

## Book Review

Richard L. Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings*. New York: Oxford University Press, 2008, pp. 584, \$75.00.

Reviewed by Eli Wald

### I. Introduction

Teaching legal ethics is hard.<sup>1</sup> The mandatory class, taught in most law schools in the second or third year of instruction, is unpopular with students who resent having to take required classes beyond the first year curriculum (497).<sup>2</sup> Next, many students expect the course to prepare them for taking the Multistate Professional Responsibility Examination, a multiple choice-type test covering the ABA Model Rules of Professional Conduct and the ABA Judicial Code of Conduct (ix). As a result, students expect a “code” class, which would cover as many rules as possible, and are often not interested in, or receptive to, exploring other materials, such as sociological, historical, economic and cultural studies of the legal profession. Finally, the class attempts the Herculean task of ethical education: it aims not only to familiarize law students with the rules of professional conduct (and thus hopefully encourage future attorneys to “do the right thing” by following the rules), but, more importantly, the course also attempts to help students develop sound professional judgment. It introduces students, at least informally, to notions of professionalism and

**Eli Wald** is an Associate Professor and the Hughes-Ruud Research Professor of Law, University of Denver Sturm College of Law. I thank Arthur Best, Alan Chen, Bryant Garth, Tammy Kuennen, David McGowan, Kris Miccio, Steve Pepper, Molly Selvin, and Carroll Seron for their helpful comments. A special thanks to Leslie Levin for her meticulous feedback and to Rick Abel whose help improving this review reveals true commitment to critical scholarship and mentorship. All errors, of course, remain my own. University of Denver Sturm College of Law research librarian Diane Burkhardt provided, as usual, excellent research assistance.

1. See Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 *Fordham L. Rev.* 817, 821 (2000) (“the traditional course on professional responsibility tends to be boring and unpopular with both students and faculty”); “[t]here are inherent problems and infinite ways to fail in teaching this subject.” Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 *L. & Contemp. Probs.* 139, 140 (Summer/Autumn 1995); William H. Simon, *The Trouble With Legal Ethics*, 41 *J. Legal Educ.* 65, 65 (1991) (noting that “[a]t most law schools, students find the course in legal ethics or professional responsibility boring and insubstantial, and faculty dread having to teach it”).
2. The American Bar Association (ABA) accreditation standards mandate instruction of legal ethics as condition for accreditation. See ABA Standard 302(a)(5) (2007–2008).

role-morality, educates them about their duties to their clients, the legal system and the public, and takes a step towards transforming them into ethical, or at least ethically-minded, professionals.

Putting aside disagreement regarding whether ethical education is possible and effective (498, 512), the task is further complicated by the fact that casebooks, the traditional instructional aid utilized in law schools, are ill-suited for the class. Not only are there, relatively speaking, only a few reported “legal ethics” cases decided by appellate courts, but cases, with their typical short summary of the relevant facts and focus on the court’s holding, deprive students of the necessary context in which to understand and assess lawyers’ conduct. In other words, while reported cases (and casebooks which excerpt them) may be suitable for extracting the “rule of law,” they are usually quite poor in providing the context in which to evaluate the underlying conduct of the actors in question. This feature may not be of great concern in some areas of the law, where we may be less concerned with *why* the defendant acted the way she did, but it is a main consideration in legal ethics, where understanding the reasons for lawyers’ unethical conduct is an explicit goal of such courses. In response, many legal ethics casebooks feature expanded use of problems in addition to case excerpts. Yet even these problems tend to be relatively short and fail to offer a sufficient context in which to understand the challenges facing lawyers.

Richard Abel’s new book, *Lawyers in the Dock*, makes teaching legal ethics easier. It offers six detailed case studies of lawyer misconduct, covering not only the allegations of wrongdoing and disposition of the disciplinary process, but also, importantly, rich factual accounts against which to assess the lawyers’ conduct.<sup>3</sup> The case studies detail the respective lawyers’ personal and professional backgrounds and career paths; their interactions with their clients, colleagues, opposing counsel, and the court; their understanding of their own conduct; their perception of the disciplinary experience; and in some instances, even their responses to Abel’s account. The case studies thus develop the context necessary for the understanding of lawyers’ misconduct that is systematically missing from traditional casebooks. *Lawyers in the Dock* is an invaluable, long-overdue resource, one that ought to be mandatory reading in every legal ethics class (supplementing whatever casebook or materials are otherwise used in the class) and recommended reading for every practicing attorney.

Abel states his goal explicitly in the Preface: “I wanted to present ethical issues in such a way that readers...could see how lawyers come to engage in questionable behavior and how they explain it. Only if we gain a better

3. On the importance of using case studies in teaching legal ethics, see generally Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *Fordham L. Rev.* 787 (2001). See also Carolyn Grose, “Once Upon a Time, In a Land Far, Far Away...” *Lawyers and Clients Telling Stories about Ethics (and Everything Else)*, 20 *Hastings Women’s L.J.* 163 (2009); Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 *Clinical L. Rev.* 731 (2003).

understanding of the etiology of ethical violations can we hope to reduce them. Toward this end, I needed detailed accounts of ethical misconduct” (ix). *Lawyers in the Dock* delivers on this promise. And if Abel had stopped at offering instructive case studies, this review could have concluded by congratulating him for a job well done.

Abel, however, does not stop there. Instead, he attempts to generalize the case studies, extracting from them a general normative claim—the legal profession’s betrayal of trust (1-7, 53-59, 491-498)—and proceeds to advocate recipes to restore this lost trust (498-528). Abel’s desire to move beyond the descriptive and address the implications of his observations is, of course, understandable, even commendable. Indeed, given Professor Abel’s stature as a leading legal profession scholar, his readers might expect him to tackle the hard questions the case studies raise. Nonetheless, here the book is not as successful, for four related reasons. First, Abel does not offer a detailed definition of the profession’s duties of trust to clients, courts, and the public. Whereas Chapter 1 does offer an impressive interdisciplinary overview of the notion of trust generally, it does not turn its attention in sufficient detail to the meaning and scope of the bar’s duties of trust. As a result, the book ends up claiming the betrayal of an obligation it never clearly defines. Worse, because *Lawyers in the Dock* does not clearly define betrayal of trust, it risks confusing readers, having them misconstrue the meaning of trust, and consequently wonder whether the case studies actually illustrate its betrayal.<sup>4</sup>

Second, while Abel’s case studies evidence and demonstrate many important issues relating to lawyers’ misconduct, they cannot and do not establish the book’s main thesis that the legal profession betrays trust. Abel acknowledges some of the methodological shortcomings relating to his case study selection process (54-57, 390 n.918) and specifically does not claim that his case studies are representative. Unrepresentative case studies, however, cannot prove any general claims. In particular, Abel’s case studies cannot prove a general claim of betrayal of trust. At best they can only illustrate such a concern.

Third, *Lawyers in the Dock* focuses on only one segment of the profession—solo and small firm lawyers. The narrow focus of the book is intentional. In contrast with his celebrated body of work studying the legal profession from an institutional perspective,<sup>5</sup> in this work Abel explores lawyer deviance at the level of individual attorney behavior. Though the case studies actually suggest disturbing institutional and system-wide failures, as a result of his limited perspective, Abel does not explore these in detail, rendering his broad claim of betrayal of trust under-developed. Finally, having insufficiently defined the

4. Some reviewers of *Lawyers in the Dock* were in fact confused by Abel’s definition of trust, assuming he meant loyalty to clients. See, *infra*, Part IV.B.

5. See, e.g., Richard L. Abel, *The Legal Profession in England and Wales* (Oxford University Press 1988); Richard L. Abel, *American Lawyers* (Oxford University Press 1989); Richard L. Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford University Press 2003).

problem it intends to explore and having fallen short of proving its normative case, some of the book's reform proposals, unsurprisingly, are less than compelling.

Nonetheless, Abel's book is a must read. Its six case studies, comprising the bulk of the book, constitute an important contribution to scholarship on the legal profession. Regrettably, the book's attempt to draw a general insight from the case studies—namely that the legal profession betrays trust—and to advocate reforms to address this problem is not as compelling, and unlike Abel's previous scholarship, *Lawyers in the Dock* misses an opportunity to address serious institutional and systematic problems plaguing the legal profession.

This review is organized as follows. Part II offers a summary of the six case studies detailed in *Lawyers in the Dock*, and explores their significant contribution to the study of lawyer deviance and misconduct as well as to the teaching of legal ethics. The rest of the review deals with Chapters 1 and 8 and their attempt to generalize the case studies and extract from them a normative claim. Part III examines some of the patterns suggested by the case studies. It assesses the methodology used to select the case studies, reviews some of the similarities Abel finds (behavioral patterns among the individual lawyers studied), and discusses some common themes the author does not investigate (institutional and system-wide failures). Part IV explores the book's normative claim that the legal profession betrays trust, concluding that while *Lawyers in the Dock* suggests that some solo and small firm lawyers betray trust, it misses an opportunity to advance a more comprehensive claim against the legal profession as a whole. Part V presents a short conclusion.

## II. The Case Studies

Chapters 2 to 4 explore lawyer neglect. Chapter 2, aptly titled "Juggling Too Many Balls," features David Kreitzer, a Manhattan personal injury lawyer whose practice grew so steadily during the 1980s that by 1989 he was handling a thousand cases and had added four associates and office staff to his solo practice (71-72). To Abel, Kreitzer exemplifies the American ideal of upward mobility, rising from a modest working-class background and a low-ranked night law school to a thriving professional career with an office on Madison Avenue (102-103).

Yet in 1993 Kreitzer was charged with neglect in three cases, faced six additional neglect charges in February 1995, and five more in November 1995. The charges alleged significant, systematic neglect often stretching over a decade (72-90). In 1997 Kreitzer was found liable for neglect and failure to adequately supervise his associates' work and was suspended for three years (90-92). Worse, in 2001 Kreitzer was disbarred after he plead guilty to commercial bribery stemming from his involvement during the early 1990s in a scheme to pay off middlemen and insurance adjusters in exchange for "expediting" the settlement of insurance claims (92-96).

Abel documents Kreitzer's conduct throughout the neglect disciplinary proceedings. Kreitzer first denied the allegations, blaming the neglect on the expanding scope of his practice (72, 100), and subsequently argued that his battle with cancer explained some of the delays (72, 90-91). Later, he attempted to justify the bribery on the ground that "other attorneys were doing it" (93), again invoking his illness as a mitigating excuse and also denying understanding that the money he paid was used for bribery (94-95).

More importantly, Abel revealingly situates Kreitzer's conduct and excuses within the context of his personal injury practice. Because cash flow is highly erratic (103), some practitioners may be tempted to accept every case with potentially significant damages. But while an expanding caseload can generate cash flow, it can also undermine speed and diligent client representation since the lawyer's goal is to minimize his costs, not maximize the return for any individual client. The lawyer might as well serve a complaint and then wait for a settlement offer (96). Furthermore, the sheer size of the caseload may tempt the over-extended lawyer to delegate work to inexperienced associates, as Kreitzer did (97), and inhibit meaningful supervision. Client neglect is therefore an inherent risk of such a "successful" practice, with the "unfortunate" consequences that virtually all cases are significantly delayed and some are mishandled (100).

Of course, many personal injury lawyers have successful and ethical high-volume practices. Nonetheless, Kreitzer's account is disturbing exactly because it reflects the growth pattern of some personal injury practices. Kreitzer arguably did not initially intend to neglect his clients. Rather, Abel demonstrates that Kreitzer's missteps were the gradual result of risks inherent in personal injury practice. Succumbing to the perils inherent in the practice, Kreitzer gradually became a "bad" lawyer by neglecting and harming his clients. Over time, he intentionally let his practice grow out of control, did not learn from previous discipline for neglect, and ended up disbarred.

Kreitzer's story thus serves as an important cautionary tale for law students—that every aspiring and even successful personal injury attorney is likely to face challenges that could cause him to stray. Many lawyers of course will overcome those challenges, yet Kreitzer's case study is effective as a teaching tool exactly because it portrays lawyer deviance not simply as the result of innate "badness" but as an acquired conduct influenced by practice realities.

Chapter 3 features Joseph Muto, an immigration attorney. Muto amassed hundreds of clients, many of whom sought asylum and faced possible deportation, by affiliating himself with so-called "travel agencies," which illegally smuggled immigrants into the United States. In return for the high volume of clients the "travel agencies" produced, Muto charged extraordinarily low fees to represent immigrants he met minutes before the court hearings or never met at all. The high volume of cases, as well as the nature of his affiliation with the "travel agencies," caused Muto to chronically neglect his clients' cases, be ill-prepared, miss deadlines, and achieve poor results on behalf of his

clients. His low fees, in turn, provided further disincentive to invest sufficient effort preparing the cases. After a lengthy disciplinary investigation Muto was disbarred (108-160).

Once again, Abel excels at situating Muto's experience within the greater context of Manhattan immigration law practice (or at least a subculture of that practice), arguing convincingly that while Muto's behavior was not representative of mainstream immigration law practice, it was part of a deviant subculture rather than an example of a rogue outlier attorney. An attorney-witness for the disciplinary committee against Muto admitted that he and other immigration attorneys accepted cases from similar "travel agents" (120). Other witnesses testified to the widespread relationships between attorneys such as Muto and "travel agencies" (123). Indeed, the prosecuting disciplinary attorney acknowledged the existence of that subculture: "[t]he fact that the practice of immigration law at 26 Federal Plaza may fall below...the standard that members of the bar should adhere to, does not excuse Mr. Muto's conduct..." (165).

While the existence of a subculture of professional failure certainly does not excuse Muto's conduct, it does help explain it. It also clearly suggests that Muto was an example of a more widespread problem and not merely a "bad-apple." Abel's masterful and detailed telling of Muto's story sends a powerful message to students and members of the bar: Muto was not an unusual, innately evil wrongdoer, and his demise cannot simply be explained away in terms of casting him as an outlier. Muto worked hard and tried to succeed, and his failure was, at least in part, due to pressures and challenges faced by many lawyers working in the same subculture of immigration law.

Chapter 4 follows Lawrence Furtzaig, the only attorney in the case studies who was not, practically speaking, a solo practitioner.<sup>6</sup> Like Kreitzer, Furtzaig's career appeared to exemplify upward mobility and professional success. In 1980, he started working as a paralegal for a boutique real estate law firm. He put himself through night school and was hired as an associate at the firm in 1985, became a non-equity partner in 1990, billed an incredible number of hours, and in 2000 was elected an equity partner (193-194). Yet in March 2001, Furtzaig was fired and suspended for five years (202-203).

Furtzaig got into trouble after he failed to restore two cases to the court's calendar and was subsequently untruthful in about a dozen others, lying to clients about the status of their cases and trying to cover up the lies by fabricating documents and judgments (194-203). Abel's case study helps explain Furtzaig's conduct: Furtzaig was over-worked and poorly supervised. He initially tried to conceal his conduct by paying neglected clients \$60,000 out of his own pocket (195); and his over-the-top caseload was in part the result of intense loyalty to the firm.

6. Kreitzer worked for other small firms until his caseload grew large enough to support a solo practice and eventually his own law firm. Philip Byler, *infra* p. 7, was of counsel at the time of the acts that gave rise to disciplinary complaints, although his firm played no meaningful role in Byler's wrongdoing.

Yet the case study does not excuse the neglect, instead demonstrating that Furtzaig's "overcome by work" defense (199) rings hollow. Abel's description of the firm's culture suggests that Furtzaig was not in a position to ask for, let alone receive, appropriate help and guidance from his supervisors. Moreover, Furtzaig paid out-of-pocket precisely so he could cover up and misrepresent to his client. And while he may have been loyal to the firm, he accepted an unreasonable caseload and later tried to cover up his neglect in part because of his desire to keep his job and make partner.

Furtzaig's story sounds a familiar theme: Furtzaig is not an innately bad lawyer intent on harming clients, and his predicament is a cautionary tale. Whereas one may be tempted to discount the experiences of Kreitzer and Muto as indicative of the challenges faced by bottom-feeder attorneys, Furtzaig practiced in what Abel describes as "a well-respected firm" (204). He worked hard, too hard, and his excessive devotion was a cause of his downfall. More disturbingly, while his senior partner described his ordeal and reaction to the pressure at the firm as "atypical" and "not an appropriate response" (203), one wonders how atypical were the immense pressures Furtzaig experienced. While Furtzaig was clearly accountable for his own misconduct, his downfall illustrates that deviance is at least in part a function of practice realities and circumstances that many lawyers face.

Chapters 5 and 6 examine lawyer misconduct related to fees. Chapter 5 features the story of a trust and estate attorney, Benjamin Cardozo, who paired up with a litigator, Deyan Brashich, to represent a client in a family saga that included the management of her parents' trust, her allegedly wicked brother, and high-maintenance children (215-239). The court rejected the trust settlement Cardozo and Brashich negotiated, claiming it was designed to maximize the lawyers' fee at the expense of their client. The court subsequently found disturbing that the lawyers made a fee application without revealing that they were receiving additional money from their client (251-254). The disciplinary committee charged Cardozo and Brashich with a personal conflict of interest, as well as dishonesty, fraud, deceit, and conduct prejudicial to the administration of justice (because the client was misled to believe the settlement was in her best interests) (259). The court found that Cardozo sought to deceive his client "in order to obtain a higher fee" (270) and that Brashich failed to correct Cardozo's misstatements, and publicly censured both (Cardozo escaped a harsher sanction because he was no longer practicing) (268-280).

The case study explains how Cardozo, a seasoned attorney with a stellar reputation and nearly fifty years of experience, and Brashich, whom a court found as a matter of fact was not motivated by the money (265), ended up being disciplined for a personal conflict of interest and fee-related fraud. The lawyers represented the client loyally for years (253), incurred substantial expenses (219), and were entitled to large fees. Abel details the intense involvement of

the lawyers in the case and Cardozo's resulting sense of entitlement, which led to his fraudulent conduct and Brashich's self-denial which caused him to go along with Cardozo's conduct (250).

Chapter 6 follows Philip Byler, a litigator who represented a friend with a tax shelter problem. Byler claimed that the client told him he could keep any tax refund as payment for his services. When the IRS issued an unexpected large refund, Byler transferred the money to his own account and told the client about it only after the check had cleared. When the client demanded return of the refund, Byler refused to escrow the funds.

Once again, the case study is revealing because Byler is by no means the "usual suspect" students might imagine to violate fee rules. Byler was a graduate of Harvard Law School, clerked for the Sixth Circuit Court of Appeals, and worked for awhile for the elite law firms Cravath, Swaine & Moore and Weil Gotshal (290). He represented his client effectively, not only reversing an initial adverse IRS finding but ultimately securing a substantial refund. Indeed, Byler was entitled to substantial fees (he subsequently won an arbitration of his quantum meruit claim for about \$40,000). The Byler case exemplifies the driving force behind all of Abel's case studies, that the lawyers featured do not appear to be innate wrongdoers—law students and practicing lawyers may easily imagine themselves in these lawyers' shoes. Byler got in trouble in part because he represented a friend-turned-client without clearly laying out his fees; he failed to communicate clearly with the client; and he refused to admit error and fought a losing battle that led to his suspension. Abel notes correctly that a written retainer probably would have prevented Byler's demise (349).

Finally, Chapter 7 is the sole example of lawyers' excessive zeal, following the demise of attorney Arthur Wischart, who represented a client in a sexual harassment and sexual discrimination claim against her employer. At first, Wischart's commitment to his client seemed laudable—for instance, he resisted opposing counsel's discovery stonewalling. But he began to veer off course when he hired the client in need of a job as a paralegal in her own case (391). Eventually, Wischart let his devotion to his client cloud his professional judgment. When the client-turned-paralegal read privileged documents left in a conference room by opposing counsel, Wischart not only failed to act appropriately by returning the documents to opposing counsel, he attempted to use the documents to extort a settlement offer and failed to comply with court orders regarding the documents.

Wischart's excessive zeal cost his client dearly. Abel's account suggests that the client may have had a meritorious claim, yet the client's case was dismissed with prejudice. Wischart then launched a series of near absurd appeals accusing first the trial judge and subsequently appellate judges of mental illness, tainted judgment, and bias. Wischart was suspended and did not apply for readmission.



Teaching legal ethics is hard. A key component of the course—the ABA Rules of Professional Conduct—is a black letter code, and students often have a hard time imagining the kind of complex practice realities that would trigger the Rules, let alone their violation. Take, for example, Rule 1.3 dealing with client neglect, which states briefly: “A lawyer shall act with reasonable diligence and promptness in representing a client.”<sup>7</sup> Students may assume that lawyers who violate this seemingly straightforward rule are lazy, uncaring or even intent on harming their clients. *Lawyers in the Dock* moves beyond these simplistic assumptions. Furtzaig neglected his clients out of need and greed but was neither innately evil nor lazy. In fact, he worked too hard without adequate guidance, a factor that led to neglecting his clients. In addition to pursuing their self-interest at the expense of their clients, Kreitzer and Muto tried to do too much for too many clients. Kreitzer didn’t effectively manage his client base, and Muto’s conduct was influenced by the “travel agents” who referred clients to him.

Similarly, while the rules regarding reasonable fees, contingency fees, and depositing client funds in escrow accounts appear to be straightforward, Abel’s rich case studies introduce experienced lawyers who still stumbled for complex reasons. Cardozo (and his client) misguidedly believed he was entitled to the fee he demanded irrespective of the applicable fee rule. Byler was entitled to a portion of the fee he demanded but allowed inflated notions of personal friendship and his own professional worth to cloud his judgment, took matters into his own hands, and refused to entertain the possibility that he might be mistaken. Finally, Wischart’s over-the-top loyalty to his client led to his abuse of the judge, opposing counsel, applicable rules of conduct, and ultimately, his client’s best interests.

By illustrating rule violations in practice realities, humanizing without excusing the lawyers involved, and explaining their conduct in light of complex motivations and in the context of demanding personal and professional circumstances, *Lawyers in the Dock* breathes life into a hard-to-teach subject. Unlike excerpted cases and even hypotheticals, the case studies effectively demonstrate how and why lawyers, even experienced and successful ones, misbehave. In doing so, they push students beyond simplistic and stereotypical assumptions about attorney misconduct.

### III. What the Case Studies Show

#### *A. Methodology*

Abel clearly acknowledges that the case studies are not representative: “In order to choose my...cases, I read more than 200 opinions by the [regulating court]...gradually developing categories of the most common situations” (56). He then dismissed some common categories on the ground that they were uninteresting (such as commingling and misappropriating client trust accounts, and disbarment following a criminal conviction) (56), which left

7. Model Rules of Prof'l Conduct R. 1.3 (2008).

him with the three categories featured in the book, neglect, excessive fees, and over-zealous advocacy. Finally, “within each category I looked for extreme cases, which were more dramatic and, arguably, more revealing of underlying motivation” (57).

Abel is to be commended for his candor in not claiming his case studies to be representative. That disclaimer aside, Abel’s methodology seems somewhat lacking. First, the reader has no idea whether reading 200 opinions constituted a sample of the decided opinions, although elsewhere Abel explains that the 200 cases were all the cases decided over a ten-year period.<sup>8</sup> Second, with due respect, the method of “gradually developing categories” followed by exclusion of “uninteresting” categories seems questionable. To be sure, one cannot study everything and Abel’s decision to study neglect cases seems plausible because neglect is the most common reason for disciplinary complaints. Yet some doubts linger. For example, are Abel’s categories consistent with conventional categorization of attorney misconduct? It appears not: while the latter are determined by ethical rules, Abel’s categories are determined by behavior, and one is left having to accept the author’s judgment regarding “interesting” and “uninteresting” behavior. Finally, the selection of “extreme cases” seems baffling. It is unclear why Abel assumes that “extreme” or “dramatic” cases are “more revealing of underlying motivation.” Would not extreme cases be less revealing about underlying motivations? For example, in the Cardozo and Brashich case study the complex dysfunctional family relationships do render the case more extreme, but they arguably detract and distract attention from the ethical questions at hand. In that sense the case is less, not more, revealing. And would not the selection of extreme cases render the case studies not merely “not representative” but rather positively “unrepresentative”?

At the end of the day, while Abel’s case selection methodology is defensible, one is left wondering whether it allows for any kind of generalization. Abel anticipates and addresses one concern regarding his case studies. His decision to rely on reported disciplinary records introduces a bias, because solo and small firm lawyers are over-represented and large firm lawyers under-represented in disciplinary cases (54-55). Abel, a life-long scholar and critic of organizational behavior, acknowledges the bias and discounts it, because *Lawyers in the Dock*, unlike his previous body of work, is mainly interested in the conduct of individual lawyers.

Yet other consequences of the decision to study disciplinary records are left unaddressed. For instance, all the disciplined lawyers in Abel’s case studies are men. Is this a coincidence? It certainly can’t be representative of the gender

8. In an interview with Joseph Gerken, Reference Librarian at the University at Buffalo Law School Library, as part of UBLaw Conversations, a production of University at Buffalo Law School and the Baldy Center for Law and Social Policy, Abel further explained that the 200 opinions he read constituted ten years’ worth of cases. See MP3: Richard Abel on Lawyers in the Dock: Lawyers and Disciplinary Cases (November 19, 2008), available at [http://ublaw.classcaster.org/blog/faculty\\_conversations/2008/11/19/richard\\_abel\\_on\\_lawyers\\_in\\_the\\_dock\\_lawyers\\_and\\_disciplinary\\_cases](http://ublaw.classcaster.org/blog/faculty_conversations/2008/11/19/richard_abel_on_lawyers_in_the_dock_lawyers_and_disciplinary_cases) (last visited August 5, 2009) [hereinafter *Lawyers in the Dock*].

composition of the legal profession in Manhattan because Abel read cases spanning from the mid-to-late 1980s to the mid-to-late 1990s, a period in which women constituted not an insignificant number of practicing lawyers. Is gender a relevant factor in explaining lawyer deviance and misconduct? Male lawyers are in fact disproportionately disciplined compared with female lawyers so Abel's case selection is consistent with the existing gender pattern of discipline. To be fair, disciplinary records constitute a rich data source, rarely utilized to study lawyer deviance. Yet Abel's decision to look closely at these records as opposed to, say, malpractice claims or criminal cases against lawyers, and to focus on small firm attorneys limits the reach of his conclusions regarding the conduct of other segments of the bar.<sup>9</sup>

All these observations would have been somewhat academic had Abel stayed clear of trying to generalize from his case studies. Abel, however, does not shy away from the task, arguing that the case studies support a general claim of betrayal of trust by the legal profession.<sup>10</sup> Yet his methodology cannot possibly support such an ambitious claim. Because the case studies are not representative, they can only generally illustrate rather than prove a claim of betrayal. Moreover, by his own admission, the case studies are biased and over-represent solo and small firm practitioners. Therefore, the case studies cannot even illustrate, let alone prove a claim relating to the entire legal profession. At best, the case studies illustrate betrayal of trust by a segment of the legal profession—solo and small firm lawyers. And while this is a sizeable segment—Abel notes that in 2000, 48 percent of private practitioners worked alone, and another 15 percent practiced in firms of two to five lawyers (56)—even within that segment of the bar, Abel's studies exclude treatment of women lawyers, not an insignificant percentage of solo and small firm lawyers.

Moreover, the decision to rely exclusively on disciplinary records, forcing a focus on solo and small firm attorneys, compromises the book's otherwise great appeal as a pedagogical tool. A lot of legal education, even at non-elite law schools, focuses on large firms (as opposed to solo and small-firm practice) and appellate case law (legal work less likely to be performed by solo and small firm practitioners). Throughout their law school experiences, students are thus sent a message that solo lawyers are not cut from the same cloth as their large firm counterparts. In this sense, Abel's book falls into the same problematic trap by implicitly suggesting that it is only solo and small firm attorneys who do not quite have the right "stuff" to engage in ethical practices. Ironically, Abel chose to focus on individual lawyers' behavior because that is

9. Two of the six case studies feature some personal connection to Abel. In Chapter 6, it turns out that the client is the brother of Thomas Morgan, one of the leading legal ethics scholars of our generation and a contemporary of Abel's (372), and in Chapter 7 it is revealed that Judge Moskowitz attended the same law school as Abel, graduating a year after he did (390). No doubt, these coincidences did not influence Abel's choice of cases, but they do at least open the door to suggestions of case selection impropriety (which Byler is quick to raise in his response) (367–673).
10. In an Author Response, Abel states: "I defined the central problem of lawyer deviance as betrayal of trust." Richard L. Abel, Author Response, 11 *Legal Ethics* 126, 126 (2008).

what it taught in the standard legal ethics class and because such a focus was arguably the best way to engage students in the classroom. However, by only selecting solo and small firm practitioners, the whole book sends an implicit message that this is where ethical lapses occur. The recent Carnegie Report on legal education emphasizes the role of informal socialization and the ways in which legal educators need to be more cognizant of sending such implicit messages.<sup>11</sup> Viewed from this perspective, *Lawyers in the Dock's* decision to focus on solo and small firm lawyers begs the question of the message the book sends, particularly as a teaching tool.

### *B. What Abel (Correctly) Thinks the Case Studies Illustrate*

Read together, the case studies suggest several common themes or behavioral patterns among the disciplined attorneys, some of which Abel mentions in Chapter 8.

#### 1. Inability to Admit Mistakes

The lawyers featured in the case studies were unable to admit errors, and some could not even entertain the possibility they were wrong. "Once these lawyers committed themselves to an action, they found it difficult to change course" (494). Abel notes that despite compelling evidence of decade-old neglect, Kreitzer maintained that he diligently pursued his clients' interests. Muto insisted that he did quality work for grateful clients ignoring the severe consequences of his neglect (494-495). Furtzaig's response to the allegations of wrongdoing demonstrates his inability to admit mistakes: "Furtzaig could not allow himself to fail.... [H]e admitted, 'I hate to believe that I need help...'. He turned his anger against himself for making common, correctable mistakes, producing profound depression. He could not acknowledge those mistakes, much less forgive himself" (205). Cardozo convinced himself (and his client) that he was entitled to the fee he requested, notwithstanding the relevant rules of conduct.

Byler and Wischart exemplify inability to admit, even conceive of, their fallibility. Byler would not admit that depositing the IRS refund in his client's account and immediately withdrawing the entire refund without telling his client until after depositing the check in his own account was wrong. He would only go as far as acknowledging, "I will do what I reasonably can to avoid misunderstandings and disagreements. I believe that in today's world, a written retention agreement is necessary" (339). Incredibly, after being disciplined, Byler still maintained that he had not escrowed the IRS refund because there was no fee dispute. "Confronted with [the client's] explicit objection to the fee, Byler dismissed it as not 'genuine' because he could not entertain the possibility of being wrong" (352). Told explicitly during the penalty phase that this was his opportunity to express remorse and apologize for his unethical conduct, Byler could not bring himself to do so (359). As a

11. See generally William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

result, the hearing panel recommended a harsher penalty because of Byler's "adamant failure to recognize that there was even a bona fide dispute..." Byler was "either unwilling or unable to recognize even the possibility of error on his part" (360).

A judge best described Wischart's inability to concede error, "A judge rules—rightly, wrongly, or indifferently—that the documents should be returned and the case should be dismissed. An appellate court affirmed.... This simple, straightforward history notwithstanding, [Wischart commenced] a slew of motions, appeals, applications, and even other lawsuits in another court... [evidencing] obstinate refusal to take 'no' for an answer" (442). Wischart, "an attorney for nearly 50 years, apparently lost sight of his moral, ethical, and legal obligations to the court, the public, and his opposing counsels, and saw fit to use any and every means and avenue available to him in his efforts to 'win'" (464).

## 2. Need and Greed

With the possible exception of Cardozo, all of the lawyers were partly motivated by need, greed or both. When Kreitzer encountered cash flow problems he increased his caseload to an unmanageable size and later resorted to bribery to expedite payments. Muto essentially became a part-time employee on the payroll of "travel agencies" sacrificing the ability to exercise meaningful professional judgment because the arrangement proved to be more profitable than practicing independently. Both lawyers' conduct is especially disturbing because their need (and greed) was ingrained in their institutional practice realities. That is, their deviance was not the result of simple greed. Rather, for Kreitzer, attaining "success" as a personal injury lawyer in the context of highly volatile and uncertain cash flow, and for Muto "succeeding" as an immigration attorney involved wrongdoing.

Greed was also likely a motivation for Cardozo and Brashich's conduct. "[The court] found that Cardozo and Brashich switched between quantum meruit, negotiated, and contingent fees as circumstances changed, in order to maximize their fee, without presenting the alternatives to their client" (285). Finally, Byler's short-term financial need was so significant that he assumed the risk of discipline (especially striking given that his longstanding personal relationship with his client strongly suggested the client was not going to let the matter go).

## 3. Overworked or Underpaid Lawyers

Many of the lawyers in the case studies worked so hard they were tempted to cut corners, overcharge, and act aggressively. With a 1300-client inventory, Kreitzer could spend, on average, 12 minutes per client either working on or supervising associates' work, assuming a 65 hour work week. He admitted that he "probably just got caught up with too many cases" (100). Muto took on so many clients that he did not have time to meet all of his clients, adequately prepare, or even keep track of all of their respective hearings. Furtzaig

assumed the reason he neglected his clients was “lack of time” (196). The compelling message of the case studies is that these lawyers did not choose to neglect clients; rather, they overcommitted themselves which in turn led to misconduct.

Cardozo and Brashich represented their client for years while incurring substantial uncompensated expenses. After negotiating a complex settlement agreement, they felt they had “earned” their requested fees. Similarly, the stonewalling by Wisheart’s opposing counsel meant that his compensation would be further delayed, a likely contributor to his frustration and over-the-top aggression. For these lawyers, the fee uncertainty was a factor in each instance of misconduct; delayed compensation led the attorneys to take matters into their own hands and caused their aggressive conduct.

Byler represented his client effectively for little pay and as a result felt morally entitled to the IRS refund check, notwithstanding the rules of conduct. His case, however, is distinguishable from that of Cardozo, Brashich and Wisheart, because Byler simply failed to execute a retainer agreement (493–496). His lack of payment was his own doing, as opposed to Cardozo, Brashich, and Wisheart, whose uncertain fees were a feature of their respective practices and contingency fee structure.

### *C. What the Case Studies Also Illustrate*

Two compelling similarities among most of the lawyers featured in the case studies are surprisingly not sufficiently explored by Abel. This oversight is not a coincidence. *Lawyers in the Dock* focuses primarily on individual lawyers and searches for behavioral patterns among them. But because the book mostly overlooks problems other than at the individual-lawyer level, it does not examine in detail common institutional and system-wide features. To be sure, due to their methodological limitation, the case studies do not prove these phenomena, but they do suggest their troubling prevalence.

#### 1. Widespread Ignorance of the Rules and the Law, Elementary Incompetence, and Poor Exercise of Professional Judgment

With the possible exception of Furtzaig, all the lawyers displayed either ignorance or misunderstanding of the applicable rules of professional conduct and of the pertinent law relating to their practices, made elementary mistakes giving rise to incompetence, and most strikingly, exercised poor professional judgment.

Muto repeatedly demonstrated poor understanding of rules of evidence and procedure, was chronically disorganized, drafted incomprehensible pleadings, and misunderstood and could not reply to basic questions and instructions from judges presiding over his cases. For example:

Court: Mr. Muto, what is it that you're looking through?

Muto: The evidence packet, Your Honor.

Court: Your client just says he's never given you any evidence. How did you come to get this...? I think it's time for you to be forthcoming and honest.

Referee: Do you have any record or office diary that shows that you met him?

Muto: Begging His Honor's pardon, what do you mean by an office diary showing I met him?

Referee: Well, do you keep a diary as a lawyer...(128)?

Cardozo and Brashich appeared ignorant of relevant legal rules and did not understand basic aspects of the case and their compensation. For example, “[a]t the time [Cardozo] believed that if he lost the appeal he would not have been entitled to anything under the retainer or from the Surrogate...” notwithstanding the fact that the Surrogate clearly told him that “‘you do not have to’ be successful to claim in quantum meruit” (229-230, 284). Similarly, Brashich explained that “[h]e had taken the \$375,000 fee without Surrogate approval because ‘after practicing law for 32 years...I thought that once the parties had agreed...the fees would be blessed by the Surrogate’” (245).<sup>12</sup> Neither lawyer understood the Rules of Professional Conduct. For example, “[a]sked by [the Surrogate] whether he ever told [the client] she could apply to the Surrogate for fees on a time and task basis, Brashich said ‘the question never came up.’ [The Surrogate] wondered why: ‘You’re a lawyer.’ ‘You have an obligation...[pursuant to ABA Model Rule 1.4] to tell your client.’ Brashich replied that ‘the arrangement had already been made and the issue never came up’” (250). Abel concluded, “Despite their eight decades of combined joint legal experience...both made elementary errors” (286). Ironically, Cardozo and Brashich arguably could have secured substantial fees if they had only acted pursuant to the rules, yet their ignorance caused the lawyers to violate them.

Byler's conduct was not simply the result of misunderstanding the escrow rules. He was told about the rules, and presumably looked at the rule. He did not follow them because, *inter alia*, he did not think that his client had a good faith “dispute” about the facts. In other words, Byler exercised poor professional judgment. Indeed, had he deposited the IRS refund in a client trust account and then negotiated or sued for fees, he likely would have prevailed (as

12. In his defense, Brashich practiced for 32 years as a litigator but may not have had any prior trusts and estates experience.

indicated by the fact that he ended up winning \$40,000 in arbitration against the client). This does not excuse his conduct, but it does indicate that poor judgment in addition to betrayal was an important issue. Furthermore, Byler got into so much trouble in part because he did not appreciate the practical wisdom behind Rule 1.5 encouraging written retainer agreements (a practice that would have likely spared him the entire ordeal). Because Rule 1.5 has no requirement of a written fee agreement (not to mention that New York, where Byler was licensed at the time of his misconduct, did not follow ABA Rule 1.5), Byler's failure to appreciate the practical wisdom behind the Rule does not reflect ignorance of the rules of conduct, but it does reflect poor professional judgment.

Perhaps most revealing and disturbing is the Wischart case. The plaintiff appeared to have a solid case but Wischart made numerous mistakes; for instance, he preempted his own motions to reconsider by filing appeals and did not understand the doctrine and consequences of mishandling privileged documents, work-product and waivers. Had he acted promptly upon learning that his client read protected information to preserve its confidentiality, he likely would have avoided the harsh sanction of having the case dismissed with prejudice (440-441). In Wischart's defense, the question of what to do when a client takes and reads papers left in plain view by opposing counsel is a difficult legal issue. Yet attempting to extort a settlement offer from opposing counsel and the defendant, as Wischart did, is not an appropriate option. He could have easily deposited the documents with the court instead, and then litigated his right to see them.

Wischart demonstrated poor exercise of professional judgment while trying to act in his client's best interest. An example is his imprudent decision to hire the unemployed client as a paralegal in her own case, no doubt an altruistic move. But the consequences for the client were devastating. In dismissing the case with prejudice, the judge relied explicitly on the fact that the client was also a paralegal, "[The client] as a paralegal in her attorney's office had an obligation to return and turn these over to the lawyer, and he had an obligation to turn them back over to [opposing counsel]" (426). Understanding the gravity of his mistake, Wischart tried to argue that the client-turned-paralegal read the confidential documents in her capacity as a client, not a paralegal (439), but the court correctly rejected his plea (441).

Of course, the court could have dismissed the case with prejudice even if the client was not a paralegal, but perhaps it would not have. Abel documents that the court was initially sympathetic to the client and had not the client been so closely affiliated with Wischart, the court might have sanctioned him for his misconduct without also sanctioning the client. Moreover, while there is no rule against hiring a client as a paralegal, Wischart could have hired the client as a paralegal in another case or simply referred her to one of his colleagues. In hindsight, the consequences of his poor exercise of professional judgment were particularly catastrophic for the client, yet even if Wischart



could not have anticipated the client reading opposing counsel's privileged documents, there was no reason to place her in this dual role.

Subsequently, Wischart continued to demonstrate poor professional judgment in filing numerous baseless and abusive motions to disqualify, challenges, and appeals, which further compromised the client's case and his own before the disciplinary committee.

## 2. Poor Institutional Setup and System-wide Failures

In *Lawyers in the Dock* Abel was interested in studying the conduct of individual attorneys, as opposed to the conduct of organizations, i.e., law firms (55-56). Unsurprisingly, he repeatedly finds fault with his solo practitioners and holds them accountable, legally and morally, for their wrongdoing. In his quest to question lawyer conduct at the individual level and in his zeal to hold individual attorneys accountable (no doubt all of Abel's lawyers were individually accountable for their conduct), Abel seems to pay insufficient attention to significant institutional and system-wide considerations that contribute, enable and certainly help explain some of the lawyer misconduct in question.

First, Abel does not explore the corruptive and dynamic power of attorney interaction with (passive and overworked) magistrates and judges. Muto's failures were in part explained by Judge Ferris' inability (at the time immigration judges lacked the power to discipline attorneys) or unwillingness to exercise authority over his conduct (until she ultimately referred Muto for discipline). For example: "She denied the motion and asked for the documents that had been due the previous June but refused to accept them 'unless you give me an explanation' for their lateness. When Muto had none, she recessed so he could 'think of something to say.' He returned and claimed... Ferris gave Muto two weeks to explain why he hadn't moved to enlarge the time. 'Why you did not act like a lawyer. That's what lawyers do.' Muto promised her 'You will have it, Your Honor'" (114), but of course failed to deliver. Abel's four-page description of a subsequent exchange between Judge Ferris and Muto (115-119) would be comical if it was not so deplorable. As the saying goes, it takes two to tango, and Judge Ferris (and arguably other judges before whom Muto regularly appeared) seems to have at least tolerated and passively enabled his incompetence, in part because the system deprived them of the power to directly discipline lawyers practicing before them.

Similarly, Judge Moskowitz's tolerance of the stonewalling, abusive discovery tactics employed by Wischart's opposing counsel offers some insight into his conduct inside and outside her courtroom. To be clear, Judge Moskowitz's inability or unwillingness to address the "Rambo" discovery tactics of Wischart's opposing counsel certainly does not excuse his conduct, but it helps explain Wischart's disrespect and abusive conduct toward opposing counsel and the judge (250-255).

Abel also overlooks the corruptive power of interacting with opposing counsel and powerful third parties as explanations for the lawyer misconduct he details. Cardozo and Brashich's conduct throughout the case was in part a function of their dynamic negative interaction with opposing counsel Bashian. Clearly, Wischart's conduct was in part explained by his negative interaction with opposing counsel Weil Gotshal & Manges. And while Muto was clearly responsible for his shortcomings, assessing his conduct without an explicit analysis of the corruptive power of his interactions with powerful third parties (i.e., the "travel agencies") is incomplete, if not outright misleading.<sup>13</sup>

Second, *Lawyers in the Dock* pays insufficient attention to institutional considerations prevalent in the lawyers' respective practice areas. Kreitzer's conduct is explained in part by pressures experienced by many, if not all, personal injury attorneys. Uncertain and volatile cash flow creates an incentive to take on as many clients as possible, which opens the door to delay and client neglect. The fact that the vast majority of all civil matters settle provides further incentive for personal injury attorney like Kreitzer to take little action. Many personal injury attorneys, of course, do not succumb to these pressures inherent in their practice. But to limit the analysis to Kreitzer's individual conduct seems incomplete.

Similarly, Muto's repeated excuse that "everybody was doing it" certainly does not excuse his conduct, and Abel compellingly documents that "everybody was doing it" is a favorite excuse of wrongdoers. Yet the banality of the excuse does not negate the troubling reality it exposes. How is it that at least a segment of immigration practice in New York City is so perverse? What does it tell us about identifying Muto as the sole, or even leading culprit? No doubt, Muto is accountable for his conduct. But what about holding the failed system accountable for creating an institutional set up that leads lawyers like Muto to stray? While clearly not his only options, Muto faced two unappealing choices: to work with the "travel agencies" or opt out of the practice.<sup>14</sup> The choice does not negate his conduct but it does strongly suggest we should not hold him alone responsible (120, 123, 161, 165, 166, 177, 180). Muto's clients suffered not only because of his incompetence but also because he was caught in an impossibly complex and dysfunctional immigration mess. Rather than only highlighting Muto's individual betrayal of his clients, Abel could have also considered the implications of the system-wide betrayal of a class of clients (poor dependent asylum seekers) by lawyers, the court system, and "travel agencies."

Furtzaig's experience provides yet another example of the importance of institutional considerations and the futility of holding individual lawyers

13. *But see* Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. Rev. 1449 (2006) (discussing the nature of immigration practice in greater length).

14. *See generally* Leslie C. Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers*, 34 Law & Soc. Inquiry 399 (2009) (providing a qualitative study of seventy-one New York immigration lawyers exploring their backgrounds and career paths).

alone liable for professional misconduct. How was Furtzaig able to hide his failures for so long? What does it tell us about the firm he worked for and the profession? Furtzaig worked for the law firm for twenty years, fifteen as an attorney, and was lying for eight years before he was caught. Moreover, the firm's culture, one in which "there was no one else to ask for help" (194) coupled with significant competitive pressures to get work done, seems relevant in assessing Furtzaig's demise. Because Abel focused on Furtzaig's individual relationship with the senior partner at the firm, he did not explore in sufficient detail the firm's institutional design and culture as contributing to Furtzaig's conduct. The case studies suggest a disturbing pattern of holding individual lawyers alone responsible for their misconduct and ignoring important relevant institutional and systematic considerations. For example, in assessing the Cardozo and Brashich saga, Abel harshly characterizes some aspects of the trusts and estates system (288), but in Chapter 8 he advocates mostly reforms aimed at individual lawyers rather than the firm or profession-wide.

Third, Abel's case studies evidence a systematic failure of the legal profession to effectively monitor, guide and support lawyers, especially solo practitioners. How and why was Kreitzer so "successful" for so long? How was he able to amass such a large client base and neglect so many clients for so long? Indeed, Kreitzer had been previously disciplined but his pattern of neglect persisted. Similarly, how did Muto manage to stay in practice for years given his gross incompetence? Exactly because these cases are so egregious, to the extent that they are representative, they cast a serious cloud over the profession's traditional claim of effective self-regulation.

In assessing Byler's conduct, Abel correctly points to the failure of the profession to demand written fee agreements (349, 350). However, Abel's entire analysis of the case (352-355) centers on Byler at the individual level. Where was his firm? While he was neither a partner nor an associate, he was of counsel to the firm, not an insignificant affiliation. Furthermore, the fact that Byler either did not receive common sense professional mentoring or did not act on it is troubling exactly because Abel asserts that Byler was close to prominent lawyers at Cravath and elsewhere (for example, Joseph R. Sahid, a retired partner at Cravath, attended Byler's mitigation hearing to offer "moral support, informal advice and counseling" (321-322)). Since other solo and small-firm lawyers may not be as fortunate or well-connected as Byler, to the extent that his experience is representative, the state of professional peer support systems must be truly appalling.

Wishart sought advice and guidance about how to handle the privileged documents. He conducted some research at the local bar association's library, called a couple of colleagues who refused to get involved, and received (self-serving and tainted) advice from an attorney who stood to earn a referral fee in conjunction with the case (404-409). Wishart could have also called the local bar association's "hot line" for guidance, yet one gets the feeling that quality advice would have been hard to get in this instance. The lack of professional guidance is no excuse for Wishart's wrongdoing, yet is not a system and a

profession that offers little support and professional guidance also to blame? Consider hard working and well-intentioned Furtzaig, who seems to personify the profession's failure to guide a young attorney (194).

This failure is especially troubling because some of Abel's case studies (with the possible exceptions of Cardozo and Byler) represent "successful" stories of upward mobility. If the case studies reveal prevalent practice realities, what does it tell us about the probability of success within a profession that seems to fail its most vulnerable members?

In sum, Abel's decision to focus on individual lawyers as opposed to small, mid-size, and large law firm attorneys is certainly defensible. Yet to start and finish the analysis at the individual level, ignoring relevant institutional and systematic considerations that shaped and led to the lawyers' conduct, is incomplete and possibly misleading. Similarly, if subsequent research confirms widespread ignorance of the rules of conduct and the law, elementary and common instances of incompetence, and pervasive poor exercise of professional judgment, a focus on the conduct of individual lawyers would lose sight of a more disturbing, bigger picture of the failure of self-regulation and the bankrupt professional promise of guaranteeing quality legal services.

#### **IV. What the Book Could Have But Does Not Show (Betrayal of Trust by the Legal Profession)**

Abel does not stop at looking for similarities among his case studies but also attempts to extract from them a general claim—the betrayal of trust by the legal profession. The exercise is ambitious because generalizing narratives is a very difficult task,<sup>15</sup> and worthy because Abel is arguably correct that the profession betrays trust, but ultimately unsuccessful. This is unfortunate because *Lawyers in the Dock* misses an opportunity to make its important case more effectively. Abel's thesis is compromised by two faults, a methodological one and a conceptual one, both of which could have been addressed and hopefully will be addressed in a forthcoming volume exploring misconduct by California lawyers.

##### *A. The Methodological Problem with "Lawyers in the Dock"*

Non-representative case studies cannot prove any claim, big or small. At best, such narratives may illustrate or suggest broad propositions. In particular, *Lawyers in the Dock* cannot establish that the legal profession betrays trust in general, it can only weakly suggest it. In Chapter 1 Abel states that his goal is to use the case studies to generate hypotheses for others to study (55), yet he attempts to address some of the normative questions raised by the case studies himself, which his limited methodology does not allow. Thus, the title of Chapter 8—"Restoring Trust"—is overstated because the case studies have not proven a widespread problem that needs fixing. Abel's contention that "[t]he costs of lawyer betrayal are too high for clients, the legal profession,

15. Leny De Groot-Van Leeuwen, *A Window on Lawyer Misconduct*, 11 *Legal Ethics* 103, 105 (2008).

the legal system, society, and even the lawyers themselves” (491), may or may not be true, and while *Lawyers in the Dock* lends some support to it (consider, for example, the immigrants hurt by Muto), the book cannot and does not prove the claim. And while Abel may also be correct that the usual responses to deviance—more regulation and harsher penalties—may be ineffective, his case studies support the claim (certainly the lawyers featured in the case studies responded poorly to discipline) but cannot prove it. Consequently, the stated goal of Chapter 8, to look for alternative solutions for the legal profession’s betrayal of trust, depends on two sets of assumptions (the profession betrays trust and the “usual” solutions are ineffective) that Chapters 1 to 7 fail to establish.

Solutions to this methodological challenge can take one of three forms. First, Abel could have resisted the temptation to make normative claims. The case studies in Chapters 2 through 7 already accomplish a lot by presenting complex legal ethics problems in a way that illustrates how and why some lawyers engage in questionable conduct. They enrich and expand our understanding of the causes for ethical violations and set the stage for further research.<sup>16</sup> While Abel’s desire to do even more and address policy questions is admirable, his research methodology prevents him from doing so.

Second, Abel might address the methodological challenge by supplementing disciplinary records with studies of malpractice claims, criminal cases against attorneys, and large-firm attorney misconduct. That approach would allow him to rely on the case studies to better support, rather than assume, broad assertions. Finally, if Abel desires to pursue normative claims and chooses not to address methodological shortcomings, he could simply refrain from overstating his claims. When he purports to define the “central problem of lawyer deviance as betrayal of trust,”<sup>17</sup> Abel plays into the hands of critics who could deflect the (important) content of his assertions by pointing out (correctly) the over-extended and ill-supported nature of his normative argument. Abel’s case studies may not prove “the central problem of lawyer deviance,” but they most certainly illustrate a disturbing problem in need of addressing.

### *B. The Conceptual Problem with “Lawyers in the Dock”*

A more challenging problem is a conceptual confusion plaguing Chapters 1 and 8. *Lawyers in the Dock* claims that the legal profession betrays trust without actually defining either the meaning of trust or its betrayal. Abel apparently intended Chapter 1, entitled “Trust and Betrayal,” to define those concepts. The chapter is a tour de force, a broad and comparative study of trust. In

16. Such research is already being pursued. In an excellent review of *Lawyers in the Dock*, Leslie Levin builds on Abel’s sociological study of lawyer deviance and expands the analysis by exploring psychological processes and factors that affected the conduct of the lawyers featured in the case studies. See Leslie C. Levin, *Lessons from Lawyers in the Dock*, 22 *Geo. J. Legal Ethics* (forthcoming 2009).

17. Abel, *supra* note 10.

a world of increased specialization and narrowing expertise, where every proposition is expected to be supported by a lengthy footnote,<sup>18</sup> Abel's impressive analysis of trust across time, place, and industries is refreshing and illuminating. Surprisingly, however, the 60-page chapter never defines, explicitly or implicitly, the notions of lawyers' or the legal profession's trust. Perhaps Abel believes that the concept is self-explanatory or intuitive. It is not.

Conceptually, Abel asserts, "[t]he legal profession depends on trust: by clients (because of knowledge asymmetries), by judges and opposing counsel (to reduce transactions costs) and by society (on the capacity of the legal system to produce justice)."<sup>19</sup> This narrow definition of trust as a structural necessity, a concomitant of the division of labor, could have sufficed if Abel limited himself to a sociological study of lawyers' behavior and deviance. But since Chapter 8 tackles normative questions and advocates reform proposals, the book should have explored the meaning and manifestations of lawyers' and the profession's duties of trust in much greater detail. Abel seems to proceed by identifying three categories of breach of trust: neglect, excessive fees, and over-zealous client representation. That is, rather than providing a positive definition of lawyers' trust and its manifestations, Abel defines the concept negatively by providing examples of its breach.

As a sociological strategy, it may be more fruitful to approach a norm like trust by studying its breach rather than compliance, however, such a narrow definition is likely to confuse readers. Expectedly, in a review of *Lawyers in the Dock*, Alan Paterson assumed that by "trust" Abel meant the lawyer's fiduciary duty of loyalty.<sup>20</sup> Perhaps surprisingly, definitions of the duty of loyalty, a cornerstone of the attorney-client relationship, are hard to come by.<sup>21</sup> Attorney loyalty to clients includes avoidance of conflicts of interest and requires effective communication, competence, diligence, and protection of

18. See, e.g., Elyce H. Zenoff, *I Have Seen the Enemy and They Are Us*, 36 *J. Legal Educ.* 21, 21 (1986) (arguing that published articles are "boring, too long, too numerous, and have too many footnotes, which are also boring and too long").

19. Abel, *supra* note 10.

20. Alan Paterson, *Breach of Trust or Breach of Loyalty: How Best to Characterise Lawyer Deviance?* 11 *Legal Ethics* 115, 115 (2008). Notably, at an "Author Meets Readers" panel at the 2009 Annual Law and Society Association meeting, reader David McGowan of the University of San Diego also understood Abel's "trust" to mean loyalty to clients.

21. See Robert P. Lawry, *The Meaning of Loyalty*, 19 *Cap. U. L. Rev.* 1089, 1089 (1990) ("[T]he concept [of loyalty] is not defined or explicated in any of the various codes of ethics that have dominated the governing of American lawyers in the 20th century.... [T]he use of the principle of loyalty is problematic because we really do not have a firm grasp on the concept itself."); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 *Emory L.J.* 909, 960 (1980) ("The central problem in the developing law of legal ethics, I believe, is the concept of the lawyer's duty of loyalty, which is central to the lawyer-client relationship. The major task in the jurisprudence of legal ethics is to define, or redefine, the lawyer's duty of loyalty to the client."); see generally Eli Wald, *Loyalty In Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 *St. Mary's L.J.* 909 (2009).

confidential information.<sup>22</sup> Paterson's misconstruction of Abel's meaning was understandable. Not only does Abel not offer a definition of lawyers' trust, but his case studies, with the exception of Wischart's, actually deal with the betrayal of the duty of loyalty (Kreitzer, Muto and Furtzaig neglected their clients in breach of diligence; Cardozo, Brashich and Byler were tainted by personal conflicts of interest; and all the lawyers failed to effectively communicate with their clients).

Like Paterson and McGowan, I too read *Lawyers in the Dock* thinking that Abel was mostly concerned with attorney loyalty to clients, assuming that by "betrayal of trust" he meant betrayal of the duty of loyalty owed by lawyers to clients. If so, the question becomes does *Lawyers in the Dock* lend support to the claim that lawyers are disloyal to their clients?

To the extent that the case studies were meant to explore disloyalty to clients, they multiply the conceptual confusion because of Abel's case study selection methodology. While each illustrates some aspects of disloyalty, they more effectively demonstrate the impact of poor exercise of professional judgment, poor institutional design, and system-wide failures. Consider the experiences of Kreitzer and Muto. Their incompetence and neglect surely evidence disloyalty. Yet the cases are somewhat odd choices in that regard because a striking feature in both is that the lawyers never displayed loyalty to their clients to begin with. In other words, Kreitzer and Muto represent the absence of loyalty more than its breach. With more than 1,000 clients, what kind of attorney-client relationships could Kreitzer have possibly had with each client? Were the relationships significant enough to warrant a meaningful discussion of betrayal? Or was the problem his failure to form meaningful attorney-client relationships? Similarly, Muto's disregard of his clients' welfare is clearly a form of disloyalty. But it seems unsatisfactory to stop the analysis there because, in a sense, Muto's "real clients" were the "travel agencies" not the asylum seekers. The betrayal took place not by disregarding the clients' welfare, but by pretending to represent them.

Some scholars of the legal profession would argue that loyalty attaches as soon as an attorney-client relationship is formed, meaning that even lawyers like Kreitzer and Muto conceptually betrayed loyalty and therefore trust.<sup>23</sup> Even so, these case studies at best show only this generic betrayal of loyalty, which is not the intuitive notion of a much thicker notion of trust Abel invokes.

Next consider Furtzaig's case. Once again, because Furtzaig neglected his clients' cases he breached his duty of loyalty and therefore betrayed their trust. Yet as striking as his disloyalty are the institutional and organizational considerations that brought about that betrayal. If *Lawyers in the Dock* intended to illustrate lawyers' disloyalty to clients, Furtzaig's experience may not be the most effective illustration since that disloyalty was overshadowed by

22. Wald, *supra* note 21, at 920-936.

23. I thank Steve Pepper for making this point.

institutional and organizational factors, not to mention by competing loyalties to his senior partner and the law firm.

Cardozo certainly betrayed his client by crafting a settlement that overcharged her and increased his fees, and he deceived her by pretending to be loyal while taking advantage of her. At the same time, he also was very loyal to her, which makes the case questionable as an illustration of disloyalty. Even if the client's unusual loyalty to Cardozo was the product of his deception, selecting the case of a client who does not believe she suffered disloyalty to illustrate disloyalty is somewhat peculiar.

Finally, the relationship between Byler and his client does evidence strong loyalty and trust, but it is in great part personal, not professional. More importantly, while the "real" issue in the case is the betrayal of trust, many of the details actually explored in the case have to do with the investigation into his failure to escrow client funds (318, 320, 349). The two issues are, of course, related, yet the case deals more with the latter than it does with the former.

In conclusion, *Lawyers in the Dock's* failure to define "trust" opens the door to a significant misunderstanding of the book's normative claim. Construing Abel's "trust" to mean "loyalty to clients" is reasonable enough, and although the case studies illustrate disloyalty to clients, they also raise other complex issues which are left unexplored, such as the lawyers' systematic poor exercise of professional judgment, institutional weaknesses which caused Kreitzer, Muto, Furtzaig, Cardozo, Brashich, Byler, and Wisheart to fail, and system-wide failures that explain their misconduct.

*C. Does "Lawyers in the Dock" Prove Its Central Claim—  
Betrayal of Trust by the Legal Profession?*

In an "Author's Response" to readers,<sup>24</sup> as well as a recorded interview<sup>25</sup> and a recent "Author Meets Readers" panel discussion, Abel asserted that defining "trust" as "loyalty to clients" is too reductive and not his intention in *Lawyers in the Dock*. By "trust" he meant to encompass not only attorney loyalty to clients but also attorney loyalty to other constituencies such as courts, opposing counsel, the legal system, and the public. Moreover, he intended to examine not only attorney loyalty to clients but also instances of excessive zeal on behalf of clients (for example, Wisheart). Elsewhere, I have labeled this conception of multi-layered loyalty a "limited agency," to denote that a lawyer's fiduciary duty of loyalty to clients as an agent is limited and constrained by duties to other constituencies.<sup>26</sup> Second, by "trust" Abel meant avoiding conflicts of interest, effective communication, competence, diligence, and protection of

24. Abel, *supra* note 10 ("Loyalty to client...is an essential element [of trust], but it is not the whole. Excessive zeal...expresses too much lawyer loyalty to the client, not too little.").

25. *Lawyers in the Dock*, *supra* note 8.

26. Wald, *supra* note 21, at 952-954.



confidential information as well as the dependence of clients on lawyers for purposes of exercising their autonomy.<sup>27</sup>

In other words, by “trust” Abel apparently meant to (but unfortunately did not clearly) include the full range of an attorney’s duties to a client as well as to courts, opposing counsel, other lawyers, the legal system, and the public. Duties to client encompass not only loyalty but also effective representation in the broadest sense—enabling dependent clients to exercise autonomy in a highly regulated society. According to Abel, this is the sense in which Kreitzer, Muto, Cardozo, Brashich, and Wisheart betrayed trust. Duties to court include competence, professional decorum, and furthering the administration of justice, the sense in which incompetent Muto and abusive Wisheart betrayed trust. Duties to opposing counsel include respectful treatment as well as playing by rules, the sense in which Wisheart betrayed and was betrayed by opposing counsel, as well as the sense in which Cardozo and Brashich betrayed trust. Duties to other lawyers include serving the interests of one’s firm, the sense in which Furtzaig betrayed his own firm, ironic given that excessive loyalty to his senior partner and law firm motivated that misconduct. Finally, by breaching the rules of professional conduct and relevant rules of law as well as disserving their clients, the lawyers betrayed the system and public trust.

Armed with this refined definition of trust provided by Abel outside of the book, one can conclude that Abel’s case studies do in fact illustrate betrayal, and, therefore, that the book (although plagued by methodological and conceptual confusion) does suggest individual lawyers’ betrayal of trust. However, *Lawyers in the Dock* could have, but did not, illustrate the broader normative claim of betrayal of trust by the legal profession. In fact, the case studies could have supported a much harsher indictment of the legal profession, a charge Abel never pursues.

The legal profession encompasses solo and small firm lawyers, mid size and large firm attorneys, government, non-profit and in-house lawyers, judges and law professors. It also includes law firms and other entities such as law schools and bar associations. And it includes institutional design features, such as rules of procedure and evidence, local court rules, and fee shifting rules, as well as self-regulation, lawyer training, and attorney discipline apparatus. *Lawyers in the Dock*, however, purports to deal with only solo and small firm practitioners. It explicitly excludes mid-size and large firm lawyers and law firms as organizational “lawyers.” It also accepts the disciplinary system “as is,” asserting without proving that tinkering with the rules of conduct and sanctions would be ineffective, and stating that reform to the disciplinary system itself is outside the scope of the inquiry. The book also ignores a role for law schools, arguing that additional education is likely to be ineffective in reducing misconduct.

27. See, e.g., Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 617 (arguing that in a highly regulated society clients depend on lawyers for the meaningful exercise of their autonomy and that without such access to lawyers and the law clients are rendered second-class citizens).

Kreitzer's case illustrates not only his betrayal of individual clients, but also their betrayal by the broader profession. The institutional design of the personal injury practice arena sets up lawyers like Kreitzer for failure. Kreitzer neglected his clients for decades while he was celebrated as a success story of upward mobility. The pressures to amass a too-large-to-handle case inventory and delay resolution resulted in part from a failure to effectively monitor Kreitzer as well as from characteristics common to personal injury practice, including the unstable cash flow and the fact that most cases eventually settle.

Muto certainly betrayed his vulnerable dependent clients, but they were also betrayed by powerless and ineffective judges who tolerated Muto's chronic incompetence and by a system which allowed abusive "travel agencies" to practice without serious scrutiny. As much as Muto's case illustrates the betrayal of individual clients, it suggests the deplorable betrayal of this class of vulnerable clients by a dysfunctional immigration law system. To hold Muto alone responsible for his clients' plight seems to miss a big part of the picture.

Furtzaig's case indeed captures his betrayal of clients and his own law firm. But it also represents Furtzaig's betrayal by his supervisors and law firm as well as the broader profession. Furtzaig put himself through night school and worked endless hours only to fail miserably and find himself not only an abuser of clients but also a victim of an intensely competitive and even abusive work environment. By the time Furtzaig attained the promised success (becoming an equity partner), he was already engaged in misconduct and neglect. The legal profession provided no safety net, little to no guidance and mentoring, and no help to redeem and rebuild his professional life.

Cardozo and Brashich's client was a victim of her brother, an endlessly complex maze of legal rules she could not possibly navigate alone, no meaningful access to lawyers, and a cumbersome trust and estates system. Abel chooses to treat the client's blind loyalty to Cardozo and Brashich as evidence of the effectiveness of the deception they perpetrated on her. Arguably, the client's perspective also reflects the fact that she was betrayed so often, and by so many parties including the legal system's indifference and inaccessibility, that her lawyers' betrayal was the least offensive one she suffered.

Byler betrayed his friend-turned-client (who, by the way, was hardly vulnerable and dependent on Byler but rather a sophisticated consumer of legal services with ample access to the legal system), while Byler was betrayed by a profession that trained him poorly. A graduate of Harvard Law School and an alumnus of one of the oldest and most respected law firms, he apparently did not learn to exercise solid professional judgment. And despite a prolonged disciplinary action, no one helped Byler to see the errors of his way and save his career. To the contrary, the disciplinary system met Byler's arrogance, stubbornness, and refusal to admit error with its own brand of arrogance, stubbornness and insistence on humiliation (507). Exactly because Byler is a product of one of the best law schools in the country and one of its elite law firms, his failure, to the extent that his experience is revealing more

generally, taints not only him, but also the institutions that trained him and the profession that counted him as a member.

Wishart betrayed his client, opposing counsel and the judicial system. Yet his client was also betrayed by an ineffective judge and an abusive opposing counsel, an indifferent legal system (allowing a prima facie meritorious plaintiff to suffer years of delay in which she could not find a job as the result of her allegedly discriminating and harassing employer badmouthing her reputation), and finally an unjustly harsh outcome (dismissing her likely meritorious case with prejudice).

Moreover, all the clients in *Lawyers in the Dock* suffered because of their lawyers' ignorance, incompetence, and poor judgment. Collectively, their cases illustrate (but of course do not prove) the failure of the legal profession to train, guide and monitor lawyers. If graduates of Harvard Law School (Byler) and practitioners with a combined 80 years of experience (Cardozo and Brashich) fail so miserably, their experiences suggest a harsh indictment of the entire legal profession, exposing its promise of professionalism, and in particular its claims of immersing students in esoteric knowledge and self-regulation, as a sham. Ignoring the institutional and system-wide failures its case studies illustrate, *Lawyers in the Dock* ends up missing an opportunity to seriously challenge the legal profession to assume responsibility for its members and uphold its duties to the public.

#### *D. Future Reform*

Abel's reform proposals target whom he believes are the leading culprits for betrayal of trust—individual lawyers. Some of the proposed measures seem highly plausible. For example, Abel advocates publicizing disciplinary actions more widely, including by granting prospective clients online access to disciplinary records and eliminating private reprimand as a sanction (509). He also calls for improved institutional attorney socialization and selection, akin to the mentoring and discipline processes employed by the medical profession (509-512). Echoing Leslie Levin, Abel suggests that bar associations make short-term low-interest loans to financially distressed lawyers to prevent misconduct driven by need (513), recommends offering clients a bill of rights (514), and proposes that all fee agreements be confirmed in writing (516).

Other reform proposals appear implausible or undesirable. For example, requiring all lawyers to have a partner (513) seems to erroneously assume that will improve the professional conduct of individual lawyers. The case studies, however, lend no support for forcing lawyers to partner up, nor any support for the plausibility of this solution. In fact, Furtzaig was a member of a firm and in spite of the theoretical incentive to monitor his practice, he was isolated, suggesting that firm structure by itself is likely to accomplish little. Furthermore, Abel notes that “[Furtzaig's firm] was a well-respected firm with an effective calendaring system” (204). This observation, however, undermines Abel's recommendation because it suggests that having an effective calendaring system is not nearly enough to prevent neglect. The firm may have been “well-

respected,” but Abel’s own account reveals that it lacked any meaningful mentoring, support, and supervision procedures. Interestingly, the firm did immediately fire Furtzgaig and filed a grievance with the disciplinary committee when his neglect was exposed, but of course, it was only protecting itself. In that sense, the firm’s regulatory effort was too little (it did not prevent nor detect neglect for years) and certainly too late (significant neglect had already taken place). Similarly, Byler was at least a nominal member (of-counsel) of a law firm which played no role in his misconduct and discipline.<sup>28</sup>

Because *Lawyers in the Dock* does not explore in detail the aspects of the case studies that deal with widespread ignorance of the rules of conduct and the law, incompetence and poor exercise of professional judgment, poor institutional design, and system-wide failures, it misses an opportunity to explore reforms targeting not only individual lawyers but also the profession as a whole as well as some of its organizational actors. For example, while Abel dismisses education as ineffectual (512), the behavior of the lawyers portrayed in the case studies suggests the profession may need to rethink the way it trains its members and subsequently guides and monitors their performance. Indeed, it is somewhat ironic that Abel doubts education as an effective measure of combating misconduct on the ground that almost all of the lawyers he studied were highly experienced, long past the influence of law school and continuing education. To the extent that the case studies are generally revealing, the fact that educated and highly experienced lawyers misbehaved suggests not that education is likely to be ineffective but rather that something is wrong with the way the profession currently educates and trains its members.

If future studies confirm the prevalence of ignorance, incompetence and poor exercise of professional judgment, reforms might entail rethinking legal education at law schools, the bar admission process, and continuing legal education. Taking training and mentoring seriously might include reintroducing meaningful mandatory apprenticeships, instituting post-admission reviews as well as rigorous continuing legal education programs. Structural reforms may include not only making short-term low-interest loans to lawyers in need, but also to lawyers in practice areas in which cash-flow is inherently volatile, such as the personal injury arena.

Detailed analysis of reform proposals suggested by the practice realities exposed in the case studies was outside the scope of *Lawyers in the Dock*, and is equally outside the scope of this review. It is important to note, however, that because the book does not identify institutional and systematic failures

28. Other suggestions, such as requiring malpractice insurance as a condition for practicing law (513), may be plausible but nothing in the case studies lends support to it and Abel does not engage the lengthy debate on the subject. See Eli Wald, Taking Attorney-Client Communications (and therefore Clients) Seriously, 42 U.S.F.L. Rev. 747 (2008) (summarizing the literature debating mandating malpractice liability insurance).

as a problem, it does not contemplate reform proposals at that level and focuses on individual lawyers as both responsible for betrayal of trust and as the appropriate subjects of reform. The case studies (but not Abel) suggest that future reform proposals ought to also include other aspects of, and actors within, the legal profession.

### V. Conclusion

The problems *Lawyers in the Dock* identifies and the solutions Abel advocates are largely unrelated to the formal rules and regulations of the legal profession or their enforcement. Instead, the book studies lawyers' conduct, and its prescriptions entail professional, structural, institutional, and cultural fixes. This makes a powerful case for teaching legal ethics not as just a code course. Is there anything about the way we teach the course that could address the kind of ethical lapses detailed in the case studies? Perhaps teaching stories like these will inculcate a different set of professional expectations among students who might otherwise be fixated on compliance with the formal rules, and will help students overcome a naïve set of assumptions about which lawyers misbehave and why. The rich narratives in Chapters 2 to 7 make an invaluable contribution to the understanding of the causes and nature of lawyer deviance and misconduct. In particular, the case studies fill an unfortunate gap in the standard teaching materials of the legal ethics class and ought to be required reading, alongside studies of attorney deviance in other segments of the profession such as misconduct by large firms, government lawyers, and so on.<sup>29</sup>

While methodological and conceptual challenges ultimately prevent *Lawyers in the Dock* from proving that lawyers and the legal profession betray trust, the book does frame important issues for future qualitative and quantitative research. Abel's observations regarding solo and individual attorneys raise troubling questions about the profession's ability to train, mentor, and regulate individual members, and the case studies also suggest troubling institutional and systemic concerns. Indeed, if future research confirms the broader failures suggested by Abel's case studies, this review argues that appropriate reforms might need to take a more radical approach than the one advocated by *Lawyers in the Dock*.

The narrow focus of the book on solo and small firm lawyers notwithstanding, the case studies themselves raise intriguing institutional and system-wide issues. For example, while the case studies mostly deal with individual lawyers representing individual clients, the book does not generally explore the complex relationship between access to the practice of law by marginalized individuals and access by disenfranchised individuals to lawyers and legal services. A lawyer from a lower socioeconomic background with a

29. A compelling tale of misconduct in the large law firm context is Milton C. Regan, Jr., *Eat What You Kill: The Fall of a Wall Street Lawyer* (University of Michigan Press 2004).

non-prestigious law degree may seek to get ahead by serving individuals,<sup>30</sup> but success may come from pushing the ethical lines as documented in *Lawyers in the Dock*—too many cases and clients (Kreitzer, Muto and Furtzaig), too much bargaining (Byler and Wischart), etc. Yet these marginalized attorneys may be the only lawyers available to certain groups of clients (Muto’s immigrant clients, Cardozo and Brashich’s client). The ethics rules, in turn, allow those who prosper without serving individuals, notably elite large firm corporate lawyers,<sup>31</sup> to blame the victims—marginalized lawyers and clients alike—rather than the legal system.

Another issue left for future research is the implications of betrayal of trust in terms of professional deregulation. To the extent that the case studies suggest that lawyers are about as honest, corrupt, careful, lazy, and so on as people generally, and in particular that lawyers are not more trustworthy than ordinary people, they lend support to calls to de-regulate the practice of law as a profession and regulate it instead as an ordinary line of business.<sup>32</sup> Interestingly, while Abel argues in Chapter 8 that many of the functions that lawyers perform poorly and expensively could be performed better and more cheaply by non-lawyers, deregulation seems to be at odds with Abel’s turn in Chapter 8 to restore professionalism.

30. Consider Abel’s “successful” upwardly mobile lawyers.

31. See generally John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 319 (Russell Sage Foundation 1982) (coining the term the “two hemispheres” of the legal profession and documenting the tendency of large law firms to represent entity clients and of solo and small firms to represent individual clients).

32. See, e.g., Richard A. Posner, *The Problematics of Moral and Legal Theory* 185–211 (Harvard University Press 1999).