



THE MARKET FOR BAD LEGAL SCHOLARSHIP:  
WILLIAM H. SIMON'S EXPERIMENT IN  
PROFESSIONAL REGULATION

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## INTRODUCTION

William H. Simon<sup>1</sup> is a highly regarded law professor and legal theorist whose principal subjects include the legal profession. Much of his scholarship challenges conventional professional norms and practices.<sup>2</sup> His most recent article targets lawyers, especially law professors, who advise clients and serve as expert witnesses.<sup>3</sup> His basic premise is that some clients do not seek lawyers' accurate, honest views but want their lawyers to ratify their proposed or past conduct regardless of its lawfulness, and that law professors and other lawyers sometimes satisfy this market by giving "bad legal advice." To discourage lawyers from doing so, and to minimize the impact of lawyers' bad advice on third parties, Simon argues that lawyers should follow more rigorous standards of analysis, transparency, and accountability both when they give advice or expert testimony and when clients later use their legal work to influence others. He argues that legal academics practicing law should meet the most rigorous standards of all—including standards of transparency associated with the academy, not the legal profession<sup>4</sup>—and, further, that legal academics should regulate each other by "shaming" colleagues who practice badly.<sup>5</sup> In the

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1. Columbia law professor William Simon is unrelated to Hofstra law professor Roy Simon, who is occasionally mentioned in this Reply.

2. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998) [hereinafter SIMON, *PRACTICE OF JUSTICE*]; William H. Simon, *Ethics, Professionalism, and Meaningful Work*, 26 HOFSTRA L. REV. 445 (1997) (criticizing inflexibility of the bar's "[d]ominant [v]iew"); William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996) (challenging the "[d]ominant [v]iew" that lawyers should obey the law). Simon has been especially skeptical of confidentiality rules, believing that the public interest may be better served by more liberal disclosure of client confidences. See, e.g., William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1140-43 (1988) [hereinafter Simon, *Ethical Discretion*]; William H. Simon, *The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 952 (2005) [hereinafter Simon, *Post-Enron Identity Crisis*] ("This is a great marketing advantage for lawyers, but . . . the social benefits of attorney-client confidentiality are unproven and the benefits to corporate clients are vastly exaggerated."); William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 652-53 (2003); see also *infra* note 35.

3. William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555 (2008).

4. *Id.* at 1574-76.

5. *Id.* at 1574, 1576, 1596.

abstract and at a level of generality, Simon's theory is appealing because it promises to hold lawyers to a higher standard of care for the public good. The question, however, is how Simon's proposal at a level of particularity would play out in actual law practice. This Reply argues that Simon overstates the problem, understates the significance of existing disincentives to giving erroneous advice, and offers a solution that is difficult to implement and would do more harm than good.

Ordinarily, it is hard to test theories challenging conventional modes of practice, but not in this case because, while writing his article, Simon engaged in legal work to which he could apply his theory. Specifically, in 2003, he became a litigation consultant and legal ethics expert witness on behalf of plaintiffs who were suing their former lawyers, the civil rights law firm of Leeds Morelli & Brown (LM&B), and he secured the plaintiffs' waiver of confidentiality and permission for him to write about their lawsuits.<sup>6</sup> Doing so accorded with his theory that when law professors give legal advice or testify as experts, they should envision their work as an extension of their legal scholarship, meaning that when practicing lawyers would conventionally maintain client confidences, law professors would publicly present and discuss their legal work as if they were debating legal theory in law journals and at academic conferences. At the same time, as an expert witness, Simon accumulated information about the legal work of opposing academic experts that he might use to critique the work of those who practice under the prevailing standards and expectations.

Simon's article, *The Market for Bad Legal Advice*,<sup>7</sup> presents his theory<sup>8</sup> and illustrates it by discussing *McNeil v. Leeds, Morelli & Brown*, one of the malpractice lawsuits in which he participated. Simon critiques the work of the three law professors on the opposite side of the litigation, of whom I was one.<sup>9</sup>

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6. See *id.* at 1577 n.75 (“[Simon] learned about the Nextel settlement as a consultant to plaintiffs’ counsel in some of the cases arising from settlements negotiated by LM&B.”).

7. William Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example* (Columbia Law School Pub. Law & Legal Theory Working Papers, Paper No. 07139, 2007), available at <http://lsr.nellco.org/columbia/pllt/papers/07139/>. Simon subsequently revised the article for publication in the *Stanford Law Review*. Except where otherwise noted, citations in this Reply are to the *Stanford Law Review* publication.

8. The theory grew out of criticisms he expressed in an earlier article, William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 *LAW & SOC. INQUIRY* 243, 260-61 (1998).

9. Simon’s article contends that all three academic experts on the opposite side of the litigation gave “bad advice.” I was one of those experts. I was retained after the lawsuit was filed to serve as an expert witness on behalf of LM&B and individual lawyers who were defendants. I was not, as Simon contends, a “legal advisor,” but an expert witness. Simon’s article refers to what he assumes to be my opinions but makes no reference to my twenty-seven-page expert declaration setting forth my opinions (which preceded his article’s electronic publication) or to my expert testimony (which preceded his article’s revision for the *Stanford Law Review*). Although I stand by my opinions in the *McNeil* litigation, my

Intending to be “provocative,”<sup>10</sup> Simon accuses the others of giving “bad legal advice” both procedurally (because the process by which they developed and expressed their views departed from his theory) and, to a lesser extent, substantively (because he disagrees with their views on the law).<sup>11</sup>

Simon’s accusation is provocative in the conventional sense: It is meant to get attention, and has already done so,<sup>12</sup> in part because of its one-sided factual account,<sup>13</sup> equally one-sided legal positions,<sup>14</sup> and personal attacks on Professor Geoffrey C. Hazard, Jr. and two other academic brethren.<sup>15</sup> But it is also provocative in another sense: In July 2007, two months before the lawsuit went to trial, Simon circulated a draft of the article to the law professors on the other side in a failed attempt to provoke a response from them, and then, in November 2007, before the trial concluded, he published it electronically.<sup>16</sup> In trying to provoke the defendants’ experts, the article is, at once, an act of advocacy in a pending litigation and a stage of the ongoing experiment in which Simon put his theory into practice.

While claiming that the other three academics performed badly, Simon offers himself as a model of “desirable” legal and scholarly practices.<sup>17</sup> But events after Simon drafted the article cast doubt on this claim:

- The defendants accused him of professional misconduct for (among other things) securing the literary rights to the plaintiffs’ story and writing and distributing his article about the litigation

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primary purpose in this Reply is not to debate my substantive views but to critique Simon’s theory of legal and academic practice.

10. Simon, *supra* note 3, at 1558.

11. *Id.* A reader might understandably take Simon’s criticism primarily as a substantive one. But later in the article, he makes clear that it is not so much substantive as procedural—that his substantive views on the propriety of LM&B’s conduct “are hotly disputed” and that his “argument does not depend on whether [he is] right about the merits.” *Id.* at 1577.

12. *See, e.g.*, Leigh Jones, *Scholars Cited for ‘Bad’ Advice*, NAT’L L.J., Nov. 19, 2007; Posting of Andrew Perlman to Legal Ethics Forum, <http://legaethicsforum.typepad.com/blog/2007/11/more-of-profess.html#more> (Nov. 12, 2007, 11:11 EST); Posting of John Steele to Legal Ethics Forum, “Quasi-Third-Party Advisor”: An Unnecessary, Unworkable Role, <http://legaethicsforum.typepad.com/blog/2007/11/post.html#more> (Nov. 13, 2007, 9:17 AM). Brian Leiter’s blog asked whether Simon’s article was the “blockbuster” legal ethics article of the year? Posting of Brian Leiter to Brian Leiter’s Law School Reports, *The Blockbuster Legal Ethics Article of the Year?*, <http://leiterlawschool.typepad.com/leiter/2007/11/the-blockbuster.html> (Nov. 15, 2007).

13. *See infra* Part III.A.

14. *See infra* Part III.B.

15. Simon, *supra* note 3, at 1574 (“It bewilders me how Yale University or the University of Pennsylvania (where Hazard subsequently moved) could find [Hazard’s opinion in the Kaye Scholer matter] consistent with its dignity and responsibility.”); *id.* at 1587 (“Hazard’s opinion is patently wrong on nearly every issue it addresses . . .”).

16. The significant difference between the two drafts was that the published version included a footnote acknowledging Simon’s role as an expert witness in the *McNeil* case.

17. Simon, *supra* note 3, at 1577 n.75.

before trial. The plaintiffs' attorney declined to defend Simon's conduct, and the trial court struck Simon's expert testimony without opposition.<sup>18</sup>

- The legal positions that Simon had previously endorsed were rejected as a matter of law by the judge and as a matter of fact by the jury, which rendered a verdict for the defendants.<sup>19</sup>
- As soon as Simon published the article electronically, disinterested academics in the field of legal ethics questioned both the credibility of his article's discussion of the opposing experts and its thesis about how lawyers should practice.<sup>20</sup>

Thus, the quality of Simon's advocacy as a litigation consultant, the credibility of his expert opinions, and the value of his article as a work of scholarship, all suffered because, in accordance with his theory, he merged his professional and academic roles, ignored the conventional professional norms, and attempted to perform his legal work as if he were engaged in scholarship. If Simon's legal work was indeed an extension of his scholarship, it was bad legal scholarship with pernicious consequences for his clients.

This Reply explores Simon's theory and his implementation of it. Part I points out problems with Simon's theory about how lawyers, including academic lawyers, should perform legal work. Part II uses Simon's work as an expert witness in *McNeil* as a case study to test his theory. It shows that his theory did not withstand testing, not only because Simon's attempts to adhere to the theory harmed his clients, but also because, as committed as he was to the theory, Simon evidently found the theory imprudent to fully implement in practice. Whatever one may otherwise think of Simon's theory, his experiment in the practice of law thus proved it to be a failure.

Finally, Part III explores Simon's idea that academics should regulate their colleagues' legal work by publicly "shaming" those who perform badly. Simon uses his Article, in part, as a vehicle to shame Professor Hazard, who issued a written opinion with which Simon disagrees. Toward that end, Simon attempts to show that Hazard's opinion was "patently wrong on nearly every issue it adresse[d]."<sup>21</sup> Employing Simon's article as a case study, Part III argues that academic exercises in professional "shaming" make for both bad scholarship and bad regulation. Simon's critique of Hazard's legal work, for example, rests on a biased and incomplete account of both the facts and the law, and his disagreement with Hazard, largely based on a different set of factual understandings, is academically trivial. Given its limitations, one might wonder whether other scholars will engage in similar regulatory exercises and whether law journals will publish the results.

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18. *See infra* Part II.F.

19. *See infra* Part II.G.

20. *See infra* Part II.F.

21. Simon, *supra* note 3, at 1587.

## I. A BRIEF CRITIQUE OF WILLIAM SIMON'S THEORY OF LEGAL AND ACADEMIC PRACTICES

Simon's theory addresses two aspects of professional practice. First, it offers ideas about how lawyers in certain areas of practice should conduct their work. Simon's view is that lawyers, especially academic lawyers, whose legal advice or expert opinions may later become public, should have greater duties of candor, disclosure, and accountability than they now have. Second, Simon considers the work of legal academics in their scholarly role. His position is that legal scholars should critique their colleagues' legal practice, thereby performing a regulatory function. This Part raises questions about Simon's theory before turning in Parts II and III to Simon's own legal work and academic writing as case studies through which to test his theory. Subpart A outlines Simon's theory. Subpart B focuses on the duties he would impose generally on lawyers who serve as legal advisors or expert witnesses, premised on the duties now imposed on tax lawyers. Finally, Subpart C examines the further duties he would impose particularly on law professors who serve as legal advisors or expert witnesses, based on what he regards as informal academic norms.

### A. *An Outline of Simon's Theory*

Simon addresses the professional work of lawyers and law professors and how it should be performed and regulated. He maintains that lawyers giving legal advice or serving as expert witnesses (among others) should have heightened duties of candor, disclosure, and accountability—comparable to, but exceeding, those imposed by IRS regulations on lawyers issuing formal tax opinions. Further, he maintains that lawyers rendering these services who are also law professors should have additional disclosure obligations derived from what he regards as the norms of academia. These disclosure obligations would facilitate the work of other academics in a new regulatory role he assigns them: “shaming” colleagues who perform their professional work badly. Needless to say, Simon's theory about how lawyers and law professors should practice law challenges conventional norms. Here is how Simon's theory unfolds.

First, Simon invents the term “quasi-third-party legal advice,” which he defines to mean “legal advice in which lawyers purport to speak disinterestedly in order to influence public conduct or attitudes for the benefit of private clients, and which is given under conditions of nonaccountability and secrecy.”<sup>22</sup> Various legal services, he argues, fall within this definition. Simon begins by offering two illustrations from legal ethics practice involving ethics professors' after-the-fact evaluations of law firms' professional conduct.<sup>23</sup> In

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22. Simon, *supra* note 3, at 1557.

23. *Id.* at 1567-75. The first involved Professor Charles Wolfram's after-the-fact

each case, a professor issued an opinion stating that the law firm in question had acted properly, and the law firm then disclosed the opinion to defend its conduct in the press. Simon believes the opinions were wrong and that members of the public might have been influenced by the opinions in forming their own views at that stage, before legal proceedings against the law firms had commenced or gone very far. Simon then characterizes two additional areas of law practice as “quasi-third-party legal advice”: legal advice and expert testimony.<sup>24</sup>

Second, Simon argues that lawyers providing “quasi-third-party legal advice” should depart from the conventional norms and practices in order to protect third parties or the general public. He says that these lawyers should adopt some version of the norms that IRS regulations known as Circular 230 impose on tax lawyers who provide private tax opinion letters. Like the tax laws and regulations generally, Circular 230 is complex.<sup>25</sup> It generally imposes obligations of candor, clarity, due diligence, analytical support, and reasonable framing. Simon thinks the legal services he targets are enough like tax opinions to warrant extending the IRS norms to them. But precisely because of the differences, Simon argues that a “quasi-third-party legal advisor” should additionally have a duty “to update [his opinion] in the light of new information where there is continuing reliance on the opinion.”<sup>26</sup>

Finally, Simon argues that special rules should apply to law professors providing “quasi-third-party legal advice” because they benefit from the implicit imprimatur of their academic institutions. He says that these law professors should see their legal work as an extension of their scholarship, and they should perform their legal work in accordance with the professional norms that he thinks should apply to scholarly publications, not just those applicable to legal practice. His “basic norm” is that “[w]hen an academic publicly expresses a view as an expert or authorizes another to attribute an expert view to her, she should take care that the view be publicly accessible and clearly and accurately expressed, with its basis as fully stated as feasible.”<sup>27</sup> To make her opinions “as readily accessible as possible,” the professor should post them on a website, at least “[i]f she has substantial quasi-third-party practice.”<sup>28</sup> Further, it is not only permissible but also “desirable” to carry into scholarship a debate that an academic “join[s] as a litigation consultant or expert”<sup>29</sup> even

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analysis of Vinson & Elkins’s representation of Enron. The second, involving Professor Geoffrey Hazard’s after-the-fact analysis of Kaye Scholer’s representation of Lincoln Savings & Loan, was previously criticized by Simon in a 1998 article. *Id.* at 1572 n.62.

24. See discussion *infra* Part I.B.

25. See generally JONATHAN G. BLATTMACHR ET AL., *THE CIRCULAR 230 DESKBOOK* (2006); Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 *YALE J. ON REG.* 77 (2006).

26. Simon, *supra* note 3, at 1565.

27. *Id.* at 1574.

28. *Id.*

29. *Id.* at 1577 n.75.



while litigation over the academic's opinion is ongoing. He maintains that academics should avoid confidentiality commitments that interfere with their ability to debate publicly their legal opinions.<sup>30</sup>

At bottom, Simon's theory strikes a new balance between clients' interest in controlling information and the interest in transparency to facilitate professional regulation. Lawyers are regulated through a variety of mechanisms, including the disciplinary process, civil and criminal liability, and informal regulation by their clients and other lawyers. These all depend on information about what lawyers are doing. But there is a tension between the regulatory interest in transparency and client confidentiality, which promotes the private and public interest in obtaining effective legal assistance. The rules of professional conduct, civil procedure provisions, and other laws strike a balance between the regulatory interests and competing public and private interests,<sup>31</sup> but they often favor the client's right to control information about the lawyer's representation.<sup>32</sup>

Simon's theory calls for greater transparency, particularly in the work of lawyer academics, in order to enhance regulation. With respect to academic lawyers, his aim is to establish a regulatory role for the legal academy and the law reviews. Simon assigns law professors a quality-control function, comprised of their "informal criticism and shaming" of colleagues who perform bad legal work.<sup>33</sup> To better enable law professors to serve this role, Simon demands greater transparency in situations where academic lawyers' work affects third parties: more disclosure in writings directed to clients that later may be viewed by third parties; earlier and broader public dissemination of academic lawyer work product; and public disclosure of their otherwise private views that raise questions about the ongoing validity of earlier work. In effect, Simon imports norms from two other regulatory regimes—the regulation of lawyer conduct in an area where client self-regulation is at its apex (i.e., tax advice) and the "regulation" of legal scholarship (as he perceives it)—and applies them to academic lawyers' work in other contexts.

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30. *See, e.g., id.* at 1574 (stating that an academic should "clarify and revise public descriptions of her view as long as the view is the subject of public attention" and "should not make any private commitments incompatible with this principle"). Simon's general opposition to confidentiality commitments is further reflected in the contrast he draws between his own work as an expert witness and that of the opposing experts who failed to secure authorization to write about their work. Simon put this point more plainly in his original electronically published version. *See* Simon, *supra* note 7, at 27-28 n.60 (arguing that insofar as opposing experts' confidentiality commitments restricted them from responding to his criticisms, that is a problem "of their own making").

31. For example, the crime-fraud exception to the attorney-client privilege and the self-defense exception to the confidentiality rule make concessions to regulatory interests.

32. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (2002).

33. Simon, *supra* note 3, at 1596.

### B. *Critiquing Simon's Theory of Law Practice*

Even in the abstract, Simon's ideas about how lawyers and legal academics should practice seem questionable. Indeed, almost immediately after Simon published his article, John Steele posted a response criticizing Simon's theory as unworkable.<sup>34</sup> Among other things, Steele observed, the term "quasi-third-party advisor" obscures the differences among the various lawyer roles that Simon discusses; further, the transparency norms that Simon attributes to academic practice are at odds with the legal profession's confidentiality norms, making it hard to see how an academic lawyer can view his two roles as "continuous."<sup>35</sup> The following critique elaborates on Steele's insights and offers additional observations suggesting that Simon's proposed new norms of law practice are unwarranted and potentially destructive. It looks first, and most closely, at Simon's ideas about the obligations that legal advisors should assume. It then briefly examines Simon's ideas about the duties of legal expert witnesses, a subject explored in greater depth in Part II in the context of Simon's work as an expert witness in *McNeil*.

#### 1. *The duties of legal advisors*

Simon's initial examples of "quasi-third-party legal advice" are after-the-fact legal ethics evaluations by Professor Wolfram in the Enron case and Professor Hazard in the Kaye Scholer case. It is understandable that Simon starts here because his theory is on firmest footing in the context of ex post legal evaluations that the client requests specifically for the purpose of influencing public opinion. Even so, one might question whether the standards that tax regulations set for tax lawyers providing opinion letters on the tax law need to be extended to lawyers who provide after-the-fact legal ethics evaluations.<sup>36</sup> In any event, such work is rare and is not Simon's main concern.

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34. Posting of John Steele to Legal Ethics Forum, *supra* note 12 (concluding that Simon's "thesis needs a complete rethinking if not an outright rejection"). Steele is an in-house law firm ethics advisor and a lecturer in legal ethics at University of California, Berkeley School of Law and Santa Clara School of Law.

35. *Id.* Simon's preference for transparency over attorney-client confidentiality, premised on the view that the benefits of confidentiality are exaggerated and that it undermines regulatory interests, is a theme of his writings. See, e.g., Simon, *Post-Enron Identity Crisis*, *supra* note 2, at 952 ("A little-noticed cost of confidentiality is that it undermines accountability, not only of clients, but of the lawyers themselves. Confidentiality prevents review and assessment of the quality of much legal advice."); see also *supra* note 2, and *infra* note 53. For some readers, Simon's argument that legal advisors, especially academic legal advisors, should work more transparently, might be rejected if for no other reason than that it grossly undervalues the importance of confidentiality.

36. Given the unique attributes of tax opinion practice, one cannot conclude simply by force of analogy that the regulatory standards applied by Circular 230 and currently governing no other area of legal practice should be applied to after-the-fact legal evaluations. Tax opinion letters are meant to be kept private by the recipient. Tax lawyers provide them

The two types of legal work on which Simon focuses—ex ante legal advice and expert testimony—are distinct from legal evaluations like those with which Simon leads off.

Simon focuses especially on legal advice concerning a client's future conduct where the client expects to use "the lawyer's advice for support in the event the [client's] conduct is later challenged."<sup>37</sup> This might describe advice in any area of the law, but Simon offers legal ethics advice as his example. In general, professional norms encourage lawyers to secure legal advice about how to resolve uncertain questions of professional conduct.<sup>38</sup> Simon recognizes that the lawyer-advisor starts out "as a first-party legal advisor"—that is, he simply gives advice to a client. But Simon maintains that the ethics advisor should come to regard himself as a "quasi-third-party legal advisor" if "it becomes highly probable that the client will rely publicly on the advice."<sup>39</sup> By "publicly," Simon includes disclosure in litigation or in dealings with regulatory authorities, not necessarily in the media.<sup>40</sup> At that point, Simon argues, the lawyer should stop complying with "normal confidentiality obligations" and comply with the norms of candor and accountability derived in part from tax opinion writing.<sup>41</sup>

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ex ante so that taxpayers can rely on them in shaping future conduct. They are issued in the context of a regulatory regime in which taxpayers are rarely audited and therefore have primary responsibility for compliance with the tax law, and in which tax lawyers therefore play a crucial role in the process of legal compliance. Even an erroneous tax opinion may have a legal effect, enabling the client to avoid tax penalties by establishing that he relied on the lawyer's opinion in good faith.

In contrast, the after-the-fact evaluations of law firms' professional services to which Simon referred were solicited with the very expectation that they would be made public if they met the firms' expectations. The law firms had already engaged in the challenged conduct, which had been publicly exposed and was being publicly challenged, and the law professors' after-the-fact evaluations would have no legal effect unless, in an adjudicative setting, they were found to be persuasive. Any harm created by disclosing an erroneous legal opinion to the press was slight compared to the harm of an erroneous tax opinion.

37. Simon, *supra* note 3, at 1575.

38. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2002) (allowing a lawyer to disclose client confidences to obtain such advice).

39. Simon, *supra* note 3, at 1575.

40. Simon's use of the term "publicly" implies disclosure through the media, whereas his use of the *McNeil* case as an illustration shows that Simon includes cases where the former client has no evident interest in discussing the lawyers' opinions in the media. In *McNeil*, Simon was the one who publicized the expert witnesses' ex ante opinions. Insofar as Simon contemplates disclosures in a lawsuit rather than in the media, it is unclear about which harms his theory is concerned. Obviously, the harm is not an effect on public attitudes. The concern may be the effect on opposing parties or fact finders, but as will be discussed, the adversary process can offset the effect of erroneous advice. See *infra* text accompanying notes 65-68 and Parts II.E & II.G.

41. Simon, *supra* note 3, at 1575. Simon's discussion of *McNeil* implies that lawyers should meet the Circular 230 standards even before their advice is publicly disclosed. Simon criticizes Hazard for failing to write an opinion with reasoned analysis according to the Circular 230 standard, see *id.* at 1587-91, even though Hazard's advice was given long before anyone knew that his advice would become public in litigation.

As discussed below, Simon's theory has several problems. First, his premise is vague: from a substantive perspective, it is unclear what he means by "bad" advice. Second, leaving aside contexts where reliance on counsel's advice provides a legal defense, Simon exaggerates the problem of "bad" advice: he is unpersuasive that substantively "bad" advice to clients causes harms to specific third parties or to the general public that must be redressed by revising professional norms, and he overlooks existing mechanisms of accountability. He also exaggerates the extent of the market for bad legal advice. Again leaving aside advice-of-counsel cases, it is questionable whether clients will demand "bad" legal advice and, even if they do, whether lawyers will supply it. Finally, whatever the magnitude of the public harm caused by bad advice and the size of the market for it, transplanting tax-opinion norms to a broader array of legal consulting practices would cause more problems than it could possibly solve. Simon's proposed changes to current professional practices would make legal advice prohibitively expensive for many clients and would significantly erode the guarantee of client confidentiality that historically has been regarded as essential to the effective legal representation of clients needing legal advice.

First, Simon's theory assumes there is a market for substantively bad advice, but Simon does not define "good" legal advice from a substantive perspective.<sup>42</sup> In the legal ethics context, for example, he does not explain whether a lawyer giving advice should aim to identify what the courts would say about how disciplinary rules and other laws apply to the client's proposed conduct, what disciplinary authorities would say, what informed members of the professional community would say (or themselves do), what legal ethics or academic experts in particular would say, or simply what the lawyer-expert believes in good faith.<sup>43</sup> Simon does not consider whether the answer differs depending, for example, on whether the lawyer-expert is giving a prospective opinion on which another lawyer might rely in fashioning future conduct or is expressing an expert opinion retrospectively in a malpractice lawsuit. Simon believes that he knows bad advice when he sees it, but his own views turn out to be idiosyncratic.<sup>44</sup>

Second, Simon is unpersuasive that the public harm caused by a lawyer's "bad" advice to his own client justifies rewriting professional norms to deter or

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42. Simon's argument seems circular, since it defines "bad" legal advice primarily by reference to the process by which advice is developed and expressed rather than by reference to its substance. Simon proposes procedural correctives to the market for bad advice, but defines bad advice as advice that does not accord with his prescribed procedure.

It is strange to speak of a market for advice that is *procedurally* "bad." If clients want legal advice that legitimates their illegal conduct, as Simon assumes, the clients should care about the substance of the advice but be indifferent to how it is dispensed, as long it has the desired effect.

43. *See infra* Part III.C.

44. *See infra* Part III.B.

expose bad advice. No doubt, lawyers sometimes express erroneous legal views. But Simon overstates the risk that third parties will detrimentally rely on a lawyer's erroneous legal advice to his client. Unlike third parties who are intended recipients of lawyers' opinion letters, third parties who learn incidentally of legal advice given to others face little risk precisely because they are not invited to rely in any legally meaningful sense. Interested parties will test the opinions.

Consider the legal ethics example. A law firm may justify challenged behavior by pointing to the advice it previously received. It will ordinarily do so, not in the media, but in litigation or in disciplinary proceedings. Malpractice plaintiffs' counsel or disciplinary authorities are sophisticated and skeptical and will have every reason to scrutinize and test the prior advice.

Nor does bad legal advice given privately to one's client generally provide a legal advantage that undermines the public interest more broadly. Simon does not focus on legal advice that may establish an advice-of-counsel defense or have some other potential legal effect. Here, his premise that deliberately erroneous legal advice to clients may prejudice third parties would be more compelling. But while noting that reliance on the advice of counsel may be a legal defense in some areas of legal practice,<sup>45</sup> Simon extends his theory to advice such as on legal ethics that provides no legal advantage<sup>46</sup> so that the likely victim of substantively bad advice is the client, not the public.<sup>47</sup>

Third, lawyers (including academic lawyers) who are inclined to give substantively bad advice presently can be held accountable through (and deterred by) formal and informal legal processes. Legal advisors are subject to civil liability and discipline. If clients rely to their own detriment on their lawyers' deliberately erroneous (and overly accommodating) advice, their lawyers may be civilly liable for malpractice.<sup>48</sup> If clients justify wrongful conduct by relying on erroneous advice in litigation, the lawyer who gave the

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45. Simon, *supra* note 3, at 1557. For example, reliance on legal advice may be a defense to criminal charges that require proof of willful wrongdoing or to civil liability for punitive damages, if the client can show that the relevant facts were fully disclosed to the lawyer and that the client then relied in good faith on the advice. Tax opinions serve this function, which is why the IRS has a special interest in regulating tax opinion letters. So do legal opinions on securities, antitrust, and patent law.

46. Simon acknowledges that there is no advice-of-counsel defense for lawyers' disciplinary violations. *Id.* at 1586 n.131. In his deposition, he suggested that legal advice may have some relevance, however, "when a question is a close question that could go either way, when there's a lot of ambiguity about the situation." Deposition of William H. Simon at 137, *McNeil v. Leeds Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County June 21, 2007) [hereinafter June 2007 Deposition]. If the question is that close, it is not clear why advice on either side of the question is substantively "bad."

47. One needs to think differently about legal advice when it will provide an advice-of-counsel defense. See Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 *FORDHAM L. REV.* 1429, 1447-49 (2006).

48. See generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799 (1992).

advice risks embarrassment by having the advice criticized in a judicial opinion. Deliberately erroneous advice also may be a basis for professional discipline. Legal advice differs in these respects from an after-the-fact evaluation that the client invokes solely to influence public perceptions. Simon does not explain why existing mechanisms of accountability need to be enhanced or supplemented; nor does he make a persuasive case that legal advisors will become significantly more accountable via informal processes if they adopt the Circular 230 norms.

Fourth, Simon does not explain why, absent a potential advice-of-counsel defense, there should be a significant market for substantively “bad” first-party advice.<sup>49</sup> Although Simon analogizes to legal opinions given to third parties to induce them to enter into transactions (i.e., true “third-party opinions”),<sup>50</sup> the analogy is weak. For example, Simon does not explain why a rational lawyer-client would seek bad ethics advice with the expectation of using it to justify malpractice or disciplinary violations when, in the end, the cost of responding to allegations of misconduct is high and the prior advice does not provide a legal defense. Because lawyers are generally conservative about risk, there is an open market, not for erroneous and risky advice, but for legal advice about “risk management”—that is, about precautions useful to avoid running afoul of civil, criminal, or disciplinary law. This market is promoted by legal malpractice insurers and supplied by legal experts on lawyers’ and law firms’ professional conduct. Legal ethics advisors are more likely to counsel clients to stay far clear of the line than to provide opinions designed to ratify conduct that crosses the line.<sup>51</sup>

Even if bad advice is in demand, Simon does not explain why lawyers can be expected to supply it in the absence of more extensive disclosure obligations. The professional norms assume that lawyers are generally motivated to act ethically, and Simon has previously endorsed that assumption.<sup>52</sup> As a matter of professionalism, concern for their reputation, and long-term self-interest, lawyers might ordinarily be expected to resist

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49. Even when legal advice has legal effect, it may not make sense to seek legally erroneous advice. Seeking a dishonest opinion validating one’s proposed unlawful conduct seems like an unwise strategy, given the cost of defending unlawful conduct and the uncertainty whether an opinion letter will ultimately establish a defense. Simon does not explain why, given the choice, a rational client would not prefer a lawful means of minimizing taxes over an unlawful tax scheme that will have a greater tax advantage (if undiscovered) and that is supported by an opinion letter known to be dishonest.

50. Simon, *supra* note 3, at 1558-59.

51. Simon never explains why legal ethics experts, especially those who are academics, would be motivated to give deliberately bad advice, especially given their own malpractice exposure. If lawyers have such strong motivations to make money, it seems unlikely that they would become legal academics rather than full-time practitioners.

52. See Simon, *Ethical Discretion*, *supra* note 2, at 1144 (“Like most discussions of lawyering, mine simply takes for granted that lawyers are substantially motivated to act ethically and that they have the capacity for reasonably good normative judgment.”).

temptations to give advice that they know or believe to be wrong. This is particularly true with respect to so-called quasi-third-party legal advice, which will be publicly disclosed and scrutinized by opposing parties. A result-oriented client would be far less likely to retain a pliable advisor than to seek a well-reputed expert whose honest opinion accords with the client's position. An expert who cultivated a reputation for telling clients what they want to hear would not have much credibility with regulators or other members of the relevant legal or professional community, and his advice would therefore have little value to a sophisticated client seeking to influence knowledgeable third parties.

Finally, Simon might argue that he does not need a compelling justification for placing greater demands on legal advisors, but this would overlook the countervailing interests underlying conventional practice.<sup>53</sup> Significantly, the norms of tax opinion writing would undermine clients' access to legal counsel by making garden-variety legal advice prohibitively expensive. Lawyers currently give legal advice in many forms to clients of various means, including low- and middle-income clients. Often, lawyers give oral advice or brief written advice predicated on their understandings of the facts and law. Whether lawyers provide a quick conclusion or an elaborate written opinion depends on many factors, including the complexity of the facts and law, the client's ability to afford time-consuming services, and the urgency and magnitude of the problem. Tax opinion letters, which are at the most demanding end of the spectrum, are extremely expensive.<sup>54</sup> Applying Circular 230 to legal advisors in other areas of the law would undermine the profession's efforts to make legal services affordable and accessible.<sup>55</sup> Many cannot afford an extensive written opinion when a quick conclusion will suffice, and even those who can

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53. In the past, Simon has acknowledged that client interests deserve some weight. *See id.* at 1143 ("Reduced confidentiality would probably entail some costs to clients, but the important issue is whether these costs outweigh the costs to third parties and the legal system from the prohibition of disclosure."); *see also id.* at 1140-43. However, Simon has previously criticized existing professional norms, such as those requiring the preservation of client confidences, on the theory that they overvalue clients' interests at the expense of public interests. For example, contrary to fundamental professional assumptions, he has observed that "[t]he rationale for confidentiality with respect to ongoing or anticipated wrongful behavior is that it induces people to seek legal advice. But a person who intends to abide by the law in any event does not need this inducement." *See, e.g.,* Simon, *supra* note 8, at 281.

54. Tax opinion letters would be expensive even absent Circular 230. Taxpayers want opinion letters to be as elaborate, well-reasoned, and credible as possible since they are intended ideally to persuade the IRS and, in the very least, to demonstrate the taxpayer's good faith. The lengthy, reasoned opinions are affordable because their beneficiaries, taxpayers seeking to minimize significant potential tax liabilities on large amounts of income, have considerable financial means.

55. *See, e.g.,* Justice Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 *FORDHAM URB. L.J.* 1107, 1108 (2002) (observing that for many clients, limited engagements such as "telephone, Internet, or in-person advice . . . make a lawyer's services affordable").

do so will often be reluctant to seek one.<sup>56</sup> Ultimately, these norms would substantially reduce lawyers' role in promoting compliance with the law to both clients' and the public's detriment.<sup>57</sup>

Simon might respond that his proposal is not so onerous because it is not directed at a large category of legal advice but only at what he calls "quasi-third-party opinions." But this argument raises the definitional problem of distinguishing *ex ante* between first-party and so-called "quasi-third-party" advice. Whenever a lawyer advises a client that its proposed conduct is lawful, the lawyer can anticipate that if the conduct is later challenged, the client will point to the lawyer's advice to justify the conduct, whether or not the advice has a legal effect. Therefore, if this is what Simon means by "quasi-third-party opinions" that must be given in writing in accordance with Circular 230, virtually all advice would qualify.<sup>58</sup> Lawyers would have to end the practice of giving oral advice or sending brief writings describing how the legal lines are drawn or confirming that clients may lawfully engage in particular conduct. On the other hand, if Simon's definition is narrower, and refers exclusively to *ex ante* legal advice given at a time when the client unconditionally intends to make the lawyer's advice public in order to influence others, then Simon's theory has virtually no application. Clients often anticipate the possibility of having to refer to a lawyer's advice if conduct undertaken on the advice of counsel is later challenged, but that is conditional. When receiving the advice, the client's preference would be to avoid questions about how it acted and, therefore, to avoid any reason to disclose the lawyer's advice. In the exceptional situation where the client solicits the lawyer's *ex ante* advice intending unconditionally to rely on the advice but also to disclose the advice to others, the lawyer is unlikely to be aware of that intent. Under the narrower definition, the Circular 230-style obligations for issuing written opinions would rarely be triggered.

The definitional problem does not apply equally to the duty to update legal opinions because that proposed duty would apply only after the lawyer learns

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56. At least when he initially published his article electronically, Simon was unconcerned that additional obligations would diminish access to legal services. Simon, *supra* note 7, at 26 (opining that "the fact that a duty to revise, taken seriously, might reduce demand for quasi-third-party advice is not a strong objection to it").

57. Simon is centrally concerned not with the substantive quality of expert advice but with the form in which it is provided. In criticizing the opposing experts' work, his deposition testimony was consistent with his theory that "good" opinions must be written and elaborated. June 2007 Deposition, *supra* note 46, at 140 (testifying that Roy Simon's opinion should have been in writing); Deposition of William H. Simon at 212, *McNeil v. Leeds Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County July 20, 2007) [hereinafter July 2007 Deposition] (testifying that Nextel could not reasonably rely on Hazard's opinion because "there is no analysis on its face"). But Simon considered it less important to put his own opinions in writing. June 2007 Deposition, *supra* note 46, at 140; *see also infra* Parts II.B & II.D.

58. The exception would be when the lawyer advises the client that anything it might conceivably do would be unlawful.



that his advice has been (or is highly likely to be) publicly disclosed. But this aspect of Simon's proposal raises additional practical problems. The practice would add further to the expense of rendering legal advice. Lawyers would have to increase their fees for legal advice in anticipation of the future obligation to update or correct their advice as necessary for the benefit of third parties. Since the practice is designed to benefit third parties, clients would have little motivation to pay for it in the future. Moreover, the practice would be logistically impractical since former clients would have little incentive to cooperate with former legal advisors' efforts to take account of how the advice is used and to learn new facts.<sup>59</sup>

Further, the duty could not be carried out without a new, and unwelcome, exception to the ethical duty of confidentiality. Simon assumes that when a lawyer's advice is or might be publicly disclosed, the attorney-client privilege is waived.<sup>60</sup> Even when this is so, the ethical duty of confidentiality generally survives. Without the client's consent after full disclosure, the former lawyer may not discuss the advice outside formal proceedings.<sup>61</sup> One might answer that lawyers should contract with clients in advance to allow the lawyer to discuss and update an opinion once it is placed in issue,<sup>62</sup> but such an agreement would likely be revocable when the time came to rely on it.<sup>63</sup> The current disciplinary rules would have to be amended to authorize lawyers voluntarily to discuss past advice, but the organized bar would legitimately oppose creating a new exception to the confidentiality rule that might

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59. For example, a law firm that is sued for malpractice or questioned by disciplinary authorities will have no incentive to update its former legal advisor.

60. Contrary to Simon's suggestion, *see* Simon, *supra* note 3, at 1575 n.70, a mere "high probability" that the client will publicly rely on the lawyer's advice in the future does not waive the attorney-client privilege. Until the client actually puts a lawyer's advice in issue in a legal proceeding, there will not be an implicit waiver.

61. Simon maintains that "once the client goes public and presents the lawyer's opinion as expertise (rather than advocacy), it has waived any plausible claim to confidentiality." Simon, *supra* note 3, at 1566. Perhaps Simon means that the client waives any *moral* claim to confidentiality. Under the rules of professional conduct, the client does not waive a claim to confidentiality by putting the lawyer's advice at issue or publicly discussing it. The lawyer's confidentiality duty extends beyond privileged information. For example, ABA Model Rule 1.6 applies to any "information relating to the representation of a client," privileged or not, absent an exception. MODEL RULES OF PROF'L CONDUCT R. 1.6. (2002). Further, public discussions of legal advice may not waive even the attorney-client privilege other than with regard to the communications that are specifically disclosed. *See In re von Bulow*, 828 F.2d 94 (2d Cir. 1987).

62. *See* Simon, *supra* note 3, at 1574 (an "academic should not make any private commitments incompatible" with the duty to "clarify and revise public description of [opinions that become] the subject of public attention").

63. *See, e.g.*, Ass'n of the Bar of the City of N.Y., Comm. on Professional and Judicial Ethics, Formal Op. 1997-2, at 8 (1997) ("If the minor client consents in advance to the lawyer's reporting of confidences or secrets concerning abuse or mistreatment, the client may later change his mind and revoke consent, in which event the lawyer must maintain confidentiality . . .").

discourage clients from seeking advice in the first place. Historically, both the bench and bar have valued confidentiality more highly.

Simon's impulse is laudable insofar as he aims to reduce the risk that clients will use their lawyers' erroneous legal advice to others' prejudice. But the devil is in the details. Simon's proposed change in how legal advisors practice is not justified. He is not persuasive that erroneous legal advice to clients poses serious harms to the public, that there is a significant demand for and supply of deliberately erroneous advice under existing norms, or that lawyers are not already sufficiently accountable when lawyers' erroneous advice to clients is publicly disclosed. Nor does Simon adequately take account of how more demanding norms will undermine clients' access to legal counsel or of other practical impediments to implementing his theory.

## 2. *The duties of expert witnesses*

Simon sweeps expert witnesses within the rubric of "quasi-third-party legal advisors," but he is mistaken. Expert testimony is not "legal advice" given "to influence public conduct or attitudes . . . under conditions of nonaccountability and secrecy."<sup>64</sup> Generally speaking, legal advice is advice that a lawyer gives to a client about how the law applies to the client's specific factual situation and on which the client may rely in shaping future behavior. Expert witnesses do not have clients, and they do not give prospective "legal advice"; they express disinterested opinions after the fact. They do not seek to influence public conduct or attitudes; they seek to assist judges and juries in making informed decisions. Their opinions are not secret but are disclosed in discovery and at trial, and they are accountable for their opinions through the litigation process. Some of the practical problems with Simon's theory, particularly as applied to expert witnesses, are exposed in Part II, which examines Simon's own role as an expert witness in the *McNeil* litigation. But even as abstract theory, Simon's argument that expert witnesses should practice comparably to tax advisors is unconvincing.

Like Simon's views on legal advisors, his views on expert witnesses suffer from various problems, beginning with the vagueness of his premise that there is a market for substantively "bad" legal work of this nature. Simon does not explain what makes a substantively "good" expert opinion or what makes a testifying expert's opinion "bad." In the legal ethics context, the answer may differ, for example, depending on whether the opinion is to be offered in a civil malpractice case such as *McNeil* or is to be offered in connection with a disciplinary proceeding, a disqualification motion, or an application for sanctions in litigation.<sup>65</sup> Simon does not explain whether the expert should

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64. Simon, *supra* note 3, at 1558-59.

65. See, e.g., Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71 (1996) (discussing different approaches to conflicts of interest under

attempt to predict what a court would say about the propriety of the challenged lawyer's conduct, give his view on whether the conduct fell within the range of what lawyers ordinarily do in the professional community, identify the prevailing professional understandings, provide a personal view of what the relevant rules mean or should mean, or apply some other benchmark.<sup>66</sup> Nor does Simon express a view on whether an honestly held opinion that is rejected by the judge or jury is substantively "bad" by definition, or whether, given the uncertainties that exist, different and opposing opinions may both be legitimate.

Further, while Simon is surely right that clients sometimes welcome erroneous expert opinions,<sup>67</sup> existing procedural rules take account of this, and Simon is unpersuasive that new standards comparable to those of Circular 230 are needed.<sup>68</sup> Rules of procedure require expert witnesses to disclose their opinions through reports or in depositions in advance of trial, and expert opinions are tested through the adversary process. Before juries or judges accept them, expert opinions are critiqued by opposing experts and examined in depositions and at trial. They are subject to challenge under evidentiary rules when their methodology is so unreliable that the opinions will not assist the trier of fact. Like other expert witnesses, legal experts have powerful incentives to formulate well-reasoned views. If they do not, they will be subject to impeachment and embarrassment in the litigation process,<sup>69</sup> and their opinions will be of comparatively little value, meaning that the lawyers will not have a long future as expert witnesses.<sup>70</sup>

While litigation is not foolproof,<sup>71</sup> there is no reason to think that different norms for expert witnesses will make litigation more reliable,<sup>72</sup> and Simon does not suggest otherwise. His interest is in enhancing informal processes—

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disciplinary rules and disqualification decisions); *see also infra* Part III.C.

66. On the unresolved role of legal ethics experts in legal malpractice cases, *see*, for example, Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert Witness*, 13 GEO. J. LEGAL ETHICS 405 (2000); Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102 (1996).

67. Bad expert testimony will be more welcome than bad legal advice. For example, legal malpractice plaintiffs may seek expert testimony that supports their positions, regardless of whether the expert is expressing a correct or honestly held opinion. On the other hand, even in malpractice cases, prudent parties may prefer honest opinions that will help them make informed decisions whether to pursue or settle charges.

68. Simon acknowledges the imperfect analogy between legal advice and litigation expert opinions and suggests that "Circular 230-type standards" may therefore "require some softening" for experts. Simon, *supra* note 3, at 1566 n.36. But his subsequent discussion of the advice and expert opinions in *McNeil* makes no distinction.

69. Legal experts' unfounded opinions are more easily exposed than those of other experts because their work and methodology are more readily accessible to opposing lawyers and judges, who work in the same profession.

70. Expert witnesses in some jurisdictions are also subject to malpractice liability. *See, e.g.*, *Levine v. Wiss & Co.*, 478 A.2d 397 (N.J. 1984).

71. For example, common wisdom is that in legal malpractice cases, jurors' sympathies run with individual plaintiffs over law firm defendants.

72. *See infra* Parts II.D, E & G.

e.g., the processes of truth seeking in the court of public, professional, or academic opinion—by affording observers (especially legal academics) more information on which to base critiques. Simon is not crystal clear about what informal processes he has in mind, but his focus is evidently on legal academic discussion as opposed to discussions in the popular or professional media, and his preference is presumably for discussions in academic publications, where ideas can be most fully elaborated and citations can be checked.<sup>73</sup>

It is unlikely that different norms for legal experts will lead informal processes, such as academic critiques, to reach more reliable results than litigation. Academics will rarely critique their colleagues' legal work, no matter how transparent it is.<sup>74</sup> Further, academics' critiques are unlikely to be accepted as conclusive because readers will be skeptical about both their factual and legal analyses.<sup>75</sup> Simon's discussion of the Kaye Scholer matter illustrates the point.<sup>76</sup> This was one of the rare occasions on which a law firm's conduct was closely scrutinized in both the professional and academic literature, but even then, the jury is still out. Simon has expressed the view that, although the facts are not sufficiently clear, the charges against Kaye Scholer "seem facially well grounded,"<sup>77</sup> whereas most practitioners think the charges were unfair.<sup>78</sup> In the unlikely event that legal scholarship reaches a verdict contrary to the one reached in court that is accepted as reliable within the academic community, the losing litigant may find that to be of little comfort. Attention would be better spent in suggesting how to improve litigation than in seeking ways to bolster informal public accountability as an alternative. If litigation is flawed, law review articles are not the solution.

Finally, Simon fails to take account of the harms that may result from altering existing norms for expert testimony. In general, experts are retained at an early stage of litigation and asked to provide opinions before the case goes to trial, at a stage when the facts are likely to be contested and not fully developed and when it may not be entirely clear what questions, if any, will be the subject of expert testimony at trial. Experts reconsider their opinions as additional facts are provided. At trial, experts base their testimony on the facts established at trial or, where the facts are contested, one or more versions of the facts. Extensive written factual or legal analysis at an early or intermediate stage will not be necessary to promote truth seeking as long as the opposing

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73. See Simon, *supra* note 3, at 1596 ("Quasi-third-party practice is thus in tension with academic norms holding that openness, and especially exposure to peer criticism, is a fundamental safeguard of the soundness of conclusions.")

74. See *infra* Part III.C & D.

75. See *infra* Part III.A & B.

76. See Simon, *supra* note 3, at 1572-75.

77. See Simon, *Kaye Scholar Affair*, *supra* note 8, at 282.

78. See Simon, *supra* note 3, at 1573. The Enron case, also discussed by Simon, *id.* at 1567-71, is another example. Questions concerning the propriety of Vinson & Elkins's conduct, although much discussed, were not resolved in the legal and academic literature.

party has sufficient notice to prepare its own case. Duties to perform unnecessary work will make compensated experts' services less affordable, and potentially inaccessible, and make uncompensated experts more reluctant to serve. Such requirements may also be impractical. For example, the full array of potentially relevant facts necessary to perform Simon's notion of "due diligence" may simply not exist in a comprehensible form when the expert is required to produce opinions, and facts necessary to "update" an opinion may not be accessible.

### C. Critiquing Simon's Theory of Academics' Law Practice

Simon argues that an academic giving legal advice or expert opinions has additional responsibilities. He reasons that the views expressed by law professors in the course of their legal work "implicate the academic's institution . . . because the client, in disseminating the views, invariably invokes the expert's University affiliation and because the third-party effect of the views depends, often heavily, on the University's reputation for impartiality and reliability."<sup>79</sup> Simon thinks law professors practicing law should comport with academic "anti-secrecy norms,"<sup>80</sup> meaning that in their private law practice as legal advisors or expert witnesses, "academic[s] should not make any private commitments incompatible with [the] principle" that their "view[s] be publicly accessible."<sup>81</sup> They should practice law as an extension of their scholarship.<sup>82</sup> When their opinions are given with the understanding that they may be made public, academic lawyers would have duties to "take care that their view[s] be publicly accessible and clearly and accurately expressed" and to "clarify and revise public descriptions of [their] view[s]."<sup>83</sup> Law schools should enforce these norms, he says, "through criticism and shaming."<sup>84</sup>

Simon's very premise that it is law professors' academic affiliations that makes their opinions reliable<sup>85</sup> is doubtful. The public will not erroneously assume that when law professors engage in legal work, they are doing so on

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79. Simon, *supra* note 3, at 1572.

80. *Id.* at 1572.

81. *Id.* at 1574.

82. Simon's "point [was] that encouraging expert witnesses to integrate their litigation work openly into their academic work is part of the solution [to the problem of partisanship on the part of expert witnesses], rather than an extension of the problem." Posting of William Simon to Legal Ethics Forum, Expert Bias and Disclosure: Professor Bill Simon's Reply to Andrew Perlman and John Steele, <http://legaethicsforum.typepad.com/blog/2007/11/both-andy-and-j.html> (Nov. 15, 2007).

83. Simon, *supra* note 3, at 1574.

84. One might wonder whether Simon would choose similarly to "shame" his Columbia colleagues, knowing that doing so would undermine collegiality (another important academic value) and possibly make him a pariah within his own institution.

85. Simon, *supra* note 3, at 1596 ("Quasi-third-party advice . . . characteristically invokes the reputation of the University in order to encourage public reliance . . .").

behalf of their institutions and that their universities endorse or otherwise give credence to their views. On the contrary, the public well understands that principles of academic freedom mean that universities do not, and cannot, take responsibility for professors' scholarship, much less for their private legal work. Even Simon does not go so far as to suggest that, in the interest of accountability, universities should review their professors' legal opinions in advance (although he might be understood to suggest that universities should review their professors' opinions after the fact).<sup>86</sup> If the public does not understand that the legal academic is expressing legal opinions in his individual capacity, not on behalf of his law school, the public can be educated by those who dispute the academic's opinions.

At best, law professors' academic affiliations play a minor role in establishing their qualifications and credibility to perform legal work.<sup>87</sup> Experience as a legal academic might justify an assumption that one has developed relevant knowledge and habits of mind, such as an ability to look at questions objectively and from many angles,<sup>88</sup> associated with law teaching. But it is not the academic affiliation, but the experience that one has gained as a lawyer or academic, that most matters.

One's academic affiliation, without more, may actually be a liability because many assume that academics live in "ivory towers," removed from real-world practice.<sup>89</sup> Consider legal ethics advisors. Lawyers seeking advice about their professional obligations want wise, useful advice. Legal ethics advice fundamentally requires good judgment honed through professional experience and through discourse with other lawyers. If answers to hard questions could be derived exclusively through library research, lawyers would not need to go to experts; they could conduct the research themselves. Increasingly, legal academics, particularly at top law schools, are thought to be theorists removed from the realities of law practice.<sup>90</sup> While a law professor's free opinions may be welcome, it is not clear that lawyers will pay for them until, through experience, he overcomes the presumption that, as an academic,

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86. *Id.* at 1574 (suggesting that two universities where Professor Hazard taught should have found his work to be inconsistent with their "dignity and responsibility" and that universities should enforce compliance with candor and openness norms "through criticism and shaming").

87. Litigators may value academic experts for their presumed knowledge and ability to explain matters credibly and cogently to a jury, not for their academic affiliations per se. Simon offers nothing to suggest, for example, that Colorado jurors in the *McNeil* trial would have been expected to give greater credence to out-of-state academics than to Colorado practitioners.

88. Simon refers to the virtue of "scholarly detachment." Simon, *supra* note 3, at 1577 n.75. However, clients may prefer someone who is professionally engaged.

89. Simon implicitly acknowledged and attempted to refute the stereotype when he testified in his deposition that academics "don't work in silos or ivory towers, notwithstanding the [cliché] . . ." June 2007 Deposition, *supra* note 46, at 56-57.

90. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

he is out of touch with the real world. In seeking legal ethics advice, it would be foolhardy for lawyers, who are sophisticated consumers of legal services, to favor poorly qualified academics over well-qualified practitioners.<sup>91</sup>

Simon's approach also raises practical objections.<sup>92</sup> He assumes that by redacting references to particular clients, professors can post the salient portions of their opinions without violating confidentiality duties.<sup>93</sup> But Simon ignores the care required to avoid public disclosures that unintentionally reveal client information.<sup>94</sup> Simon analogizes to bar association ethics opinions that interpret ethics rules while preserving client identities. But many bar association opinions are sent only to the inquirer, and many lawyers with ethics questions cannot seek advice from bar associations precisely because of confidentiality concerns.<sup>95</sup> Simon's premise is even more impractical in other fields. If a patent professor privately issued an opinion that a client's product did not infringe another party's patent—i.e., a so-called “willfulness” opinion that provides a potential advice-of-counsel defense to a claim of willful patent infringement—it is doubtful that the professor could make the opinion public in any useful way without breaching client confidentiality.

Simon's vision of academics' law practice requires clients to limit or waive confidentiality in advance and to authorize their academic lawyers to engage in public “scholarly” debate while cases are in dispute, notwithstanding professional and procedural rules that ordinarily require lawyers to keep confidences. However, any benefit to third parties is outweighed by the harm to clients. First, advance waivers of confidentiality presumptively chill clients from making necessary disclosures. Second, the academic's public discussion of a client's case may, while furthering the academic's sense of scholarly mission, undermine the client's cause. Third, engaging in academic debate over one's legal advice or expert opinion during a litigation in which it is in issue

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91. Academics such as those targeted by Simon's article illustrate the point: Professors such as Geoffrey Hazard, Charles Wolfram, and Roy Simon have not only spent countless hours engaged in classroom and scholarly study of the meaning and application of professional rules, but have worked with practitioners on bar association committees and in other contexts in which they are exposed to how practitioners deal with real-world problems.

92. An additional practical question discussed later is whether legal academics will play the assigned role of examining colleagues' law practices and regulating those who practice badly by “shaming” them publicly. *See infra* Part III.D.

93. Simon, *supra* note 3, at 1574-75. Aside from those established by ethics rules, fiduciary obligations, and attorney-client privilege, relevant confidentiality duties may include those established by sealing orders and other court orders.

94. *See, e.g.*, N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 718, at 3 (1999) (confidentiality rule permits disclosure only “to the extent that information relating to particular clients can be disclosed in such a form that a recipient of the information could not identify it with a particular individual”).

95. *See* Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 745 (2002) (“Seeking advice from an individual lawyer, especially one in the same law firm [rather than from a bar association], limits the extent to which embarrassing or highly confidential information is disseminated.”).

may undermine the academic lawyer's credibility as a witness by suggesting, among other things, that the academic is an advocate, if not a zealot. It is questionable whether fully informed clients will accept legal advice or expert services on these terms. Implementing Simon's theory would not transform how law professors practice law but would diminish their ability to practice law at all and diminish the public's meaningful access to law professors' legal services.<sup>96</sup>

Ultimately, Simon offers a burdensome and complicated answer to a perceived problem that is much more easily solved. If there is a risk that law professors' advice or expert opinions will be overvalued because of the unwarranted inference that they are speaking on behalf of, or are endorsed by, their universities, the risk can be greatly reduced if not eliminated through clarity on the law professor's part. For example, professors can avoid exploiting symbols of the affiliation (e.g., academic letterhead) and be explicit in their written opinions and reports that they act in their individual capacity, not on behalf of their academic institutions.<sup>97</sup> Both theoretically and practically, disclaimers are preferable to new disclosure norms, particularly given the tensions between the norms of the legal profession and those of academia.

## II. GLASS HOUSES AND IVORY TOWERS: SIMON'S IMPLEMENTATION OF HIS THEORY

Although disagreeing with the substance of other experts' opinions in the *McNeil* litigation, Simon focuses on procedural issues—in particular, the extent to which the others departed from Circular 230 and academic norms.<sup>98</sup> He

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96. Whether law professors ought to practice law can be, and has been, separately debated. See, e.g., Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623 (2004); Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345 (2001). My view is that relevant law practice can enhance one's teaching and scholarship. See Bruce A. Green, *Reflections on the Ethics of Legal Academics: Law Schools as MDPs; or, Should Law Professors Practice What They Teach?*, 42 S. TEX. L. REV. 301 (2001).

97. Disclaimers of this nature are common. For example, government lawyers who speak in academic settings customarily note at the outset that they are speaking in their individual capacity. See, e.g., *Conference on Electronic Discovery, Panel Three: Rules 26, 33, and/or 34: Burdens of Production: Locating and Accessing Electronically Stored Data*, 73 FORDHAM L. REV. 53, 55 (2004).

98. Simon, *supra* note 3, at 1577 (noting that “an important purpose of [his] argument does not depend on whether [he is] right about the merits”); *id.* at 1587 (criticizing Hazard's opinion for “its complete silence on the nature of the conflict created by the payment arrangements of the DRSA”); *id.* at 1590 (criticizing Hazard's opinion for “failing to explain its conclusion about consentability”); *id.* at 1590 (criticizing Hazard's opinion for “assum[ing an] issue away”); *id.* (criticizing Hazard for “violat[ing] the norm of reasonable framing”); *id.* at 1595 (criticizing Hazard for failing to address whether the consultancy arrangement was an impermissible restriction on law practice).



implicitly argues that by providing legal services as an extension of his scholarship, he followed a better path. This Part addresses Simon's claim by examining his role in the litigation from a procedural perspective in order to test his theory that academic lawyers should provide legal services such as legal advice or expert testimony in accordance with heightened duties of disclosure and accountability. The essay adopts Simon's own scholarly methodology, employing an example from legal practice to explore his legal theory.<sup>99</sup>

As this case study shows,<sup>100</sup> Simon's practice did not always accord with his theory. But my purpose here is not to suggest that Simon was living in a glass house and throwing stones. My argument is that Simon was right insofar as he failed to practice what he preached, that his adherence to conventional standards reflects not only their legitimacy but also the difficulty and impracticality of implementing his alternative approach, and that it was precisely when he attempted to practice his theory that he most went astray.

#### A. Background: *The Nextel Settlement*

Simon served as an unpaid "litigation consultant or expert" in malpractice litigation against LM&B and some of its individual lawyers. The alleged malpractice arose out of the firm's earlier representation of more than 500 Nextel employees and former employees with potential discrimination claims against Nextel. In 2000, LM&B and Nextel discussed the possibility of settling the disputes informally through an ADR process. During the negotiations, LM&B retained a legal ethics expert, Professor Roy Simon, to advise it about how to draft and implement the settlement agreement in accordance with applicable disciplinary rules and other law governing lawyers, and Nextel retained another expert, Professor Geoffrey Hazard, to do essentially the same. Roy Simon gave his advice orally; Hazard eventually memorialized his opinion in a short writing.

LM&B and Nextel's lawyers ultimately negotiated a Dispute Resolution & Settlement Agreement (DRSA), which provided for an alternative dispute resolution process to resolve LM&B's clients' claims against Nextel. The three-step process would begin with discussions, followed by mediation, and concluding with binding arbitration. Among the terms that would later prove controversial were that Nextel would pay \$5.5 million to LM&B to cover fees

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99. Although Simon could have considered hundreds of additional examples of lawyers practicing under existing norms, there may not be other examples of lawyers attempting to implement Simon's theory.

100. The facts described in this Reply come principally from deposition transcripts, exhibits, and legal filings in the *McNeil* litigation; Simon's article; and relevant postings on the Legal Ethics Forum website. Because my role was exclusively as an expert witness in *McNeil*, I have no access to information about the other litigation against LM&B in which Simon has served as a litigation consultant, and rely on Simon's writings with respect to that other litigation.

and most expenses for both its work leading up to the agreement and for subsequently representing the claimants in the ADR process, and that once the claims were resolved, LM&B would also receive \$2 million to serve for two years as a consultant to Nextel. Recognizing that the DRSA gave rise to a conflict of interest but having been advised that it was one to which the claimants could give consent after full disclosure, LM&B secured its clients' consent in writing.

Two Colorado claimants, Denise McNeil and Alencia Ashton-Moore, agreed to the DRSA process but later became dissatisfied with LM&B's representation, discharged LM&B, and retained new counsel, who negotiated a settlement with Nextel that the two claimants accepted. The two later filed a malpractice lawsuit in Colorado state court against LM&B and several of its lawyers as well as against Nextel. The case against Nextel was eventually dismissed,<sup>101</sup> while the case against the law firm and its lawyers was tried. The jury returned a verdict in LM&B's favor on November 9, 2007.

*B. The Virtues of Client Information Control: Simon Privately Validates the Complaint*

In around 2003, Simon became an informal litigation consultant to Angela Roper, a lawyer representing some of LM&B's former clients who were unhappy with their settlements with Nextel.<sup>102</sup> Roper filed a lawsuit on their behalf against LM&B in New Jersey. Evidently Simon continues as a litigation consultant and/or expert witness in that case, which was transferred to New York and is still pending. One of Simon's earliest contributions was to criticize LM&B in a television interview that Roper helped to arrange.<sup>103</sup>

Roper introduced Simon to the *McNeil* plaintiffs' then-lawyer, Bill Richardson.<sup>104</sup> During Simon's subsequent involvement in *McNeil*, he

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101. Court's Order Re: Nextel's Motion for Summary Judgment, *McNeil v. Leeds, Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County Oct. 4, 2007). For the most part, the trial court found that the claims against Nextel failed as a matter of law. For example, the court found that "the record is devoid of evidence that Nextel, by entering into the DRSA with the Lawyer Defendants, engaged in the requisite conduct to show it aided and abetted the Lawyer Defendants in the breach of their duty owed to Plaintiffs." *Id.* at 4.

102. Roper also represented other former clients of LM&B in a matter involving a similar settlement with another company. Posting of William Simon to Legal Ethics Forum, *supra* note 82.

103. I am unaware of whether Simon disclosed his role in the litigation or whether he appeared in the interview exclusively as a presumably disinterested Columbia law professor. I am also unaware of whether he disclosed that Columbia was not endorsing his opinions.

104. July 2007 Deposition, *supra* note 57, at 192. Simon's article makes no reference to his role in reviewing the complaint. After the article was published electronically, Simon posted a statement on Legal Ethics Forum discussing his role in the litigation but implying that his involvement began in 2006 as an expert witness. See Posting of William Simon to Legal Ethics Forum, *supra* note 82 ("Angela Roper referred the Colorado plaintiff's counsel

remained in contact with Roper and discussed his work in *McNeil* with her.<sup>105</sup> The outcome of *McNeil* was important to Roper and her clients; *McNeil* functioned as a stalking horse for Roper's lawsuit.<sup>106</sup> The success of *McNeil* was presumably also important to Simon, as a litigation consultant to Roper, and he therefore had an interest in assisting in the Colorado case.

Simon agreed to review available evidence before Richardson filed a complaint. Simon's role under Colorado law was to determine whether the plaintiffs' case had substantial justification.<sup>107</sup> This was a gatekeeper role, designed to keep clearly nonmeritorious malpractice claims out of the courts. The function fits within Simon's conception of quasi-third-party legal advice, since endorsing the claim would influence not only the plaintiffs, who would embark on lengthy proceedings, and the plaintiffs' counsel, who would undertake the case on a contingency fee basis, but also third parties: witnesses, jurors, the judge and other court personnel, and of course the defendants, who would expend time and money defending the lawsuit. If the plaintiffs' claims were illegitimate, the plaintiffs might nevertheless welcome a bad opinion that validated their claims, because law firms charged with professional malpractice generally settle in part to avoid the costs of defending themselves.<sup>108</sup> If Simon gave a substantively bad opinion validating the complaint, there was no mechanism to hold him legally accountable to the lawyer defendants who consequently faced unmeritorious litigation.<sup>109</sup>

Simon may have satisfied Colorado's procedural rules,<sup>110</sup> but he did not satisfy the Circular 230 requirements. He relied exclusively on the facts stated in the draft complaint, which he assumed to be true, and on the DRSA, which

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to me in 2006, and I agreed to testify.”).

105. July 2007 Deposition, *supra* note 57, at 191-99, 235-36.

106. *Id.* at 235-36 (quoting e-mail from Simon to Roper stating, “I’ll share anything I get” from the *McNeil* plaintiffs’ counsel with Roper). For a well-known example of how one litigation may be used as a stalking horse for another, see *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (addressing conflict of interest where defense lawyer represents codefendants in consecutive trials, creating the risk that the lawyer will use the first representation to advantage the second one). In this case, of course, the *McNeil* plaintiffs had independent counsel who owed loyalty to his own clients and who could not take direction from or cede control to Roper. Even so, the *McNeil* litigation would presumably provide Roper insight into the viability of strategy and legal theories relevant to her own clients.

107. See COLO. REV. STAT. ANN. § 13-20-602 (West 2008) (requiring malpractice plaintiff to certify that relevant evidence was reviewed by a person with expertise, who determined that the claim did not lack “substantial justification”); July 2007 Deposition, *supra* note 57, at 196.

108. Simon's article identified the risk that malpractice plaintiffs would employ expert opinions to increase the settlement value of undeserving claims, Simon, *supra* note 3, at 1566 n.36, but there is no indication that he considered that his own role might have that effect.

109. Nor was there a mechanism to hold him morally accountable, since he had no obligation to identify himself.

110. This is not entirely clear, since he reviewed only the complaint and not the available evidence itself.

he had previously seen,<sup>111</sup> and privately attested that there was a sufficient case to go forward. He did not engage in “due diligence,” meaning some inquiry into the underlying facts. He did not write a “reasoned opinion” with “analytical support,” but only gave the conclusion that the state statute required.

Although Simon’s opinion had third-party effects, he implicitly concluded that the clients’ interest in controlling information outweighed the public interest in transparency. Providing a detailed public report would have been strategically disadvantageous to the plaintiffs since it would have provided premature disclosure of their expert’s views. In theory that should not have mattered, since the very premise of complying with Circular 230 is to benefit third parties, not the clients, but in practice, the clients’ interest evidently seemed more compelling. That was true even though, in this case, the expert’s services were being provided for free, and, therefore, the financial cost of obtaining unnecessary services was not a consideration.

Simon’s article acknowledges that his theory is “in strong tension with the conception of the expert witness’s role,” but argues that accommodating a client’s strategic interests by delaying disclosure is inconsistent with the premise that an expert witness is disinterested and with “the premises of the academy as to how sound understanding is achieved.”<sup>112</sup> The problem, of course, is that “sound understandings” are achieved differently in the adversary process than in the academy. It is understandable that even someone committed theoretically to openness and transparency would in actual practice do only what the procedural rules required, which was to draw a conclusion based on a quick look at one side’s facts. The Circular 230 standard is contextual—it is inappropriate in this context. The rules of procedure reflect a reasoned judgment that at the pre-filing, pre-discovery stage, although some modest gate-keeping is desirable, it is unfair to require plaintiffs to pre-try their undeveloped cases before experts as a condition of getting through the courthouse doors. Transparency in the interest of quality control rightly took a backseat to the interests underlying client control of information.

### *C. Implementing the Theory: Simon Secures a Confidentiality Waiver*

In around 2006, after the plaintiffs filed the complaint and substituted another lawyer, Paul Gordon, Simon agreed to serve as an expert witness in the litigation, again at Roper’s instigation.<sup>113</sup> There is no indication that until that point Simon had considered how his prior opinion was used and whether to

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111. June 2007 Deposition, *supra* note 46, at 38; July 2007 Deposition, *supra* note 57, at 196.

112. Simon, *supra* note 3, at 1576.

113. July 2007 Deposition, *supra* note 57, at 198-99.

update it if the facts, as developed in the course of discovery, turned out to be contrary to the plaintiffs' complaint.

Simon sought no compensation but did secure the plaintiffs' agreement for him to write about the case.<sup>114</sup> Although he was aware that experts ordinarily must keep their opinions and the materials they receive confidential until they are disclosed formally through the discovery process, Simon indicated that he would accept no restrictions on his ability to discuss his opinions publicly except insofar as information was covered by a protective order or some specific confidentiality right applied.<sup>115</sup> Simon thereby expressed his commitment to the idea that his consulting and academic roles are "continuous" and that the consulting role is an "extension" of his academic role.

This was a departure not only from academic experts' conventional practice but also from Simon's own past practice. Simon had occasionally been an ethics expert in litigation,<sup>116</sup> including in the recent past, and he had not regarded his obligations as an academic lawyer-expert to be different from those of any other expert. Likewise, he had occasionally given advice on legal ethics but, evidently, had practiced in ordinary ways.<sup>117</sup> He had not routinely provided written opinions, much less written opinions following the strictures of Circular 230.<sup>118</sup> Nor had he maintained a website on which he posted the opinions he provided as an expert witness or legal advisor. He had not required parties retaining him to forgo confidentiality so that he could subject his views to academic critique and debate. On the contrary, when asked in his deposition

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114. The plaintiffs' expert witness disclosure indicated that Simon was forgoing a fee in exchange for permission to talk and write about the *McNeil* case. Plaintiffs' Expert Disclosures at 13-14, *McNeil v. Leeds, Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County Jan. 19, 2007) ("Professor Simon charges \$500 per hour, but has agreed to waive his fee for services rendered to Plaintiffs in exchange for Plaintiffs' consent to Professor Simon's use of the publicly available information about Plaintiffs' case for teaching, lecturing and writing."). However, Simon later testified that the disclosure was "a little misleading" because he did not view the plaintiffs' permission as compensation or consideration. June 2007 Deposition, *supra* note 46, at 76-77; *see also* Posting of William Simon to Legal Ethics Forum, *supra* note 82 ("The plaintiffs would have been happy to have me talk about the case even if I had not agreed to testify."). In a December 2007 e-mail after receiving a draft of this Reply, Simon wrote to me that "the [McNeil] plaintiffs knew about and encouraged my intention to write about the case from the beginning of my work on the case." E-mail from William Simon, Professor of Law, Columbia Law School, to author (Dec. 29, 2007) (on file with author). Otherwise, for reasons of privacy, Simon has refused to provide detail about his interactions with the plaintiffs and their counsel. His position is that he should be accountable for the third-party effects of his testimony but that his relationship with the plaintiffs and their counsel concerns other, first-party matters. This is so notwithstanding that, as an expert witness, his communications with the plaintiffs are not protected by the attorney-client privilege and are a legitimate subject of inquiry in a deposition.

115. July 2007 Deposition, *supra* note 57, at 264-65.

116. June 2007 Deposition, *supra* note 46, at 5 (stating Simon's estimation that he had been retained five times as an expert in litigation).

117. *Id.* at 7-9.

118. *Id.* at 10-13.

in the *McNeil* case about a recently settled lawsuit in which he served as the plaintiff's expert witness, Simon acknowledged having signed a "confidentiality agreement"—that is, "a nondisclosure agreement that said [he] wouldn't talk about the case except as authorized"—and declined to discuss that case without the plaintiff's permission.<sup>119</sup>

Simon excused his own prior transgressions from his theory by observing, "I may not have thought of the kind of work I was doing as an expert witness as continuous with my academic work, which I now know . . . was a mistake."<sup>120</sup> This raises several obvious questions, such as why Simon chose to use other experts to illustrate procedurally "bad legal advice" rather than drawing from his own experience in other cases, why he was less forgiving of the opposing experts' compliance with conventional norms than of his own,<sup>121</sup> and why he was so harsh and personal in his criticism of other experts for practices that he had followed until this case.<sup>122</sup>

Simon never put his novel arrangement with the *McNeil* plaintiffs in writing,<sup>123</sup> and there is no indication that the plaintiffs understood the risks, although informed consent was morally and perhaps legally required. If Simon began as a litigation consultant before being disclosed as an expert, he was in a lawyer-client relationship.<sup>124</sup> In that case he had a confidentiality duty to the plaintiffs as clients and was required to obtain their informed consent to disclosures of confidences.<sup>125</sup> The *McNeil* plaintiffs (or any other plaintiffs against LM&B for whom Simon was a litigation consultant) would have to understand that Simon might exploit, for the benefit of his scholarship, information relating to the representation that the plaintiffs would not want to

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119. *Id.* at 14-15.

120. *Id.* at 57.

121. See, for example, his insistence that it was fair to publish his article at a time when other experts could not respond, because doing so was "not inconsistent with confidentiality agreements" and desirable for the academic consultant. Simon, *supra* note 3, at 1577 n.75.

122. See, for example, accusing them by name of giving "bad legal advice" and of being "enablers of pernicious . . . practices." *Id.* at 1558.

123. See, e.g., June 2007 Deposition, *supra* note 46, at 43-44. There is no indication that Simon spoke directly with the plaintiffs to ascertain whether they understood the implications of the novel arrangement.

124. See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407, at 3-4 (1997) (stating that "protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant" and that "[t]hat role at least implicitly promises the client all the traditional protections under the Model Rules, including those governing counseling and advocacy, confidentiality of information and loyalty to the client."). In short, a legal consultant acts like a lawyer representing the client, rather than as a witness.

125. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). The applicable rules would have been those of either Colorado, where the litigation was filed, or those of the state in which Simon practiced law.

see in print.<sup>126</sup> If he was a litigation consultant, Simon also had a personal-interest conflict because of the incentive to give advice or formulate views that were most advantageous to his future writing, and Simon required informed consent in light of this conflict. If one regards the authorization to write an academic article about the *McNeil* case as a “literary right,” informed consent would not even suffice. The agreement was not one to which clients could be asked to consent: until the representation ended, Simon could not “make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”<sup>127</sup>

Simon attempted to lay the groundwork for implementing his theory that legal and academic work should be “continuous,” but doing so posed risks against which the conventional norms are designed to protect. Simon’s arrangement potentially undermined his effectiveness as an expert witness by raising questions about his credibility. An opposing lawyer could cross-examine Simon to make it appear, whether or not deservedly, that his opinions were influenced by his desire to write a provocative law review article or that his desire to cross swords in print again with Geoffrey Hazard pushed him to extreme positions. Unless an academic in Simon’s position wrote carefully, publishing an article about the pending case might invite ancillary litigation over whether he was violating the court’s protective order.<sup>128</sup> Doing so might also provoke a complaint that he was violating the court’s expectations that participants in litigation try the case only in court<sup>129</sup> or the court’s expectations that witnesses not talk about the case among themselves,<sup>130</sup> although the defendants ultimately challenged Simon’s testimony on grounds other than any of these.<sup>131</sup> Simon may have recognized that fully informing the clients of the implications of his unique mode of practice would threaten his ability to secure

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126. Even publicly available information is subject to the confidentiality duty, so a lawyer would need client consent even to write articles about information available from the client’s court files. The possible exception, which was probably irrelevant in *McNeil*, would apply to “information [that] has become generally known” regarding a lawyer’s past representation. *Id.* R. 1.9(c)(1).

127. *E.g.*, *id.* R. 1.8(d). Even if Simon was not in a lawyer-client relationship with plaintiffs opposed to LM&B, he may have had a disciplinary duty as a matter of candor (or, in the very least, a moral duty) to make the unusual terms of his retention clear, so that the plaintiffs and their counsel could fully consider the implications of his intent to write about their ongoing litigation based on information learned in the course of his legal work. *Cf. infra* text accompanying note 166 (plaintiffs’ counsel later complained that he did not know what Simon was writing until Simon’s deposition).

128. Simon was evidently aware (or became aware) that there was a protective order in the case. July 2007 Deposition, *supra* note 57, at 231, 234-35.

129. *Cf.* MODEL RULES OF PROF’L CONDUCT R. 3.6 (2002).

130. When the case later went to trial, the court ordered that the witnesses, including expert witnesses, not discuss their testimony with each other and not attend the trial except when giving their own testimony.

131. *See infra* Part II.F.

their permission to write about his work as his theory required. But the very fact that his theory is at odds with conventional norms that are designed to protect clients raises troubling questions about the legitimacy of his theory.

*D. The Virtues of Conventional Expert Practice: The Disclosures of Simon's Opinions*

Simon wavered in his commitment to his theory. When the opportunity came for disclosing his expert opinions, Simon returned to functioning less like his ideal expert and more like an ordinary one. He rejected the Circular 230 and “updating and correction” requirements, adhering only to the concept that academic norms require public discussions of one’s work in the academic community.

*1. Simon's departures from Circular 230*

In the course of discovery, Simon’s opinions were disclosed twice. First, in January 2007, the plaintiffs’ lawyer disclosed a summary of Simon’s opinions.<sup>132</sup> In general, disclosure of an expert’s anticipated testimony may be made by a party’s lawyer under Colorado rules of procedure; unlike in some other jurisdictions, a report by the expert himself is not required. The lawyer’s disclosure was slightly over a page.<sup>133</sup> Simon provided his own seventeen-page report six months later, just a few days ahead of his June 21, 2007 deposition, and printed it on his academic letterhead.<sup>134</sup> It did not include any disclaimer warning recipients that in invoking his affiliation with Columbia Law School, he did not mean to suggest that he was speaking on behalf of his university or invoking its “reputation for impartiality and reliability.”<sup>135</sup>

Simon’s theory calls for robust written reports, followed by “updating and correction,” when a legal academic’s advice or opinion may have third party effects, as Simon thinks is true of a legal academic’s expert report in litigation. Simon had two opportunities to disclose the reasoning behind his opinions in accordance with his theory, but, as discussed below, he abided at most by the ordinary expectations of the procedural rules.<sup>136</sup> Simon’s theory also called for

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132. Plaintiffs’ Expert Disclosures, *supra* note 114, at 13-14.

133. *Id.*

134. Letter of William H. Simon to Paul Gordon (June 14, 2007) (on file with author).

135. See Simon, *supra* note 3, at 1572 (observing that an academic lawyer’s advice “significantly implicate[s] the academic’s institution” because “the client . . . invariably invokes the expert’s university affiliation” and because the opinion’s influence “depends, often heavily, on the University’s reputation for impartiality and reliability”).

136. June 2007 Deposition, *supra* note 46, at 66-67 (“I took responsibility for the substance of my opinions, but I wasn’t taking responsibility for compliance with Colorado [c]ivil [p]rocedure. . . . I don’t think Rule 26 concerns my disclosure obligations. They concern the parties’ disclosure obligations.”).



making one's opinions broadly available to the public in order to facilitate critiques by academic brethren, but throughout the time he served as a potential expert witness, and even afterwards when he published his article on SSRN and presumably continued as an academic consultant, Simon never posted his opinions on a website (as he said academics should); not did he post the underlying documents and transcripts from the *McNeil* case that third parties would need to evaluate his expert opinions or his article. The mismatch between theory and practice casts doubt on the legitimacy and viability of the theory.

*Due diligence.* To begin with, Simon rejected the idea of factual "due diligence," which would have called for reviewing evidence to establish the factual basis of his opinion. Instead, Simon expressed a preference for "see[ing] nothing" and receiving "stipulated facts," after which he might look at documents selectively to verify what was in the stipulation.<sup>137</sup> When the plaintiffs' counsel insisted that Simon review documents, Simon initially left it to counsel to decide what documents he should examine,<sup>138</sup> and assumed the truth of the plaintiffs' account.<sup>139</sup>

As a result, Simon ignored or disregarded facts that had been adduced in the discovery process contrary to his assumptions about the DRSA and to the plaintiffs' allegations.<sup>140</sup> For example, Simon assumed that the DRSA prohibited the claimants from retaining counsel in place of LM&B. This was disputed by the defendants and contradicted by the fact the plaintiffs themselves had discharged LM&B and retained other counsel.<sup>141</sup> Likewise, Simon assumed that the DRSA forbade the claimants from talking to each other about the settlement process, but ignored that this reading was not only disputed but contradicted by the fact that the *McNeil* plaintiffs "talked all the time" with each other and with other claimants.<sup>142</sup>

*Reasoned analysis and clarity.* Simon also rejected the ideas he espoused about how legal advisors and experts should discuss the law, beginning with his idea that legal advisors and experts should provide "reasoned opinions" like those required of lawyers providing tax opinions.<sup>143</sup> The initial one-plus page

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137. *Id.* at 48-49 ("[I]deally . . . I would have looked for [the plaintiffs' counsel] to draw up a statement of stipulated facts . . . . But he didn't want to do that.").

138. *Id.* at 48 ("I don't think I asked [the plaintiffs' counsel] for anything. I told him to send me what he thought I should look at.").

139. July 2007 Deposition, *supra* note 57, at 223-24.

140. Among other things, Simon never reviewed documents relating to the negotiation of the DRSA that would have shed light on its meaning.

141. June 2007 Deposition, *supra* note 46, at 122.

142. *Id.* at 132-33.

143. *See id.* at 71 ("I could have said much more . . . ."); *id.* at 74 ("I could have disclosed opinions much more fully . . . . [T]his is a much more sketchy disclosure.").

disclosure contained no analysis at all.<sup>144</sup> Simon's subsequent report was lengthier but still inadequate.

Consider, for example, Simon's views on the question of whether the conflicts created by the DRSA were "consentable." This was evidently a critical issue to the plaintiffs, who later filed a motion requesting a judicial ruling on the question. Only two pages of Simon's seventeen-page opinion identified what he regarded as the conflicts created by the DRSA<sup>145</sup> and only one page explained why, in his view, the conflicts were not consentable.

Simon's report cited no judicial decisions, bar association opinions, or treatises. He relied exclusively on the Colorado conflict rule's wording<sup>146</sup> and on his own idiosyncratic analytic approach to its meaning. In particular, Simon focused on the fact that LM&B's fees and consultancy arrangement were fixed rather than contingent. Thus, the amount of the fees would not depend on the results LM&B achieved on the claimants' behalf in the ADR process. In his view, the fixed-fee arrangement created a nonconsentable conflict mainly because it "gave the lawyers no financial interest in the vindication of their clients' interests and created strong pressures to compromise or sacrifice those interests."<sup>147</sup> Contrary to his theory's approach to "clarity,"<sup>148</sup> Simon did not

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144. For example, with respect to LM&B's alleged conflict of interest, the statement said no more than that in Simon's opinion, LM&B's rule violations included "representation of a client where the representation may be materially limited by the lawyer's own interests and those of another person without the client's informed consent and under circumstances where no reasonable lawyer could conclude that representation would be adequate." Plaintiffs' Expert Disclosures, *supra* note 114, at 14 (citing COLO. RULES OF PROF'L CONDUCT R. 1.7).

The Circular 230 criteria call for a written opinion to reflect the lawyer's analysis, not just to summarize his ultimate conclusions. Simon extensively criticized Hazard's failure to capture his reasoning in the summary he provided to Nextel. There is no reason to doubt that Hazard engaged in considerable review of facts and analysis as well as contemporaneous discussion with Nextel's counsel while the DRSA was being drafted. Under Simon's theory, there was more reason for him than for Hazard to provide a detailed factual review and analysis in writing before memorializing his conclusions, since Hazard might have regarded himself at the time as simply a first-party legal advisor, whereas Simon wrote his opinion for the opposing party's benefit.

145. Letter of William H. Simon, *supra* note 134, at 8-10.

146. Rule 1.7(b) of the Colorado Rules of Professional Conduct is the counterpart to ABA Model Rule 1.7(b). It allows a lawyer to engage in a conflicted representation with client consent when the lawyer reasonably believes that the representation will not be adversely affected by the conflict. COLO. RULES OF PROF'L CONDUCT R. 1.7(b) (2008).

147. Letter of William H. Simon, *supra* note 134, at 8-11. The plaintiffs' subsequent motion, based on the expert opinions of a Colorado lawyer as well as on Simon's views, provided a different argument. Rather than putting dispositive weight on the noncontingent nature of LM&B's fee under the DRSA, the plaintiffs principally argued that the fact that the fee payment came from Nextel and would be followed by a consultancy arrangement gave LM&B too powerful an incentive to curry favor with Nextel. In focusing on the flat fee provision, Simon may have recognized that the plaintiffs' argument, based principally on the Colorado expert's opinion, was unavailing, given the ample precedent legitimating the challenged DRSA provisions. *Cf. infra* note 256 and accompanying text (client may consent to lawyer's adversity to client currently represented in unrelated matters).

say whether his analysis reflected his personal view about how the conflict rule should be interpreted, his belief about how Colorado lawyers generally interpret and apply the conflict rule, his understanding of how Colorado courts or disciplinary authorities approach the rule, or his understanding of what would be acceptable for a Colorado lawyer exercising reasonable care.

Simon also failed to acknowledge that even if a fixed-fee arrangement theoretically motivates a lawyer to minimize the amount of work performed and to be indifferent to the result, the courts and profession assume that, as a matter of professionalism, lawyers will put their clients' interests first. Simon's report made no reference to the varied work lawyers around the country perform on a fixed-fee basis, including the representation of criminal defendants, and to the fact that almost without exception, courts and other authorities have not objected that fixed-fee agreements, or other standard fee arrangements, violate the conflict rules.<sup>149</sup> His report similarly failed to address contrary arguments or to indicate his level of certainty or uncertainty in the face of such arguments.

*Candor.* Simon's use of his academic letterhead was inconsistent with the Circular 230 requirement that lawyers be candid about their role. The letterhead's reference to Simon's academic affiliation risked creating the appearance that his university endorsed his views. This would illegitimately bolster his credibility in the event the report were later made public or put before a judge or jury.<sup>150</sup>

*Updating and correction.* As discussed earlier, even during the period before writing his expert report, Simon ignored new facts as they became available in discovery and failed to "update" the opinions he had formed at the outset of the litigation based on a review of the DRSA alone. When his wish to be kept up to date was frustrated, he did little but complain.<sup>151</sup> Much less did he update his opinions as new facts developed after his opinions were disclosed.<sup>152</sup> Under his theory, Simon evidently still had this duty after the *McNeil* trial, since Roper could use his opinion in the pending New York

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148. See Simon, *supra* note 3, at 1564 (stating that "where the opiner's views are idiosyncratic" rather than mainstream, she should "make[] clear what approach she is taking and explain[] the ways in which her substantive convictions are idiosyncratic").

149. See *infra* Part III.B.

150. Similarly, the plaintiffs' expert disclosure sought to exploit Simon's academic affiliation. It stated that "Professor Simon may be called to testify in his capacity as an expert attorney and Professor of Law." Plaintiffs' Expert Disclosures, *supra* note 114, at 13 (emphasis added).

151. See *infra* note 153 and accompanying text. Simon did not insist on more information as a condition of continuing as an expert, as his theory might have suggested.

152. Simon believed that the plaintiffs' expert disclosure misleadingly described the terms of his retention, but he took no initiative to correct it. It was only months later, when he was being questioned in a deposition about the arrangement and was asked about the accuracy of the description in the expert disclosure, that Simon first expressed the view that the description in the retention agreement was misleading. See *supra* note 114.

litigation, but Simon has not publicly updated his opinions based on the trial evidence.

## *2. The legitimacy of conventional norms*

Simon's departure from his theory suggests several points: that he implicitly came to realize that the existing norms strike a better balance between competing client and regulatory interests; that especially when one is functioning within the existing civil process, it is preferable to comply with conventional norms than to impose heightened duties on oneself that opposing experts will not share; and that there are practical impediments to revamping the current procedural regime to impose Simon's norms on all expert witnesses.

To begin with, conventional practice, under which the expert ordinarily forms opinions based on the factual assumptions provided by counsel, makes sense. The judge or jury will be the trier of fact who will resolve factual disputes based on evidence adduced at trial. Ordinarily, experts do not resolve credibility disagreements and give opinions on how to resolve disputed facts. Indeed, experts often testify in response to hypothetical questions or assumed facts that the lawyer expects to prove. For an expert to read voluminous documents to adduce the facts is generally a needlessly time-consuming exercise. Particularly in fact-intensive cases with substantial discovery, high-quality expert witnesses could become prohibitively expensive. Requiring parties to pay for services they do not need, such as "due diligence," in order to serve the public's theoretical need for greater protection against factually unfounded expert testimony, would undermine parties' access to justice. Besides that, a review of all available discovery may ultimately be unrevealing because relevant facts may not be reflected in the available documents and deposition transcripts.

It also made sense for Simon to follow conventional practice governing the presentation of opinions, under which he presented his opinions summarily rather than in an extensive, analytic writing. Colorado procedure enabled the opposing parties to obtain more extensive information about the expert opinions and their bases. Expert disclosures come at an intermediate point in the litigation. Colorado provides for the exchange of expert reports, after which the experts can consider new issues that the opposing experts addressed and can reconsider and refine their views in light of opposing views. Then the parties can depose the opposing experts, exploring their reasoning, their level of certainty, their reasons for not addressing particular issues, and other questions to which Circular 230 is directed. The deposition gives the affected "third party" a chance to learn what it wants to know, but that may not be contained in the expert disclosure, and it does so at a later point when relevant legal issues and relevant facts are better developed.

Even if one concludes that procedural rules should be amended to require greater expert disclosure, it makes no sense for experts voluntarily to assume

duties that the rules do not now require. No doubt, the opposing party would have benefited if Simon had submitted a report that complied with Circular 230, because Simon would have provided a much wider target for eventual cross-examination. Complying with his theory would thus have impaired Simon's effectiveness as an expert, thereby undermining the plaintiffs' interest in presenting his opinions as compellingly as possible.

Finally, Simon's experience illustrates the practical problem with the duty to update and correct. At one point, Simon expressed frustration with the plaintiffs' counsel for not providing information and keeping him up to date,<sup>153</sup> demonstrating the impracticality of an ongoing obligation. Because Simon was still their expert witness, the plaintiffs had an interest in facilitating his efforts to learn relevant facts and prepare a report. But even then Simon encountered difficulties in obtaining the necessary information. Imagine how much harder it would be once a legal advisor or expert has completed his work for the client and seeks new information to update his opinions for the benefit of third parties. At that point, the client has no incentive to cooperate, and therefore it may be impossible to procure the necessary facts and procedural information to justify raising doubts about one's earlier opinions or about how they are being employed.

One might infer that Simon ultimately recognized that it is better to play by the conventional discovery rules than by the more demanding disclosure obligations that his theory demanded of quasi-third-party academic legal advisors. In fact, he implied as much in a later deposition in which he defended his report. Simon testified that what makes an *opinion* reasonable, in his view, is not what is expressed in the writing that summarizes it. It is how the opinion itself was derived—e.g., whether the lawyer adequately considered the material facts and analyzed how they “fit under the applicable legal criteria.” Challenged on the adequacy of his written summary of his opinions, he responded, “I’m not talking about what’s a reasonable summary of an opinion. I’m talking about what’s a reasonable opinion.”<sup>154</sup> Simon's observation that what matters is the substantive quality of the lawyer's opinion, not how it is packaged for delivery, is a succinct refutation of his own theory.

#### E. *Keeping Quasi-Third-Party Legal Advisors Accountable: Simon's Depositions*

Simon's theory presupposes that legal advisors, expert witnesses, and others whom he categorizes as “quasi-third-party legal advisors” are unaccountable for their work's impact on third parties. His own depositions

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153. July 2007 Deposition, *supra* note 57, at 226 (quoting e-mail from William Simon, Professor of Law, Columbia Law School, to Paul Gordon, Esq. (Jan. 27, 2007)). The plaintiffs' attorney denied failing to keep Simon apprised. *Id.* at 229.

154. June 2007 Deposition, *supra* note 46, at 90.

demonstrate that his assumption is erroneous, because once the legal work becomes public, mechanisms of accountability are built into the adversary process.

Simon was deposed twice because he did not produce all of the documents in his files at the initial deposition on June 21, 2007. The additional documents, which he produced a day before the resumption of his deposition on July 20, 2007, included his draft of *The Market for Bad Legal Advice*.<sup>155</sup> The depositions gave the defendants access to the information that Simon would have disclosed if his report had measured up to his theory.

In particular, the depositions revealed Simon's idiosyncratic approach to the meaning of ethics rules. The defense lawyer's questioning led Simon to disclose that his opinions about the DRSA rested on his belief that even a conventional fee provision might create an unconsentable conflict. Simon reasoned that *all* fee agreements create conflicts of interest of one kind or another and that disclosure and consent, in principle, are therefore always required, unless the prospective client has retained a lawyer in the past.<sup>156</sup> (In that case, presumably, the client is already aware of the risks.) For example, Simon testified, if a lawyer offered to accept a representation for an hourly fee, and the prospective client had never hired a lawyer before, the lawyer would have to explain that the fee arrangement created incentives to disserve the client's interests. Further, Simon testified that in an employment case such as the one against Nextel, the conflict created by an hourly fee might be so extreme that a client could not be permitted to consent.<sup>157</sup> That is, a lawyer could accept the representation only on a contingent fee basis.

The questioning also elicited Simon's concession that it is unconventional for lawyers to treat hourly fee arrangements as creating conflicts requiring informed consent, and that the convention "would be relevant" in a disciplinary proceeding (although presumably not in a malpractice case like *McNeil*).<sup>158</sup> As a result, the deposition revealed that Simon did not derive his understanding of the meaning of the law (here, an ethics rule) from how the law is conventionally understood. What mattered to him was the wording of the rule and his conception of its underlying principle, not how courts, disciplinary agencies and lawyers understood the rule and applied it openly in daily practice.

In Simon's theory, expert opinions must satisfy obligations of candor, clarity, and analytic support; thus, his article criticized the Office of Legal Counsel's "torture memos" for not "making clear how and why their views

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155. *Id.* at 185.

156. June 2007 Deposition, *supra* note 46, at 110-11.

157. *Id.* at 114. Note that Simon's point was not that the amount of the fee might be unreasonable but that the fact that the fee was hourly, not contingent, created an unresolvable conflict regardless of the amount.

158. *Id.* at 110-12.

were idiosyncratic.”<sup>159</sup> Simon’s expert report flunked his theory in essentially the same way as the torture memos. And yet, contrary to his theory, he was not unaccountable for taking an unorthodox analytic approach because the deposition exposed his unorthodoxy.

Similarly, the deposition demonstrated that an expert’s reliance on debatable factual assumptions can be uncovered in a way that obviates the need for factual due diligence and updating. For example, Simon acknowledged that his opinions assumed, contrary to LM&B’s position, that LM&B and the claimants understood the DRSA to forbid the claimants from substituting other counsel<sup>160</sup> or sharing information among themselves.<sup>161</sup> Not unexpectedly, given the premises of the adversary process, the depositions provided an opportunity to develop the factual and analytic bases of Simon’s opinions, thus holding him accountable in a way that made his failure to provide a fuller written report irrelevant.

F. *The Perils of Practicing Law as an Extension of One’s Scholarship: The Court Strikes Simon’s Testimony*

As previously discussed, Simon’s practice was mostly characterized by departures from his theory. But there was one significant way in which he hewed to theory: he adhered to his commitment to engage in public academic dialogue by writing about the *McNeil* case even while it was ongoing so that his law practice and scholarship would be coextensive. The problem, however, is that Simon’s interjection of scholarly norms and practices into his legal work ultimately undermined the utility of his work as an expert to the clients’ detriment.

Simon initially implemented his conception of the academic lawyer’s professional work by conferring with other academics while formulating his opinions for his report.<sup>162</sup> The disclosures to other academics were facilitated by what Simon regarded as the plaintiffs’ effective waiver of confidentiality. Simon was not deterred by the protective order in the case; he had not read it, but took plaintiffs’ counsel’s word that it would not affect him.<sup>163</sup>

More significantly, Simon followed his theory by drafting *The Market for Bad Legal Advice*, his article about the *McNeil* case, while the litigation was ongoing. He controlled access to it as long as he could, but once his file containing the draft was produced to the defendants in discovery, he sent the draft to the three academic experts on the other side and solicited their

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159. Simon, *supra* note 3, at 1564.

160. June 2007 Deposition, *supra* note 46, at 122.

161. *Id.* at 132.

162. *Id.* at 56-57.

163. *Id.* at 57-58.

comments.<sup>164</sup> Before doing so, he researched the propriety of ex parte contacts with opposing expert witnesses, but found no authority indicating a problem.<sup>165</sup> He did not ask Paul Gordon, the plaintiffs' lawyer, whether doing so was problematic or seek anyone else's opinion.<sup>166</sup> At the time, Gordon knew that Simon was working on an article but did not know its content.<sup>167</sup>

Academics sometimes circulate drafts of their articles to colleagues to obtain feedback, but Simon's circulation of the draft to the opposing experts does not neatly fit that tradition. Given the article's content and tone as well as its timing, it does not appear that he circulated the draft as a collegial gesture, inviting the opposing experts to undertake a conversation outside the formal judicial process that might lead them to reconsider or refine their views before testifying. It is not ordinary etiquette to initiate a scholarly dialogue by accusing one's peers of having given "bad advice" that enabled pernicious practices. Whether because of indifference to Simon's personal attacks, suspicion of Simon's motives, or respect for the procedural and confidentiality expectations applicable to expert witnesses, the other academics declined to respond substantively to his draft article.<sup>168</sup>

Following the depositions, LM&B filed two motions to strike Simon's testimony based on separate sets of ethical and professional improprieties. Both motions, and especially the second, pointed to Simon's decision to write and circulate his draft article during the proceedings.

LM&B's first motion argued that the plaintiffs and Simon "both engaged in significant and serious discovery abuses."<sup>169</sup> LM&B argued that expert disclosure had been due in October 2005, but even the inadequate (less than two-page) disclosure of Simon's opinions was not made until January 2007, and Simon's seventeen-page report was not provided until June 2007, on the eve of his first deposition; further, although the deposition notice called for his complete file, Simon did not produce it at that deposition, necessitating a second deposition the next month.<sup>170</sup> Among the items in the file was Simon's draft article, which, LM&B argued, "expresses a plethora of opinions and bases

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164. July 2007 Deposition, *supra* note 57, at 263-64.

165. *Id.* at 266.

166. *Id.* at 264.

167. Posting of Paul Gordon to Legal Ethics Forum, <http://legalethicsforum.typepad.com/blog/2007/11/both-andy-and-j.html> (Nov. 15, 2007, 5:21 PM) ("Professor Simon did not disclose to Colorado counsel the content of the draft article until Professor Simon's deposition.").

168. Simon's later attempt to use the expert's silence to rhetorical advantage, *see infra* note 184, reinforces the impression that he was engaged in advocacy, not genuinely seeking to initiate an academic conversation.

169. Lawyer Defendants' First Motion to Strike William Simon as an Expert Witness at 2, *McNeil v. Leeds, Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County Aug. 29, 2007).

170. *Id.* at 2-6.



for opinions that were not disclosed in conformance with this Court's orders and Rule 26 [and] contains numerous factual inaccuracies."<sup>171</sup>

The second motion targeted Simon's article more directly. LM&B argued that his conduct in writing and distributing the draft article made his testimony too unreliable and biased to be admitted into evidence.<sup>172</sup> Among other things, LM&B argued that accepting literary rights in exchange for testifying as an expert created the same problem as accepting a contingent fee, which expert witnesses may not do. LM&B pointed out that lawyers may not accept literary rights as compensation because doing so creates an impermissible conflict between the duty to represent the client competently and the lawyer's interest in making his literary account more marketable. The firm argued that a similar conflict arises for the expert.<sup>173</sup> LM&B further argued that circulating the article to the opposing experts comprised an improper ex parte communication and an improper attempt to elicit information and to influence their testimony.<sup>174</sup>

The plaintiffs' lawyer decided not to defend Simon's conduct and the court struck his testimony without objection.<sup>175</sup> Soon thereafter, but while the

171. *Id.* at 18.

172. Lawyer Defendants' Second Motion to Strike William Simon as an Expert Witness, *McNeil v. Leeds, Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County Aug. 28, 2007).

173. *Id.* at 15-19. LM&B argued:

Prof. Simon's "compensation"—his stock in trade as an academic—is being published. The more egregious he finds the Attorney Defendants' conduct, the more likely his article will find a wider audience. The more inflammatory his attacks on the Defense Experts—who are well known in academic circles—the more likely his article will be read. His opinions are directly and improperly impacted by his compensation arrangement and his "right to publish."

*Id.* at 19.

174. *Id.* at 20-22. LM&B argued:

Here, it is undisputed that Prof. Simon has circulated his law review article to colleagues in the academic community. . . . He has solicited comment from the Defense Experts, in essence, inviting them to defend themselves against his scurrilous attacks. . . . Such conduct violates Rule 3.6: Prof. Simon's actions have a substantial[] likelihood of [a]ffecting the Defense Experts, and indeed, already ha[ve], gauged by the amount of time expended by the Defense Experts and Defense Counsel in reviewing and considering Prof. Simon's actions.

*Id.* at 21 (citations omitted).

175. To be clear, this Reply takes no view of whether the plaintiffs could have successfully defended Simon's conduct and secured his testimony. Whether Simon violated any disciplinary or court rules in *McNeil* is a question best left to him and others. No view is expressed here because (a) the propriety of Simon's conduct cannot be resolved without full knowledge of the relevant facts, *see infra* note 197, and (b) a law review article is not an appropriate forum in which to regulate and "shame" a fellow academic, much less one who is an opposing expert in a litigation. *See infra* Part III.D. Even more important, these questions are beside the point. The point is that few parties will knowingly retain an academic expert witness who intends to publicly debate the case while it is ongoing. The academic will be undesirable even if the conduct might be defended successfully, because parties disfavor ancillary litigation over the admissibility of their experts' testimony and because the academic expert's conduct will subject him to additional impeachment in a litigation process in which the expert witness's credibility is as important as the substance of

proceedings were still ongoing, Simon published his article electronically. A footnote in the middle of the article minimally disclosed Simon's role in the *McNeil* litigation. It omitted that LM&B had moved to strike his testimony because of the article and that his testimony had been stricken.

Simon's omission seemed inexplicable given his theory, which presupposes that academics will respond when their views are challenged, either to defend their views or to retract them. Since Simon regarded his legal work and his scholarship as continuous, LM&B's attack on his legal work deserved a response no less than an attack on his scholarship.<sup>176</sup>

In November 2007, soon after Simon posted his article, Professor Andrew Perlman questioned its lack of candor in a posting of his own titled, *Transparency and Bill Simon's Article*, on the Legal Ethics Forum blog.<sup>177</sup> Perlman observed that "Professor Simon's involvement requires us to assess his criticisms of the opposing experts with considerable caution" in light of studies showing "that[] when people stake out positions on issues, whether by choice or by employment, they subsequently have difficulty remaining objective about the merits of their positions."<sup>178</sup> Perlman criticized Simon's article for not explaining Simon's "involvement in the Nextel dispute more prominently" and "in far more detail," raised a number of specific questions left unanswered by Simon's footnote, and concluded that without more information, "I am disinclined to buy into [Simon's] critique of the defense experts in the Nextel case."<sup>179</sup> Perlman subsequently added, in a response to another post, that the difficulty in assessing Simon's argument was compounded by the fact that the underlying documents on which he relied were not publicly available (having not been posted on Simon's website, as the article promised), and that an additional cause of "concern[] about Professor Simon's role is that he is not

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his testimony.

176. See *infra* note 184. In a December 2007 e-mail after receiving a draft of this Reply, Simon wrote, "I didn[']t know about the second motion to disqualify me because of the draft article until now." E-mail from William Simon, Professor of Law, Columbia Law School, to author (Dec. 29, 2007) (on file with author). LM&B's motions to strike Simon as an expert witness were filed on August 29, 2007 and the court order granting LM&B's motions was dated September 26, 2007—almost a full month before Simon first posted his article electronically. That the plaintiffs' lawyer somehow failed to mention to Simon during this period that he had been accused of unethical conduct and that the accusation was unopposed might serve as another example of the difficulty of updating one's work.

177. Perlman, *supra* note 12 ("Ironically, it's Professor Simon's lack of transparency that gives me concern, at least in the context of his critique of the three academic defense experts in the Nextel case.").

178. Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 95-111 (1993); Perlman, *supra* note 12 (citing Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); Langevoort, *supra*, at 95-111).

179. *Id.*

simply describing a substantive disagreement; he is impugning other people's integrity."<sup>180</sup>

Responding in the same forum, Simon justified withholding what he called his "unusual back story" on the ground that it would divert attention from "the merits" and create insatiable demand for even greater transparency.<sup>181</sup> He acknowledged being struck as an expert after LM&B filed a motion based on discovery delay but blamed plaintiffs' counsel for the delay.<sup>182</sup> Simon was evidently unaware of LM&B's second motion accusing him of ethical improprieties that, it said, made him a biased expert,<sup>183</sup> and he still saw nothing wrong with writing and circulating his article to the opposing academic experts while the case was proceeding. On the contrary, he faulted the other professors' failure to respond, suggesting that, notwithstanding their confidentiality commitments, their silence supported an inference that his criticism was just.<sup>184</sup> In response, Perlman strongly challenged Simon's claim.<sup>185</sup>

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180. *Id.*

181. Simon explained:

We rightly expect disclosure of a few basic considerations, especially financial interests and institutional affiliations. But a demand for extensive disclosure of any unusual back story that might influence one's views is paralyzing and trivializing. It postpones attention to the merits. And it sets up demands that are largely unsatisfiable because issues of motivation are inherently ambiguous and because the curiosity that fuels the demands is partly prurient. After I've answered your questions, you will usually have a whole new set.

Posting of William Simon to Legal Ethics Forum, *supra* note 82. In general, one can sympathize with an academic's reluctance to include autobiographical information in an article. See Green, *supra* note 96, at 340-42. A distinction might be made, however, when the article addresses a case in which the author is participating and one of its central arguments is that the opposing academic experts, in contrast to the author, performed their work badly.

182. Posting of William Simon to Legal Ethics Forum, *supra* note 82.

183. See *supra* note 173.

184. Posting of William Simon to Legal Ethics Forum, *supra* note 82 ("Silence in the face of harsh criticism is customarily taken to warrant an inference in favor of the criticism.").

185. Perlman wrote:

Regarding Professor Simon's claim that his article has more credibility because the defense experts have not responded, Professor Simon himself recognizes that he has put the defense experts in a terribly awkward position. It is a bit unfair for Professor Simon, who acknowledges that he was disqualified and cannot be called as an expert, to expect the defense experts to come out guns blazing regarding their views on a pending matter in which they are to be called as experts. In fact, if they did respond publicly, I'd advise them to get their malpractice coverage up to date, because in my mind, it could give the plaintiffs more fodder for cross-examination. Why would they do that?

I also have some concerns that Professor Simon circulated a draft of his article to the defense experts in a pending case. I could imagine how I would have reacted upon seeing that I was going to be vilified by a well-known academic as a result of testimony that I was planning on giving in a case. It would certainly have a chilling effect, even if I felt quite comfortable with my position. In my view, Professor Simon should not have circulated his article to the experts during a pending proceeding, and he should have waited to post his article until all of the Nextel cases had reached their conclusion.

Posting of Andrew Perlman to Legal Ethics Forum, <http://legalethicsforum.typepad.com/blog/2007/11/both-andy-and-j.html> (Nov. 15, 2007, 11:25 EST) (responding to Posting of

Paul Gordon, the plaintiffs' counsel, also entered the fray. While only listing publicly available facts to avoid violating client confidentiality, Gordon implied that he had decided not to defend Simon's conduct, and to rely exclusively on the Colorado practitioner experts, because Simon had undermined his own credibility as an expert by drafting and circulating his article.<sup>186</sup> Gordon wrote: "Professor Simon did not disclose to Colorado counsel the content of the draft article until Professor Simon's deposition. In particular, Professor Simon did not disclose the fact that he criticized other testifying experts by name and thereby jeopardized the independence of his opinions for the purposes of his credibility at trial."<sup>187</sup>

As Gordon's post reflects, Simon's decision to implement part of his theory by practicing law as an extension of his academic role had pernicious consequences for the plaintiffs who had retained him as an expert witness. The plaintiffs were deprived of their only expert witness with an academic affiliation which, in Simon's view at least, counts for much. They were also denied a substantively different justification for their argument that the claimants could not be asked to consent to the DRSA.<sup>188</sup> The plaintiffs' other experts, although reaching the same conclusion as Simon, provided different analyses. If Simon had not, in Gordon's words, "undermined his own credibility as an expert by drafting and circulating his article," the plaintiffs' case might have been stronger.

G. *Ultimate Accountability for "Quasi-Third-Party Academic Legal Advice":  
The Judge and Jury Reject Simon's Opinions*

Simon's theory assumes expert witnesses and other so-called "quasi-third-party legal advisors" are unaccountable for substantively bad opinions and that more stringent standards of practice are therefore necessary. But as Simon's own experience illustrates, the adversary process provides the ultimate measure of accountability in the form of adversary testing followed by judicial and jury decision making.

In November 2007, shortly after Simon published his article electronically, the judge and jury in the *McNeil* litigation heard evidence, including from both sides' expert witnesses, and decided the case. The trial judge concluded that the

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William Simon to Legal Ethics Forum, *supra* note 82).

186. Posting of Paul Gordon to Legal Ethics Forum, *supra* note 167. Gordon also implied that it was Simon, if anyone, who was responsible for the discovery delay that was addressed in the first motion to strike Simon's testimony. *Id.* ("As for Professor Simon's suggestion that he did not receive documents in a timely fashion, the readers are welcome to review the Denver District Court public record, which speaks for itself."). I have no view on whether Simon or Gordon is correct about which of them is to blame and have made no effort to examine the record in an effort to resolve the evident disagreement between them.

187. *Id.*

188. *See supra* note 147; *infra* note 242.

DRSA did not give rise to nonconsentable conflicts; the jury concluded that the plaintiffs had given informed consent and that LM&B had not breached its fiduciary duty to the plaintiffs in any other respect, thereby rejecting the plaintiffs' argument that other features of the DRSA were unethical.<sup>189</sup> These determinations, made in an adversary proceeding after the legal issues were fully briefed and the factual issues fully presented, rejected every relevant opinion expressed by Simon in his expert report and accepted those of LM&B's experts. By the standards of law in the real world, as opposed to an academic theory of the law, the judicial determinations established that if anyone had given "bad" advice, it was Simon, not the opposing experts. Simon revised his article after the verdict, but did not discuss the trial evidence and arguments, and thus, did not explain why the trial was inadequate to ensure the accountability of his and others' legal advice and expert opinions.

From an *ex ante* perspective, the prospect of having to defend one's views in a deposition and at trial, and of having one's views assessed by a judge and jury, is a powerful motivator to provide only those opinions that one would feel comfortable defending. From an *ex post* perspective, the judicial determination and jury verdict nullify the effect of indefensible opinions. To justify his theory, Simon has a burden to explain why the proceedings in the *McNeil* case were insufficient to hold the experts accountable, what academic critiques would add, and why one should conclude that the critique offered in an article by an academic expert consultant such as Simon is more legitimate than the determinations made by a judge and jury in a trial. One might suspect that Simon "framed" his article to avoid discussing the *McNeil* litigation and his own involvement in it (while discussing the views of opposing academic experts) because he has no persuasive answer to the argument that trials adequately hold academics (and other lawyers) accountable for the kinds of legal work at which Simon's theory is directed.

### III. ACADEMIC REGULATION OF ACADEMICS' LEGAL WORK: IS THERE A MARKET FOR BAD LEGAL SCHOLARSHIP?

Apart from exploring the role of legal academics who give legal advice and provide expert opinions, Simon's theory addresses the potential role of legal scholarship as a form of professional regulation. His premise is that the litigation process and conventional regulatory mechanisms are inadequate to hold lawyers accountable for flawed opinions that are publicly disclosed and that, at least with respect to academics, informal means of public accountability must therefore be employed. In particular, Simon envisions regulation of academic lawyers via "informal [peer] criticism and shaming" within the academy.<sup>190</sup> Academic writing would serve as a vehicle.<sup>191</sup> Thus, in Simon's

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189. *See infra* note 242.

190. Simon, *supra* note 3, at 1596.

theory, legal scholarship should support the work of the disciplinary system and legal malpractice suits to control the quality of legal practice.

Simon's theory presupposes that legal academics will serve essentially as self-appointed inspectors general, scrutinizing and critiquing their colleagues' legal work and publicly "shaming" those who work badly. Academics, in other words, will engage in professional regulation of the comparatively small universe of fellow academic practitioners; and they will do so as an extension of their academic work, at times publishing their critiques in the form of scholarly articles. To make it easier for their colleagues to write these critiques, academic lawyers would adopt the transparency and accountability norms that Simon espouses. For example, besides preparing extensive written opinions like those of tax lawyers, law professors providing legal advice and expert testimony would post their opinions on the Internet. The second half of Simon's article, which criticizes some of the work product of the opposing academic experts in the *McNeil* litigation, is evidently Simon's model for such regulatory critiques. Simon focuses on what he calls the "centrally influential ex ante opinion by Geoffrey Hazard"<sup>192</sup> appended to Simon's article.<sup>193</sup>

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191. See *id.* at 1577-78 n.75 (stating that Prof. Simon's publication of his expert opinions in the law review "subject[s] them to the test of peer scrutiny"); *id.* at 1577 (criticizing Prof. Hazard for giving confidential advice, thereby immunizing his work from "public and peer scrutiny"); *id.* at 1596 (advocating that academic-lawyers' expert advice and opinions be exposed to "peer criticism").

192. Simon, *supra* note 3, at 1577.

193. *Id.* app.II. Simon also criticizes the other two experts' work in passing. Rather than waiting to complete his article until after the *McNeil* trial in order to address the opinions the other two experts actually expressed, Simon relies exclusively on LM&B's counsel's "summaries of their anticipated trial testimony." *Id.* at 1586. In doing so, Simon inaccurately describes their views. For example, Simon attributes to me an opinion about the reasonableness of the amount of LM&B's fee, *id.* at 138 (footnote omitted), when in fact the expert disclosures make no reference to my opinion on this subject and I have never formed one. Unlike the portions of the expert disclosures relating to Roy Simon's expected testimony, the portions relating to my expert testimony make no reference to the applicable rule, N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-106 (2007), and contain no analysis relating to the reasonableness of the amount of fees for disciplinary purposes or to the facts that would be relevant to the analysis. The expert disclosures refer to my views regarding the DRSA fee provisions only in the context of opinions on conflict of interest rules, not the rule on excessive fees. That said, it is important to underscore that Simon himself does not argue that LM&B's fees were unreasonably high. His point is that the expert witnesses could not reach a reliable, ultimate conclusion without additional information that was not made available to them—namely, the amount of the plaintiffs' anticipated or ultimate recovery. He does not explain why Roy Simon and others were wrong to conclude that even if the plaintiffs' recovery was low, the amount of the fee was reasonable in light of the number of hours that LM&B put into the representation, its ordinary hourly fee, its level of experience, and other relevant factors, particularly given that the fee did not diminish the plaintiffs' recovery. See Simon, *supra* note 3, at 1591.

Further, Simon's electronically published version attributed to both Roy Simon and me the opinion that "it was sufficient disclosure simply to permit the claimants to examine a copy of the . . . DRSA," and then his article went on to characterize the view he attributed to us as "eccentric" and as an example of "how easily expertise can lapse into advocacy."

Simon's ostensible purpose is to "illustrat[e] . . . the problems of quasi-third-party academic advice."<sup>194</sup> However, the critique appears to serve other purposes, chief among them being to offer an example of the academic "criticism and shaming" that Simon's theory prescribes.<sup>195</sup>

Simon's theory assumes that public shaming is a worthwhile academic enterprise. Using Simon's article as a case study, this Part challenges that assumption, arguing that academic writing designed to regulate professional colleagues is likely to be both bad scholarship and bad regulation. In particular, the results are likely to be unreliable, if not misleading, both factually and legally, as well as trivial from a scholarly perspective.<sup>196</sup> This Part concludes by questioning whether there will be a market—either of sellers or buyers—for future scholarship of Simon's kind that is designed to regulate academic colleagues by critiquing their legal work and shaming them for their supposedly bad opinions.

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Simon, *supra* note 7, at 41 (footnote omitted). In actuality, the facts on which we were asked to rely included that in addition to reviewing the DRSA, the claimants' reviewed and retained a document describing its highlights, that "the DRSA's specific terms, and the Highlights, were explained, in detail, orally at face-to-face meetings between LM&B attorneys and every claimant," that the "[p]laintiffs were advised to seek advice from independent counsel before entering into the DRSA," and that they did so, and that they signed written statements acknowledging that they had reviewed and discussed the DRSA. Defendants Leeds, Morelli & Brown, P.C., Lenard Leeds, Steven Morelli, Jeffrey Brown, James Vagnini, and Bryan Mazzola's Supplemental Summary of Expert Opinions Served Pursuant to C.R.C.P. 26(a)(4) at 1-18, *McNeil v. Leeds Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County Nov. 28, 2005). Although Simon's law review article does not repeat this mischaracterization of the opposing experts' opinions, Simon, *supra* note 3, at 1591, it also does not acknowledge his error in originally publishing the misleading account (which may be the first and only account that some people read). Further, he substitutes a different criticism—that we failed to "acknowledge[]" and "mention[]" facts that he regards as important. What Simon overlooks here and throughout his critique of our opinions is that his understanding of our expert opinions is predicated exclusively on expert disclosures prepared by LM&B's counsel during discovery in order to give the plaintiffs notice of the subject of the experts' testimony and its factual basis. LM&B's expert disclosures are substantially more detailed than the barebones expert disclosure of Simon's opinions provided by the plaintiffs' counsel, *see supra* notes 131 & 142 and accompanying text, but even then, their purpose was simply to give fair notice, not fully to elaborate the experts' reasoning. As previously discussed, expert depositions give parties ample opportunity to explore the experts' reasoning and factual understandings more fully. *See supra* Part II.E.

194. Simon, *supra* note 3, at 1576.

195. *Id.* at 1574.

196. As previously noted, this Reply does not focus on the underlying substantive disagreement between the opposing experts in *McNeil* but rather on Simon's theory. *See supra* note 9. Consequently, in this Part, which focuses on Simon's idea that academic critiques and "shaming" should be employed to regulate law professors' legal work, the substantive issues are discussed only for the limited purpose of illustrating the flaws in this aspect of Simon's theory.

*A. The Factual Unreliability of Academics' Regulatory Critiques*

A legal academic's critique of a colleague's legal work is prone to be factually unreliable. Almost invariably, the critique will be predicated on factual understandings and will be legitimate only insofar as the factual understandings are complete and not materially inaccurate. For example, a critique of an academic's legal advice ordinarily requires knowing, at a minimum, what advice was requested, what advice was provided, and on what facts the academic relied. When an academic seeks to criticize a colleague's legal work as a regulatory exercise, questions are likely to be raised about the reliability of the facts on which the criticism is based. If the critic is an outsider to the representation, she is unlikely to be privy to all the relevant facts and may make erroneous assumptions and draw erroneous inferences. If the critic, like Simon, is a participant in the matter, he may have greater access to facts, but his knowledge of another's work may still be incomplete, and further, his factual account may be biased or self-interested because of his professional role. Simon's article illustrates these problems.<sup>197</sup>

Simon's article may be good advocacy, but it is not good scholarship. This is true even when judged by his own standards, which identify scholarly detachment as a hallmark of good scholarship.<sup>198</sup> As Andrew Perlman observed, Simon's lack of objectivity makes his article suspect as scholarship. What is troubling, as Perlman correctly recognized, "is not so much that Professor Simon is criticizing other experts or even that he is criticizing opposing experts in a case in which he was involved," but that "he is offering his views as a scholarly critique when, in fact, his involvement in the case makes a dispassionate, objective assessment difficult."<sup>199</sup>

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197. The discussion of Simon's work as a litigation consultant and expert in Part II is also limited by the incompleteness of the public record, notwithstanding that Simon was twice deposed in *McNeil*. LM&B's counsel did not elicit a full account of Simon's work in the litigation, and as a consequence, the discovery record does not answer many of the questions that one might ask about Simon's conduct if one's purpose were to critique his work from a procedural perspective, as he critiques that of Hazard. To take an obvious example, one might question whether the *McNeil* plaintiffs gave informed consent to Simon's publication of his article, especially given their lawyer's suggestion that he did not know in advance what Simon planned to write. *See supra* notes 114-15, 123-26, & 167 and accompanying text. The question cannot conclusively be resolved, however, because the depositions did not elicit any detail about Simon's communications with the plaintiffs, whether directly or through counsel, regarding what he would write about their lawsuit and the potential impact of the publication. Simon may now decline to give further detail, whether out of concern for the plaintiffs' privacy or his own. Because the relevant facts are not available, one cannot reliably assess Simon's compliance with his duties of confidentiality and candor to the plaintiffs. Similarly, questions about the propriety of his conduct raised in LM&B's two motions to strike his testimony may not presently be answerable, because the plaintiffs did not oppose the motions and therefore no hearing was held.

198. Simon, *supra* note 3, at 1574-75, 1577 n.75.

199. Perlman, *supra* note 12.



Simon's virulent attack on Hazard's legal advice in the *McNeil* case to illustrate the supposed virtues of his theory might be viewed as evidence of Simon's lack of detachment and objectivity. Simon's article did not emerge out of thin air. Simon launched a prior academic attack on Hazard in 1998.<sup>200</sup> Simon asserts that he focused on Hazard's opinion because it was "centrally influential."<sup>201</sup> But Hazard's role in the underlying events was comparatively unimportant from either a disciplinary perspective<sup>202</sup> or a civil liability perspective;<sup>203</sup> and Hazard's client, Nextel, had been dismissed from the lawsuit by the time of trial.<sup>204</sup>

It was not simply that Simon was an expert on the other side that made his objectivity suspect. It was also that Simon was a "litigation consultant" in a parallel lawsuit.<sup>205</sup> Simon was, in effect, an advocate for one side—or, at least, an advocate's counsel. His role presumably was to help plot strategy to achieve the plaintiffs' objectives, regardless of his personal view of the merits. As a litigation consultant, Simon served a different role from that of an expert witness. He was duty bound, as a matter of his professional role, to serve the plaintiffs zealously and loyally, at least until his role shifted exclusively to that of a disinterested, neutral expert witness.<sup>206</sup> This is not to suggest that Simon

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200. See Simon, *supra* note 8; see also July 2007 Deposition, *supra* note 57, at 211 ("I know that I have said more than once . . . that I think that many of the opinions in Hazard's letter are absurd and other words to that effect."); *id.* at 218 (noting that Simon referred in an e-mail to the last page of Hazard's letter as "truly outrageous").

201. Simon, *supra* note 3, at 1577.

202. When negotiating the DRSA, LM&B retained and relied on its own expert, Hofstra professor Roy Simon. The DRSA implicated Nextel's lawyers' conduct insofar as one might argue that they made an agreement improperly restricting LM&B's right to practice. Cf. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2004). But the DRSA implicated the conduct of LM&B much more significantly and directly.

203. Again it was LM&B's conduct that was central. At trial, LM&B relied on Roy Simon's prior opinion and expert testimony along with the expert testimony of two others who were retained after the litigation commenced. Neither side called Hazard as a fact or expert witness. Although the pretrial disclosures of other experts' opinions alluded to Hazard's opinion, there is no indication that the other experts reviewed Hazard's opinion and relied on its substance in developing their views or that their opinion testimony invoked the authority of Hazard's opinion.

204. See *supra* note 101 and accompanying text.

205. Simon, *supra* note 7, at 27 n.60 (referring to himself as "informal consultant to plaintiffs' counsel" and as "litigation consultant"); see also *supra* note 6; Posting of William Simon to Legal Ethics Forum, *supra* note 82 (acknowledging that he learned about the case "as a consultant to one side"). To be clear, Simon's consulting relationship was apparently only with Roper and not with counsel for the *McNeil* plaintiffs in the parallel litigation, but Simon rightly has not pressed that distinction. It would not make a difference with regard to Simon's lack of objectivity in discussing LM&B's conduct, which was in issue in both cases.

206. See *supra* note 124. Unlike an expert witness, Simon had a lawyer-client relationship, which gave rise to fiduciary and ethical duties of zealous representation, confidentiality, and loyalty (among others). In contrast, those of us who served only as expert witnesses in the *McNeil* case had no clients, no lawyer-client relationships, and no ethical or fiduciary duties arising out of such relationships. The expert witnesses were in a position to give opinions unaffected by loyalty and advocacy obligations, and our role ended

consciously wrote his article as an act of advocacy, calculated to promote the plaintiffs' ends, but simply that his attitude as an advocate would tend to influence his perspective.

It might be different if Simon had begun writing after his role ended; but Simon was not looking back on the case from a distance.<sup>207</sup> While writing, he was consulting with the plaintiffs' lawyer. Litigators use the press as an extension of their advocacy.<sup>208</sup> No matter how hard Simon strived for neutrality, one would perceive the article as an act of advocacy, designed for any of several purposes: to smoke out the opposing experts' views and develop material with which to cross-examine them; to intimidate the opposing experts from presenting their opinions in court; or to provoke other academics to publish opinions (based on Simon's recitation of the facts) that lend credence to Simon's viewpoints and that might influence the judge. Suspicions that the article was as much a legal brief as a work of scholarship would have been reinforced by the timing of its electronic publication (i.e., before the *McNeil* trial was over), by Simon's admittedly harsh tone, and, as Perlman noted, by his personal attacks on others' integrity.<sup>209</sup>

As John Steele emphasized, the presumptive one-sidedness of Simon's critique was exacerbated by the fact that as a practical matter, readers could not verify Simon's account of the underlying facts. Simon himself had not waited to complete and post his article until the case was tried and the trial transcript was publicly available. Consequently, he had not obtained and reviewed the most relevant source of factual information—namely, the trial transcript—and had not made it public on a website, as he promised to do. Simon insisted that only one document mattered—the DRSA. But as noted previously, Simon drew factual inferences about the meaning and effect of the DRSA that turned out to be disputed, contradicted by other evidence, and evidently rejected by the

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once the trial concluded.

207. Subject to confidentiality restrictions, I see nothing wrong with drawing on one's prior professional work as a basis for legal scholarship, *see* Green, *supra* note 96, at 335-38, and I have done that. *See, e.g.*, Bruce A. Green, "Hare and Hounds": *The Fugitive Defendant's Constitutional Right to Be Pursued*, 56 BROOK. L. REV. 439 (1990). Nor do I see anything wrong with drawing on ongoing work in a general way—for example, writing generally about conflicts of interest in litigation while serving as an expert witness in disqualification cases—and have done that, too. Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71 (1996). But Simon's example demonstrates the problem with engaging in scholarship specifically addressing a particular matter on which one is currently working either as an expert or as cocounsel (or both). *See* Green, *supra* note 96, at 338 ("[A]n article specifically addressing a pending matter in which the law professor represents a party is, almost perforce, a work of advocacy." (footnote omitted)).

208. *See, e.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991) (Kennedy, J., concurring) ("A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.").

209. *See supra* note 180 and accompanying text.

jury.<sup>210</sup> Simon also maintained that readers could rely on the law review editors to ensure the fairness of his factual account.<sup>211</sup> But the students' editing would be irrelevant to the reliability of the October 2007 version of his article published electronically by the Columbia Law School Public Law & Legal Theory Working Paper Group on the Social Science Research Network (SSRN). Neither Columbia nor SSRN reviewed his sources to substantiate his claims, much as he might like readers to infer that the affiliation of his article with Columbia and SSRN somehow accredits it. Further, even after the law review accepts or publishes it, the editors cannot be counted on to ensure that a critique such as Simon's is factually well-founded.<sup>212</sup> Whether readers would themselves engage in that labor-intensive exercise seems unlikely, particularly given that months after Simon electronically published his article, he had yet to post documents from the *McNeil* trial on his website.

The problem of factual unreliability pervades Simon's procedural critique of Hazard's work. Simon criticizes Hazard for not extensively explaining the conclusions summarized in his opinion letter about the propriety of the DRSA.<sup>213</sup> Simon assumes that, in reaching these conclusions, Hazard did not consider and analyze all the issues that Simon identifies in his critique. But Simon has no factual basis for this assumption. All Simon apparently knows is that "Nextel asked Geoffrey Hazard for his opinion on the DRSA before it and LM&B signed the agreement" and that "Hazard gave a four-page written opinion."<sup>214</sup> Because Hazard never testified in *McNeil*, Simon knows nothing else about Hazard's work for, and interaction with, Nextel. Simon does not know what Nextel told Hazard about why it sought his advice<sup>215</sup> and what

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210. See *supra* text accompanying notes 140-42, 160-62; *infra* text accompanying notes 218-22.

211. Simon responded to Steele: "Eventually, the article will be vetted by the editors of the Stanford Law Review, and I know from past experience that they are not lax about matters of substantiation." Simon Legal Ethics Forum Reply, *supra* note 82.

212. *Stanford Law Review* editors certainly did not ensure that Simon's account of the facts was balanced or complete when agreeing to publish his article, since the journal accepted his article in fall 2007 before the cite-checking process began. Nor was the *Law Review* in a position afterwards to ensure that when Simon characterized facts as "undisputed," they really were, and that his factual account was generally fair. To do that, the editors would have had to review the full discovery and trial record.

213. Simon, *supra* note 3, at 1577 (criticizing what Simon regards as Hazard's "striking departures from the norms of analytical support and reasonable framing"); *id.* at 1590 (criticizing Hazard's opinion for "failing to explain its conclusion about consentability"); *id.* at 1591 (criticizing Hazard's opinion for "ignoring the key issues regarding consent").

214. *Id.* at 1583.

215. For example, whether Nextel simply sought Hazard's advice as a "first-party legal advisor." Simon, *supra* note 3, at 1575, to ensure that its own lawyers complied with their ethical obligations and that Nextel did not become a party to a contract that caused other lawyers to violate the ethics rules; whether Nextel intended to use Hazard's opinion in negotiations with LM&B to assuage or rebut ethical concerns that LM&B raised concerning proposed terms of the DRSA; or whether, as Simon assumes, Nextel's lawyers, "recognizing

background facts Nextel provided;<sup>216</sup> whether Hazard provided advice orally in addition to his written opinion; whether Hazard's opinion was supported by legal research in the Nextel matter or in earlier matters involving identical issues; or whether the DRSA was revised in response to Hazard's opinions. Simon's knowledge is far too thin to use Hazard's work as a case study.<sup>217</sup> Simon has no evidence that Hazard perceived himself to be anything but a "first-party legal advisor," in which case, even under Simon's theory, Hazard had no duty to write his ethics opinion as if it were a tax opinion. Further, for all Simon knows, Hazard fully considered and analyzed all the issues that Simon identifies and discussed them extensively with Nextel's counsel.

The problem of factual unreliability also pervades Simon's substantive critique. The particular substantive questions considered by Hazard and the other experts in *McNeil* should be relatively inconsequential from Simon's theoretical perspective; as Simon acknowledges, his argument does not depend on whether or not Hazard's advice was legally correct.<sup>218</sup> Simon nonetheless delves into these questions. In 2000, Hazard analyzed the proposed terms of the DRSA under the ethics rules of New York and Virginia and under the ABA Model Rules of Professional Conduct.<sup>219</sup> Simon seeks to show that "Hazard's opinion is patently wrong on nearly every issue it addresses"<sup>220</sup>—in other words, that Hazard obviously misconstrued or misapplied the rules of professional conduct as they stood seven or eight years ago—and that Hazard is most especially wrong in applying the conflict-of-interest rules.

The resolution of virtually every substantive issue in Simon's article turns on the facts. Most of his criticisms derive from factual understandings different from those of Hazard and the other opposing experts, but Simon does not acknowledge how centrally his critique turns on disputed facts. Nor does he consider whether the discovery record, the trial evidence, and the jury's determination in *McNeil* contradict his factual assumptions, as they evidently do. Having ignored much of the discovery record and all of the trial record before publishing his article on SSRN, Simon failed to live up to his own

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the possibility of later challenge, called on [Hazard] for ex ante legitimation." *Id.* at 1577.

216. Also potentially relevant is whether Nextel was open to negotiating substantially different terms, since Simon's critique assumes that LM&B could have negotiated terms that were procedurally or financially more advantageous to the claimants as an alternative to the provisions he regards as overly generous to LM&B. *See* Simon, *supra* note 3, at 1588.

217. *See generally* Bruce A. Green, *There But for Fortune: Real-Life vs. Fictional "Case Studies" in Legal Ethics*, 69 *FORDHAM L. REV.* 977, 977-78 (2000) ("The problem with real-life tales [about lawyers' professional conduct] is that they are often incomplete. . . . [P]recisely what the lawyers did and why they did it may never become fully apparent.").

218. Simon, *supra* note 3, at 1577 ("My views on this transaction are hotly disputed, but an important purpose of my argument does not depend on whether I am right about the merits.").

219. *Id.* app.II

220. *Id.* at 1587.

professional standards of “due diligence” and “reasonable framing,” and equally failed to meet reasonable scholarly standards of diligence.

For example, Simon assumes that a DRSA provision restricted the plaintiffs from discharging LM&B and substituting other counsel.<sup>221</sup> If that had been so, Hazard and the other experts would have concurred that the provision was ethically impermissible. In fact, Hazard noted that a requirement to engage LM&B throughout the ADR process would be legally unenforceable because “[a] client has authority to discharge a lawyer at any time, for any reason or no reason.”<sup>222</sup> But LM&B, its clients, and its experts did not understand the DRSA to impose this restriction.<sup>223</sup>

Similarly, Simon assumes that a DRSA provision prohibited LM&B from accepting additional Nextel employees and former employees as clients in the pending dispute; and he therefore concludes that the DRSA impermissibly restricted LM&B’s right to practice law. However, the facts were otherwise: LM&B represented that if it entered into the DRSA, it intended to decline new clients against Nextel because accepting them would not be in the existing clients’ interests, but LM&B reserved the right to take on new claimants, evidently recognizing that it could not make a binding agreement to the contrary.<sup>224</sup>

Simon also criticizes Hazard unfairly for *not* giving an opinion on a different fact-bound question: after the terms of the DRSA were resolved and LM&B presented it to the claimants, did the claimants give informed consent to LM&B’s conflict of interest resulting from the DRSA?<sup>225</sup> Since Nextel consulted Hazard while the DRSA was being negotiated and before LM&B presented it to the claimants, Hazard could not have formed an opinion on this question.<sup>226</sup> Even afterwards, Nextel could not have provided Hazard the facts

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221. *Id.* at 1593.

222. *Id.* app.II at 1603.

223. *See supra* text accompanying notes 141 & 160.

224. LM&B “represents” in the DRSA that it “does not have the resources to represent any additional persons” and that “it believes that it is in the best interest of its clients that it devote its resources on this matter to the representation solely of the” existing clients, and further “represents that it does not intend to undertake any such representation . . . , *although Nextel recognizes that LM&B has the right to do so.*” Dispute Resolution Settlement Agreement (Sept. 28, 2000) [hereinafter DRSA] (emphasis added). Consistent with the DRSA provision, Hazard’s opinion referred to LM&B’s intention, not to its agreement, to decline new clients. Simon points to nothing in the discovery or trial record to suggest that, contrary to the plain language of the DRSA and to Hazard’s understanding of it when it was negotiated, LM&B in fact agreed in the DRSA (or outside the DRSA) to restrict its right to accept new clients against Nextel if, for example, it later decided that doing so was in the original claimants’ best interest. No ethics provision barred LM&B from deciding, in furtherance of its current clients’ interest, not to accept new claimants against Nextel, or from representing that it had so decided.

225. Simon, *supra* note 3, at 1590-92.

226. Thus, Hazard wrote at the time that the claimants’ “consent is valid only if predicated on adequate disclosure” but he could only “assume that Leeds Morelli will

needed to form an opinion because communications between LM&B and its clients concerning conflicts of interest and the DRSA were confidential. Simon accuses Hazard of “violat[ing] the norm of reasonable framing” by “assum[ing] the issue away,”<sup>227</sup> but does not explain how Hazard could have done otherwise given the timing of his work and the available information.

Simon’s criticism of Hazard’s failure to address the propriety of conduct that had not yet occurred is ironic given how Simon “framed” his critique. Simon could have waited until after the *McNeil* trial before publishing his article. This would have allowed him to seek access to trial testimony that would undoubtedly be relevant to the substantive questions he addresses; indeed, since he was no longer permitted to testify, he could have attended the trial. Yet Simon declined to take account of the trial record or of the jury’s findings. He published his article electronically on the eve of the trial and subsequently gave the following explanation for not considering the trial and its outcome: “I did not want to discuss these matters extensively in the prior draft because, first, it was unclear how things would play out, and second, such discussion would distract attention from the merits.”<sup>228</sup> What Simon means by “the merits” is unclear. He may be referring to the propriety of LM&B’s conduct, to the correctness of Hazard’s advice, or to both.

In any case, Simon’s deliberate refusal to consider the trial record and jurors’ factual determinations for fear that a fuller account of the underlying facts relevant to the propriety of LM&B’s conduct would “detract” from his critique of Hazard’s opinions raises a host of questions.<sup>229</sup> Significantly, Simon’s decision to complete and publish his article electronically just before the trial and then to publish revised versions afterwards without reference to the trial record undermines the trustworthiness of both his factual premises and the critiques based on them. No less significantly, Simon’s failure to critique the trial undermines his premise that informal processes, such as academic

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provide such a disclosure,” which “should be in writing for any claimant who is a resident of California.” *Id.* app.II at 1603. Hazard did not express an opinion whether LM&B’s future disclosures would in fact suffice; he did not have facts on which to base such an opinion. Nor did he have reason to give an example of a sufficient disclosure, since Nextel would neither make the disclosures nor oversee LM&B in doing so.

227. *Id.* at 1590.

228. Posting of William Simon to Legal Ethics Forum, *supra* note 82.

229. See, e.g., *supra* text accompanying note 212 (questioning the legitimacy of Simon’s claim that the facts were undisputed); *infra* note 242 (questioning whether Simon considered all the facts relevant to the consentability of the conflict created by the DRSA); *supra* Part II.D.1 & text accompanying notes 227-29 (questioning the seriousness of Simon’s commitment to the Circular 230 standards, which presuppose duties of due diligence and reasonable framing); *supra* Part II.G (failure to consider and explain away the trial’s results, which call into question claims that the opposing experts, whose views were legitimated by the trial result, were “patently” wrong). Given Simon’s assertion that the plaintiffs welcomed his writing, see *supra* note 114, one might expect that the trial transcripts and evidence would be readily available to him on request from Angela Roper or the *McNeil* plaintiffs’ trial or appellate counsel.

exchanges, reach more reliable results than litigation and that informal processes must therefore be enhanced through greater transparency on the part of legal advisors and expert witnesses, even if at the expense of the litigation.

The print publication of Simon's article caps a multiyear effort to provoke public discussion; Simon has carried his criticisms of LM&B's conduct to the popular news<sup>230</sup> and the internet<sup>231</sup> as well as a scholarly journal. But there is nothing to suggest that, as a consequence, the public, the profession, or the academy has formed *any* view regarding LM&B's conduct, whether in agreement or disagreement with Simon, much less one that it considers more reliable and that *is* more reliable than the result reached in *McNeil*.<sup>232</sup> Simon identifies no procedural flaws in the *McNeil* trial,<sup>233</sup> and offers no reason to think that the process he has employed to reach the truth is superior. In *McNeil*, the trial judge concluded that the conflict created by the DRSA was nonconsentable after receiving briefs, expert reports, and expert deposition testimony (including Simon's) and hearing fact and expert testimony, which were subject to cross-examination. Months after the trial ended, despite Simon's efforts to provoke informal public discussion, Simon remains the only academic to have publicly critiqued the expert opinions. It is not evident why, as a plaintiffs' expert who considered only a fraction of the evidence, he was in a better position than the trial judge to ascertain the facts and evaluate competing experts' views and should therefore be credited in the court of academic opinion.

#### B. *The Legal Unreliability of Academics' Regulatory Critiques*

Even from a legal perspective, academic exercises in shaming are likely to be unreliable. Because they are written for instrumental, rather than scholarly, purposes, the tendency will be toward exaggerated, rather than balanced, legal positions. Given the uncertain and mutable nature of the law, questions are likely to be much closer than academic regulation reveals, and, wherever one ultimately comes out, too close to justify "shaming" those with whom one disagrees substantively. Simon's article illustrates this problem.

As discussed above, much of Simon's disagreement with Hazard's opinion reflects nothing more than that Simon was working with a different set of factual assumptions. But on two issues, Simon's critique in part reflects a disagreement on the relevant doctrine. The less significant question, on which nothing turned in *McNeil*, was the propriety of the consultancy arrangement. The other, more significant question was whether it was permissible for

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230. See *supra* text accompanying note 103.

231. See *supra* note 7 (posting of article on October 22, 2007, shortly before the trial began); *supra* notes 181-86 and accompanying text (Simon's posting on internet blog).

232. See, e.g., *supra* text accompanying notes 179-81 & 199.

233. See *supra* Part II.G.

claimants to consent to the conflict of interest resulting from the DRSA's payment and consultancy provisions. Simon wrongly criticizes Hazard on both of these questions. Insofar as Simon expresses a different doctrinal understanding, his understanding is the less conventional one and his analytic approach flouts ordinary methods of interpretation and sources of authority.

Far from being "patently wrong," Hazard's view on the propriety of the consultancy agreement was consistent with conventional understandings at the time he advised Nextel. Indeed, Simon concedes that "LM&B's position is defensible."<sup>234</sup> Simon acknowledges that "[s]uch provisions are common," that they "have been held permissible as part of the settlement of" clients' claims, and that "[m]any lawyers are untroubled by" them.<sup>235</sup> He also notes that critics have questioned the utility of the ethics rule in question,<sup>236</sup> which forbids settlement agreements restricting a lawyer's right to practice.<sup>237</sup>

Simon's only significant doctrinal disagreement with Hazard's opinion is on the question of whether because of the DRSA's legal fee and consultancy provisions, LM&B had a conflict of interest to which even a well-informed client could not consent.<sup>238</sup> This is the question on which Simon considers Hazard *most* "patently wrong."<sup>239</sup> Simon omits to mention that this question, which was central to the *McNeil* case, was resolved by the trial court in LM&B's favor after full briefing. In truth, it is Simon who reaches the wrong conclusion, and his method of adducing the meaning of the applicable rules is idiosyncratic.

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234. Simon, *supra* note 3, at 1594.

235. *Id.* at 1594-95.

236. *Id.* at 1594 n.158.

237. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2002). At the time Nextel consulted Hazard specifically about the New York and Virginia ethics rules, New York courts in particular were skeptical of the ethics rule forbidding settlement agreements restricting lawyers' practice and disinclined to interpret the rule expansively. Quoting and endorsing Professor Stephen Gillers's view that the rule "is an anachronism, illogical and bad policy," a New York state appellate court concluded in 1997 that "an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York." *Feldman v. Minars*, 658 N.Y.S.2d 614, 617 (N.Y. App. Div. 1997) (citation omitted). In 2000, only a month before the date of the DRSA, a state trial judge found that it follows that a settlement agreement may include a confidentiality provision that has the indirect effect of foreclosing the plaintiff's lawyer from bringing future similar cases against the defendant. *Bassman v. Fleet Bank*, 2000 N.Y. Misc. LEXIS 659 (N.Y. Sup. Ct. Aug. 25, 2000). Simon's concern about the consultancy agreement is that it has a similar indirect effect because the conflict of interest rules would bar LM&B from representing new clients against Nextel during the period of the consultancy. Given the New York courts' doubts about the rule's utility even in situations it covers directly, it seems doubtful they would have shared Simon's concern.

238. Simon, *supra* note 3, at 1588-90.

239. *Id.* at 133 (noting that the "most remarkable feature" of Hazard's opinion "is its complete silence on the nature of the conflict created by the payment arrangements of the DRSA").



The relevant conflict rules distinguish between representations that are permissible with the client's "informed consent" or "consent after full disclosure" and those that are absolutely forbidden because of the need to prevent inadequate representation. For example, in 2000, ABA Model Rule 1.7 allowed a lawyer to undertake or continue the representation with the client's informed consent if the lawyer "reasonably believe[d]" the representation would not be adversely affected by the conflict.<sup>240</sup> The question is what this and similar consent provisions meant and how they applied in the context of the DRSA. The DRSA provided for Nextel's payment of a fixed sum to cover LM&B's legal fees and most of its expenses, so that the claimants would retain all or most of what they secured in the ADR process. The DRSA also provided for LM&B to be paid to consult for Nextel for two years after all the claims were resolved. Simon argues that, going forward in the dispute resolution process, there was an unacceptably high risk that LM&B would give the claimants short shrift because the law firm would receive the same compensation regardless of how well the claimants fared and because the firm had no nonfinancial incentives to serve the claimants well.<sup>241</sup> Simon asserts that, under applicable rules, this conflict of interest was "unconsentable," whereas Hazard and the other experts concluded that the conflict-of-interest rules allowed the claimants to give informed consent to being represented in accordance with the terms of the DRSA.<sup>242</sup>

Simon's interpretative approach is unconventional. He criticizes the defense experts for not "say[ing] a word about what standards they apply" in concluding that "the conflict was consentable."<sup>243</sup> But he is no more clear on what standard he applies. His reasoning is simply that "there can be no doubt that some arrangements are not consentable" and "[t]his case seems an especially good candidate for nonconsentability."<sup>244</sup> Apparently, Simon

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240. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002). The wording of current Rule 1.7, as amended in 2002, is slightly different, but not materially so. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

241. Simon, *supra* note 3, at 1587.

242. In *McNeil*, when the plaintiffs moved for a determination that the DRSA gave rise to an unconsentable conflict, they did not put forth Simon's rationale, perhaps because none of their other experts supported it. Instead, the plaintiffs argued principally that LM&B's receipt of fees from Nextel and LM&B's future consulting arrangement with Nextel presented too great a risk that LM&B would serve Nextel's interests out of loyalty to Nextel as a third-party fee payor and future client. See Plaintiffs' Motion for Determination of Questions of Law on Validity of Consents to Conflicts, *McNeil v. Leeds, Morelli & Brown, P.C.*, No. 03-CV-893 (Colo. Dist. Ct., Denver County Aug. 11, 2007). The argument was contradicted by the case law and other relevant authority, however, and the trial court rejected it.

243. Simon, *supra* note 3, at 1588. Of course, Simon can level this criticism only because his critique of the testifying academic experts takes account only of expert disclosures prepared by LM&B. Simon "frames" his critique to exclude their subsequent reports and trial testimony.

244. *Id.*

mentally lined up various conceivable conflicts in order of their likelihood of undermining a lawyer's loyalty and then assigned LM&B's conflict a place toward the end of continuum where conflicts are most threatening.<sup>245</sup>

Simon does not purport to draw on the understandings within the legal community or on the applicable legal literature. He incorrectly asserts that "there is little authority on when a conflict is consentable,"<sup>246</sup> and does not refer to *any* authority—not a single judicial decision, bar association opinion, treatise, article, or other writing casting light on the general question of when conflicts are "consentable."<sup>247</sup>

Simon approaches the problem in a vacuum, but in fact there is ample authority on the consentability of conflicts of interest, and this authority does not support his conclusion.<sup>248</sup> Courts often consider, explicitly or implicitly, whether a client may consent to a conflict. In the disciplinary setting, when lawyers accused of violating a conflict rule defend themselves based on client consent, courts consider whether the conflict was one to which consent could be given.<sup>249</sup> In civil litigation, when parties rely on client consent to oppose a

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245. Simon's approach calls for making an ad hoc judgment about the extent of the risk that the lawyer will be disloyal to his client in light of all the relevant factors. Various questions might be raised under this approach. One is whether there are relevant factors Simon has not considered. Since Simon relies almost exclusively on the DRSA, and has not reviewed the trial evidence, that might easily be the case. Another question is whether the strength of LM&B's historic, philosophical commitment to the rights and interests of civil rights plaintiffs would be among the relevant factors, or whether Simon's analysis embraces only objective factors. (Some regard philosophical commitments as among the "personal" interests that may implicate the conflict rules. *See, e.g.,* ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 602 (2006). It would seem to follow that a strong identification with a client's cause might offset a lawyer's self-interest arising out of fee arrangements.) Another question is where Simon draws the line. Simon points to various factors that, in his view, exacerbate the risks created by the legal fee and consultancy provisions. Simon, *supra* note 3, at 1589-90. For example, he assumes that the DRSA reduced LM&B's accountability by precluding the claimants from discussing the ADR proceedings among themselves. *Id.* at 1590. If his assumption is wrong, as LM&B maintained, would his conclusion be different? Yet another question is on what learning or experience a lawyer should draw in forming a judgment about the extent of his self-interest and the likelihood he would succumb to it.

246. Simon, *supra* note 3, at 1588.

247. Simon's indifference to primary and secondary authority was confirmed during discovery in the *McNeil* case. When asked in his second deposition whether it was true, as his draft then asserted, that in fact "there is *virtually no* authority on when a conflict is consentable," Simon responded, "Well, it depends on what you mean by 'virtually.' That's what I say in the paper. I am not retracting it, but if you want to argue what 'virtually' means, I guess I could concede that there is some authority on it." July 2007 Deposition, *supra* note 57, at 268 (emphasis added). Following the deposition, Simon revised the sentence to state, "There is *little* authority on when a conflict is consentable." Simon, *supra* note 3, at 1588 (emphasis added).

248. *See infra* notes 249-66 and accompanying text.

249. For example, Simon's discussion of whether the DRSA's consultancy provision amounted to an impermissible restriction on LM&B's right to practice law includes a citation to *In re Conduct of Brandt*, 10 P.3d 906 (Or. 2000). Simon, *supra* note 3, at 1595

disqualification motion, courts must implicitly decide whether consent suffices, and courts must decide this explicitly when a party moving for disqualification argues that its consent (or waiver) was ineffective because the conflict is not one to which consent may be given.<sup>250</sup> The question also arises in criminal cases, both pretrial when courts consider whether to accept a defendant's waiver of the right to conflict-free representation and postconviction when they consider whether a defendant's waiver was constitutionally effective.<sup>251</sup> Questions of whether a lawyer has a conflict of interest to which clients may consent are also addressed frequently by bar association ethics committees giving advice prospectively,<sup>252</sup> and the subject is discussed in legal ethics treatises.<sup>253</sup>

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n.160. In that case, the lawyer was sanctioned for, among other things, violating the conflict-of-interest rule by failing to obtain the client's informed consent to a provision in a settlement that the plaintiff's lawyer would be retained by the defendant after the dispute was resolved. Had the court thought that the conflict was nonconsentable, it presumably would not have considered, as it did at great length, the adequacy of the lawyer's disclosures. *In re Conduct of Brandt*, 10 P.3d at 919-21; see also RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 2005-2006*, at 891-92 (recognizing that a settlement agreement providing for the defendant to retain the plaintiff's lawyer, while creating a conflict of interest, is one to which the plaintiff may consent).

250. RICHARD E. FLAMM, *LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES 390-92* (2003) (addressing "[n]on-[w]aivable [c]onflicts").

251. See, e.g., *Williams v. Meachum*, 948 F.2d 863, 865 (2d Cir. 1991) (defendant in robbery case effectively waived public defender's conflict arising out of his office's representation of another defendant who met the victim's description, even though the result was to forgo presenting a "lookalike" defense); *Reckmeyer v. United States*, 709 F. Supp. 680 (E.D. Va. 1989) (defendant in narcotics case effectively (and impliedly) waived defense counsel's conflict arising out of defense counsel's interest in avoiding criminal liability for his undiscovered role in inducing the defendant to launder narcotics proceeds to pay his legal fees). See generally Bruce A. Green, "Through a Glass, Darkly": *How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201 (1989) (critiquing leading Supreme Court decision on trial courts' discretion to accept the defendant's waiver or to disqualify a criminal defense lawyer based on a conflict of interest).

252. See, e.g., Ass'n of the Bar of the City of N.Y., *Comm. on Prof'l and Judicial Ethics*, Formal Op. 1988-5 (1988) (noting that a lawyer who is a tenant in a building may represent the tenants with respect to a conversion plan even though the lawyer's self-interest is implicated and may be different from the interests of the other tenants generally, absent special facts establishing that the respective interests are too divergent to enable the lawyer to provide adequate representation); N.Y. State Bar Ass'n, *Comm. on Prof'l Ethics*, Op. 589 (1988) (stating that it is not per se improper for an organization's lawyer to serve as a member of its board of directors, notwithstanding the risk that the lawyer's self-interest as a board member may affect his representation of the corporate client, but whether the representation is impermissible even with client consent will "depend on such factors as the nature of the matter on which legal advice is sought, the financial remuneration paid to the director and the fees paid to the lawyer"). On the utility of bar association ethics opinions, see generally Green, *supra* note 95, at 749-50 (arguing that although bar association ethics opinions are not authoritative in the same sense as judicial opinions, they are a significant source of guidance to lawyers and influence the development of the law).

253. See, e.g., 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE 860-63* (2007); JUDITH A. MCMORROW & DANIEL R. COQUILLETTE, *THE FEDERAL LAW OF*

The theme of the literature is that competent, informed clients may generally consent to be represented by a lawyer with a conflict of interest.<sup>254</sup> This reflects, in part, respect for client autonomy<sup>255</sup> and, to a lesser extent, respect for a lawyer's right to practice law.<sup>256</sup> It also reflects an understanding that conflicts of interest, as defined by the ethics rules, will not necessarily affect the lawyer's representation in a manner that undermines the client's interests and objectives. The conflict rules are prophylactic rules. They identify situations where there is some risk of disloyalty or, at the very least, some risk that a client who is not informed in advance will later perceive disloyalty. The rules are largely meant to ensure that clients make informed decisions in light of these risks.<sup>257</sup> In only one situation does the current ABA rule categorically forbid a competent client from giving informed consent, which is when a lawyer seeks to represent two parties in the same litigation and one is asserting a claim against the other.<sup>258</sup>

The decisions and secondary literature conclude that consent generally may be sought when, as in the case of the DRSA, the conflict arises out of the lawyer's self-interest or out of other interests or loyalties that the lawyer has no professional obligation to serve at the client's expense. For example, with client consent, a lawyer may ordinarily represent a plaintiff in a lawsuit against a defendant whom the lawyer represents in a separate, unrelated matter. This is true despite the risk that out of loyalty to the defendant or out of a desire to avoid offending the defendant, the lawyer will advocate less zealously on the plaintiff's behalf.<sup>259</sup> The more troublesome conflicts arise out of the

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ATTORNEY CONDUCT, MOORE'S FEDERAL PRACTICE §§ 808.04(10) & 808.06(3) (3d ed. 2001); ROTUNDA & DZIENKOWSKI, *supra* note 249, at 281-82 (a lawyer may not represent a plaintiff and defendant in litigation but "Rule 1.7 does not absolutely prohibit a lawyer from representing adverse parties outside of the litigation context" with "an adequate waiver").

254. *See, e.g.*, FLAMM, *supra* note 250, at 378 (stating that "courts typically refrain from paternally infringing upon the clients' right to select counsel of choice" and "[t]his is particularly true in civil cases").

Among the factors that Simon deems relevant in deciding whether LM&B's conflict was consentable is that "*the clients were legally unsophisticated.*" Simon, *supra* note 3, at 1589 (emphasis added). This factor might seem more relevant, however, to whether the particular client's consent was adequately informed.

255. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122, cmt. g(iv) (2000) ("Concern for client autonomy generally warrants respecting a client's informed consent."); Ass'n of the Bar of the City of N.Y., Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-1 (2006).

256. *See Solow v. W.R. Grace & Co.*, 632 N.E.2d 437, 440 (N.Y. 1994) ("A per se disqualification rule . . . conflicts with public policies favoring client choice and restricts an attorney's ability to practice . . .") (citations omitted).

257. *See generally* Green, *supra* note 65, at 104 ("[T]he conflict of interest rules are prophylactic rules . . . [that] do not proscribe conduct that is necessarily harmful in itself, but protect against the occurrence of various harms").

258. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2002). This provision was added in 2002, after Hazard gave his opinion to Nextel.

259. *See, e.g.*, Ass'n of the Bar of the City of N.Y., Comm. on Prof'l and Judicial

representation of two or more clients in the same matter when there is a significant risk that competent representation of one will undermine the interests of the other. The lawyer in this situation has an obligation to serve both clients' interests in the matter, but to serve one well, he may have to harm the other. It is conflicts involving competing client interests, and not personal-interest conflicts as in *McNeil*, that are typically at the far end of the spectrum where client consent is impermissible.

The literature does not support Simon's novel reading of the conflict rules to preclude the DRSA's fixed-fee provision on the ground that, unlike a contingent fee, it gave the claimants' lawyers an extreme self-interest in representing their clients poorly.<sup>260</sup> On one hand, the literature is contrary to Simon's premise that contingent fees avoid the tension between clients' interests and lawyers' economic self-interest.<sup>261</sup> On the other hand, it is contrary to Simon's understanding that the conflict rules proscribe fixed-fee arrangements that, in theory, give lawyers an incentive to hurry through a representation in order to move on to the next fee-paying client. For example, counties have retained private lawyers to represent indigent criminal defendants on a fixed-fee basis.<sup>262</sup> Legitimate concerns have been raised that the fees tend to be unfairly low,<sup>263</sup> but even extremely low fixed fees have not been held to create unconsentable conflicts.<sup>264</sup> Similarly, authorities have considered whether insurance companies may hire lawyers to represent their policyholders on fixed-fee contracts, and almost all have authorized this arrangement as long

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Ethics, Formal Op. 2006-1 (2006); Ass'n of the Bar of the City of N.Y., Comm. on Prof'l and Judicial Ethics, Formal Op. 2005-05 (2005); Ass'n of the Bar of the City of N.Y., Comm. on Prof'l and Judicial Ethics, Formal Op. 2005-1 (2005).

260. Nor does it support Simon's attack on the consultancy provision. On the conventional understanding that future consultancies do not create unconsentable conflicts, see *supra* note 249.

261. See, e.g., Poonam Puri, *Taking Stock of Taking Stock*, 87 CORNELL L. REV. 99, 130 (2001) ("Given the greater potential for conflicts of interest between lawyers and clients, the rules of professional conduct regulate contingency fees to a greater extent than other fee arrangements." (footnote omitted)); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 678 (1994) ("[I]n contingency fee cases, attorneys' economic interest lies in maximizing the return on their work; clients' interest lies in gaining the highest possible settlement. Depending on the amount of effort and expense lawyers have invested in preparation, the alternative uses of their time, and their degree of risk adverseness, they may be more or less disposed to settle than their clients." (footnote omitted)).

262. The lawyer may receive a flat fee for each case or a flat annual fee for representing a portfolio of cases (for example, a percentage of cases in the county).

263. See generally Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003).

264. See, e.g., Kan. Bar Ass'n, Comm. on Ethics-Advisory Servs., Op. 92-11 (1992) (explaining that a lawyer may participate in fixed-fee indigent defense contracts as long as the pay is not so low that he believes his judgment or ability to provide competent representation will be impaired). The opinion observes that traditionally, even lawyers assigned to represent clients without a fee have not generally been thought to have conflicts of interest that foreclose the representation.

as the fees are not so low that the lawyers believe they will be induced to curtail their services.<sup>265</sup> In the *McNeil* case, of course, there was no suggestion that LM&B's legal fees were too low; on the contrary, the plaintiffs complained that the fees were unreasonably high.

Nor can Simon support his conclusion by reference to how lawyers conventionally practice or could be expected to practice in analogous circumstances. Litigators would see nothing odd about representing parties in nonpublic ADR proceedings for a flat fee, although the lawyers' compensation would be unrelated to the outcome and the quality or amount of their efforts and there would be no public or judicial review of the lawyers' work. Or, to draw an even closer comparison, suppose that after accepting the DRSA, McNeil discharged LM&B and sought to retain a new lawyer for a fixed \$5000 fee to undertake the representation through the ADR process, and that this would be a fair and reasonable amount.<sup>266</sup> If the lawyer accepted the flat fee, all the conditions would be present that, in Simon's view, give rise to an unconsentable conflict; if anything, under Simon's analysis, the new lawyer's conflict would be more serious because he would be less accountable.<sup>267</sup> But

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265. See, e.g., Florida Bar, Prof'l Ethics Comm., Op. 98-2 (1998) (an insurance defense lawyer's agreement to defend insured on a flat fee basis is not per se improper); State Bar of Mich., Comm. on Prof'l and Judicial Ethics, RI-337 (2006) (same); Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 97-7 (1997) (same); Utah State Bar, Ethics Advisory Opinion Comm., Op. 02-03 (2002) (same); West Virginia Lawyer Disciplinary Bd., L.E.I. 98-01 (1998) (same). The striking exception is *American Insurance Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996), which held that an insurance company may not employ lawyers on a fixed fee basis to represent policyholders. The Kentucky court's concern was largely with how the set fee may be used by insurers "to constrain counsel" or exert pressures on counsel, *id.* at 572, and it explained its departure from other courts' decisions based in part on its "state's aversion to the practice of law by corporations." *Id.* at 573. One scholar described the Kentucky opinion as "my candidate for the title of Worst Opinion On A Professional Responsibility Topic In 1996." Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 207-08 (1997) (footnote omitted); see also Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 286 (1997) (agreeing with Silver that "the Kentucky court's opinion is remarkably unpersuasive"). But see Douglas R. Richmond, *The Business and Ethics of Liability Insurers' Efforts To Manage Legal Care*, 28 U. MEM. L. REV. 57 (1997) (defending the Kentucky decision).

266. Simon might regard a flat fee in this context as implausible. See Simon, *supra* note 3, at 1588 & n.137 (characterizing flat fee under DRSA as "highly unusual" and noting that "in the civil sphere" flat fees are usually found in routine transactions or in long-term lawyer-client relationships involving sophisticated clients). But flat fees are more widely used than he acknowledges. See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 789 (4th ed. 2004) (identifying a flat fee as one of "[f]our types of fee arrangements [that] are now common").

267. In LM&B's case, notwithstanding Simon's disputed assumption that "the confidentiality provisions precluded the claimants from talking to each other," Simon, *supra* note 3, at 1590, the claimants evidently could and did compare notes. See *supra* text accompanying notes 142 & 161. If they perceived that LM&B was performing poorly, they could later find counsel to initiate a multiplaintiff malpractice action. In contrast, a lawyer

there is no reason why the lawyer would feel compelled to decline. Certainly, nothing in the professional literature would alert him to the possibility that he could represent the claimant only on a contingent-fee basis.<sup>268</sup>

Given the sharpness of his attack, Simon assumed at least a moral burden to show that Hazard was patently wrong about what the applicable ethics rules required of LM&B in 2000. Simon fails to meet that burden. Simon could not begin to meet the burden without taking account of the existing interpretive writings and conventional professional understandings. Simon criticizes Hazard's opinion for its lack of reasoning and authority, but having set the bar

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representing only McNeil would face little risk, since a malpractice action on behalf of McNeil alone would be uneconomical. Further, LM&B's work would be reviewed by mediators and arbitrators who could assess whether they were consistently shortchanging the claimants and could refer LM&B to disciplinary authorities if it was. The arbitrators and mediators would have more difficulty assessing a lawyer's work in a single case, and disciplinary authorities would be less concerned about the possibility of neglect in a single case.

268. There are many discussions in the professional literature of clients' retention of lawyers on a flat-fee basis, but I have found none that identifies the possibility that such a flat-fee payment by a client gives rise to a conflict of interest, much less a nonconsentable conflict, under the ethics rules. For example, the ABA Model Rules identify the possibility of fixed fees, *see* MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(8) (2002), but do not establish special procedural requirements for fixed fees as they do for contingent fees, *see id.* R. 1.5(c)-(d), and nowhere suggest that fixed fees may create conflicts of interest, as the acceptance of a nonmonetary fee might. *See id.* R. 1.8 cmt. 1. Likewise, bar association ethics opinions refer to fixed fees for various legal work either in passing or with regard to other ethics issues (as in the case of nonrefundable retainers), but do not advise lawyers to consider whether the fixed-fee arrangement creates a conflict of interest. *See, e.g.*, Conn. Bar Ass'n Comm. on Prof'l Ethics, Inf. Op. 00-12 (2000) (matrimonial action); Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 2000-4 (2000) (financial planning services); Supreme Court of Ohio, Bd. of Comm'rs on Grievances and Discipline, Op. 99-9 (1999) (online legal advice); S.C. Bar, Ethics Advisory Comm., Op. 02-07 (2002) (criminal defense). Commentators recognize that fixed fees, like other fee arrangements, create incentives for lawyers that may not be aligned with their clients' best interests but do not perceive that a conflict implicating the ethics rules results. *See, e.g.*, William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 836 (1988) (discussing flat fees in criminal cases); David M. Morris, Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021, 1046 (1986) (same); Ronald D. Rotunda, *Innovative Legal Billing, Alternatives to Billable Hours and Ethical Hurdles*, 2 J. INST. FOR STUD. LEGAL ETHICS 221, 232-33 (1999) (rejecting argument that flat fees create impermissible conflicts and discussing *In re Oracle Sec. Litig.*, 136 F.R.D. 639, 642-44 (N.D. Cal. 1991), which rejected as "specious" an argument that a fixed amount for legal expenses created an impermissible conflict). Nor am I aware of any legal ethics casebook, treatise or other secondary writing indicating that a client's fixed fee payment creates a conflict under the ethics rules. Of course, fixed fees are not conventionally used in some practice areas, such as personal injury, but that has nothing to do with conflicts. Lawyers in personal injury cases prefer contingent fee arrangements both because clients usually cannot afford fixed or hourly fees and because contingent fees are economically advantageous to lawyers who select cases carefully. Lawyers in civil rights cases seek the benefit of statutory fee-shifting provisions for the same reasons. If fixed fees do not implicate the conflict rules in criminal and matrimonial cases, where there is particular sensitivity to conflicts of interest, it is hard to see why fixed fees would create conflicts of interest, much less impermissible ones, in civil rights cases.

higher, he does no better. Even a cursory review of the background authority demonstrates that there is a firm basis for the conclusion reached by Hazard (and later, by the trial judge) that the conflict of interest created by the DRSA was consentable. Simon's critique illustrates that, from a legal no less than factual perspective, academics' efforts to regulate their peers will be of questionable reliability. Academics may often be "wrong" on the meaning of the law (at least from the perspective of authoritative judicial interpretations), but rarely are they so wrong that they deserve to be sanctioned. One might therefore be skeptical of legal scholarship that purports to punish a professor for offering bad opinions on the law's meaning.

### C. *The Scholarly Triviality of Academics' Regulatory Critiques*

From a scholarly perspective, academic critiques of colleagues' legal work are likely to be, in themselves, of little academic or scholarly value. For example, in the case of an academic who provided legal advice, the question will likely be whether the academic correctly interpreted the law and applied it to the given facts. From a regulatory perspective, the legitimacy of the critique as a form of "shaming" depends on the advice being clearly wrong. But if the advice is so clearly wrong because the law is well settled, the underlying legal question will not be interesting from a scholarly perspective. Further, the fact that the question is purely doctrinal means that even if it is unsettled, it will be narrow and potentially trivial.

Simon's critique of Hazard's opinions illustrates the problem. Much of the second half of Simon's article is, of necessity, narrowly doctrinal because the point of Simon's exercise is to shame Hazard for providing what Simon regards as "patently" erroneous legal opinions. Because Simon is driven by his regulatory agenda, he pointedly ignores far more interesting questions than whether, for example, the disciplinary rules in the year 2000 permitted clients to consent to conflicts of interest under a peculiar set of assumed, but disputed, facts. Simon himself observes that "[t]he Nextel case is important for . . . what it shows about plaintiffs' lawyer responsibility in aggregate litigation,"<sup>269</sup> suggesting that the case might provide an occasion for considering theoretical and normative questions about how lawyers should represent large numbers of clients in civil litigation outside the class action setting. Such questions are the subject of ongoing study and debate by legal scholars and practitioners in the fields of civil procedure, tort law, and legal ethics, among others, as well as by the American Law Institute.<sup>270</sup> But Simon does not contribute new ideas to this

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269. Simon, *supra* note 3, at 1577.

270. See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 543-50; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000); Deborah R.



important debate, much less offer an affirmative vision about how lawyers in LM&B's situation should conduct their work and be regulated, because his singular focus is on Hazard's interpretation of disciplinary rules.

Simon has previously developed views on how to interpret laws,<sup>271</sup> and he might at least have offered thoughts on how ethics rules generally should be interpreted, but his narrow agenda led him to overlook this opportunity as well. Many ethics rules, like the conflict rule, are vague or ambiguous. Legal advisors in Hazard's situation might try to predict how a court would interpret or apply the rule, but courts of different jurisdictions can employ different interpretive approaches; indeed, the court of a single jurisdiction can take different approaches depending on whether it is examining the rule in the context of a disqualification motion, a sanctions or disciplinary proceeding, or another setting. Courts might seek to implement the intent of the rule drafters on one hand, or employ a more "common law"-style or policy-based analysis on the other.<sup>272</sup> Simon fails to explore how courts should interpret the ethics rules or how lawyers should generally do so when courts have not resolved a question of interpretation. Nor does he reflect on the conflict-of-interest rules in particular. Judgments about whether the rules allow informed clients to retain lawyers who have conflicts of interest—or, as in the *McNeil* case, whether the rules allow clients to enter into settlement agreements whose provisions give rise to conflicts of interest<sup>273</sup>—may turn on differing philosophical approaches. One may be more inclined to allow clients to consent if one is predisposed to favor client autonomy over paternalism or if one is generally confident in lawyers' professionalism rather than cynical about their motives. However, Simon does not explore the extent to which his intuitions on the conflict-of-interest question may simply reflect philosophical predispositions or empirical assumptions that others do not share.

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Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883 (2007); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149 (1999); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1470-78 (1998).

271. See, e.g., SIMON, PRACTICE OF JUSTICE, *supra* note 2, at 37-40.

272. See generally Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485 (1989).

273. Unlike in the ordinary case, the effect of concluding that the DRSA gave rise to an impermissible conflict of interest would not be to require the clients to retain other, conflict-free lawyers, but to forbid the clients from entering into the DRSA. Simon evidently assumes that the DRSA was unfavorable to the claimants and that LM&B could have achieved better outcomes for them either by negotiating a better agreement or by foregoing the agreement; but Simon never explains why this is so and has no factual basis for this assumption. See Simon, *supra* note 3, at 1588-90. In any case, whether the DRSA's fee agreement was ideal is irrelevant to the conflict of interest analysis. If it was reasonable to believe that the fee agreement would not adversely affect LM&B's representation, then the clients could consent to it under the conflict rule regardless of whether a seemingly better arrangement was achievable.

Simon's endeavor is, thus, limited in ambition. He simply wants to show that Hazard's legal advice was wrong. Most scholars would view this sort of critique as an uninteresting scholarly pursuit, if it can be described as "scholarly" at all.

#### *D. The Untested Market for Academics' Regulatory Critiques*

Even assuming one regarded Simon's critique of the opposing experts as legitimate scholarship, it is questionable whether academics will want to implement Simon's theory of scholarly shaming as a form of professional regulation. It is also uncertain that law reviews will generally want to publish the results.

Academics will likely reject the regulatory role that Simon assigns them because such articles are bad regulation. Reconstructing the past from an incomplete record is often legitimate for scholarly purposes both because attempts at historical reconstruction are understood to be imperfect and because the stakes are low: if one makes an error on a question of nineteenth-century legal history, for example, no one is prejudiced. It is different, however, when the point of the exercise is to shame one's colleagues. Greater factual accuracy is expected in the regulatory context. That requires, in turn, a process calculated to elicit all the relevant information and to resolve factual disputes. If a disciplinary authority were to consider publicly reprimanding (or otherwise sanctioning) a lawyer for performing badly, it would first provide an opportunity to be heard, afford a process to resolve disputed facts, and require a neutral fact finder to make a factual determination to some level of confidence. That is basic due process, but it was not what Simon undertook. Absent due process, academics could not be sure that they had sufficient mastery of the relevant facts to justify embarrassing their colleagues. An author cannot reliably critique legal advice or opinions unless she knows what the academic lawyer knew at the time he performed this legal work. (That is why academics and others giving expert opinions in malpractice cases prefer to rely on assumed facts and leave it to the jury to resolve factual disputes.) Even a deposition and trial record may be incomplete because they are typically developed for purposes other than to assess the legal advisor's work.

Most legal academics, respecting conventional notions of fairness and reliability, would therefore refrain from engaging in scholarship as regulation. This might especially be so in critiquing legal ethicists' work. There is a particularly high cost to legal ethicists' professional reputations when questions are raised about their integrity. That is, in part, why Simon's exercise in "shaming" seems particularly shocking and should have called for an exceedingly high level of conviction.

Engaging in scholarship for regulatory purposes would also take time away from what most regard as more significant work. Consider the advice and opinions in the *McNeil* litigation. Would disinterested academics spend time

drafting articles critiquing them? Reading deposition and trial transcripts, however easily available they became, in order to critique opinions that may have no relevance beyond the particular case, would not strike most academics as interesting, pleasurable, or worthwhile. The proof is that, although hundreds of academic expert opinions are publicly available, there are few public critiques of these opinions by academics who were not themselves involved in the litigation.

Whether law reviews would publish academic critiques of other academics' legal work is an open question. As discussed above, critiques such as Simon's are not good scholarship. Law reviews are unlikely to perform the kind of work necessary to verify the factual underpinnings of these writings. Law reviews have no reason to regulate law professors. Beyond that, critiques of legal advice and opinions should be uninteresting to student-run law journals insofar as they seek to publish articles on important questions of law and legal theory that contribute to scholarly conversation and that may be cited by courts or other scholars. Pure critiques of legal work will be narrowly doctrinal and fact-intensive and therefore of limited general relevance.

Simon's article did not test the market because it is not the kind of scholarship that his theory envisions. His article is not a straightforward critique of academics' legal work. The critique of the opposing experts' work is appended to Simon's theory and offered to illustrate it, not as a writing that has scholarly value in itself. Simon could have tested his theory by writing a stand-alone critique of the opposing experts and submitting it to law reviews for publication to see whether there is a market for such writings. He apparently thought better of doing so perhaps because, at some level, he recognized that scholarly journals might regard such writings as unimportant and eschew the regulatory role that he envisions for them.

#### CONCLUSION

Professor Simon has offered a theory about how lawyers, especially those who are law professors, should perform significant aspects of their legal work. Borrowing from tax regulations and informal academic norms, he proposes that lawyers perform their work more rigorously and transparently in order to enhance the ability of informal regulatory processes, including academic scholarship, to hold lawyers accountable. He offers this as a solution to a problem that he considers pervasive: that clients seek substantively erroneous legal opinions from their advisors and expert witnesses, that law professors and other lawyers respond by deliberately providing erroneous legal opinions, and that third parties are harmed as a consequence.

This Reply has raised a host of challenges to Simon's theory. First, it questions the magnitude of the problem Simon describes. It is doubtful that the demand for and supply of erroneous legal advice is truly pervasive. Formal and informal mechanisms of accountability already exist. The likelihood that

lawyers' deliberately erroneous opinions will significantly harm third parties is also exaggerated. Second, this Reply demonstrates that, whatever the magnitude of the problem, the professional norms that Simon proposes to substitute for the existing ones raise theoretical and practical problems of their own. For example, an obligation generally to provide written opinions comparable to tax opinions would make legal advice prohibitively expensive for most clients, and an obligation of "transparency" would discourage clients from making the full disclosure to legal consultants that is traditionally deemed essential to enable lawyers to provide competent advice. Third, this Reply questions whether refashioning professional norms will actually enhance informal mechanisms of accountability. Simon assumes, for example, that greater transparency will prompt legal academics to critique and shame colleagues who render bad opinions. But there are many reasons why law professors will be reluctant to assume this regulatory function, including the difficulty of obtaining all the relevant facts and resolving factual disputes, the unlikelihood of reaching sufficiently firm conclusions on disputed legal questions to justify shaming colleagues with opposing views, the triviality of such work from a scholarly perspective, and the procedural unfairness of using academic writing as a form of regulation.

Theories can be tested. Simon put his theory to the test in a case in which he served as an expert witness. As this Reply shows, his experience illustrates the practical problems with his theory. Simon had a chance to implement the norms he proposed. But the logic and practical wisdom of conventional norms prevailed, with the result that, to a large extent, Simon refrained from putting his theory into practice. When he did transgress conventional norms in order to make his professional and academic work "continuous," he hurt his clients by writing about their lawsuit while it was ongoing, and in doing so he achieved no countervailing public benefit. Simon's attempt to implement his idea of academic self-regulation was equally unsuccessful. He failed to demonstrate that articles transparently intended to "shame" one's colleagues make for scholarship that unbiased academics will want to write or that serious law journals will want to publish. Simon's experience shows that the norms he prescribes will improve neither the practice of law nor legal scholarship. To the contrary, despite Simon's best intentions, they will undermine clients' interests and, ultimately, the public good.