

2.3. AVOIDABLE

The sources of possible conflicts that are usually the subject of concern are those that are avoidable, or perhaps, more accurately, invited. For law professors, these sources of conflict range from representing clients to serving as expert witnesses,¹³ being of-counsel to law firms, or simply consulting about specific legal issues.¹⁴ In all of these cases, the danger becomes more serious if the activity takes place at a level sufficient to affect the lifestyle of the professor.

It is important to keep in mind at this point that the relevant question for purposes of this inquiry is whether the outside activity will come into conflict the professor's work as a scholar. Another way to ask the question is to access whether any of the scholar's outside activities has an impact on the topic selected, the methodology employed, the expression of the results, or the credibility of the scholar.

In the case of the scholar/expert witness, there are numerous safeguards – opposing experts, cross-examination – to protect the audience of the actual testimony. On the other hand, positions taken as a scholar definitely affect the marketability of the professor as expert. Anyone who has been contacted to act as a potential expert knows that his or her research will be examined very closely to determine whether he or she has written anything that could be construed as inconsistent with the position taken as an expert.

¹² See Gregory C. Sisk, Valerie Aggerbeck, Robert Nick Farris, Megan McNevin & Maria Pitner, *Scholarly Impact Of Law School Faculties In 2015: Updating The Leiter Score Ranking For The Top Third*, 12 U. ST. THOMAS L.J. 100 (2015).

¹³ This will, of course, vary with the jurisdiction.

¹⁴ See, text accompanying *infra* note 16. In some instances, "of counsel" law professors may consult only with lawyers and not have their time billed to specific clients or matters. Firms may retain professor-consultants for assistance of a general nature and may pay their consulting fees from firm funds not attributable to a particular client or matter. When a client or a case is billed for this time, however, it is likely that the law professor (if he/she is admitted to a bar), is, at a minimum for conflicts of interest purposes, a lawyer of the firm and, in many cases, in an attorney-client relationship with the firm's clients for whom he/she provides legal services.

For those dependent on expert witness activity, this may mean being careful about taking strong positions or any positions at all as a scholar.¹⁵

Credibility as a scholar may also be affected by the outcome of testimony. Taking positions as an expert that could not pass muster within the profession may have an impact on the faith others are willing to afford the expert's scholarly efforts. These credibility issues have occasioned commentary on the hazards faced by scholars who are expert witnesses. Perhaps the most well-known example of this involves Nobel Prize winning economist Robert Lucas. He was described as having "disdain for reality" and "abdicat[ing] entirely the concept of the independent expert witness."¹⁶ Some may argue that cynicism about the activities of expert witnesses may have reached the point that the credibility of the scholarship produced by scholar/expert witnesses is unaffected by the scholar's assumption of other potentially-conflicting roles. If this is not the case, however, then the impact is in one direction only which is to undermine respect for such scholarship.

Law professors provide services to retaining firms in a variety of ways, including being designated "of counsel" to firms. These positions may seem relatively benign. One may wonder how being an occasional advisor to a law firm could affect scholarship. It is important to keep in mind the person who is "of counsel" is selling a product and that product must be worth it to the retaining firm. Sellers in this market would be wise not to take positions in scholarship that would be at odds with positions likely to be taken by the firm's clients. This, in effect, provides opposing counsel with effective impeachment material and lessens the value of the scholar's services as an expert. Some scholars as consultants/experts/of counsel attorneys may, because of their affiliation with retaining firms, author amici briefs as if they are disinterested scholars who just happen to advance the positions those who have retained them.

Although the "of counsel" designation is variable and encompasses several types of relationships, from an ethical perspective:

¹⁵ The authors' perspectives are informed by their own past experiences as expert witnesses and consultants. One recalls an instance in which he was coauthoring an article in the field of antitrust and was cautioned against mentioning possible anticompetitive conduct in a particular industry because participants in that industry were prospective customers for expert services.

¹⁶ BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION, 1999 WL 33889(N.D. Illinois, 1999).

There can be no doubt that an of counsel lawyer (or firm) is "associated in" and has an "association with" the firm (or firms) to which the lawyer is of counsel, for purposes of both the general imputation of disqualification pursuant to Rule 1.10 of the Model Rules ... Similarly, the of counsel lawyer is "affiliated" with the firm and its individual lawyers for purposes of the general attribution of disqualifications ...¹⁷

This means that for conflicts of interest purposes, the clients of the firm are the clients of lawyers affiliated as “of counsel.” Consequently, law professors who are “of counsel” may not view themselves as having clients, but, at least for some purposes, they do. Among the duties lawyers owe to their clients are duties of loyalty, confidentiality, and, most significantly, conflicts-avoidance.

The affiliation with a firm may mean that scholarship that takes a position contrary to the retaining or “of counsel” firm’s clients may potentially generate conflicts (or at the very least, some concerns about whether the firm’s clients will be displeased). A more subtle form of damage to the scholarly mission occurs when the scholar unconsciously avoids taking positions in anticipation of potential negative impact upon lucrative retention arrangements.

It is possible, at least in theory, that occasional consulting will have little impact on scholarship. This is especially the case if payment does not result in an adjustment in one’s life style. The principal problem arises if the professor wants to be a repeat player. Nearly always, a consultant knows what a client would like to hear. Perhaps the consultant cannot give the client that specific message but measured tones and a lack of emphasis may mean more repeat business than a truthful “that is a totally untenable position” especially if means a loss of face for one of the “customers.” This, of course, does not mean the professor’s scholarship is affected but the professor may increasingly become known as the “go to” person with clever ideas about how to avoid a price fixing accusation or, for example, how to invoke the exclusionary rule. Once that is the product being sold, it is a small step to lowering the quality of the product by producing scholarship that would dilute this expertise.

¹⁷ AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY Formal Opinion 90-357 May 10, 1990 USE OF DESIGNATION "OF COUNSEL."

2.4. PERSONAL DEVELOPMENT

A version of avoidable conflicts that deserves specific mention concerns the slippage between personal development as a scholar and remuneration. Robin Feldman and others in proposing ethical standards for intellectual property professors write:

IP scholars have become more engaged in policy advocacy, the writing of amicus briefs, and the practice of law. In general, we think this is a salutary development. Courts regularly complain about scholarship being unconnected to the real world, and law students worry that they are not being trained to succeed in practice. Greater engagement between scholars and the world of practice can help solve both problems and can also bring a thoughtful, more unbiased perspective to legislative and judicial debates traditionally dominated by interested parties.¹⁸

The authors note the importance of the participation of law professors in the “real world” and this seems indisputable. This does not address, however, the issue of whether the nature of those “real world” activities should be determined by the market. There is no necessary correlation between what will enhance the development of someone in the role of scholar and the money to be earned by selling expertise. This might be contrasted with a context in which professors are prohibited from ~~for~~ earning outside income other than expenses. Rather than expertise being allocated to those who can pay and, perhaps, pay the most, outside employment would be steered in the direction of the activities most likely to enhance scholarly development. The distortion introduced into the process of becoming an accomplished scholar is exacerbated by the possibility that research and teaching preferences will be influenced by the potential lucrative consulting opportunities available in some fields but not others.

3. DISCLOSURE IN OTHER CONTEXTS

It is instructive to compare disclosure by legal scholars with comparable practices in other contexts. For example, the purchase of a product that carries a warning label – a form of disclosure – can be viewed as form of informed

¹⁸ Feldman et. al., *supra* note 1, p. 339.

(implied) consent.¹⁹ In the context of legal representation in some cases, informed consent may permit the formation of an attorney client relationship even where there are potential conflicts. Of course, in both regimes there are times when disclosure and consent, whether express or implied, is not enough to fully protect the less informed party and the transaction is not permitted. The question is where disclosure by scholars falls? Is it sufficient to alert readers to the possible biases or should those who aspire to be scholars simply avoid conflicts?

3.1. PRODUCTS LIABILITY

In the context of manufactured products, the issue is when a manufacturer can escape liability by noting a dangerous aspect of the product. This may not seem to fit the think tank context but in fact it does. In both cases the conflict is financial. In the case of the profit maximizing producer, the product could be made safe but it is not in the producer's profit maximizing interests. In the think tank context, the consequences are also financial. Here too the scholarly output could be made safe in the sense of being unaffected but that is not in the self-interest of the scholars.

In theory, disclosure that a product may be dangerous makes the most sense when the cost of avoiding harm is lower for the consumer than it would be for the manufacturer and others who would be affected. In particular, it is important to weigh the impact on those negatively affected by barring the marketing of the product altogether.²⁰ For example, small toys can be harmful to children below a certain age who like to put things in their mouths. Presumably a responsible parent realizing this, will not allow children below a certain age to have access to toys with small components. Unfortunately this is not always the case but the solution is to remove the warning and not to market toys that might be ingested. Although it is difficult to place values on human life, if forced to do so²¹ the cost of eliminating the harm completely likely exceeds the cost of parental attention that either keeps young children

¹⁹ It most, thought, it is consent to some probability of harm. Whether it is rational to consent in this instances can be subject to various biases. See *infra* notes 45-52.

²⁰ See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 69 FR 41314.

²¹ Although difficult and likely impossible, placing a value on life is implicit in a great number regulations and funding decisions ranging from the installation of highway guard rails and the setting of speed limits to funding of medical research.

away from small toys or involves close supervision. Shifting the risk to some parents some of the time arguably makes sense.

This might be contrasted with automobile airbags. Automobiles could be marketed without airbags but include a disclosure/warning that collisions may result in serious bodily harm or death. Buyers could then opt to have airbags installed. This is likely to be at a much higher per unit cost that would be incurred under conditions of mass production. Or they could simply accept the risk of injury to themselves and others. The magnitude of this risk is unknown and, unlike the cautious parent, controlling one's own actions does not reduce the risk since the harm can be caused at any time by a third party. The automobile buyer is, thus, like the reader of scholarship in that he or she is ill-equipped to assess risk of bias.

3.2. LEGAL REPRESENTATION

A similar pattern emerges in the context of the handling of conflicts of interest under attorneys' rules of professional responsibility and related bodies of law. In the legal ethics context, "curing" a conflict of interest means that the measures which have been taken are sufficient under governing law to allow all or some part of the conflicted legal representation to go forward or, if no such curative measures are available, declining or terminating the conflicted representation. Many attorney-client conflicts of interest are curable through disclosure and consent, but some are not.²² The concepts of consentable and unconsentable conflicts of interest in legal ethics are useful in thinking about whether conflicts in scholarship should be deemed curable through consent as a form of risk-shifting. This discussion first describes how legal ethics defines informed consent and then turns to the ethical notion of the unconsentable conflict.

When the ethics rules and the common law of conflicts do allow consent by potentially affected clients to cure a conflict of interest in legal representation, their consent must be "informed."²³ Because disclosure and consent play such important roles in the management of conflicts in legal representation, the relevant rules of professional responsibility provide extensive and nuanced guidance to lawyers. It is instructive for comparison

²² Cf. MODEL RULES OF PROF'L CONDUCT R. 1.7 (Discussion Draft 1983).

²³ MODEL RULES OF PROF'L CONDUCT R. 1.7 (b)(4), R. 1.9 (a), R. 1.0 (e) (Discussion Draft 1983).

with the treatment of disclosure as a cure to conflicted scholarship to examine some of that guidance.

“Informed consent” is defined in the Model Rules as that which “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”²⁴ The Comments to those rules provide that lawyers “must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.”²⁵ That same comment also observes that:

*[o]rdinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.*²⁶

The rules of professional conduct also provide lawyers with explanations regarding the relevant factors to use in assessing the adequacy of the provided disclosure:

*In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.*²⁷

The comment to Model Rule 1.7 explains that “[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.”²⁸ For purposes of our comparison, this

²⁴ MODEL RULES OF PROF'L CONDUCT R. 1.0 (e) (Discussion Draft 1983).

²⁵ MODEL RULES OF PROF'L CONDUCT R. 1.0 (e), cmt. 6 (Discussion Draft 1983).

²⁶ MODEL RULES OF PROF'L CONDUCT R. 1.0 (e), cmt. 6 (Discussion Draft 1983).

²⁷ MODEL RULES OF PROF'L CONDUCT R. 1.0 (e), cmt. 6 (Discussion Draft 1983).

²⁸ MODEL RULES OF PROF'L CONDUCT R. 1.7 (e), cmt. 18 (Discussion Draft 1983). The information required depends on the nature of the conflict and the nature of the risks involved.

obligation to ensure that the client is not only given information, but also receives a clear explanation of what that information means for the client's interests, i.e. precisely how the client's interests may be implicated, is important. It indicates that the focus in the legal ethics regime is always on ensuring that disclosure and consent are meaningful vis-à-vis the goal of protecting the client's right to conflict-free and competent representation. Significantly, the focus is not on facilitating the attorney's desire to represent as many clients as possible.

Disclosure and consent in this context assume the role of a warning label in the example of products liability. In effect, the client is viewed as being sufficiently informed to bear any risks of associated with possible conflicts. In addition, there may be advantages to the client in not applying the unconsentable conflict rule. For example, suppose two brothers ask a lawyer to represent both of them in their effort to purchase a restaurant. One of them is a chef; the other has money for the purchase price; both will sign a guarantee on a required loan. With fully informed consent (which would include explaining how their interests might diverge and that the lawyer may not be able to keep information one of them tells him from the other), the lawyer may represent both brothers.²⁹ Similarly, a couple may wish to obtain an amicable dissolution of their marriage. In many instances, a lawyer may, in some circumstances, represent both parties in the negotiation of the property settlement to be submitted to the court in the proceeding.³⁰

²⁹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 illus. 3 (2000).

³⁰ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 illus. 8 (2000). This illustration is subject to exceptions and qualifications that vary significantly from jurisdiction to jurisdiction.

When disclosure and consent are not sufficient, the conflict is thus deemed “unconsentable”,³¹ and representation is not permitted. In the products liability context this is comparable to either removing a product from the market or permitting its sale only if the product is modified.³² Three types of unconsentable conflicts are relevant here. One is the direct adversity-positional variety. For example two parties vying for the same broadcast license could not be represented by the same lawyer.³³ In another type of scenario, a relationship with a prior or concurrent client may make it impossible to disclose enough information to result “informed consent.”³⁴ Finally, under the applicable standards dual representation is not permitted, even with consent if no objectively reasonable lawyer would conclude that he or she in this instance could provide competent and diligent representation to both parties.³⁵ In these situations, no amount of disclosure will cure the conflict.

3.3. COMPARING A.A.L.S. “BEST PRACTICES”

It is illustrative to compare what it takes to cure a conflict with consent under products liability law and legal ethics with the treatment of consent under the Association of American Law Schools (hereinafter A.A.L.S.) “Best Practices.” The comparison is startling. In products liability law and under the legal ethics rules when disclosure is not sufficient to protect the purchaser or the client,

³¹ Comment to MR 1.7 Comment [28]. Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

³² A further analogy can be found the case of the Food and Drug Administration and finding that pharmaceuticals can be marketed as safe and effective but with warning labels as opposed to drugs that are not approved at all.

³³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 illus. 1 (2000).

³⁴ MODEL RULES OF PROF'L CONDUCT R. 1.7 (e), cmt. 19 (Discussion Draft 1983).] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

³⁵ Model Rule 1.7 provides: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

the outcome is that the transaction or the representation is not allowed to go forward. As explained below, in the case of legal scholarship, however, when disclosure presents a similar inconvenience, the result is to allow the dual role and, astonishingly, to require less disclosure.

More specifically, conflicted scholars are told to disclose essentially two types of information. First, the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professorial capacity.³⁶ Disclosure of material facts should include:

*(1) the conditions imposed or expected by the funding source on views expressed in any future covered activity; and (2) the identity of any funding source, except where the professor has provided legal representation to a client in a matter external to legal scholarship under circumstances that require the identity to remain privileged under applicable law.*³⁷

Note the advice given when the exception arises: “[i]f such a privilege prohibits disclosure the professor shall generally describe the interest represented.”³⁸ In many respects, this rule makes sense since it puts the interests of a client ahead of those who consume scholarship. The foregone possibility comparable to that found in the context of products and legal ethics is not to engage in outside employment that creates the conflict.

Law professors must also disclose:

*the fact that views or analysis expressed in any covered activity were espoused or developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor.*³⁹

Again, notice that the treatment of the issue when fully informed “consent” cannot be obtained:

Disclosure should include the identity of any client, where practicable and where not prohibited by the governing Code or Rules of Professional Conduct. If such Code or the Rules prohibit a professor from revealing the

³⁶ See *supra* note 5.

³⁷ See *supra* note 5.

³⁸ See *supra* note 5.

³⁹ See *supra* note 5.

*identity of the client, then the professor shall generally describe the client or interest represented or both.*⁴⁰

As has been explained above, the ethics rules reach a different result: they do not allow the lawyer to go forward with conflicted representation, if obligations to others prevent the disclosures necessary for fully informed consent. Instead, they compel the lawyer to decline or withdraw from the representation. Again, the rules seem to have the priorities correct but neglect the possibility of simply not engaging in an activity that creates the conflict. Both disclosure requirements seemed more attuned with allowing scholars to maximize their income, rather than encouraging the best possible efforts to avoid conflicts in the first place.

4. THE PROBLEM WITH DISCLOSURE

4.1. RISK SHIFTING

As noted, the issue of whether disclosure is adequate can be distilled to how the risk of a lack of objectivity should be allocated. “Should,” of course, carries a normative connotation and could be equated with notions of justice or fairness. There are a variety of ways to approach the issue. For example, the Categorical Imperative would mean asking whether shifting the risk by virtue of disclosure is using readers as means to ends. A quasi-Rawlsian approach would ask what would be chosen behind a veil that meant individuals did not know if they were likely to be among the conflicted or among those who are consumers of possibly conflicted work posing as scholarship. An economic approach, similar to that described above with respect to products, would be to ask which party could protect against the risk at the lower cost.

The answer to the risk shifting question may vary with the approach taken and the projected audience⁴¹ but there are strong arguments for not allowing the risk to be shifted by way of disclosure. For example, from the economic perspective the question is whether legal scholarship is more like

⁴⁰ See, e.g., *supra* note 5.

⁴¹ Given the number of ways conflict can arise and the nature of legal scholarship, it is possible it is already taken with a grain of salt. Like all law professors we would like to work from the premise that this is not the case.

toys with small parts or automobiles without airbags. The airbag analogy is more apt because the reader has no way to gauge the actual level of the risk.

Almost certainly the cost of recognizing existence of the bias, determining its impact, and discounting the worth of the scholarship based on that analysis is a huge one for the reader. In fact, to be perfectly safe the reader would be required to discount the validity of anything carrying a disclosure.⁴² Interestingly, the cost to the scholar as a scholar is also high in that scholarship with a warning label is likely to be less valued.⁴³ Moreover, a simple rule against accepting remuneration above expenses would mean consulting is allocated in a manner most consistent with scholarly development.

From the point of view of the Kantian Categorical Imperative the answer also seems fairly straight forward. Those who moonlight and disclose are asking readers to take on the risks of conflicts of interest that they have created. In return for consulting and disclosing the scholars receives intellectual stimulation and money. The readers become the means to achieving these ends. The problem is that these ends are very different. It is illogical to think the scholar truly interested in intellectual stimulation would only take advantage of those opportunities if compensated. Thus, even with no payment, development as a scholar would occur. The leads to the stark conclusion that scholar/consultants are asking their readers to bear the risk of avoidable bias primarily in order to allow them to earn extra income.

The Rawlsian approach is more difficult. It requires one to envision a situation in which people not knowing if they are to be consumers or producers are asked if a disclosure rule would be accepted. On a broader perspective the issue is akin to whether people would prefer a society in which statements by others were dependable or, perhaps, one like our own in which nearly all statements are discounted for the possibility of exaggeration, imprecision, or fabrication. Two added pieces of information would also be available behind

⁴² Eliminating all disclosure requirements would exacerbate the problem in that the reader might well assume that all works are subject to conflicts.

⁴³ This economic analysis can be expanded upon by asking if those made better off by a rule allowing moonlighting and disclosure could compensate those who are worse off by virtue protecting against bias. This would be an application of the Kaldor-Hick or wealth maximizing standard of efficiency but the issue still comes down to which party is, at the lower cost, able to guard against the risk.

the veil. The first this that only a small number of those with elite educations would become the producers. Further, this small group would be able to earn modest to significant sums of money by taking on the moonlighting activities that then, sometimes, intentionally affect their veracity. The twist here is that even those profiting from the ability to shift the risk of their own biases will be vulnerable to the same lack of dependency when it comes to the work of others. In short, everyone is negatively affected and very few are able to benefit. If one follows the Rawlsian assumption of risk aversion, adoption of a “disclosure is enough” rule seems unlikely.

Although there is room for debate, it is likely that the risk shifting implicit in disclosure is not justified by any number of approaches to fairness or efficiency. On final notion that should be dispensed with is the possible argument that by reading an article that includes a disclosure, the reader has thereby consented to whatever bias the article contains. This would be like saying that the parent of the child who swallows a small toy has consented to the harm caused because there is warning label. This notion of consent is similar to one advanced by Richard Posner in the 1980s and confuses risk with the actual harm that could result from that risk.⁴⁴ If this is the proper notion of consent then every driver involved in a car crash could be said to have consented to that crash even though the fault was that of another driver.

4.2. DISCLOSURE AS PERMISSION

Although there appears to be little written on the topic, it makes sense to pose the question of whether a general disclosure requirement would increase or decrease the instances of bias. In effect, could disclosure have a liberating effect because once the risk of bias has been shifted, those who might be biased may be inclined to lower their efforts to remain objective? Conversely, does the requirement of disclosure cause think tank employees to be more careful? In effect, they do not want the implications of the disclosure to be proven true.

There appears to be no answer to this question. The cynical view has an economic flavor to it and is understood by thinking in terms of the small toy example. If there is no liability for harm caused by swallowing small toys it lowers the manufacturing costs which generally means increase production.

⁴⁴ See RICHARD ALLEN POSNER, *THE ECONOMICS OF JUSTICE* 94 (1981).

Similarly, a professor may reason, perhaps subconsciously, that he or she cannot be embarrassed by biased work since the possibility of bias has already been communicated. It is far-fetched to think that scholars would consciously use the risk shifting character of disclosure as a justification for known bias. On the other hand, it is not unreasonable to think in terms of a writer lowering his or her guard while under the impression that disclosure fulfills any obligations to readers. A less cynical view is that having been required to disclose the writer will be inclined to prove the implications of disclosure wrong and be especially fastidious about keeping outside interests at bay.

4.3. OPTIMISM AND SELF-EVALUATION BIASES

Regardless of whether one chooses the cynical or optimistic view of the possibly conflicted writer, there is a significant likelihood that both authors and readers will be affected by the optimism bias⁴⁵ or self-evaluation bias⁴⁶ or both. The optimism bias usually comes into play when people are asked to estimate or consider the likelihood of being negatively affected by a bad event.

A substantial literature illustrates that they underestimate the probability of the event affecting them.⁴⁷ These range from the likelihood of illnesses⁴⁸ to auto accidents.⁴⁹ The optimism bias can be applied to the issue of conflicts of interest by viewing the professor as asking him or herself whether he or she is as likely as the average person to allow outside interests to interfere with topic selection, analysis, objectivity, or presentation. If the optimism bias holds, most individuals will believe their efforts to be more objective than average. Of course, it is not possible for everyone to be above average. In effect, by referring to oneself, a bias is introduced. The optimism bias is usually found when people are asked to consider negative events. Robert Cooter, however, expands to a more general description: “[T]he psychological

⁴⁵ See generally Neil D. Weinstein & William M. Klein, *Unrealistic Optimism: Present and Future*, 15 J. SOC. & CLINICAL PSYCHOL. 1 (1996). See also Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEG. STUD. 199 (2006); Paul Slovic, *Do Adolescent Smokers Know the Risks?*, 47 DUKE. L. J. 1133 (1998).

⁴⁶ See generally Robert H. Gramzow, Andrew J. Elliot, Evan Asher & Holly A. McGregor, *Self-Evaluation Bias and Academic Performance: Some Ways and Some Reasons Why*, 37 J. RESEARCH IN PERSONALITY 41 (2003)

⁴⁷ See generally Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1658-1663 (1998).

⁴⁸ See Neil D. Weinstein, *Unrealistic Assumptions about Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980).

⁴⁹ See David M. DeJoy, *The Optimistic Bias and Traffic Accident Risk Perception*, 21 ACCIDENT ANALYSIS & PREVENTION 333 (1989).

origin of the bias toward optimism is believing that one's own actions are free from fault, or, in a word, self-righteousness causes optimism."⁵⁰

Cooter's broad description probably is more in line with what is called the self-evaluation bias. That bias can be negative or positive; people may over or underestimate their abilities. Most people, though, overestimate their ability⁵¹ and it is not hard to imagine that those involved in outside employment overestimate their ability to keep their two "masters" separate. The self-evaluation or self enhancement effect has been found to be correlated with narcissism and ego involvement but not with higher levels of performance.⁵² What these areas suggest is that even if one takes the benign view and believes those who are potentially subject to conflicts are mindful of possible effects and try hard to avoid the impact of outside interests on their scholarship, they are likely to over-estimate their ability to succeed.

5. CONCLUSION

The prevailing A.A.L.S. approach to conflicts in scholarship seems to be a solution arrived at by reasoning backwards from a conviction that scholars should be allowed to assume these dual roles. This is in stark contrast with other more consumer oriented, client protective approaches. It may be premised in part on an a priori on the assumption that disclosure produces greater objectivity in scholarship. Not only is this assumption open to question, but the availability of the disclosure option may, in fact, be producing less objective scholarship because it gives scholars license not to worry about the potential impact of conflicts. The perverse effect of the disclosure requirement would thus be to produce less objective scholarship.

Some may argue in favor of the A.A.L.S. disclosure approach because without the incentive of outside income, scholars would be less engaged in real life legal processes and that such engagement is particularly valuable for legal scholars. This assumption also seems open to question. Many legal scholars

⁵⁰ See Robert D. Cooter, *The Objective of Private and Public Judges*, 41 PUBLIC CHOICE 107 (1983).

⁵¹ See Mark D. Alicke, *Global Self Evaluation as Determined by Desirability and Controllability of Trait Adjectives*, 49 J. PERSONALITY & SOC. PSYCHOL. 1621 (1985). Constantine Sedikides & Aiden P. Gregg, *Self-Enhancement: Food for Thought*, 3 PERSP. ON PSYCHOL. SCI. 102 (2008).

⁵² See Richard W. Robins & Jennifer S. Beer, *Positive Illusions About the Self: Short-Term Benefits and Long-Term Costs*, 80 J. PERSONALITY & SOC. PSYCHOL. 340 (2001).

would, as long as their expenses were paid, engage in outside activities for educational purposes, to enrich their research, for a change of pace, and to fulfill the service components of their jobs. Moreover, the choice of where to lend expertise would likely be more in line with actual scholarly development because financial incentives would be muted. In fact, the outcome may very well be an allocation of expertise that benefits the have-nots as well as the haves. This is not, however, to say all bias would be removed but at least avoidable bias would be limited.

The principal drawback with the disclosure solution is that it simply is not designed to address the core issue: treating less than fully informative disclosure as an accepted and sufficient cure to conflicted scholarship blurs the lines between academics and firms, between scholars and consultants, and between scholarship and advocacy. This outcome is undesirable for a number of reasons. Society depends upon its universities and its scholars to provide non-partisan, objective, expertise-driven knowledge, which is difficult to obtain elsewhere. The knowledge shaped by special interest or position-based advocacy is unlikely to be politically, socially, or theoretically neutral in its cumulative effects, nor is such knowledge equitably accessible to all of those wishing to advance a partisan view or position. Finally, if scholars are not careful to avoid the impact of the conflicts this article identifies and the lines are further blurred, consumers may either mistake advocacy for scholarship or significantly discount all scholarship because they assume it is advocacy.