### **BOOK REVIEW**

# TEACHING LAWYERS TO BE MORE THAN ZEALOUS ADVOCATES

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#### INTRODUCTION

In her important new book, *In the Interests of Justice*, Stanford law professor and ethics scholar, Deborah Rhode, takes on a daunting task—identifying structural characteristics that have led to malaise in the legal profession. In eloquent prose, Rhode systematically deconstructs the profession, its members' discontent, and the principles that underlie the adversary system, as well as the lawyer disciplinary process and legal education itself.

Rhode focuses much of her attention on the structural problems inherent in modern legal education. This ethics expert and legal educator identifies a tension between American law schools' dual mission—to train students to understand the conceptual underpinnings of the law while also teaching them the practical skills necessary to be accomplished advocates. As Rhode puts it, "[l]aw schools are expected to produce both 'Pericles and plumbers'—lawyer statesmen and legal scriveners." In her chapter on legal education, Rhode highlights the downside of the highly competitive learning environment that characterizes American law schools, and the dearth of alternative pedagogical styles and courses that go beyond traditional "legal" subjects.

I endorse Rhode's analysis of modern legal education and its relationship to the legal profession's reputation as a whole. Increasing the number of ethics courses in American law schools has done little to improve the public perception of lawyers. Rhode has a number of theories as to why, including the failure to integrate ethics into other law school courses and the rigid nature of law school pedagogy.<sup>3</sup> I agree with Rhode's analysis and I would offer an additional explanation:

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<sup>1.</sup> Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 8-9 (2000).

<sup>2.</sup> *Id.* at 186.

<sup>3.</sup> Id. at 185-207.

Current legal ethics training lacks an emphasis on the fiduciary relationship that lawyers have with their clients and the fiduciary role that they often assume in practice.

Lawyers play two kinds of fiduciary roles. First, they stand in a general fiduciary relationship to their clients each time they begin an attorney-client relationship. Second, they assume the mantle of "statutory" fiduciary when they are appointed as guardians, trustees or executors. A heightened attention to the fiduciary obligations taken on by lawyers in practice would add a dimension currently lacking in modern legal education.

The fundamental definition of a fiduciary is a "person having a duty ... to act primarily for another's benefit in matters connected with [an] undertaking." The competitive message sent by the structural realities of legal education is at best inconsistent with the definition of fiduciary duty laid out in *Black's Law Dictionary*: "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person . . . . the highest standard of duty implied by law." 5

Law school, like the legal profession, is inherently hierarchical. Law students themselves compete daily for class rank, coveted spots on law review, prestigious clerkships, and high paying jobs with large firms—an understandable impulse given the large debt burden many face upon graduation. This structure conveys the message that putting one's own interests first in order to "win" the game is the primary objective. That may be an adaptive lesson if transferred to successful advocacy on behalf of a client. It is also a message that fails to communicate other important values inherent in the fiduciary duties these students will take on in their chosen profession.

American legal education must offer students models of behavior that not only comport with winning at all costs, but that are consistent with being ethical stewards of their clients' financial and legal best interests. New law school graduates will then be more likely to act in a manner that promotes the best outcome for a client even when it means the lawyer's financial or professional interests might suffer. This, in turn, will improve the public's perception of lawyers and the legal profession as a whole.

Law school faculty have a central role to play in this effort: They can mentor students, make an effort to integrate the concept of fiduciary duty into existing courses, and identify new courses that will produce lawyers who better understand their fiduciary duty to their clients. Students can be exposed to the concept of the lawyer as a fiduciary

<sup>4.</sup> BLACK'S LAW DICTIONARY 625 (6th ed. 1990).

<sup>5.</sup> *Id*.

earlier in their law school experience, complementing their professional responsibility course by studying the ethical aspects of fiduciary duty. In her book, Rhode argues that incorporating collaborative learning, in addition to the traditional Socratic and appellate case method, would also moderate the current emphasis on individual achievement as the exclusive academic value. These kinds of educational reforms will yield law students better able to fulfill their general fiduciary obligations to their clients.

In addition to the general fiduciary relationship that characterizes all attorney-client relationships, lawyers will increasingly be called upon to act as "statutory" fiduciaries—executors, trustees, and guardians—of an aging and mobile American population. They are well-suited to assume this role, given their training in analyzing and problem-solving. This demographic shift offers lawyers a wealth of opportunities to serve both paying clients and impoverished ones on a pro bono basis.

Teaching law students to be competent statutory fiduciaries goes one step beyond teaching them to be good lawyers. As lawyers, we analyze facts, fit those facts into legal theories, and then present several options among which the client must choose. As guardians or trustees, lawyers themselves must take that last step in the process and make that choice on behalf of an incompetent ward or minor beneficiary. Law schools currently do little to develop this particular kind of judgment and decision-making skill on the part of law students.

This article (1) reviews the fiduciary obligations of lawyers generally; (2) describes Professor Rhode's specific recommendations for curricular and pedagogic reform; and (3) analyzes how those reforms, and others, might fulfill the obligation of law schools to produce well-trained fiduciaries in addition to zealous litigators.

#### I. THE GENERAL FIDUCIARY OBLIGATIONS OF LAWYERS

In 1953, Henry S. Drinker quoted then-Ethical Canon 11 when he wrote about the lawyer as fiduciary:

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client. Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly.<sup>7</sup>

RHODE, supra note 1, at 198-99.

<sup>7.</sup> HENRY S. DRINKER, LEGAL ETHICS 89 (1953) (quoting MODEL CODE OF PROF'L RESPONSIBILITY Canon 11 (1937)).

Drinker gave a number of examples of this general fiduciary duty of a lawyer to his client. For example, he noted that a lawyer who has collected a number of accounts on behalf of a client, "may not withhold the funds of one account to meet any obligation to him for fees on another of them." Lawyers may not delay the pursuit of a claim to force the client to pay his fees nor "refuse to handle a debtor's bankruptcy proceedings except on condition that after the adjudication the bankrupt sign new notes to the creditors whom the lawyer represents."

Drinker also made the point that the lawyer's fiduciary duty is particularly strong when the client is borderline competent; "[w]hile the lawyer may act for such a one whom he honestly believes to be competent, he owes him a special duty not to overreach him." This applies to the lawyer not only as a general fiduciary, but also when lawyers take on the specific mantle of "statutory fiduciary" as trustee or guardian.

The usual fiduciary relationships include "trustee and beneficiary, guardian and ward, agent and principal, attorney and client, executor or administrator and legatees and next of kin of the decedent." Each of these associations may vary in the depth and nature of the confidential relationships involved and the fiduciary duties that arise, but they all are premised on the duty of loyalty that arises when one reposes trust and confidence in another. As Austin W. Scott noted in his 1949 article, *The Fiduciary Principle*,

The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty. Thus, a trustee is under a stricter duty of loyalty than is an agent upon whom limited authority is conferred or a corporate director who can act only as a member of the board of directors or a promoter acting for investors in a new corporation. All of these, however, are fiduciaries and are subject to the fiduciary principle of loyalty, although not to the same extent.<sup>12</sup>

<sup>8.</sup> Id. at 93 (citation omitted).

<sup>9.</sup> *Id.* (citation omitted).

<sup>10.</sup> Id. (citations omitted).

<sup>11.</sup> Austin W. Scott, The Fiduciary Principle, 37 CAL. L. REV. 539, 541 (1949).

<sup>12.</sup> *Id*.

In an effort to demonstrate the ancient roots of the fiduciary concept, Scott cited to the biblical parable of the unjust steward to illustrate the point.<sup>13</sup> Scott noted that the unjust steward:

received no bribe or commission from his master's debtors. All that he got in return for the partial release of his master's claims against them was the hope that, as he had conferred a financial benefit upon them, they would after his discharge from his stewardship confer benefits upon him. Since he thus acted in his own interest and not in that of his master, he betrayed the confidence which had been placed in him. He may not have been subject to indictment for a criminal offense, but he was certainly civilly liable for the loss which he caused to his master; or at least this would be so in the United States of America today.<sup>14</sup>

From Scott in the 1940s to Drinker in the 1950s to more recent scholars like Edward D. Spurgeon and Mary Jane Ciccarello in the 1990s, the lawyer's general fiduciary duty to her clients has continually been made clear. Spurgeon and Ciccarello noted in an article arising from a Fordham University Law School Symposium that "[a] lawyer is

<sup>13.</sup> *Id.* at 539 (citing *Luke* 16:1-8). Scott's recitation of the biblical parable of the unjust steward, found in the sixteenth chapter of the Gospel according to Saint Luke, illustrates well the manner in which an attorney can breach his fiduciary duty to his client:

There was a certain rich man, which had a steward; and the same was accused unto him that he had wasted his goods.

And he called him, and said unto him, How is it that I hear this of thee? Give an account of thy stewardship; for thou mayest be no longer steward.

Then the steward said within himself, What shall I do? For my lord taketh away from me the stewardship: I cannot dig; to beg I am ashamed.

I am resolved what to do, that, when I am put out of the stewardship, they may receive me into their houses.

So he called every one of his lord's debtors unto him, and said unto the first, How much owest thou unto my lord?

And he said, An hundred measures of oil. And he said unto him, Take thy bill, and sit down quickly, and write fifty.

Then he said to another, And how much owest thou? And he said, An hundred measures of wheat. And he said unto him, Take thy bill, and write fourscore.

And the Lord commended the unjust steward, because he had done wisely: for the children of this world are in their generation wiser than the children of the light.

Id. (citing Luke 16:1-8).

<sup>14.</sup> Id. at 546-47.

always in a general fiduciary relationship with her client." That general fiduciary duty should therefore be a primary focus in the training of young lawyers. Sadly, legal education has failed in this regard. It has focused almost exclusively on the role of lawyers as zealous advocates, a role that has now evolved more into the "zealous litigator" model of lawyering. The law school curriculum has largely ignored the fiduciary dimension of lawyering.

Not only is there a dearth of discussion about the general fiduciary duty of all lawyers to their clients, there is a lack of attention to the fact that many lawyers assume the role of "statutory" fiduciary. As Spurgeon and Ciccarello note, not only do lawyers have a general fiduciary duty to all clients, but they "may serve clients in other fiduciary capacities as well. Other capacities may include executor, administrator, trustee, guardian, and agent." <sup>16</sup>

In assessing the malaise that afflicts the legal profession as a whole, Rhode focuses on the flawed system of training for American lawyers. In her critique of the modern American law school, one can see how the concept of lawyers as fiduciaries gets left behind.

### II. PROFESSOR RHODE'S CRITIQUE OF MODERN LEGAL EDUCATION

Rhode identifies a number of problems with modern legal education including the predominant pedagogical approach—"[a] combination of lecture and Socratic dialogue, with a focus on doctrinal analysis."<sup>17</sup> She correctly asserts that we in legal education do little to teach the teachers to teach. Not unlike higher education as a whole, we assume that those steeped in the knowledge of the law will automatically be able to effectively communicate that knowledge to students who know little, if anything, about the area. While there is a growing body of scholarship on teaching, it has yet to receive the kind of prestige that other areas of doctrinal research receive. As a consequence, legal academics may be reluctant to focus their research efforts in this area of study. On the study of the study of the study of the study.

Rhode also demonstrates that the Socratic method is a rather vague approach to learning and that the law school experience is characterized

<sup>15.</sup> Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 FORDHAM L. REV. 1357, 1359 (1994).

<sup>16.</sup> Id.

<sup>17.</sup> RHODE, supra note 1, at 196.

<sup>18.</sup> Id. at 197-98.

<sup>19.</sup> For an excellent exposition of this issue, see Marin Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 Am. U. L. Rev. 367 (1990).

<sup>20.</sup> Elizabeth Greene, Scholars Share Findings on Innovations in Teaching, CHRON. OF HIGHER EDUC., Apr. 3, 2000, Today's News, at http://chronicle.com.

by a highly competitive classroom environment:<sup>21</sup> She is right that the Socratic method used ineptly, or in a large classroom, often yields one student who may learn from it, but dozens of others who tune out while the Socratic dialogue is taking place. The failure of collaborative learning opportunities, as well as the lack of personal attention to learning styles fostered by traditional law school pedagogy, produces students who are focused on competition and who often manifest symptoms like depression, substance abuse, and various stress-related disorders which Rhode attributes to the current law school model.<sup>22</sup>

The methodology used has changed little since Christopher Columbus Langdell introduced the modern approach to law school pedagogy in the nineteenth century at Harvard Law School. We use appellate cases as the primary mode of communicating all knowledge needed to be a good lawyer. This knowledge includes not only legal doctrine but presumably legal ethics, problem solving skills, and the social and political implications of the legal problem at hand. As Rhode argues, this case-centered methodology falls far short in all of these areas.<sup>23</sup> A related issue is the fact that "[m]uch classroom discussion is both too theoretical and not theoretical enough; it neither probes the social context of legal doctrine nor offers practical skills for using that doctrine in particular cases."<sup>24</sup>

There is also the dearth of preparation of students as professional counselors. Clinical courses are given short shrift at many institutions—either because they lack the prestige of other substantive areas of law or because administrations consider them too expensive. Thus, instructors fail to address what Rhode characterizes as the "psychological dimensions of lawyering" in the three years it takes us to produce a law school graduate. We have failed to integrate the "medical school model" of professional education in any meaningful way into modern legal education. Our students can easily graduate with a J.D. never having laid eyes on, never mind counseled, a real live client.

This problem is compounded by the slow progress in integrating multi-disciplinary courses into the law school curriculum. Such courses would enhance both the students' training in the psychological dimensions of lawyering and the sensitivity of young lawyers to other approaches to problem-solving and delivering services to clients. Rhode concludes that "almost all graduates, whatever their substantive

<sup>21.</sup> RHODE, supra note 1, at 197.

<sup>22.</sup> Id

<sup>23.</sup> See id. at 197-98.

<sup>24.</sup> Id. at 198.

<sup>25.</sup> Id.

<sup>26.</sup> Id.

interests, would be well served by more grounding in information technology, alternative dispute resolution, international law, social science research methodology, and managerial strategies."<sup>27</sup>

Rhode acknowledges that the increase in legal ethics courses in law schools has not yielded a concomitant increase in the public's opinion of lawyers. <sup>28</sup> She offers several theories for why this is true, including the lack of pervasive ethics training throughout the curriculum and the low status that ethics courses still have in American law school curricula. <sup>29</sup>

Rhode also acknowledges that the slow pace of innovations in law school curricula may be due less to a resistance to change than to the expense involved in implementing a new model of legal education. Adding more clinical opportunities and smaller classes costs money, and this in turn might further increase the cost of an already exorbitant law school tuition. However, she concludes that many of the reforms that she proposes, like interdisciplinary collaboration, the use of on-line technology, simulation exercises, and collaborative approaches to learning, do not involve more costs as much as they do more time and intensive preparation on the part of legal educators. <sup>31</sup>

Rhode insightfully concludes that legal educators will not spend that time unless it is sufficiently rewarded.<sup>32</sup> Until legal education moves away from its current focus on the number of pages published in law reviews as the sole measure of a successful and remunerative academic career, the changes Rhode calls for will not take place. As she says, "[s]ignificant changes in law school curricula will require equally significant changes in law school incentive structures."<sup>33</sup>

# III. THE FIDUCIARY PRINCIPLE IN LEGAL EDUCATION AND THE LEGAL PROFESSION

How does the principle that lawyers have a general fiduciary obligation to their clients relate to Rhode's discussion of reforms in legal education? Several years ago I had the pleasure of being present for an exchange between Thomas Bergin, Emeritus Professor at the University of Virginia School of Law, and Anthony Kronman, Dean of Yale Law School and author of another insightful book on the decline of the legal

<sup>27.</sup> Id. at 199.

<sup>28.</sup> See id. at 200.

<sup>29.</sup> Id. at 200-03.

<sup>30.</sup> Id. at 199.

<sup>31.</sup> Id.

<sup>32.</sup> See id.

<sup>33.</sup> Id.

profession, *The Lost Lawyer*.<sup>34</sup> The topic at the law school dinner was the decline of the public's perception of lawyers and the disaffected nature of young lawyers today.

Professor Bergin noted the lack of mentoring of new lawyers at large law firms as a constant refrain when talking to young lawyers about their discontent. In correctly identifying this disaffection, I believe that the lack of mentoring and time spent with new lawyers—a product of increased demand on older lawyers to bill more hours—can be characterized as a failure of older lawyers to fulfill their fiduciary duty to the profession and the public to train new lawyers. Again, the definition of fiduciary duty is one who is willing to subsume his or her own interests to those of another.<sup>35</sup>

In identifying an increasing greed in the profession, Rhode and other authors have highlighted the cause of this failure to fulfill the duty to train new lawyers. I think they have not sufficiently characterized the problem when they note that it is a problem for the public image of the profession. In a profession that has a monopoly on legal services, it is arguable that adequately training new lawyers is not just a desirable goal, but rather it is akin to a fiduciary duty. The failure to do so may well be characterized as a breach of such duty to a public who has granted lawyers an exclusive license to deliver legal services.

Patrick Schiltz discussed this lack of mentoring within legal education and the legal profession and condemned the failure to train "novice lawyers." In his article, Schiltz noted that law firms have given up mentoring young lawyers due to financial pressures and that law schools are also failing their students in this regard. Schiltz posits three conditions for effective mentoring and thus ethical training of lawyers in law schools: (1) the academy must accept the idea that one of its primary functions is to train students to actually practice law and to do so ethically; (2) every faculty must have a substantial number of professors who actually have practiced law or have "a genuine interest in the work of practitioners and judges;" and (3) faculty members must spend time with students outside the classroom to have effective mentoring take place. 38

<sup>34.</sup> ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

<sup>35.</sup> Black's Law Dictionary, supra note 4, at 625.

<sup>36.</sup> Patrick J. Schiltz, Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney, 82 MINN. L. Rev. 705, 743-46 (1998).

<sup>37.</sup> Id.

<sup>38.</sup> Id. at 747.

## Schiltz argued that:

[a]ll of these conditions appear to be vanishing in the academy. The reason why they are vanishing, and therefore why the academy is becoming as hostile to mentoring as is the profession, is that the academy appears to be in the grip of a materialism that is not unlike that of the profession, except that its focus is the accumulation of academic prestige rather than material wealth, and it is measured in pages published rather than hours billed.<sup>39</sup>

In 1968, Professor Bergin wrote an article entitled, *The Law Teacher: A Man Divided Against Himself.* He described the law professor as "a man divided against himself," the victim of an "intellectual schizophrenia" which had him "devoutly believing that he could be . . . an authentic academic and a trainer of [practitioners]." More than thirty years later Schiltz echoed this sentiment and that of Rhode when he wrote:

[i]n today's academy—particularly in the elite schools—the predominant message communicated to newly appointed faculty is that tenure will depend mostly, if not entirely, on scholarship, and that one's teaching will not even factor into the decision unless it is so bad as to provoke student rioting (and that may not even be disqualifying.)<sup>42</sup>

Not only are tenure and promotion decisions based on scholarship rather than teaching, but merit pay increases and benefits like sabbaticals and research leaves can be affected as well.<sup>43</sup>

The pursuit of high quality scholarship might have a beneficial effect on the academy, but the problem with today's pursuit is that, "many now claim that a professor's success actually depends more upon the *quantity* of his or her writings than their quality." As a result, the legal academy suffers "from a lot of very bad writing" and the

<sup>39.</sup> Id.

<sup>40. 54</sup> Va. L. Rev. 637 (1968).

<sup>41.</sup> Id. at 637-38.

<sup>42.</sup> Schiltz, supra note 36, at 750.

<sup>43.</sup> Id. at 751.

<sup>44.</sup> Id.

academy's greed for prestige is "claiming mentoring and, in a larger sense, the ethical practice of law as its victim." 45

The rise of the *U.S. News & World Report* rankings of law schools into first tier, second tier, third tier, and fourth tier has also accelerated this trend. He while such rankings may arguably be good for students as consumers in order to help them make a well-informed \$100,000 purchasing decision, the quality of what they are buying in terms of teaching and mentoring has declined as a direct result. Unlike the number of pages published in law reviews, effective teaching is not an indicator that is easily measured in these surveys. In an understandable desire to move up the rankings, many schools—elite and non-elite—have pushed their faculty to produce pages of legal scholarship, in some cases without much attention to the issue of whether that scholarship adds significantly to the substantive area of law it addresses.

The problem with this model is that it may be appropriate at Yale or Harvard where most graduates will go into teaching or large law firms. But this "research university model" of legal education is particularly problematic at the many non-elite law schools that turn out lawyers who go directly into solo and small-firm practice upon graduation. Lawyers in fiduciary roles are often those engaged in solo

<sup>45.</sup> Id. at 752.

<sup>46.</sup> While it does not measure the number of faculty publications directly, the U.S. News & World Report [hereinafter U.S. News] ranking of law schools arguably contributes to the emphasis on pages published to the exclusion of strong teaching. In part, this is due to the lack of any direct measure of student satisfaction with the teaching in the U.S. News methodology. It is also due, in part, to the weight U.S. News places on a law school's reputation among academics, which itself may be heavily influenced by other ranking methods that have emerged as alternatives to the U.S. News rankings. For example, Brian Leiter's Educational Quality Ranking of U.S. Law Schools emphasizes faculty quality. David E. Rovella, A Survey of Surveys ranks the Top U.S. Law Schools, NAT'L L.J., June 2, 1997, at A1. A large part of that measure is made up of the number of faculty articles in the ten most frequently cited student-edited law reviews and frequency of citation, among other quantitative measures. Id. Unlike U.S. News, at least Leiter gives some small weight to teaching quality using data from the Princeton Review Surveys of Student Satisfaction with Teaching. Id. For an explanation of Leiter's methodology as compared to U.S. News, see New Educational Quality Ranking of U.S. Schools 2000-2002, http://www.utexas.edu/law/faculty/bleiter/ LGOURMET.HTM. For an example of a survey based exclusively on number of pages of articles by faculty members, see Wayne E. Green et al., Law: A Law School Does Its Own Rankings, WALL St. J., Feb. 15, 1989, at B1, describing a Northwestern University School of Law study in 1989 done to counter the law school's rankings in the U.S. News survey. One legal scholar responded to that approach by saying, "[i]t does seem very mindless to count the number of pages in law reviews." Id.

For a well-developed critique of the *U.S. News* rankings commissioned by the Association of American Law Schools, see Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, (Feb. 18, 1998) http://www.aals.org/validity.html.

or small firm practice with little oversight from a large-firm structure that tends to minimize the risk to clients of malfeasance. Thus, these young attorneys will be taking a client's money—in the form of a retainer or an estate or trust—often with inadequate training and little or no oversight.

Rhode proposes a diversity of approaches to legal education to address this particular problem: different levels of training for different legal needs at different costs.<sup>47</sup> This may work, but the lower tier schools are unlikely to give up their aspirations to rise up the ranks very quickly. Money, prestige, and self-image are powerful disincentives to do so.

Law schools are professional schools. They exist to train lawyers and while legal scholarship is an important function of law schools, this function should be evenly balanced with the other important missions of America's law schools. It is essential that law professors add their insights in the substantive areas of the law through legal scholarship. It is also essential that they be given incentives to make their classroom presentations more effective and to think critically about making the law school curriculum a more powerful tool for training competent lawyers. I strongly agree with Rhode that the latter role is compromised when there are few incentives given for mentoring those who will form the new ranks of the legal profession.<sup>48</sup>

I would go one step further than Schiltz and Rhode. I would again characterize this failure as a breach of an essentially fiduciary duty to produce well-trained lawyers. Like the legal profession as a whole, those 180 or so law schools approved by the American Bar Association also have a monopoly. Law school graduates in the vast majority of states cannot sit for the bar exam without a J.D. from an ABA-approved law school. This monopoly on legal education—like the monopoly of state bar associations on the practice of law—creates a higher duty for law schools to put their primary emphasis on law professors mentoring students. By making time spent with students and preparing for class and improving pedagogy equally important goals, law schools will offer law professors an incentive for doing so. Students will be able to see the fiduciary principle in action—law professors setting aside their own

<sup>47.</sup> RHODE, supra note 1, at 190-91.

<sup>48.</sup> Some legal scholars have offered a dualist model of legal education whereby faculty gravitate toward what they do best—some teach and some write—but they are not forced to do both, thus compromising the quality of either. *E.g.*, Scordato, *supra* note 19, at 371.

<sup>49.</sup> Some legal scholars and economists have made an extensive case for the fact that the ABA has a true monopoly in the antitrust sense over legal education. See, e.g., George B. Shepherd & William G. Shepherd, Scholarly Restraints? ABA Accreditation and Legal Education, 19 CARDOZO L. REV. 2091, 2095 (1998).

personal interests in researching and writing—to put the interests of their students first. This is the bedrock reform that must occur before other reforms can take root and yield results. While the students' power as consumers may not be enough to alter the current model of legal education, <sup>50</sup> American law schools' unique duty to the public to train competent lawyers should be enough to force such reform.

# IV. THE SKILLS NEEDED TO BE AN EFFECTIVE AND ETHICAL FIDUCIARY

Lawyers are essentially agents. Given this basic fact, the lack of many law school courses on agency law is striking. relationships are viewed by some legal scholars as a "subset of agency relationships," and a primary goal in regulating "agency relationships is to encourage the agent to serve her principal's interests as well as her own."51 As Elizabeth S. Scott and Robert E. Scott noted in their thoughtful article, Parents as Fiduciaries, the nature of the fiduciary/agency relationship gives rise to the risk of self-interested behavior.<sup>52</sup> An agent and a fiduciary are asked to perform a complex series of services on behalf of a principal rather than a single, contractual act as in a commercial context.<sup>53</sup> To do so well requires "considerable decisionmaking discretion." There is always a monitoring problem since the principal or beneficiary in such a fiduciary relationship is in an inferior position in terms of both information and the ability to supervise the fiduciary's actions.<sup>55</sup> Thus, the Scotts made it clear that the goals of fiduciary law include providing the fiduciary with incentives "to pursue collective rather than personal goals." The fiduciary has both a duty of care, carrying out her services with diligence and skill, and a duty of loyalty, not placing "her personal interests above those of her principal."57

<sup>50.</sup> One of the Author's professors at the University of Virginia School of Law used to say that his students were sadly mistaken if they thought they were the consumers of legal education. We were not the consumers; rather, we were the product.

<sup>51.</sup> Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2419 (1995). The Scotts noted that some scholars argue that fiduciaries are different from typical agents, because principals control agents and are ready to countermand their agents' decisions. *Id.* at 2425 (citing Robert Clark, *Agency Costs versus Fiduciary Duties*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 56-59 (1985)).

<sup>52.</sup> Id. at 2419.

<sup>53.</sup> Id.

<sup>54.</sup> Id. at 2419-20.

<sup>55.</sup> Id. at 2420.

<sup>56.</sup> Id.

<sup>57.</sup> Id.

The Scotts identified several mechanisms used to effectuate these goals and to align the fiduciary's interests with those of the beneficiary. These include extralegal means, including informal social norms, and legal means, the threat of sanction or default.<sup>58</sup> The more extralegal means work to regulate fiduciary behavior, the less we need legal methods and the more efficient such regulation will be.<sup>59</sup> In characterizing the mechanisms that encourage alignment of the fiduciary's interests with those of the beneficiary as "bonding mechanisms," the Scotts noted:

fiduciary law explicitly uses informal social norms to influence fiduciary behavior in ways that reduce conflicts of interest. By establishing a standard of performance that emphasizes heightened obligations of loyalty and integrity, and by the use of hortatory moral rhetoric, the law invokes a personal sense of moral obligation in the performance of fiduciary duty. <sup>60</sup>

This approach is in contrast with the tone used by courts in describing commercial contractual relationships.

What can we conclude, then, about training young lawyers to be responsible fiduciaries of their clients' interests? They need to be aware of the obligation in the first place. In order to carry out the "considerable decisionmaking discretion" that the Scotts identified, law students need to develop good judgment. They need to be cognizant of the heightened moral obligation that attaches to this special role. Law schools must give students the skills necessary to carry out the services they are obligated to provide in a competent manner. Law students must be aware of what constitutes self-dealing and what type of actions might breach the fundamental duty of loyalty to their clients. needed to be a "statutory" fiduciary may encompass even more specific skills and knowledge of areas like financial planning and counseling as well as an awareness of issues involved in the aging process. How do all of these needs translate into an agenda for structural reforms of American law schools? Many of Rhode's proposals are actually consistent with this goal in the following ways.

Rhode identifies a major problem with law school pedagogy as the combination of lecture and Socratic dialogue, with a focus on doctrinal analysis. 61 Modifying that classroom technique, as well as the competitive atmosphere that it fosters among students, is a critical piece

<sup>58.</sup> Id. at 2421-22.

<sup>59.</sup> Id.

<sup>60.</sup> Id. at 2425.

<sup>61.</sup> RHODE, supra note 1, at 196.

of the reform puzzle. In order to produce students who are attuned to the practice of thinking of another's interests first, law schools will in fact have to employ more collaborative learning styles. The team approach to projects in business schools in fact fosters more of such an awareness. While the American ethos is on individual freedom and achievement, law students steeped in such an approach will not begin to think in a "fiduciary" mode when faced with a dilemma that pits their interests against those of their clients.

The use of appellate cases in particular as our primary pedagogical tool is not only an inefficient method of disseminating even doctrinal knowledge, its constant message is that there is always a winner and a loser. The decisionmaking skills drawn upon by lawyers who have to pay the electric bill and are tempted to dip into the client's trust fund are not enhanced by reading hundreds of appellate cases. Those kind of skills fare far better when honed in the context of a multi-pronged pedagogical approach that includes simulation, courses on practice management, and the psychological stresses of practice.

The more theoretical approach to which appellate cases lend themselves often fails to bring out the more practical skills of ethically and profitably running a law practice. Rhode calls for "more grounding in information technology, alternative dispute resolution, international law, social science research methodology, and managerial strategies." In addition to helping them be better representatives of their clients, more work in information technology and managerial strategies would help those young (and old) lawyers faced with the financial and psychological stress of running a law practice. In addition to more discussion about ethics, such practical skill-building courses would better equip these lawyers to run profitable practices and thus better withstand the temptation of dipping into the till to pay personal bills or settling a case to obtain a fee when settlement may not be in the best interests of the client.

The dearth of preparation of students as professional counselors—an important component of those lawyers acting as statutory fiduciaries—also goes to the heart of the failure to produce well-trained fiduciaries. As Rhode notes, clinical courses are given short shrift due to expense or a lack of prestige. This failure to address the "psychological dimensions of lawyering" is particularly problematic when training a good fiduciary. We put those lawyers acting as trustees, executors or guardians in a position of ultimate trust: They actually make decisions for their clients who are unable to do so for

<sup>62.</sup> Id. at 199.

<sup>63.</sup> See id. at 198-199.

themselves. Rhode suggests more grounding in problem-solving skills. Combined with courses in the social and psychological effects of aging and mental disabilities, such coursework in problem-solving will go a long way toward yielding students well-suited to make the ultimate decisions on behalf of clients.

An increase in the number of ethics courses and a more pervasive approach to ethics teaching will also improve law students' abilities to fulfill the general and statutory fiduciary obligations and raise their awareness of the moral dimensions of fiduciary law. American law faculties should also undertake a comprehensive review of the curriculum in an effort to identify where discussion of fiduciary principles might be introduced. Besides discussing the general fiduciary obligation to all clients in Professional Responsibility, we only briefly mention fiduciary duty when discussing boards of directors in Corporations and trustees in Estates & Trusts and, infrequently, in firstyear Property. Surely, there are more opportunities to discuss the fact that in addition to being zealous litigators, lawyers are called upon to act in a fiduciary manner. Contracts offers another chance to contrast the fiduciary principle with the relationship of parties to a commercial contract and their duties. In Torts, a discussion of settlement decisions provides a good opportunity to discuss the lawyer's fiduciary obligation to advise the client in a manner that benefits the client even if the lawyer would be better served by a contrary path. In Criminal Law, using cases that focus on the ubiquitous problem of lawyers who steal from client trust funds or estates and are criminally prosecuted as well as disbarred could lead to an early discussion of the fiduciary role lawyers play when it comes to their clients. In the few law schools that still offer Remedies, there are multiple opportunities to talk about breach of fiduciary duty and its consequences.

There must be dozens of other chances to talk about the significance of lawyers assuming the general and statutory fiduciary duties. In addition to a more integrated approach to exposing students to the fiduciary dimensions of lawyering, every law school in America should have a required two-credit course on agency law. This seems axiomatic since the essential relationship between every attorney and client is a principal-agent relationship.

Finally, I would conclude with what may be viewed as a controversial insight. For the first year ever, women make up more than fifty percent of law school classes.<sup>64</sup> The socialization of women in American society still stresses the moderate, conciliator role of mothers.

<sup>64.</sup> See Jane Easter Bahls, The New Majority, STUDENT LAWYER, Sept. 2000, at 21; see also Kristen Choo, Despite Increasing Numbers of Female Lawyers, Gender Equality May not be Guaranteed in the Future, A.B.A. J., Aug. 2001, at 58.

In fact, the traditional view of motherhood is that of an almost quintessential fiduciary relationship—subsuming one's own interests to those of another.<sup>65</sup> The impact of a majority of women in America's law school classrooms and more women in the professorial ranks will itself have a positive effect in terms of redefining lawyering to reemphasize its fiduciary dimension.

#### V. CONCLUSION

Some law schools do provide students with multiple clinical opportunities and a multi-disciplinary approach to the curriculum. They offer courses that use collaborative approaches to learning and address areas like legal problems of the elderly, mental disability law, mediation, financial planning, and health care for the elderly poor. Some law schools train their students in law practice management and information technology. A few even offer incentives to professors to improve teaching that equal or exceed those incentives to publish. More law schools should consider adopting these and the other pedagogical and curricular innovations Professor Rhode suggests in her new book. Such reforms will go a long way toward fulfilling the obligation of America's law schools to produce well-trained fiduciaries as well as zealous advocates.

<sup>65.</sup> See Scott & Scott, supra note 51, at 2419. These commentators push the analogy of parents as fiduciaries beyond rhetoric and build a model for viewing them as actual fiduciaries under the law. Id.

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