

Professor-Student Is *Not* a Fiduciary Relationship

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Introduction

In 1999, in doing legal research on academic disputes between students and either professors or colleges, I learned that the college nearly always wins in court, because the judge defers to the college in purely academic matters.¹ In practice, this means that a grieved student has no forum outside of hearings and appeals at his/her college. The obvious quest is to find a legal theory that will permit grieved students to be heard in court. In 1981, Professor Nordin suggested a contractual theory,² but judges have not accepted her proposal.

During 1999-2000, I flirted with the idea that professors had a fiduciary duty to their students, as a possible way of holding professors accountable for abuse of their students. In May 2007, after I finished my essay on academic abstention, I read several law review articles³ that suggested that professors have a fiduciary duty to their students. This essay considers whether professors have a fiduciary duty to their students and concludes that the professor-student relationship is *not* a fiduciary relationship.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm>.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Fiduciary Duty

A fiduciary is a person who is trusted to use the utmost good faith and fairness in dealing with the person who hires the fiduciary. In particular, a fiduciary is not permitted to take selfish advantage of the fiduciary relationship. Common examples of fiduciary relationships include:

- attorney - client
- physician - patient⁴
- agent - principal

¹ Ronald B. Standler, *Academic Abstention in the USA*, <http://www.rbs2.com/AcadAbst.pdf> (June 2007).

² Virginia Davis Nordin, "The Contract to Educate," 8 J. COLLEGE & UNIVERSITY LAW 141 (1981).

³ See Bibliography, below, at page 22.

⁴ See below, at page 19.

- employee - employer⁵
- parent - child; guardian - ward; and any other *in loco parentis* relationship
- trustee - beneficiary of trust
- clergy - parishioner
- among partners in a partnership

In many of these fiduciary relationships, the fiduciary has some specialized knowledge or skill that is used solely for the benefit of the person who hired the fiduciary. For example, an attorney represents a client, and applies the attorney's knowledge of law for the benefit of the client. For example, a guardian or parent presumedly has more knowledge and experience than a child, so that the guardian or parent can be trusted to make decisions in the best interest of the child. And, for example, a trustee not only knows how to safely invest money, but also how to avoid disbursing it wastefully or inappropriately.

A fiduciary relationship differs from the usual "arm's length" relationships in business transactions, because a fiduciary has a legal obligation of loyalty solely to the beneficiary of the fiduciary relationship. The beneficiary of a fiduciary relationship can appropriately trust — or can appropriately have confidence in — the fiduciary to do what is best for the beneficiary, unlike the skepticism and mutual distrust of a common business relationship.

Law Review Articles

In a short article published in the Harvard Law Review in 1957, Professor Seavey complained about the lack of due process protections given to students who were expelled from college.

In passing, Prof. Seavey noted that professors had a fiduciary relationship to students:

These same professors ... are in fact fiduciaries for their students and should be the first to afford to their students every protection. [FN3]

[FN3] A fiduciary is one whose function is to act for the benefit of another as to matters relevant to the relation between them. Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to students. One of the duties of the fiduciary is to make a full disclosure of all relevant facts in any transaction between them. See RESTATEMENT, AGENCY § 390 (1933); RESTATEMENT, TRUSTS § 170 (1935). The dismissal of a student comes within this rule.

Warren A. Seavey, "Dismissal of Students: 'Due Process,'" 70 HARVARD LAW REVIEW 1406, 1407 (June 1957).

Although it was "obvious" to Prof. Seavey that professors were fiduciaries, judges — as explained below — have rarely accepted that legal characterization of the professor-student relationship as a fiduciary relationship. Prof. Seavey was an expert on agency, restitution, and judgments, and a professor at Harvard Law School. He was *not* an expert on education law, he

⁵ *Snepp v. U.S.*, 444 U.S. 507, 518 (1980) ("... the employee possesses fiduciary obligations arising out of his duty of loyalty to his employer."); Restatement Second of Agency § 1 (1958).

apparently expected conventional law to be consistently applied to schools and colleges. I think Prof. Seavey was angrily responding to harsh treatment of black students who engaged in civil disobedience during the early days of the civil rights movement.

Other law review articles are cited below, at page 22.

Court Cases

As mentioned in my essay on *Academic Abstention*, judges do *not* apply conventional contract law or conventional tort law in student v. college cases, thus ensuring that the college always wins, regardless of the facts of the dispute. Therefore, I have no confidence that judges would recognize the existence of a professor's fiduciary duty to a student, even if such a fiduciary relationship were appropriate.

The following cases are among the few reported cases that discuss the possible fiduciary duty of a professor. Given that there are many hundreds of reported cases involving student v. university, these few cases indicate that judges rarely consider a possible fiduciary duty by professors.

Zumbrun

A student, Jean Zumbrun, sued the University of Southern California for a refund of \$ 518 tuition, and other damages, when the professor who taught Sociology 200 canceled the remaining class meetings after 1 May 1970 and canceled the final exam that was scheduled on or before 2 June 1970. Prof. Miller joined faculty strike that "protested U.S. foreign policy in Cambodia". Zumbrun's theories included breach of fiduciary duties. The trial court dismissed her Complaint, but the appellate court reinstated some of her claims, *not* including the alleged breach of fiduciary duty. The appellate court wrote:

We do not believe that the allegations of the complaint plead sufficient facts to impose a liability for a breach of a fiduciary duty which caused plaintiff to suffer an economic damage, other than possibly the unearned amount of tuition and costs allocable to 'Sociology 200.' The initial difficulty with this breach of fiduciary duty theory is that facts giving rise to a confidential relationship have not been pleaded. As explained previously, the normal relationship between a student and the university and its agents is contractual. A bare allegation that defendants assumed a fiduciary relationship or that they entered into an educational joint venture with plaintiff are conclusions. '(I)t is the general rule that an allegation that one is a trustee is but a conclusion of law' (Cullinan v. Mercantile Trust Co. (1926) 80 Cal.App. 377, 383, 252 P. 647.) An 'allegation that defendant holds the property 'as Trust' is a naked conclusion of the pleader.' (Neusted v. Skernswell (1945) 69 Cal.App.2d 361, 364, 159 P.2d 49, 50.) '(T)here is not a fiduciary relation between the promisor or promisee and the beneficiary of a contract.' (Rest.2d Trusts, s 14, com. b.) No facts have been alleged setting forth a project, educational in nature, with a common purpose of mutual interest to all parties and one in which there was a mutual right to control the management and operation. (Cf. Ragghianti v. Sherwin (1961) 196 Cal.App.2d 345, 351,

16 Cal.Rptr. 583; *Goldberg v. Paramount Oil Co.* (1956) 143 Cal.App.2d 215, 219-220, 300 P.2d 329.) The mere placing of a trust in another person does not create a fiduciary relationship. (*Ampuero v. Luce* (1945) 68 Cal.App.2d 811, 819, 157 P.2d 899.) Finally, an agreement to communicate one's knowledge, exercising his special knowledge and skill in the area of learning concerned, does not create a trust but only a contractual obligation. (Cf. *Gonsalves v. Hodgson* (1951) 38 Cal.2d 91, 98--99, 237 P.2d 656.)

The allegation that in representing, agreeing, promising, and warranting that 'Sociology 200' consisted of the particulars heretofore mentioned and 'that defendants would exercise good faith and judgment concerning said course' even when coupled with an averment that defendants 'assumed a relationship to plaintiff which was fiduciary in nature,' or that 'plaintiff reposed trust and confidence in said defendants' and that they 'with knowledge thereof, accepted the trust and confidence of plaintiff,' or that defendants 'induced plaintiff's complete and trusting personal confidence' resulting in a relationship comparable to a fiduciary relationship, or that they entered into a 'joint educational venture' is not, in our opinion, adequate. There must be a further statement as to the 'res' or 'thing' dealt with resulting in some benefit to defendants and a corresponding damage to plaintiff. Nor does the additional allegation that defendant Miller undertook to teach the course and drew his normal salary suffice. What information concerning her affairs was disclosed in confidence to defendants, or any of them? (Civ.Code, § 2219.) What were the matters connected with the trust and what was the advantage obtained by the defendants? (Civ.Code, § 2228.) At most, the only benefit received by any defendant, even if there were a fiduciary relationship and a 'breach of trust,' was the unearned portion of the tuition and fees paid by plaintiff which were allocable to 'Sociology 200.'

Zumbrun v. University of Southern California, 101 Cal.Rptr. 499, 506-507 (Cal.App. 2 Dist. 18 Apr 1972).

Crook

The U.S. District Court summarized the facts:

In 1977, plaintiff Wilson Crook was a student at the University of Michigan studying for his masters degree in geology. As a condition for the award of his masters degree, Crook was required to complete a masters thesis. In April 1977, he submitted a thesis entitled "The Geology, Mineralogy and Geochemistry of the Rare-Earth Pegmatites, Llano and Burnet Counties, Texas." Crook's thesis was accepted by the department, and the school conferred a M.S. degree upon him on April 30, 1977.

Subsequent to the award of Crook's masters degree, members of the school's faculty began to suspect that portions of his thesis were bogus and based upon false and fabricated research data. On April 10, 1979, the University of Michigan Graduate School formally notified Crook that his thesis was being challenged and that his degree was at risk. The Graduate School held a hearing on this matter on September 22, 1979, after which it recommended that Crook's degree be rescinded. The Regents of the University subsequently voted to accept the recommendation, and Crook's masters degree was officially rescinded.⁶

A number of the faculty members of the University's Department of Geological Sciences were purportedly concerned with the dissemination of false information which might result from published materials which were drawn from or based upon Crook's discredited thesis. They decided that in order to set the record straight and protect the reputation of the

⁶ Crook sued the University and lost. *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987).

University, they would publish an article discrediting the "discoveries" announced in Crook's thesis and suggesting means by which the international geological community could avoid such misinformation in the future. With this in mind Professors Donald Peacor, William Simmons, Eric Essene, and William Heinrich ("professors") drafted an article and submitted it to the geological publication, *The American Mineralogist*, (the official publication of co-defendant Mineralogical Society of America). Prior to the publication of the article, the professors and the editorial staff of *The American Mineralogist* forwarded a draft of the article to Crook in order to solicit his response and a possible reply article. [FN1] The discrediting article was eventually published in the January-February 1982 issue of *The American Mineralogist*, which Crook claims was released for distribution on or about February 28, 1982.

FN1. Crook drafted a rebuttal article, but the editors of *The American Mineralogist* deemed it unfit for publication in a scholarly journal.

On February 17, 1983, Crook brought this action against the professors (in their individual and official capacities) and against the Mineralogical Society of America, alleging breach of contract, breach of fiduciary duties, defamation, intentional infliction of emotional distress, interference with a contractual relationship, and interference with a prospective advantage.

Crook v. Peacor, 579 F.Supp. 853, 854-855 (E.D.Mich. 31 Jan 1984).

The defendants moved for summary judgement. Regarding Crook's allegations of breach of fiduciary duties, the court wrote:

Count II [of Crook's complaint] alleges a substantially similar claim predicated upon a breach of unspecified fiduciary obligations. Defendant professors move for dismissal or summary judgment as to these counts claiming failure to state a cause of action.

Crook's complaint fails to allege any of the particular elements of Counts I or II. At hearing Crook's counsel conceded that Counts I and II were "fall back positions," and that he did not have anything specific to offer in support of them at that time. Crook has offered no affidavit or deposition which puts forth facts to support these counts. It would be unfair to require defendants to defend against these vague claims without knowing the essential nature of the contractual or fiduciary duties which they are alleged to have breached. Therefore, defendant professors' motion for dismissal of these counts is granted without prejudice. If discovery should reveal the existence of such contractual or fiduciary relationships, Crook may re-state such claims.

Crook, 579 F.Supp. at 857.

My search of the Westlaw database on 27 May 2007 found no subsequent opinion for this case. This case only shows that Plaintiff's attorney believed that professors *might* have a fiduciary duty to a former student. In this case, Crook was no longer a student when his former professors decided to publish, thereby alerting the geological community to false information in Crook's work. Because there was no relationship between Crook and his former professors, it follows that there can not be a fiduciary relationship.

André

In a 1994 New York State case, two college students were advised by the Chairman of the Computer Science department that a particular graduate-level computer programming class was suitable for their meager⁷ mathematical background. In fact, the class was far above the students' ability to comprehend. The students sued in small claims court and won a refund of the \$855 tuition they paid, refund of the \$30 cost of the textbook, \$115 damages under state deceptive business practices statute, and \$1000 punitive damages.⁸ An appellate court reversed by a 2 to 1 vote, holding that the students' claims were really a form of "educational malpractice", which, regardless of whether in tort or in contract, was not actionable in New York as a matter of public policy. The judge in the small claims court wrote:

In this case the defendant assumed the obligations of a fiduciary towards the plaintiffs when it assigned Dr. Narayan Murthy, Chairman of the Department of Computer Science, to be plaintiffs' "advisor". It was Dr. Murthy that "advised" and misinformed the plaintiffs about the true nature of the Pascal Course by reassuring them that no advanced math background was needed. The plaintiffs trusted Dr. Murthy as their "advisor" and relied upon his judgment and inducements and purchased the Pascal Course.

After the Pascal Course started Dr. Murthy admitted that Professor Zahn had chosen an inappropriate textbook and was not teaching the Pascal Course properly. Dr. Murthy was Department Chairman and the supervisor of Professor Zahn. Dr. Murthy had both the power and the obligation to address plaintiffs' complaints by ordering Professor Zahn to change textbooks and teach the basic computer programming course which the plaintiffs and the class had purchased. Instead, Dr. Murthy did nothing. His fiduciary duties required much, much more [*Di Maio v. State*, 135 Misc.2d 1021, 517 N.Y.S.2d 675, 677 (1987)].

Because the defendant assumed a fiduciary duty towards the plaintiffs the Court need not address the broader issue of the nature of the general relationship between student and college [see, e.g., *Village Community School v. Adler*, *supra*, at 124 Misc.2d 817, 818, 478 N.Y.S.2d 546, 547 citing *Donohue v. Copiague Union Free School District*, 47 N.Y.2d 440, 443, 418 N.Y.S.2d 375, 391 N.E.2d 1352 (1979); *James v. SCS Bus. & Tech. Inst.*, NYLJ, Jan. 15, 1993, at 28, col. 4, *supra* (colleges which participate in HEA programs are fiduciaries)]. The defendant assumed a fiduciary duty towards the plaintiffs and breached that duty and is liable for the damages flowing therefrom.

André v. Pace University, 618 N.Y.S.2d 975, 980-981 (N.Y.City Ct. 13 May 1994).

The appellate term by a 2 to 1 vote, reversed the decision of the trial court:

The [trial] court also found that defendant was liable for breach of fiduciary duty, violation of General Business Law § 349, and determined that plaintiffs were entitled to rescission of the contract based on lack of consideration and on the ground that defendant's description of the class was "false, deceptive and misleading". These causes of action in essence constituted mere reformulations of an educational malpractice claim, which was improperly entertained by the court. Accordingly, there is no basis to impose damages....

⁷ One of the Plaintiffs had a B.A. English literature, while André has a M.A. in Film. 655 N.Y.S.2d at 778. These majors did not require them to take advanced mathematics classes.

⁸ *André v. Pace University*, 618 N.Y.S.2d 975 (N.Y.City Ct. 1994).

André v. Pace University, 655 N.Y.S.2d 777, 780 (N.Y.Sup.App.Term 15 Nov 1996).

Although the essence of Plaintiff's *pro se* Complaint was that they had relied to their detriment on the representations of the Chairman of the Computer Science Department, the appellate court tersely dismissed this detrimental reliance claim:

Dr. Murthy's representation that the plaintiffs would have no difficulty with the class was a mere expression of opinion which cannot give rise to an actionable claim.

André, 655 N.Y.S.2d at 780 (N.Y.Sup.App.Term 1996).

This is an example of how academic abstention⁹ overrides conventional contract law in a student v. university dispute.

Shapiro

Shapiro was a graduate student in social work who counseled psychotherapy patients at an off-campus center. After Shapiro fulfilled her obligations in the psychotherapy practicum for school credit, she transferred all but one of her patients to other counselors. Shapiro continued to see one patient, who Shapiro believed was suicidal and might not tolerate transfer to another counselor. Zeitlin, Shapiro's supervisor at the off-campus center, brought charges¹⁰ of unethical conduct against Shapiro, in connection with her continuing to counsel the one patient. Shapiro's faculty advisor, Prof. Butterfield, testified at the hearing. Shapiro then sued Butterfield, alleging breach of fiduciary duty. The trial court, affirmed by an appellate court, dismissed Shapiro's Petition. The appellate court wrote:

Count I of Shapiro's petition alleged that Butterfield breached his fiduciary duty toward Shapiro in the following ways: (1) by referring Zeitlin's complaint to the administration; (2) by failing to advise Shapiro of the prudent course; (3) by failing to aid or facilitate an alternative dispute resolution; (4) by publicly revealing confidential information; and (5) by testifying against Shapiro in the NASW hearing.

We find that Shapiro failed to adequately allege that a fiduciary relationship existed between herself and Butterfield. Shapiro cites to no cases in which a fiduciary relationship has been found to exist between a student and a faculty advisor. However, Shapiro claims that she pled the requirements for the establishment of the relationship in accordance with *Emerick v. Mutual Benefit Life Insurance Co.*, 756 S.W.2d 513 (Mo.banc 1988). Those requirements are:

- (1) as between parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance;
- (2) things of value such as land, monies, a business, or other things of value must be possessed or managed by the dominant party;
- (3) there must be a surrender of

⁹ Ronald B. Standler, *Academic Abstention in the USA*, <http://www.rbs2.com/AcadAbst.pdf> (June 2007).

¹⁰ The charges were first presented to the Dean of the College, who refused to hear the allegations because they were off-campus conduct. The charges were then presented to the National Association of Social Workers (NASW), who, after a hearing, issued a private letter of censure to Shapiro, who was a student member of NASW.

independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party.

Id. at 526-27. The petition, however, contained only bare allegations supporting such a relationship. Such allegations amount to mere conclusions and are insufficient to support the claim. [citation omitted] The motion to dismiss was properly granted as to Count I of the petition.

Shapiro v. Butterfield, 921 S.W.2d 649, 651 (Mo.App. E.D. 7 May 1996).

Frost

During 1987-1990, Prof. Frost at the University of Tennessee obtained research contracts from employees of the U.S. Government in exchange for awarding them bogus graduate degrees based on dissertations containing plagiarized material. Prof. Frost and some of his students were later convicted of mail fraud. The courts determined that Prof. Frost had a fiduciary relationship with the University.

It is axiomatic that an employee has a fiduciary duty to protect the property of his employer. *See, e.g., Carpenter*, 484 U.S. at 27, 108 S.Ct. at 321 (employee has fiduciary duty to protect and not exploit confidential business information of employer); *see generally* RESTATEMENT (SECOND) OF AGENCY § 1 (1958)(defining "agency" as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act"). A professor therefore owes a fiduciary duty to protect the property of his employer university, just like any other employee. *See Cahn v. Antioch Univ.*, 482 A.2d 120, 131-32 (D.C. 1984)(deans owed fiduciary duty to university when managing university funds).

Frost and Turner had considerable influence, although not complete control, over whether one of their students received an advanced degree from UTSI. The department of engineering, of which Frost was the Chairman, has only a limited number of graduate students. Further, the major professor of a student has tremendous influence over the direction and ultimate success of that student's dissertation or thesis, the completion of which is integral to the attainment of an advanced degree. Indeed, Berlinrut testified that he did not graduate from UTSI because Frost gave him a "no progress" for his dissertation research during his last quarter, and because he failed his comprehensive final examination, which Frost prepared by taking the unusual step of not telling Berlinrut beforehand that the exam would include an additional math problem.

Accordingly, Frost and Turner owed a fiduciary duty to the University when determining whether a student would graduate if the University has a property right in a degree which it has not issued yet. Ultimately, a university is a business: in return for tuition money and scholarly effort, it agrees to provide an education and a degree. The number of degrees which a university may award is finite, and the decision to award a degree is in part a business decision. Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will hurt the reputation of the school and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money. The University of Tennessee therefore has a property right in its unissued degrees, and Frost and Turner had a fiduciary duty to the University when exerting their considerable influence over whether the school would give a degree to a student.

U.S. v. Frost, 125 F.3d 346, 366-367 (6th Cir. 12 Sep 1997), *cert. den.*, 525 U.S. 810 (1998).

Ho

During 1982-89, Su Inn Ho was a graduate student in chemistry at the University of Texas at Arlington, where she was pursuing a doctoral degree. After she was dismissed from the doctoral program for failing an oral examination on the fundamentals of chemistry, she sued *pro se*, alleging many different theories, including breach of fiduciary duty by her professors. She alleged that if her professors had told her earlier that she was not qualified for a doctoral degree, she would not have wasted so many years of her life (and wasted her tuition money and provided free chemistry research services to professors) pursuing a doctoral degree. The trial court granted summary judgement to defendants and an appellate court affirmed:

Whether a formal fiduciary relationship exists is a question of law when the underlying facts are undisputed. when influence has been acquired and abused, or when one personally gains from the trust and confidence reposed by another, a fiduciary relationship is likely to exist. *Moore*, 595 S.W.2d at 507-08 [(Tex. 1980)].

Initially, we do not find as a matter of law that formal fiduciary relationships exist between teachers and students in a normal educational setting. Secondly, in deciding whether there was an informal fiduciary relationship, in view of Ho's allegations and in a summary judgment context, it was the burden of the individual defendants, as summary judgment movants, to present affirmative evidence that no such relationship existed. *In re Estate of Thompson*, 873 S.W.2d at 114. In each of their affidavits, the individual defendants averred that they had a normal student-teacher relationship with Ho. They asserted they did their usual job duties of teaching, supervising, advising, and evaluating her. As we have noted, they also averred that the duties required of Ho were those usually and normally required of doctoral students. The summary judgment evidence was sufficient to show that Ho's relationship with the individual defendants was not, by its nature, confidential. That being true, the evidence was sufficient to show the nonexistence of the two required elements necessary to establish an informal fiduciary relationship. Thus, the individual defendants established they had no affirmative duty to speak arising from such a relationship. *Ho v. University of Texas at Arlington*, 984 S.W.2d 672, 692-693 (Tex.App.-Amarillo 4 Nov 1998), *review denied*, (Tex. 1999).

Schneider

In 1990-91, a female student was sexually harassed by male professor. She sued the college, alleging, among other things, breach of fiduciary duty. The jury awarded her \$115,000 and the college appealed. The New Hampshire Supreme Court held that the college was a fiduciary.

The party reposing confidence becomes dependent on the fiduciary because he or she must rely on the fiduciary for a particular service. *See Frankel, Fiduciary Law*, 71 CAL. L.REV. 795, 800 (1983).

In the context of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one. *Cf. Schneider, Sexual Harassment and Higher Education*, 65 TEX. L.REV. 525, 552 (1987). Students are in a vulnerable situation because "the power differential between faculty and students ... makes it difficult for [students] to refuse unwelcome advances and also provides the basis for negative sanctions against those who do refuse." Bogart & Stein, *Breaking the Silence: Sexual Harassment in*

Education, 64 PEABODY J. EDUC. 146, 157 (1987); cf. M. Paludi, *Sexual Harassment on College Campuses: Abusing the Ivory Power* 85-87 (1990) (discussing student-professor power differential and role in sexual harassment).

When the plaintiff enrolled at PSC, she became dependent on the defendants for her education, thereby requiring them "to act in good faith and with due regard" for her interests. *Lash*, 124 N.H. at 439, 474 A.2d at 982. The relationship between students and those that teach them is built on a professional relationship of trust and deference, rarely seen outside the academic community. As a result, we conclude that this relationship gives rise to a fiduciary duty on behalf of the defendants to create an environment in which the plaintiff could pursue her education free from sexual harassment by faculty members.

It would be prudent for educational institutions "to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to [sexual harassment]." *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 300, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) (Stevens, J., dissenting). "A well-designed and implemented grievance procedure will deal effectively with faculty misconduct, provide an accessible and fair forum for student complaints, and promote the creation of an environment in which sexual harassment is not tolerated." *Schneider*, *supra* at 574.

Finally, our conclusion that a fiduciary relationship existed between the defendants and the plaintiff does not rest on the *in loco parentis* doctrine. In *Marquay v. Eno*, 139 N.H. 708, 717-18, 662 A.2d 272, 279 (1995), we held that a special relationship exists between primary and secondary schools and their students, and that that relationship imposes a duty of care upon schools to protect students who they know or should know are being sexually abused by school employees. We based our conclusion in part on the role of schools as parental proxies over minor students. *See id.* at 717, 662 A.2d at 279. In contrast, the fiduciary relationship in this case rests on the unique relationship described above.

Schneider v. Plymouth State College, 744 A.2d 101, 105-106 (N.H. 16 Dec 1999).

Johnson

The facts of this case, as alleged by Plaintiff in his Complaint, were summarized by the U.S. District Court:

Plaintiff Kris Johnson is a graduate student in the doctoral program at Yale University, in the School of Forestry and Environmental Studies. Upon his entrance into the program, he was assigned a committee of faculty advisors to assist him in the development of his dissertation. Defendant David Skelly is a member of this committee and defendant Oswald Schmitz is co-chair.

While working on a research project for Schmitz in the summer of 1995, Johnson developed the idea for his dissertation, based on the Trophic-Dynamic Theory of Redundancy (the Theory), and recorded his notes and other information about the Theory in a private journal. During that time, Johnson discovered two other student workers reading his journal and later overheard them explaining its contents to Schmitz. As a result of this incident, Johnson expressed hesitation when Schmitz requested that he explain his ideas. Johnson was told by Schmitz that in order to complete his dissertation and pass his qualifying exam, he would have to trust the faculty. Johnson subsequently explained the Theory to Schmitz. Schmitz thought highly of the Theory, and recommended that Johnson prepare a grant to obtain funding for further research.

Johnson expressed concern to Kristina Vogt, a Yale faculty member who was the other co-chair of his dissertation committee, that Schmitz would misappropriate his ideas; Vogt assured him that this would not happen. However, unbeknownst to Johnson, during that year

Schmitz planned to take credit for the Theory and began steering his research in that direction. As this was occurring, Johnson continued to work on his research, incorporating a novel technology called the Reaction Norm Approach into the Theory, and submitted a paper for publication in a well-known journal describing certain aspects of the theory. The Reaction Norm Approach was later appropriated by Skelly.

In mid-August 1996, Johnson took the written part of his doctoral qualifying exam, and was advised by Vogt that he had done very well. In Fall 1996, Johnson appeared before the members of his "doctoral dissertation committee" for the oral part of his qualifying exam. During the exam, Johnson was aggressively criticized by Schmitz and Skelly in order to discourage him from pursuing his ideas and to allow them to misappropriate the Theory. Johnson was told that his "thinking was flawed," "he could not see the big picture," and his ideas were "ridiculous and unoriginal."

Following the exam, Schmitz told Johnson that he was relieving him of his ideas and subsequently, Schmitz and Skelly published Johnson's Theory and Reaction Norm Approach without attribution to Johnson. This publication precluded Johnson from pursuing further research on the Theory, as he was no longer able to obtain funding, and he was forced to abandon the Theory as his dissertation topic.

In January 1997, Vogt assured Johnson that she would stop Schmitz from further appropriating the Theory. However, afraid that she would not do so effectively, Johnson also submitted a formal letter to the Director of Doctoral Studies complaining of academic fraud. He did not receive a formal response, and in September, Yale stopped delivering his monthly salary supplement and his funding.

Johnson then wrote to the Dean of Yale School of Forestry and Environmental Studies who informed him that an Inquiry Committee would be formed. Five months later, the Committee informed Johnson that they had not found any reasonable grounds for believing his allegations of academic fraud. The investigation consisted of a keyword search to determine originality and did not include either intellectual analysis of Johnson's ideas, or personal interviews with plaintiff. Johnson appealed to the Provost who declined to reevaluate his claim. [all citations to Complaint omitted]

Johnson v. Schmitz, 119 F.Supp.2d 90, 91-92 (D.Conn. 29 Sep 2000).

Johnson then filed litigation against Yale University and Profs. Schmitz and Skelly, including a claim of breach of fiduciary duty. Defendants moved to dismiss, but the trial court held that the Complaint properly stated claims for breach of contract, breach of fiduciary duty, and negligence:

C. Breach of Fiduciary Duty

1. Claim against Yale. [footnote omitted]

The plaintiff claims that since Yale was "in a position of power and authority" over him and "in a position of trust and confidentiality with regard to his education ideas and work product," Yale had a fiduciary duty toward him, based on the "unique[ness]" of the particular relationship between a "graduate-level student and an educational institution." He avers that as a student climbs the education ladder, the student-school relationship transforms. According to Johnson, because Yale graduate students are expected to develop their own research ideas and to supply funding for this research in the form of grants, under the sponsorship of professors, they are uniquely dependent on the University. Therefore, Yale's promise to its graduate students to provide a "nurturing environment," is a basis for the conclusion that a fiduciary relationship may exist between Yale and Johnson.

A fiduciary relationship is "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Dunham v. Dunham*, 204 Conn. 303, 320, 528

A.2d 1123 (1987) (a fiduciary relationship could be found to exist between brothers where the younger brother continually placed trust and confidence in the older brother, as an attorney, for legal and non-legal advice); *Alaimo v. Royer*, 188 Conn. 36, 37-41, 448 A.2d 207 (1982) (fiduciary relationship existed between plaintiff, 60 year old woman, and defendant who represented himself as knowledgeable real estate broker); *cf. Southbridge Associates v. Garofalo*, 53 Conn.App. 11, 18, 728 A.2d 1114 (1999) (no fiduciary relationship exists between mortgage lender and mortgagor borrower where bank had not become borrower's financial advisor). Accordingly, "[t]he fiduciary must act honestly, and with the finest and undivided loyalty[.]" *Konover Dev't Corp. v. Zeller*, 228 Conn. 206, 220, 635 A.2d 798 (1994).

The Connecticut Supreme Court has purposefully refrained from defining "a fiduciary relationship in precise detail and in such a manner as to exclude new situations." *Id.* at 320, 635 A.2d 798 (quoting *Harper v. Adametz*, 142 Conn. 218, 225, 113 A.2d 136 (1955)) (relationship between real estate agent who placed newspaper advertisement for sale of land and bidder could be defined as fiduciary); *accord Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 429 (2d Cir. 1999) (holding that jury could have found a fiduciary relationship between the Diocese and parishioner Martinelli based on priest's ties to plaintiff and Diocese's "knowledge and sponsorship" of that relationship).

Given the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student. Yale allegedly represented that it would safeguard its students from faculty misconduct and provide a nurturing environment for its students. In light of the Connecticut Supreme Court's disinclination to confine the scope of the fiduciary duty doctrine by precise definition and its willingness to allow for case-by-case analysis in new situations, this Court concludes that greater factual development is required to determine whether such a relationship existed here. Plaintiff may further develop such factual issues as Yale's representation of its mission towards graduate students, and whether or not it represented that it would take care of graduate students to the exclusion of all others, which could be relevant to the determination of whether Yale owed a fiduciary duty to Johnson. Therefore, this analysis must await a full factual development at at least the summary judgment stage, and Yale's motion to dismiss is denied with respect to this Count.

2. Claim against Schmitz and Skelly.

The plaintiff claims that because Schmitz and Skelly were in a "position of power and authority" over Johnson, their relationship with him was of a fiduciary nature. Professors Schmitz and Skelly held such a position because they were assigned to serve on his dissertation advisory committee, whose sole purpose was to "assist Johnson in the development and completion of his dissertation."

Upon further factual development, plaintiff may be able to show that the high degree of trust and confidence he placed in his professors was justified. His relationship with Schmitz and Skelly was personal and individualized, and as his advisors, they had some duty to protect his interests. Accordingly, this relationship appears somewhat analogous to the attorney-client relationship, because the members of his committee were not entitled to act for their own benefit. Further, Schmitz allegedly encouraged Johnson to trust him in sharing his dissertation ideas, and stated that failure to do so would be detrimental to Johnson's academic prospects. This act of encouragement is relevant to the consideration whether a fiduciary relationship was created here. *See Alaimo*, 188 Conn. at 37, 448 A.2d 207 (fiduciary

relationship existed where defendant real estate broker encouraged plaintiff to trust him and assured her that he was experienced).

Therefore, for the reasons this Court concludes that Johnson might be able to establish that he has a fiduciary relationship with Yale, he may similarly be able to demonstrate a factual predicate for a fiduciary relationship with Schmitz and Skelly. The plaintiff alleges that the fiduciary duty was breached because Skelly and Schmitz, *inter alia*, misappropriated his ideas. If he can prove the existence of such a duty and the breach, the burden would then shift to Skelly and Schmitz to prove fair dealing by clear and convincing evidence. *Dunham*, 204 Conn. 303, 323, 528 A.2d 1123 (1987).

For these reasons, defendant's motion to dismiss the breach of fiduciary duty count against Schmitz and Skelly is DENIED.

[all citations to the Complaint and Briefs are omitted]

Johnson v. Schmitz, 119 F.Supp.2d at 97-98 (D.Conn. 29 Sep 2000).

Subsequently, the Parties negotiated a draft settlement agreement on 28 June 2001 that required each of the professor-defendants "to disclaim in writing ownership of any ideas advanced as original by plaintiff in his dissertation prospectus."¹¹ Negotiations then broke down and the individual disclaimers were never provided to Johnson. Thereafter, Johnson's attorney negotiated a written settlement agreement to which Johnson never agreed, the defendants attempted to enforce that agreement, but the trial court refused, and the case proceeded towards trial.¹² My search of the Westlaw databases on 26 May 2007 found no further reported opinion in this case.

Chou

Beginning in 1983, Joany Chou was a graduate student pursuing a Ph.D. at the University of Chicago. Prof. Roizman was her doctoral advisor. Subsequent to her graduation, Dr. Chou worked in Prof. Roizman's laboratory as a post-doctoral research assistant, until 1996. Prof. Roizman is listed as sole inventor on U.S. Patent 5,328,688 and co-inventor on U.S. Patents 5,795,713 and 5,922,328. Dr. Chou sued, alleging she should be the sole inventor on the '688 Patent and co-inventor on the other two Patents (i.e., correction of inventorship on Patents), and also sued Roizman on breach of fiduciary duty to her, and other counts.

For purposes of the claim that Prof. Roizman breached his fiduciary duty to Chou, the following allegation by Chou is important:

Chou allegedly told Roizman in February of 1991 that her discoveries should be patented, and he allegedly disagreed. [citations omitted] At that time, however, Roizman had already filed the '688 patent application, [footnote omitted] which was allegedly directed to the same disputed invention, and had named himself as the sole inventor of that subject matter.

Chou v. University of Chicago, 254 F.3d 1347, 1353 (Fed.Cir. 3 July 2001).

¹¹ *Johnson v. Schmitz*, 237 F.Supp.2d 183, 186 (D.Conn. 19 Dec 2002).

¹² *Johnson v. Schmitz*, 237 F.Supp.2d 183, 192 (D.Conn. 19 Dec 2002).

Dr. Chou alleges that Prof. Roizman fraudulently concealed from her that he had misappropriated her invention and filed for a Patent as sole inventor.

The U.S. District Court dismissed her claims, but the U.S. Court of Appeals reversed:

We also agree with Chou that the district court erred in dismissing her claim against Roizman for breach of fiduciary duty. A fiduciary duty in Illinois may arise in one of two ways. A fiduciary relationship automatically arises from particular relationships, such as attorney-client and principal-agent, as a matter of law. *Ransom v. A.B. Dick Co.*, 289 Ill.App.3d 663, 224 Ill.Dec. 753, 682 N.E.2d 314, 321 (1997). A fiduciary relationship may also arise from the special circumstances of the parties' relationship, such as when one party justifiably places trust in another so that the latter gains superiority and influence over the former. *Id.* The relevant factors in determining whether the latter fiduciary relationship exists include the disparity in age, education, and business experience between the parties, and the extent to which the "servient" party entrusted the handling of its affairs to the "dominant" party and placed its trust and confidence in that party. *Id.* The existence of a fiduciary relationship prohibits the dominant party with the duty from seeking or obtaining any selfish benefit for himself at the expense of the servient party while the fiduciary duty exists. *McCartney v. McCartney*, 8 Ill.2d 494, 134 N.E.2d 789, 792 (1956); *Steinmetz v. Kern*, 375 Ill. 616, 32 N.E.2d 151, 154 (1941).

Chou alleged that Roizman held a position of superiority over her as her department chairman, and that he had specifically represented to her that he would protect and give her proper credit for her research and inventions. Given the disparity of their experience and roles, and Roizman's responsibility to make patenting decisions regarding Chou's inventions, Chou has adequately pleaded the existence of circumstances that place on Roizman a fiduciary duty with respect to her inventions. Furthermore, Chou pleaded that Roizman breached that duty by naming himself as an inventor of her discoveries. Resolving all inferences in favor of Chou, as we must at this stage of the proceedings, we conclude that she has sufficiently stated a claim of breach of fiduciary duty and that the district court erred in dismissing that claim.

....

We also agree with Chou that she has stated a claim against the University for breach of fiduciary duty under the theory of respondeat superior for the same reasons as for her fraudulent concealment claim.

Chou v. University of Chicago, 254 F.3d 1347, 1362-63 (Fed.Cir. 3 July 2001).

Because there is no further reported case in the Westlaw database on this matter when I searched on 26 May 2007, I assume that the parties settled their dispute.

VanVoorhies

In a complicated case, Kurt L. VanVoorhies invented an antenna in 1991 while a graduate student at the University of West Virginia. Under the University's Patent Policy, the University owns all inventions created by faculty, staff, or students at the University. The University applied for a U.S. Patent on the invention, which was granted. The Patent lists as inventors VanVoorhies and his doctoral advisor, Prof. James E. Smith. When the University sued VanVoorhies to force him to assign the patent applications to the University, VanVoorhies countersued, alleging breach

of fiduciary duty, amongst other claims. The U.S. District Court granted summary judgment for the University and the U.S. Court of Appeals affirmed:

VanVoorhies argues that Smith and VanVoorhies had a relationship of trust concerning their inventions, and that Smith breached that trust by inducing VanVoorhies to list Smith as a co-inventor of the '970 application so that Smith could share in the revenues. He argues that WVU breached its fiduciary duty to him as his employer by misappropriating his invention rights. Smith responds that there is no fiduciary relationship between a professor and a student. WVU responds that the relationship between WVU and VanVoorhies concerning patent rights is fully set forth in the patent policy and the '970 assignment, and that nothing in those agreements indicates that WVU owed VanVoorhies any fiduciary duty.

We recently addressed a similar claim regarding the existence of a fiduciary duty between a professor and a student in *Chou*, 254 F.3d 1347, 59 USPQ2d 1257. In that case, Chou, a graduate student, alleged that her mentor-professor specifically told her that he would take care to properly protect her research and inventions, that she trusted him to do so, and that he breached the resulting fiduciary trust relationship by misappropriating her inventions for himself without her knowledge. *Id.* at 1362, 59 USPQ2d at 1265. The district court dismissed her allegations for failing to state a claim. *Id.* at 1363, 59 USPQ2d at 1265. We reversed. Assuming the truth of her allegations, as we were obligated to at that stage of the proceedings, we determined that Chou had adequately pleaded the existence of special circumstances of trust between herself and her professor under Illinois law, as well as a breach of that trust by her professor. *Id.* We also held that she had stated a claim against the University for breach of fiduciary duty under the theory of *respondeat superior*. *Id.*

In this case, the district court granted WVU, WVURC, ICI, and Smith's motions for summary judgment on VanVoorhies' breach of fiduciary duty claims because VanVoorhies had not cited any authority that a fiduciary duty existed between Smith and VanVoorhies. *Univ. of W. Va. v. VanVoorhies*, No. 1:97-CV-144, slip op. at 5-7 (N.D.W.Va. Dec. 9, 1999) (order). Although we concluded in *Chou* that Chou had sufficiently stated a claim for purposes of Illinois fiduciary duty law, we conclude in this case, which is at a further stage in the litigation, that VanVoorhies has not shown a genuine issue of material fact to support his fiduciary duty claim under West Virginia law.

A fiduciary duty arises when a person assumes a duty to act for another's benefit, while subordinating his or her own personal interest to that other person. *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 504 S.E.2d 893, 898 (1998). Even if, viewing the evidence favorably to VanVoorhies, we were to conclude that such a relationship of trust existed between VanVoorhies and Smith — a determination that we do not make — VanVoorhies did not present any evidence that Smith breached that trust by inducing VanVoorhies to list Smith as a co-inventor of the first invention. VanVoorhies was at all times aware of the patenting and inventorship decisions being made regarding the first invention, and he participated in and acceded in those decisions by jointly signing the '970 application and assignment with Smith, whom he knew would be entitled to a share of the proceeds under the patent policy. *VanVoorhies*, 84 F.Supp.2d at 763. We therefore conclude that his breach of fiduciary claim against Smith was properly resolved by summary judgment, because VanVoorhies has not introduced sufficient evidence to establish an essential element of his claim, *viz.*, a breach of the purported fiduciary duty, on which he would bear the burden of proof at trial.

Similarly, his fiduciary duty claim against WVU must fail. WVU cannot be liable under the theory of *respondeat superior* if the claims against Smith are insufficient as a matter of law, and we agree with WVU that the relationship between WVU and VanVoorhies as set forth in the assignment and patent policy does not establish any fiduciary duty on WVU's

part. We therefore affirm the court's grant of summary judgment on VanVoorhies' breach of fiduciary duty claims.

University of West Virginia Board of Trustees v. VanVoorhies, 278 F.3d 1288, 1299-1300 (Fed.Cir. 30 Jan 2002).

Zahn

During 1993-99, Laura Dee Zahn was a graduate student at California State Polytechnic University at Pomona, pursuing a master's degree in Urban and Regional Planning. She submitted the first draft of her master's thesis in the Fall of 1997. Because her thesis advisor never approved her thesis, she did not receive her master's degree in the Fall of 1999. She sued, *pro se*, the University and her thesis advisor, alleging various counts, including breach of fiduciary duty. The trial court dismissed her Complaint and an appellate court affirmed.

Zahn contends the complaint states a cause of action for breach of fiduciary duty.

We conclude that Loggins did not owe a duty to Zahn on which a cause of action for either negligence or breach of fiduciary duty can be based.

A public school is not liable in tort or contract to a student, who enrolls in one of the school's degree programs, for failure to adequately supervise and train the student, notify the student of the required learning objectives, or provide the student with written performance evaluations. (*Chevlin v. Los Angeles Community College Dist.*, *supra*, 212 Cal.App.3d at pp. 389-390, 260 Cal.Rptr. 628.) "For policy reasons ... the law refuses to hold a public school system liable to a student who claims he was inadequately educated." (*Ibid.*) "To hold them to an actionable "duty of care" in the discharge of their academic functions, would expose them to the tort claims — real or imagined — of disaffected students and parents in countless numbers." [Citation.]" (*Ibid.*) The same policy reasons preclude an action for educational nonfeasance against a professor of a public university.

The complaint does not contain allegations from which to conclude that Loggins had a fiduciary relationship with Zahn. In addition, Loggins did not owe Zahn a duty of care based on the professor-student relationship. Loggins's job as a professor at the University required him to serve on thesis committees. Loggins's agreement to chair Zahn's thesis committee did not create an actionable duty of care to supervise and mentor her, provide her with guidelines, or otherwise ensure that she produce an acceptable thesis in time to graduate. In other words, Loggins's agreement to serve as thesis chair did not expose him to tort liability for his failure to perform his job adequately.

Zahn v. Loggins, 2002 WL 982424 at*5 (Cal.App. 2 Dist. 14 May 2002) unpublished/noncitable.

This case is one of many that refuse to hear a student's complaint about alleged educational malpractice by a professor.¹³

¹³ Ronald B. Standler, *Educational Malpractice in the USA*, <http://www.rbs2.com/edumal.htm>, (Jan 2000).

Manning

Valerie Manning was dismissed from Temple University School of Medicine for failing five required classes. She sued the University on five statutory counts and six common-law counts, including breach of fiduciary duty. The trial court granted a summary judgment motion that dismissed Manning's Complaint.

In addition, Manning claims that all of the defendants were in a fiduciary relationship with her and that they breached their respective duties. In Pennsylvania, a fiduciary duty arises out of a confidential relationship where "the parties do not deal on equal terms, but, on the one side there is overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed." *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412, 416-17 (Pa. 1981). "The essence of such a [confidential] relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." *In re Estate of Scott*, 455 Pa. 429, 316 A.2d 883, 885 (Pa. 1974); *Basile v. H & R Block*, 777 A.2d 95, 101 (Pa.Super.Ct. 2001) (citing *Estate of Scott*). In essence, the dominant party may not use his or her position to harm the subordinate party to the dominant party's "own advantage." *Young v. Kaye*, 443 Pa. 335, 279 A.2d 759, 763 (Pa. 1971).

Pennsylvania law holds that a per se fiduciary relationship exists between trustee and beneficiary, guardian and ward, attorney and client, and principal and agent. *Basile*, 777 A.2d at 102. It also recognizes that the facts and circumstances in other situations may give rise to such a relationship. See, e.g., *Frowen*, 425 A.2d at 418; *Basile*, 777 A.2d at 102. However, the parties have not called to our attention any Pennsylvania case which has ruled that a graduate school or its professors owe any fiduciary duties to graduate students. Cf., *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1362-63 (Fed.Cir. 2001).

In any event, in order to breach a fiduciary duty, the dominant party must act for his or her own personal gain or to his or her own advantage. That has not occurred here. There is nothing in the record to indicate that any of the defendants had "an opportunity to abuse ... [any] trust for personal gain." *Estate of Scott, supra*. All Manning can suggest is that their personal gain or advantage was the satisfaction in seeing her dismissed. Besides the total lack of evidence on this score, we reject the notion that such motivation constitutes personal gain or advantage as articulated in *Estate of Scott, supra* or *Young, supra*. Whatever else personal gain or advantage may be, it does not include the nefarious pleasure one may obtain from observing another person fail.

Plaintiff cannot prevail on her breach of fiduciary duty claim.

Manning v. Temple University, Not Reported in F.Supp.2d, 2004 WL 3019230 at *10 (E.D.Pa. 30 Dec 2004).

Univ. of Iowa

In 1939, Professor Wendell Johnson at the University of Iowa did a nonconsensual experiment on six nonstuttering orphans to convert them to stutters. When the victims of the experiment — who suffered a lifelong battle with speech problems because of the experiment — learned of the experiment, they sued the state on various theories, including breach of fiduciary duty. The state moved to dismiss the complaint, which motion was denied. *Nixon v. Iowa*, 704 N.W.2d 643 (Iowa 30 Sep 2005). On 17 Aug 2007, newspapers reported that this case had been settled, when the state agreed to pay a total of US\$ 925,000 to six plaintiffs.

Physician-Patient Relationship

Incidentally, judicial opinions in the USA also rarely mention a fiduciary relationship in the context of physician-patient disputes.¹⁴ In the physician-patient relationship, the patient hires the physician and trusts the physician to give appropriate advice and treatment, just as in an attorney-client relationship. I think there are stronger reasons for holding a physician-patient relationship to be a fiduciary relationship than for holding a professor-student relationship to be a fiduciary relationship.¹⁵ So, if judges rarely hold that a physician has a fiduciary relationship to his/her patient, I think it is less likely that judges would recognize a fiduciary relationship in the professor-student context.

¹⁴ See, e.g., *Lockett v. Goodill*, 430 P.2d 589, 591 (Wash. 1967) (“The relationship of patient and physician is a fiduciary one of the highest degree. It involves every element of trust, confidence and good faith.”); *Hoopes v. Hammargren*, 725 P.2d 238, 242 (Nev. 1986) (“... we believe the fiduciary relationship and the position of trust occupied by all physicians demands that the standard apply to all physicians.”); *Moore v. Regents of University of California*, 793 P.2d 479, 483 (Cal. 1990) (“... in soliciting the patient's consent, a physician has a fiduciary duty to disclose all information material to the patient's decision.”); *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 569 N.E.2d 875, 879 (Ohio 1991) (“The physician-patient relationship is a fiduciary one based on trust and confidence and obligating the physician to exercise good faith.”); *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 670 (Mo. 1993); *Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 863 So.2d 201, 206-207(Fla. 2003) (“...we do recognize the fiduciary, confidential relationship of physician-patient imposing on the physician a duty to disclose” known facts and known causes.); *Murfreesboro Medical Clinic, P.A. v. Udom*, 166 S.W.3d 674, 683 (Tenn. 2005) (“... we see no practical difference between the practice of law and the practice of medicine. These relationships are ‘consensual, highly fiduciary and peculiarly dependant on the patient's or client's trust and confidence in the physician consulted or attorney retained.’ *Karlin*, 77 N.J. 408, 390 A.2d 1161, 1171 [(N.J. 1978)] (Smith, J., dissenting).”); *Harrison v. Valentini*, 184 S.W.3d 521, 525 (Ky. 2005) (“The fiduciary relationship between the parties grants a patient the right to rely on the physician's knowledge and skill.”).

¹⁵ A professor has a duty to the college to uphold high academic standards, which may cause the professor to give failing grade to a student. There may also be contractual obligations between the college and the financial sponsor of the professor's research that implicate the professor. There is nothing comparable in a physician-patient relationship, where the physician must always act in a way that is best for the patient. Moreover, a patient may be unconscious or in great pain, and unable to assert their own interests, unlike a student.

One court remarked that it would *not* recognize a claim for breach of fiduciary duty by an attorney or physician, because such claims were duplicative of a malpractice claim. *Neade v. Portes*, 739 N.E.2d 496, 500-502 (Ill. 2000). However, educational malpractice is *not* recognized by courts in the USA.¹⁶ The absence of educational malpractice opens the possibility that universities could be sued for breach of fiduciary duty to a student.

My View

After carefully considering this topic, I conclude that the professor-student relationship is *not* a fiduciary relationship, because the professor — as an employee or agent of the college — has a fiduciary relationship to the college, *not* to the student. It would be a forbidden conflict of interest for a professor to have a fiduciary relationship with *both* the college (i.e., the professor's employer) *and* the student.¹⁷

Nonetheless, it is interesting to consider several situations in which a student's attorney might allege a fiduciary relationship between the professor and student.

Professors have no fiduciary duty to a student in the context of advising a student about classes to take and career choices. Clearly, the professor should give advice that is appropriate for a particular, individual student *and* consider the best interests of the student. However, advice about the future (i.e., state of the job market in a few years, when the student graduates) is an expression of opinion that is *not* actionable. Furthermore, it is difficult to conceive of advice so bad — and a student so gullible that he/she follows the bad advice — that it leads to litigation against the professor. The leading reported case involving alleged bad advising as a breach of fiduciary duty is *André*, above at page 7, and the students lost that case.

There is an interesting issue when a professor who is advising a graduate student determines how much work is adequate for a master's thesis or a doctoral dissertation. Early graduation lets the student begin his/her own career, and promotes a competent student from a graduate student research assistant (on a stipend of perhaps \$20,000/year) to a doctoral-level researcher (at a salary of perhaps \$60,000/year). On the other hand, more work by the graduate student enhances the reputation of the professor through co-authorship of papers with the professor. More work by a good graduate student (i.e., continued "slave labor") enables the professor to undertake more research projects, for which the college handsomely rewards the professor. In this way, the

¹⁶ Ronald B. Standler, *Educational Malpractice in the USA*, <http://www.rbs2.com/edumal.htm>, (Jan 2000).

¹⁷ See, e.g., Restatement Second of Agency §§ 387, 394 (1958). See also *Stettine v. Suffolk County*, 488 N.E.2d 75, 79 (N.Y. 1985) ("... moral concept as old as the history of mankind, the idea that 'No man may serve two masters.'").

professor has a conflict of interest, in that continuation of the graduate student for as long as possible enhances the professor's career. Does the professor have a fiduciary duty to his/her graduate student? I believe the answer is "no", because advising/supervising a graduate student is part of the professor's official duties as an agent (i.e., employee) of the college, therefore the professor has a fiduciary duty to the college, *not* to the student. The leading reported case involving alleged bad advising of a graduate student as a breach of fiduciary duty is *Ho*, above at page 10, and the student lost that case.

evaluation of students

A professor has an obligation to the university to use high academic standards in grading students and in approving theses/dissertations, instead of giving good grades to every student and allowing incompetent graduate students to graduate. See the *Frost* case, above, at page 9. The professor has a duty to the college to uphold the college's reputation for quality graduates.

The professor is the agent (i.e., employee) of a college, when the professor assigns a grade or evaluates a thesis/dissertation. The grade or academic degree is actually issued by the college, *not* by the professor.¹⁸ Similarly, it is the college who expels a student for poor academic performance, *not* the professor. If the professor engages in unfair grading, malicious evaluation of a student, prejudice toward a student, or other misconduct, then I argue that the professor has breached his/her fiduciary duty to the college. In this analysis, the professor owes no legal duty to a student in connection with grading and/or approval of theses/dissertations, because the professor is an agent of the college, *not* the agent of the student.

torts

The situation is different if a professor engages in a tort against a student, such as sexual harassment,¹⁹ defamation, battery, infringement of student's intellectual property,²⁰ etc. The college did *not* assign the professor to engage in those acts, so the professor is personally liable to the student. In addition, the college may also have legal liability to the student through the doctrine of *respondeat superior*, negligent hiring, negligent supervision, etc.

¹⁸ Note that the name of the instructor who determined the grade in a class is *not* listed on the student's transcript.

¹⁹ See *Schneider*, above at page 10.

²⁰ See *Johnson*, above at page 11; *Chou*, above at page 14; and *VanVoorhies*, above at page 15.

Is the college a fiduciary?

Two cases have held that a college or university has a fiduciary relationship to its students:

- the small claims court in *André*, above at page 7 (but reversed on appeal)
- *Schneider*, above at page 10

Given that there are many hundreds of reported cases involving student v. university, these two cases show that courts in the USA generally do *not* recognize a fiduciary duty by colleges to students.

Conclusion

Courts in the USA rarely recognize that professors have a fiduciary relationship to their students in the context of grading, approving theses or dissertations, and/or in advising students.

However, the law of fiduciary relationships is still useful to faculty to guide themselves about appropriate conduct. The law of fiduciary relationships is also useful in teaching students about ethics in scientific research and/or education.

It is an *unanswered* question whether a college has a fiduciary duty to its students.

Bibliography

Melissa Astala, Note, "Wronged by a Professor? Breach of Fiduciary Duty as a Remedy in Intellectual Property Infringement Cases," 3 HOUSTON BUSINESS & TAX LAW JOURNAL 31 (2003).

Hazel Glenn Beh, "Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing," 59 MARYLAND LAW REVIEW 183, 202-203 (2000). (Courts recognize neither university nor faculty have fiduciary duty to students.)

Robert Faulkner, "Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit — The Fiduciary Alternative," 40 SYRACUSE LAW REVIEW 837, 855-866 (1989).

Alvin L. Goldman, "The University and the Liberty of Its Students — A Fiduciary Theory," 54 KENTUCKY LAW JOURNAL 643 (Summer 1966).

Kent Weeks and Rich Haglund, "Fiduciary Duties of College and University Faculty and Administrators," 29 JOURNAL OF COLLEGE & UNIVERSITY LAW 153 (2002).

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