Understanding the Complex Loyalty of Lawyers:

Dual-Commission, Governance Mandate, and Intrinsic-Limit Analyses

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1. Introduction.

If you were to ask a room full of American lawyers to state concisely the essence of their ethical role, I would be willing to bet that 9 out of 10 would say “zealous advocacy within the bounds of the law.” This phrase, from the 1969 American Bar Association Model Code of Professional Responsibility, is no longer part of the enforceable rules governing lawyer conduct. (It was removed from the 1983 Model Rules of Professional Conduct, a version of which is now the basis for all state disciplinary rules.) It is also unhelpful for lawyers not serving in an advocacy rule – e.g. who are representing clients in transactional matters or counseling clients on compliance with the law. Nevertheless, it retains its popularity as a slogan because it captures something important about the lawyer’s role. Lawyers have demanding duties of loyalty that reinforce other duties, such as confidentiality, competence, diligence, and communication; these duties are owed to their clients and enforceable by civil actions for damages.

More than that, though, the slogan conveys the unidirectionality or partiality of the lawyer’s role. The classic English statement of the duty of loyalty emphasizes that a fiduciary has only one object of concern:

[N]o one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.[[2]](#footnote-2)

Similarly, the lawyer must be concerned with the client’s interests, not getting the right legal result or doing justice, broadly speaking. As an influential summary of the law puts it, the lawyer’s basic duty is to “proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation.”[[3]](#footnote-3) The ideal of “zealous advocacy” expresses a specific conception of loyal service, in which the lawyer is required to act with an eye exclusively on the interests of the client, without consideration of the interests of third parties or broader concerns such as justice or the public interest. It also captures a core commitment of private law, which to establish rights and duties within interpersonal relationships.[[4]](#footnote-4) The lawyer’s duties are owed to the client and the client alone – the rest of the world be damned. Lawyers love to quote the justification given by Lord Brougham for his defense of Princess Caroline against adultery charges. Explaining his threat to disclose King George’s marriage to a Catholic, Brougham argued:

An advocate, in the discharge of his duty . . . knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring others.[[5]](#footnote-5)

As against the ideal of unidirectional, partial, and indeed “zealous” advocacy is the view that lawyers have quasi-public or quasi-governmental responsibilities. The Preamble to the American Bar Association’s Model Rules of Professional Conduct states that “[a] lawyer . . . is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” It is tempting to write off this rhetoric as window-dressing or the self-congratulation typical of commencement speeches, but there is a longstanding tradition within professional ethics maintaining that lawyers have a duty to act in the public interest in the course of representing clients.[[6]](#footnote-6) Moreover, there are numerous doctrines within the law governing lawyers that recognize limitations on the duty of zealous advocacy, in order to protect the interests of non-clients or the public interest at large. It is therefore an important theoretical task to seek to understand the duty of loyalty for lawyers. It is some kind of modified fiduciary duty, perhaps one subject to side-constraints to protect the interests of third parties or the public? A duty owed to more than one principal? One in which the lawyer’s mandate is not to follow the instructions of the client but to serve an abstract purpose, such as justice or the public interest? Or a duty that is subject to its own internal limitations, which reflect the interests of non-clients?

This paper will consider three theoretical approaches to understanding complex fiduciary duties of loyalty: Evan Criddle and Evan Fox-Decent’s model of fiduciaries with dual commissions,[[7]](#footnote-7) Paul Miller and Andrew Gold’s account of governance mandates, in which a fiduciary is charged with the responsibility of pursuing an abstract interest, rather than following the instructions of a principal,[[8]](#footnote-8) and a recent paper by Andrew Gold, contending that some duties of loyalty contain their own intrinsic limits.[[9]](#footnote-9) These theories have not necessarily been deployed to address the puzzle of lawyers’ complex fiduciary duties, and indeed I may take some interpretive liberties in adapting these approaches to my own ends. My own perspective on this problem is as a scholar of legal ethics and the law governing lawyers who has long been interested in the location of the lawyer’s role at the boundary between private and public law. The resources of fiduciary law and theory have proven to be quite helpful in understanding the relationship between lawyers’ duties to their clients and to non-clients, the public interest, or the system of justice. Some scholars have argued that, if duties to non-clients are sufficiently pervasive within the law of lawyering, it may be open to question whether the lawyer-client relationship is best understood as a private-law relationship, or whether it is better understood as an aspect of public law.[[10]](#footnote-10) Fiduciary theory shows, however, that the regulation of the legal profession may be understood as an aspect of private law, even while it serves important public ends such as maintaining the rule of law.

The most promising strand of fiduciary theory for modeling the complex loyalties of lawyers is the internal-limits model. On this account, duties are something that arise between parties, in the usual private-law manner; the only refinement is that these duties require the lawyer to pursue only the client’s *lawful* objectives. Understanding the limits of the client’s legal entitlements requires skill and judgment by the lawyer, but that does not mean the representation involves governance, with respect to some abstract end like the public interest. There is no need to posit a competing or second-order obligation to the public interest. The public interest is, presumably, already baked into the content of the client’s legal entitlements. The internal-limits model thus avoids reliance on the often nebulous duties owed by lawyers as officers of the court, which is unevenly applied and often used merely as a rhetorical makeweight, or on a highly contestable conception of the public interest. The internal-limits approach, by contrast with the other two, creates a tight connection between the legal entitlements of the client and the lawyer’s fiduciary duties. It also has the virtue of grounding the fiduciary duties of lawyers solidly on private law principles.[[11]](#footnote-11) The law of lawyering is best understood pertaining to the rights and duties of lawyers as they relate to clients and specific, identifiable third parties. It is not fundamentally about the relationship between lawyers, or their clients, and the state. Law is involved in the lawyer-client relationship, of course, and law is a normatively attractive means of governing the relations among citizens of a political community,[[12]](#footnote-12) so there is a sense in which the lawyer’s role can be described as quasi-governmental. But fiduciary law adds an important insight, which scholars of the legal profession need to take on board, which is that the relevant values and policies limiting what lawyers may do on behalf of their clients are to be found in the law, not in considerations of political morality or the public interest.

What may initially appear as a quasi-public or quasi-governmental aspect of the lawyer’s role is not in fact a freestanding obligation to act in the public interest. Instead, it is a requirement to recognize that the lawyer’s power to act on behalf of a client is limited by the client’s legal authorization to pursue the client’s objective. The law and its own internal limits are best conceptualized not as a side-constraint on what lawyers may do, but as something constitutive of the lawyer’s role as a peculiar kind of agent, with duties not well captured by those that characterize other agency relationships.[[13]](#footnote-13) Rather than being straightforwardly under the control of the principal, subject only to the duty not to violate the law, a lawyer as agent has an affirmative obligation to ensure that the course of action proposed by the client/principal is adequately supported by the law. In this way, lawyers perform a gatekeeping function – not by threatening to blow the whistle on unlawful transactions, but by ensuring that private ordering occurs within the limits established by law.[[14]](#footnote-14) However, the lawyer-client relationship still enhances the autonomy of clients by empowering them to control their representatives to a significant extent, while enjoying the protection of legal prohibitions on conflicts of interest and other instances of disloyalty.[[15]](#footnote-15) This complex relationship is not best understood as one involving governance, but as a way of recognizing interpersonal relationships of responsibility and accountability, both between lawyer and client and between clients and others with whom clients interact.[[16]](#footnote-16)

2. Loyalty in the Law Governing Lawyers.

a. Scope of Fiduciary Duties.

Fiduciary duties in the law are often understood as prophylactic in nature.[[17]](#footnote-17) They safeguard or backstop primary duties owed to the beneficiary by ensuring that the fiduciary steers well clear of a situation in which she would be tempted to violate a primary duty.[[18]](#footnote-18) It is very clear that conflict of interest rules in the American law governing lawyers function in this way.[[19]](#footnote-19) A lawyer is prohibited from representing a client where there is a significant risk of a material limitation on the lawyer’s capacity to fulfill the characteristic professional obligations of loyalty competence, diligence, confidentiality, communication, and independent judgment.[[20]](#footnote-20) Entering into a professional relationship materially limited by the interests of another client, a third party, or the lawyer’s own interests is, by definition, a conflict of interest. The party seeking a remedy for the conflict need not show actual harm, but only a substantial risk to the party’s interests.[[21]](#footnote-21) (That is why, strictly speaking, there is no such thing as a *potential* conflict of interest; the conflict simply *is* the situation in which there is a significant enough risk of harm to the interests of the client.) It is also not necessary to show that the lawyer intended to harm the client or put the interests of the client at risk; a conflict of interest may arise even where the lawyer acts in subjective good faith.[[22]](#footnote-22)

The regulation of lawyer conflicts of interest is a useful example of Matthew Conaglen’s and, writing separately, Irit Samet’s theory of fiduciary loyalty as a prophylactic protection for non-fiduciary duties, enhancing the likelihood that they will be performed by insulating the fiduciary from influences that may interfere with her performance of primary duties.[[23]](#footnote-23) Fiduciaries and non-fiduciaries alike can owe duties of care, but the duty of loyalty is distinctive to fiduciary relationships. “[N]ot every breach of duty by a fiduciary is a breach of fiduciary duty.”[[24]](#footnote-24) But loyalty is a doctrine that prohibits a fiduciary from acting out of a conflict between duty and interest (or duties to another).[[25]](#footnote-25) As such, it is at the core of what distinguishes fiduciaries from other parties to commercial relationships.[[26]](#footnote-26) The function of the fiduciary duty of loyalty is to keep the fiduciary far away from any situation in which he or she would be tempted to act out of personal interest, or to further the interests of another principal. Drawing from the insights of behavioral psychology, Samet furthers this thesis by contending that fiduciary duties are designed to prevent a fiduciary from getting into a situation in which her (presumed) usual commitment to honest dealing will not be enough to prevent her from causing harm to the beneficiary’s interests. Some situations are rife with the possibility of self-deception.[[27]](#footnote-27) Critics such as Lionel Smith argue against the stringency of duties proscribing conflicts of interest, because they unnecessarily constrain the actions of innocent fiduciaries.[[28]](#footnote-28) Why not trust the honesty, good faith, and judgment of fiduciaries, particularly those such as lawyers who have taken an oath to abide by professional duties of loyalty to their clients? Samet’s answer is that all humans, including those who undertake to act honestly, are subject to unconscious tendencies to act on their self-interest, and then to construct retrospectively a non-self-interested justification for their action.[[29]](#footnote-29) Relying on honesty and good faith would be a sensible strategy if people were not subject to these psychological tendencies. Given what we known about the tendency to succumb to temptation and act in a self-interested manner, however, fiduciary law recognizes stringent remedies for breach of the rigorously defined duty of loyalty.

The “zealous advocacy” motto so beloved by American lawyers captures this aspect of fiduciary law nicely. Considering anything other than the interests of one’s client is a fundamental breach of professional duty. Loyalty to clients is an important value by itself, but it also ensures that lawyers will not fail to exercise reasonable care and diligence on behalf of a client, or leak or make adverse use of confidential client information, because of their self-interest or the interests of another client or a third party. Complicating this picture, however, are numerous duties recognized by the American law of lawyering, some of which are owed to specifically identified third parties, and others of which appear to be owed to a more vaguely defined beneficiary such as “society as a whole” or “the public interest.” Some of these duties may be characterized as non-fiduciary in nature, but this does not necessarily mitigate the complications they create. If the duty of loyalty to clients is meant to overprotect other duties – competence, diligence, communication, confidentiality, and the like – then it still may be cause for concern that the duty of loyalty is watered down by the recognition of duties to third parties of an abstraction such as the public interest. If duties to non-clients are sufficiently pervasive within the law of lawyering, it may even be open to question whether the lawyer-client relationship is best understood as a private-law relationship, or whether it is better understood as an aspect of public law.[[30]](#footnote-30) A lawyer-client relationship characterized by a unidirectional obligation of zealous advocacy is similar to other private-law fiduciary relationships, in which the fiduciary’s duty is to act in the sole interests (or best interests) of the beneficiary. Balancing competing duties – whether those duties are themselves fiduciary or non-fiduciary – appears inconsistent with fiduciary loyalty.

b. An Example.

Although I use the phrase “zealous advocacy” as a shorthand way of referring to the unidirectional, highly partial conception of loyalty that is generally taken as the hallmark of the lawyer’s professional role, I do not intend to confine this analysis to situations arising in the course of handling litigated disputes. In fact, a much more interesting and difficult question for fiduciary theory arises in connection with advising or otherwise representing the client, in furtherance of the client’s objectives, with appropriate regard for the limitations of law, the interests of third parties, or the public interest.

A realistic and challenging hypothetical illustrates the possible limitation of client-centered duties of loyalty by countervailing duties to the law or the public interest.[[31]](#footnote-31) Suppose a lawyer is representing a startup technology company that has a promising idea but very little cash. The president of the startup company wants to hire two software engineers to develop an app. She instructs the lawyer to draft independent-contractor agreements with the two engineers, stating that it is important that the agreements contain confidentiality and non-compete provisions. The lawyer immediately recognizes that, under federal and state law, in light of the degree of control exercised by the company over the engineers’ work, the engineers must be treated as employees, not independent contractors. This has a number of expensive consequences for the company, including the requirement that the company withhold payroll taxes, contribute to federal Social Security and Medicare funds, and pay workers’ compensation and unemployment insurance premiums. The company must also either establish systems for all this withholding and tax payment, or pay an outside vendor to handle payroll. The president is adamant in her refusal to take on the expense and hassle of dealing with the engineers as employees. She also notes, correctly, that the two engineers are delighted with this arrangement, because it also includes an entitlement to acquire stock options which they believe will be much more lucrative in the long term than the modest wages they will earn in the short term. Assuming for the sake of the hypothetical that there are no criminal penalties for avoiding payroll taxes by structuring the relationship with the engineers as an independent-contractor arrangement rather than one of employment,[[32]](#footnote-32) what does fiduciary law and theory say the lawyer must do?

Deborah DeMott has argued that a basic feature of a fiduciary agency relationship is the obligation on the part of the agent to follow the instructions of the principal, interpreted reasonably in light of the principal’s wishes as the agent understands them.[[33]](#footnote-33) There is no ambiguity here regarding the instructions of the president, who is authorized to instruct the lawyer on behalf of the company. The president’s instructions are to prepare independent-contractor agreements for the two engineers. Obviously the law sets some limitations on the principal’s right to instruct the agent; no agent has a duty to carry out a murder-for-hire on the instructions of the principal. But drafting the independent-contract agreements is not illegal in this way. Not only is it not a *mala in se* offense like committing a murder-for-hire, but there are (at least for the purposes of the hypothetical) no criminal penalties at all for mischaracterizing the nature of the relationship between the company and the engineers. The rules of professional conduct prohibit lawyers from assisting a client in conduct the lawyer knows is criminal or fraudulent,[[34]](#footnote-34) but the conduct here does not constitute a crime or a fraud. Paul Tremblay, who developed the independent-contractor hypothetical based on his experience supervising students in an entrepreneurship clinic, argues that a lawyer has discretion to either provide the requested services or not, as long as background law does not define the client’s conduct as criminal or fraudulent.[[35]](#footnote-35) The lawyer should advise the president of the relevant risks, such as some kind of regulatory enforcement action to collect past-due payroll taxes. Assuming the lawyer did provide this advice, however, it is consistent with the lawyer’s professional obligations to draft the independent-contractor agreements.

I disagree with this conclusion about what the lawyer is permitted to do, but not because some rule of professional conduct expressly prohibits the assistance. Rather, it is inconsistent with agency and fiduciary law to believe that the lawyer, as an agent of the company, has the power to create a juridical relationship involving the company and the engineers that is greater than the power actually held by the company. Fiduciary powers are those “legal powers enjoyed on the footing of authority derived from the personal legal authority of legal persons.”[[36]](#footnote-36) That is, an agent can only do on behalf of the principal what the principal is empowered to do on her own. The company does not have the legal authorization to treat the engineers as independent contractors when they should be deemed employees. A document purporting to recognize their independent-contractor status is merely an empty string of words if it does not correspond to conventionally recognized sources of law, including not only statutes, regulations, and judicial decisions, but also the interpretive methods and rhetorical practices that constitute the craft of legal reasoning. Lawyers are powerful but they are not wizards – they cannot conjure lawfulness out of nothing. They interpret and apply the law that confers power on individuals and entities, but they do not themselves create lawful power. They act only “on the footing of authority” derived from the law.

This criticism differs from one frequently lodged against lawyers – namely, that they sometimes pursue the interests of their clients to the detriment of the public interest.[[37]](#footnote-37) The Carnegie Report on legal education, for example, faults law schools for their preoccupation with “the procedural and formal qualities of legal reasoning” to the exclusion of “the moral and social dimensions.”[[38]](#footnote-38) Similarly, Deborah Rhode, calls upon lawyers to accept personal moral responsibility for the consequences of the actions they take in the course of representing clients.[[39]](#footnote-39) My analysis of the independent-contractor hypothetical is not driven by the sense that the company is cheating and therefore a lawyer is personally obligated to refrain from providing assistance in conduct that is morally wrongful. It may be that the company is avoiding paying its fair share of Social Security and Medicare taxes, and from a moral and political standpoint is rightly subject to criticism for doing so. From the point of view of fiduciary law and theory, however, the problem with the lawyer’s preparation of the independent-contractor agreements is that it is smoke and mirrors. It claims to bring into existence a legal relationship that cannot exist on the law and facts as they are. Even if it is very much in the client’s interests to characterize the engineers as independent contractors, the lawyer in my view has no discretion, and must decline to prepare what are essentially sham documents. That conclusion follows from the fundamental presupposition of fiduciary law, that an agent can have no more power than the principal has.

3. Models of Complex Fiduciary Duties.

The startup company hypothetical illustrates the difficulty with the simple view that the lawyer’s duty of loyalty excludes consideration of the interests of third parties or the public interest. Of course, all agents are subject to the negative legal duties applicable to anyone who acts in similar circumstances. “Acting as an agent is not a privilege to commit torts, crimes, and other forms of misconduct. That is, all agents are subject to legal limits on acts that may be done rightfully on behalf of a principal.”[[40]](#footnote-40) No one thinks the duty of loyalty justifies a fiduciary in committing a murder-for-hire on the instructions of the beneficiary. The hypothetical in Section 2 is different, however, in that the limitation on the duty of loyalty is not extrinsic to the fiduciary relationship. The criminal law proscribing murder applies to everyone. Duties to non-clients in the hypothetical arise only in the context of the fiduciary relationship between lawyer and client. It is therefore an important project within private law theory to determine the basis upon which a lawyer may have a duty of loyalty to the client while also being subject to duties to non-clients. This section will consider three possibilities: The dual mandate approach advocated by Evan Criddle and Evan Fox-Decent, the model of governance mandates developed by Paul Miller and Andrew Gold, and the alternative – suggested by Gold alone – of internally-constrained duties. Of the three, I will argue that Gold’s model of internal limitations on duties of loyalty, with suitable modifications, is the best way to understand the lawyer’s fiduciary role and its relationship with duties to non-clients.

a. The Criddle/Fox-Decent Dual Mandate Approach.

Standard fiduciary theory claims that the duty of loyalty precludes service to more than one beneficiary, if the interests of the multiple principals is in conflict. As against this standard view, Evan Criddle and Evan Fox-Decent have proposed a two-tiered model of duties within fiduciary relationships.[[41]](#footnote-41) A fiduciary owes first-order duties to the immediate beneficiary (such as a lawyer’s client), including following the beneficiary’s instructions. In addition, however, the fiduciary also owes second-order duties to some other beneficiary. In the case of lawyers, this secondary beneficiary may be a tribunal before which the lawyer is appearing, the legal system more generally, or a more nebulous (arguably fictional) entity such as “the public interest.” Second-order duties “ensure that a fiduciary’s loyalty to her beneficiary does not compromise other institutions entrusted to her care that are designed to provide equal freedom under the rule of law.”[[42]](#footnote-42) While they do not say so explicitly, the terminology of first- and second-order duties appears intended to invoke Joseph Raz’s influential analysis of reasons existing on different levels.[[43]](#footnote-43) Crucial to Raz’s analysis is the insight that conflicting reasons for action need not be compared only on the dimension of their relative strength or weight, and conclusions about what ought to be done need not reflect only some kind of balancing process. Although in many cases it is appropriate to speak of one reason “prevailing over” or “being stronger than” another, there are some cases in which one type of reason may exclude altogether the resort to another type of reason. An exclusionary reason is a second-order reason to refrain from acting for a (first-order) reason.[[44]](#footnote-44) Exclusionary reasons and excluded first-order reasons are not, strictly speaking, in conflict. The former are of a different type, and work by blocking resort to reasons that would otherwise be applicable. This is so even if the excluded reasons would otherwise be very weighty in deliberation. “[E]xclusionary reasons always prevail, when in conflict with first-order reasons.”[[45]](#footnote-45)

Deborah DeMott’s article on lawyers as agents also takes the dual mandate approach, although she does not use this terminology. She begins with the distinctive feature of an agency relationship, which is the principal’s right to prescribe on an ongoing basis what the agent shall do.[[46]](#footnote-46) The lawyer thus acts as an extension of the principal, enabling him, her, or it (for many clients are organizations) to make use of the technical materials made available by the law – contracts, trusts, entity forms such as corporations and partnerships, and so on – to further the client’s interests. In addition, however, lawyers are often characterized as “officers of the court,” meaning they owe some duties directly to the court; these institutional obligations may on some occasions supersede duties owed to clients.[[47]](#footnote-47) These obligations arise from rules of professional conduct, the lawyer’s oath upon admission to practice, and other norms related to the status of the legal profession as self-governing. As DeMott notes, these additional duties are beyond the explanatory framework of the common law of agency, arising as they do as a matter of authority that is inherent in the nature of the judiciary as an institution.[[48]](#footnote-48)

The trouble with the dual-mandate approach is that very few non-client-centered duties within the American law of lawyering are genuine exclusionary reasons in Raz’s sense. The duty to prevent the introduction of false evidence, cited by Criddle and Fox-Decent as well as DeMott, is a clear example of as an obligation owed directly to the court as part of a more general prohibition on abusing the adversarial system of adjudication. For the most part, however, it does not supersede the duties of competent, diligent, even “zealous” representation owed to the client, but coexists with client-focused duties in complex ways. The relationship between client-regarding and non-client-regarding duties is one of careful balancing, not supersession.

b. A Governance Mandate for Lawyers?

Fiduciary service mandates arise in the course of fiduciary relationships such as agency and trusteeship, in which the fiduciary acts to promote one or more practical interests of the beneficiary.[[49]](#footnote-49) The beneficiary’s interests exist and may be ascertained in advance of establishment of the mandate; indeed the mandate is constituted by a specific beneficiary and an ascertainable interest.[[50]](#footnote-50) To the extent fiduciary duties are given by service mandates, fiduciary law is an aspect of private law, creating mechanisms of interpersonal accountability.[[51]](#footnote-51) The intrinsically private nature of fiduciary duties means, however, that duties cannot be understood in the absence of an identifiable beneficiary.[[52]](#footnote-52) A fiduciary governance mandate, by contrast, is one in which the purpose is not identified with a specific person and his or her purposes.[[53]](#footnote-53) Instead, a governance mandate aims at the goals or commitments of an association or group, such as a social club, a corporation, a labor union, or a Native American nation. These are relatively defined collectivities, but Miller and Gold contend that a service mandate may also run to a wider and more abstract beneficiary such as “society” or “the public interest.” The important feature of a governance mandate is that it makes reference to abstract purposes, not the purposes of a specific person or entity.[[54]](#footnote-54) It is established by an act of benefaction, in which a private person or the state confers power upon a fiduciary to promote stipulated abstract purposes.[[55]](#footnote-55) Governance mandates are institutional, not interpersonal, in nature. This means they empower fiduciaries to act on the abstract purpose of the mandate over time, and notwithstanding changes in the makeup of the governing body of the principal.[[56]](#footnote-56) Because governance mandates are not interpersonal, the mechanics of enforcing them differs from service mandates. Rather than empowering an aggrieved beneficiary to bring an action for breach of fiduciary duty, the law empowers monitoring and enforcement agencies to rectify departures from the mandate.[[57]](#footnote-57)

Miller and Gold are correct that loyalty under a governance mandate may involve respecting the abstract purpose behind an institution that transcend the interests of any specific natural persons.[[58]](#footnote-58) A corporation, for example, may be established expressly for the purpose of furthering the development of renewable energy sources. A director of the corporation would violate the duty of loyalty to this corporation by acquiring a subsidiary corporation engaged in the development of oil and gas reserves. That action would demonstrate a lack of fidelity to the object of the director’s mandate. Similarly some scholars have argued that fiduciary theory properly characterizes the role of judges in the American political system.[[59]](#footnote-59) “To say that judges hold the public's interest in trust is more than mere rhetoric or analogy; the people are their real beneficiaries and judges should conform their conduct to fiduciary standards.”[[60]](#footnote-60)

Many features of governance mandates may illuminate the role of lawyers and the regulation of the lawyer-client relationship, at least in theory. One could understand lawyers as empowered by the state to pursue an abstract purpose in the course of their representation of clients. This purpose may be something related to the public purpose for which the legal profession is constituted and regulated. For example, William Simon has proposed a judge-like governance mandate for lawyers: In connection with the representation of clients, “the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.”[[61]](#footnote-61) I have argued that lawyers do act in a quasi-public or quasi-governmental capacity in their representation of clients,[[62]](#footnote-62) and I still believe that to be an accurate description of the lawyer’s ethical role. In terms of fiduciary theory, however, I have come to see that it would be a mistake to understand the role of lawyers as involving a governance mandate. The reason is that a public-interest-regarding governance mandate for the lawyer-client relationship fails substantially on the dimension of fit with the existing law of lawyering.[[63]](#footnote-63) Notwithstanding some high-minded rhetoric, American lawyers have never accepted that they are acting to pursue a public-regarding end. After suitable debunking, the discourse of legal professionalism inevitably boils down to an ideal of zealous representation of clients, which may be admirable, but is not pursuit of an abstract purpose. It is, instead, a classic service mandate.

As noted above, I continue to believe that lawyers for private individuals and corporations play a central role in democratic self-government within the rule of law. The idea of a governance mandate appears to be a neat theoretical way of capturing this essential function of the legal profession. In the startup company example, however, the lawyer’s obligations are not best understood in terms of aligning the compensation structure of the company with the demands of social justice. The reason the lawyer should not draft the independent contractor agreement is not that it would be unjust. It may be, because if these individuals were treated as employees the company would be paying its fair share of payroll taxes. Nevertheless, I believe it would be inconsistent with the lawyer’s fiduciary duty to the company to prepare the documents. The reason, to be developed in the following section, is that, as an agent of the client, a lawyer’s fiduciary duties are both constituted and limited by the principal’s legal rights and duties.

c. Gold’s Constrained Loyalties.

The previous two models of complex loyalties are at best an uneasy fit with the law governing lawyers. Sometimes the fiduciary duties owed by lawyers to their clients coexist with duties to some other beneficiary, as in *Greycas*. That situation is not best understood on the model of having a dual mandate, with first-order duties to the client being subject to being overridden by second-order duties to the public interest or some other concrete or abstract beneficiary. Nor does it help to think about the lawyer’s mandate as directed toward the accomplishment of an abstract purpose. The third and most promising alternative, considered in this section, is that lawyers have fiduciary duties that are internally limited in scope. As Andrew Gold argues, some duties of loyalty contain their own intrinsic limits.[[64]](#footnote-64) For example, corporate law requires directors and officers to follow the law in their pursuit of shareholder value. As applied to lawyers, this approach would emphasize that the lawyer’s lawful power cannot exceed that which the client is legally authorized to do. If the law requires certain conditions, A, B, and C, to be satisfied before someone may obtain a legal right or privilege, then a lawyer acting on behalf of that person may only assert that legal entitlement if conditions A, B, and C are satisfied.

To see how this approach differs from the two previously discussed, consider the difference between these two statements of a lawyer’s duties:

1. You may do anything at all on behalf of a client, as long as it does not violate a legal prohibition or interfere with the rights of another.
2. You may do on behalf of a client only that which the law actually permits the client to do.

The first statement envisions an expansive client-centered duty that is bounded at some point by a duty to obey the law and not violate the rights of others. At some point the lawyer’s activities, which are characteristic of providing loyal, competent, diligent, effective representation, run into some sort of wall. The metaphorical wall can take the form of a clear legal prohibition (e.g. by a criminal statute) or a duty owed to another beneficiary. That is what is meant by an external constraint on the duty of loyalty. By contrast, the second statement describes a duty that is constrained from within, limited in scope by the extent of the client’s lawful powers. In my view, it is the best way to understand the lawyer’s fiduciary duty of loyalty in relation to other duties owed by the lawyer. The other duties are not independent or external prohibitions, but rather are baked into the scope of the lawyer’s authority, as an agent, to promote the client’s lawful objectives.

As Gold argues, “[i]t is . . . possible to see a lawyer’s loyalty obligation to the law as a constraint that is incorporated into a single agency relationship, or as involving a single fiduciary commission.”[[65]](#footnote-65) On Gold’s approach, the lawyer’s duty is not limited by something external to it. Rather, it goes only so far. It is like an airplane with a range of 1,500 miles; when it gets to the limits of its range, it doesn’t run into anything, but merely runs out of fuel. The “fuel” empowering the lawyer’s actions as an agent of the client is the legal entitlement of the client to do something. The client’s lawful power extends only so far as the law grants authorization. Beyond that, the client is acting without lawful authority. Recall that the basic legal duty of a lawyer is to “advance a client’s *lawful* objectives, as defined by the client after consultation.”[[66]](#footnote-66) That means the only affirmative support for the obligations the lawyer owes to the client is that which the client is lawfully permitted to do. Anything beyond that is, in a sense *ultra vires*. The authority that constitutes the lawyer’s power to act on behalf of clients is given by the scope of the client’s legal entitlements. It follows from the agency structure of the lawyer-client relationship that the lawyer has no power to do on behalf of the client that which the client has no power to do on its own. Again, this is not because of an independent prohibition in criminal law, the civil law of fraud, or a similar source. It is best described in Gold’s terms, as a limitation on what the lawyer’s professional role authorizes in light of the client’s legal rights.

This understanding of authority and the duty of loyalty in the lawyer-client relationship does not presuppose that individuals and entities are not free to act without specific legal authorization. There are many situations in which one should be presumed to be permitted to do something unless prohibited by law. Liberties of conscience, speech, movement, association, and so on recognize the *prima facie* right of citizens to do what they wish, subject to legal limitations. A different type of case raises the issue we are considering here, on the nature of lawyers’ duties of loyalty. These cases involve a juridical relationship between the lawyer’s client and another individual or entity, or in some cases the state. By “juridical relationship” I mean those correlated deontic conditions analyzed by Hohfeld,[[67]](#footnote-67) such as a right of one party which, by its nature, is paired with a duty on the part of another. “Hillman owes Summers $100” can be analyzed into a claim-right on the part of Summers to receive $100, which is correlated with Hillman’s duty to pay $100. Some rights are not claim-rights correlated with duties, but instead are privileges (or liberties) paired with the negation of authorization to interfere with the right-holder’s activities.[[68]](#footnote-68) Hohfeld calls this correlative a “no-right.” As previously mentioned, a liberty of expression protected by the First Amendment to the United States Constitution is correlated with a “no-right” on the part of the government to silence or punish the speaker for the content of the speech. A Hohfeldian power is correlated with a liability, meaning that another party’s legal relations are altered; for example, the other party must act in ways that acknowledge the entitlement of the power-holding party to do something. Commonly, as in tort law for example, the same person holds a right and a power. The right is correlated with a duty on the part of others, to avoid interfering with the right-holder’s activities in certain ways. The power is correlated with a liability, which in the case of tort rights enables the right-holder to seek redress from the person who breached his or her duty.

The Hohfeldian framework of legal entitlements, along with their correlatives (duty, no-right, liability, etc.), is essential to understanding the role of lawyers and the nature of their duties of loyalty. Some of the relationships between the holders of entitlements and third parties are established by law, requiring no action of either party to create. Tort and property entitlements, for example, protect right-holders from interferences of particular types, e.g. with physical security or the use and enjoyment of land. Lawyers can give advice with respect to those entitlements, e.g. by providing an opinion to a client that operating a candy factory will not constitute a nuisance vis-à-vis the rights of a neighboring doctor who uses his house as an office to treat patients.[[69]](#footnote-69) Or, as in *Greycas*, a lawyer representing a client must be aware of the scope of the rights of third parties which may be affected by the actions taken by the lawyer on behalf of the client. The creation of other types of rights generally involves the services of lawyers, who make use of tools provided by the legal system to negotiate and establish legal relationships with others. These “others” can be private individuals or corporations, or the state. For example, in the startup company hypothetical, the lawyer’s preparation of independent-contractor agreements for the engineers purports to establish a right on the part of the client company not to pay payroll taxes on compensation provided to the engineers. In Hohfeld’s terms, the company’s right (if in fact it has one) can be understood as either a liberty, correlated with a no-right on the part of the state to interfere with the compensation arrangement by demanding the withholding of payroll taxes, or more plausibly a power, correlated with a liability on the part of the state to be bound to the legal treatment of the engineers as independent contractors and thus disabled from collecting payroll taxes. The lawyer’s activities on behalf of the client consist of the assertion of a power, which is correlated with the state’s obligation to acquiesce in the lawyer’s characterization of the engineers as independent contractors or to do something affirmative to acknowledge the employer’s right not to withhold payroll taxes. On my view of the case, the lawyer’s lawful power to subject the state to a liability to respect the company’s tax treatment of the engineers extends only to those cases in which the assertion that the engineers are independent contractors is adequately supported by the facts and applicable law. In both cases, however, it is the essence of the lawyer’s role to counsel the client, negotiate with others, prepare documents, and assert an opinion about a situation, all with reference to rights and duties established by law.

What does this have to do with *loyalty*? Gold has an intriguing suggestion: Being true to one’s commitments is a classic way of manifesting loyalty to another.[[70]](#footnote-70) On this way of thinking about loyalty, a great deal would depend on the content of the lawyer’s commitment to the client. Gold suggests that the lawyer’s single mandate, to the client, comes with limits: “It is possible to see a lawyer’s obligations to act consistently with the law as internal to loyalty in a way that tracks common understandings of how extra-legal loyalty works.”[[71]](#footnote-71) Borrowing from T.M. Scanlon, he notes that the loyalty one is owed by friends is not unlimited – one could not expect a friend to steal a kidney if needed, for example.[[72]](#footnote-72) But this is still a conception of loyalty that relies to some extent on external limits – in this case, the moral demands of others who can justifiably prevent the friend from stealing their kidneys. I am inclined to see an account of loyalty that “incorporates among its requirements a constraint barring at least some immoral behavior”[[73]](#footnote-73) as a kind of hybrid of externally- and internally-limited versions. A purer version of an internally-limited conception of loyalty would look not to what we owe to each other (to appropriate Scanlon’s title), but to what fiduciaries are empowered to do on behalf of a beneficiary.

Suppose the lawyer decides to go ahead and prepare the agreement treating the engineers as independent contractors. By doing so, the lawyer purports to bring something new into existence, namely, a juridical relationship in which the state has no right to demand the withholding of payroll taxes. (Of course, this is in the context of already-existing juridical relationships among the state and the company, and the state and individuals.) The violation here is not so much of an external limit on loyalty. Rather, it is a failure to be able to do anything at all. The lawyer preparing an agreement without adequate legal authorization is not really like a friend stealing someone’s kidneys. It is more like someone who claims to be a wizard but in fact has no magical powers. Waving around a stick and muttering some words will not actually do anything in the absence of in-born power and extensive training at Hogwarts. Similarly, a lawyer may say all sorts of magic words, and even write them down in an official-looking document, but if the client is not actually entitled to do what the document purports to accomplish, then the lawyer’s actions are all for naught.

To take a silly example, suppose a lawyer prepares a 99-year lease on a one-acre parcel on the moon. Obviously this lease document is without effect, even if the lawyer claims to represent someone who owns land on the moon. Why? Because the would-be lessor does not *in fact* have the power to lease any part of the moon. On the assumption that the law and facts are such that the engineers in the startup company example must be treated as employees, not independent contractors, the lawyer’s preparation of the so-called independent contractor agreement is null and void to the same extent. This relationship between the client’s legal entitlements and the lawyer’s lawful power is often obscured by the necessity of using judgment in close cases. Something like the case of trying to lease the moon hardly ever arises in real life. In most cases, the lawyer is working with complex legal norms, expressed in sometimes-conflicting and often-ambiguous statutes, regulations, and common law doctrines, with facts that are sometimes unclear. In professional discipline and legal malpractice cases, courts understandably want to protect some latitude for lawyers to make reasonable judgment calls.[[74]](#footnote-74) To be clear, there is nothing wrong with lawyers making professionally reasonable judgments in doubtful cases. The point is only that, assuming *arguendo* that the underlying law and facts are clear, the best analysis in terms of fiduciary duties of the startup-company case is the absence of affirmative authorization, not the negative constraint from an external source. The important point to emphasize is that a lawyer’s actions on behalf of the client establish a juridical relationship between the client and either a private party or the state, depending on the type of engagement. Fiduciary loyalty, on this view, requires the lawyer to render advice and assistance that is aimed at promoting the client’s lawful objectives.

4. The Lawyer’s Duties on the Private Side of the Public-Private Divide.

Late Nineteenth and early Twentieth Century theories of social control expected that professionals, including lawyers, would act in the marketplace in ways that ensured that the social order reflected the common good of society.[[75]](#footnote-75) Lawyers on this account were obligated not to seek only the advantage of their clients, but instead to employ their expertise in “understanding complex facts . . . to envision a new and better community.”[[76]](#footnote-76) Following Rousseau’s distinction between private interests and the general will, lawyers traditionally understood their role as pursuing the private interests of clients within the constraints of the public good.[[77]](#footnote-77) Or, to use the term associated with the civic republican tradition, lawyers believed that they are in a better position than their clients to exercise civic virtue – that is, an impartiality among private interests, with due concern for the public good or general welfare of society.[[78]](#footnote-78) Louis Brandeis, for example, reportedly advised his client, a business owner, that his employees’ demands for higher wages were justified.[[79]](#footnote-79) Law professors in a moralistic mode love to quote a line attributed to Elihu Root: “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”[[80]](#footnote-80) These traditional conceptions of professionalism envisioned lawyers as social engineers, and here is the abstract purpose constituting a governance mandate. Lawyers are to serve not the interests of specific clients, but the much more general end of aligning the interests of clients with the public interest, and working toward a more harmonious social order. Self-regulation by the legal profession has the capacity to orient lawyers’ duties toward the common good, not the interests of particular clients.

This civic-republican conception of professionalism remains attractive to many scholars, although the dominant approach to legal ethics today is undoubtedly closer to what Simon calls the “libertarian-positivist view.”[[81]](#footnote-81) The libertarian-positivist view maintains that lawyers represent clients who are merely self-interested, pursuing their own ends, within constraints established by positive law. On this account, anything not clearly prohibited is permitted, and it is the duty of the lawyer to maximize the client's freedom of action. Lawyers are fundamentally technicians, retained by clients for their expertise in working with complex legal doctrines – again, with the end of facilitating the autonomy of clients to act on their own interests. The modern libertarian-positivist view is practically the antithesis of a governance mandate for lawyers. In fact, its central premise is to deny that lawyers have duties to the political community, other than the duty any citizen has to refrain from violating the law. It is not an exaggeration to note that the libertarian-positivist view begins with Margaret Thatcher’s notorious proclamation that “[t]here is no such thing as society.”[[82]](#footnote-82) There is also no such thing as the common good, or the public interest, toward which a governance mandate could be directed. The libertarian-positivist view instead follows public choice theory in regarding the state as “nothing more than the set of processes, the machine, which allows . . . collective action to take place.”[[83]](#footnote-83) What civic republicans would refer to as the public interest is nothing more than “individual decisions [as] combined through a specific rule of decision-making.”[[84]](#footnote-84) A libertarian-positivist lawyer would never have followed Brandeis in advising a client to do the right thing by his employees. The only question a lawyer should consider, on this view, is whether the employer had legally adequate grounds to resist the employees’ demands.

Lawyers came in for criticism during the Progressive Era for uncritically serving the interests of great industrialists. President Theodore Roosevelt tore into the “most influential and most highly remunerated members” of the legal profession for providing assistance to clients to enable them to “evade the laws which are made to regulate in the interest of the public the use of great wealth.”[[85]](#footnote-85) As late as 1932, Supreme Court Justice Harlan F. Stone was calling corporate lawyers the “obsequious servant[s] of business” who no longer had the capacity or the inclination for “bringing the law into harmony with changed conditions,” because they were “tainted by the morals and manners of the market place in all its most anti-social manifestations.”[[86]](#footnote-86) However, by the middle of the Twentieth Century most lawyers no longer viewed themselves as architects of the social order, but as providers of legal services.[[87]](#footnote-87) In a way this is an admirable change in perspective, which demystifies and makes less grandiose the lawyer’s role.[[88]](#footnote-88) It also emphasizes the importance of the genuine moral ideal of service and, in particular, the avoidance of paternalism that inevitably accompanies the effort to serve as a social engineer.[[89]](#footnote-89)

The constrained-loyalties model of the lawyer’s role shows how lawyers actually can be vital to social order – if not architects, then at least engineers or operators who keep things working as planned by the legislature and executive branch. This model sidesteps the perennial criticism of legal ethics as technocratic, by emphasizing the value in competent, faithful interpretation of the law in pursuit of the client’s instructions. Lawyers are not acting in a governance capacity, with an eye toward protecting the public interest or the common good. The duties established by agency and fiduciary law – quintessentially features of private law – nevertheless ensure that the loyalty of lawyers does not run amok and contribute to anti-social projects.

5. Conclusion.

I have argued that the puzzle for fiduciary theory presented by the law governing lawyers is how to account for the coexistence of (1) what is paradigmatically a duty of loyalty owed by the lawyer to clients with (2) duties owed to third parties, or duties that might be thought of as owing to the law or the public interest. A somewhat more metatheoretical puzzle is whether the law governing lawyers should be understood as part of private or public law. The traditional “zealous advocacy” model of lawyers’ duties is located solidly within public law, governing as it does the duties owed by the lawyer to the client. It emphasizes the agency relationship between lawyer and client, as well as duties of care, communication, diligence, and loyalty. As I have argued here, however, the zealous advocacy model cannot handle duties that run from the lawyer to non-clients, of which there are many in the law of lawyering. At this point one might be tempted to take a turn toward public-law conceptions of the lawyer-client relationship, seeing the normative commitments of the legal profession as a type of governance mandate. This move lines up nicely with a great deal of rhetoric about the public responsibilities of lawyers, but it also fails the test of fit with the existing law of lawyering. What is required is a theory of lawyers’ fiduciary duties to clients that fits comfortably within private law, and explains the existence of some fairly robust duties to non-clients.

The constrained-loyalties model shows how the private-law relationship between lawyer and client builds in recognition of public values, insofar as they are embodied in the positive law governing the client’s situation. The lawyer-client relationship is one in which an agent is empowered to act for the principal, but only to the extent the principal has lawful power. To the extent the law sets limits on the client’s permissible activities, a lawyer representing the client may not exceed those boundaries. This is not a governance relationship, where the lawyer is declining to provide assistance based on the lawyer’s assessment of the public interests implicated by the client’s proposed course of action.

1. Edwin H. Woodruff Professor of Law, Cornell Law School. Thanks to Evan Criddle, Evan Fox-Decent, Andrew Gold, and Paul Miller for critiques and suggestions, and to the participants in the International Fiduciary Law workshop at the University of Cambridge for lively discussion. I gratefully acknowledge the research funding provided by the Judge Albert Conway Memorial Fund for Legal Research, established by the William C. and Joyce C. O’Neil Charitable Trust. [↑](#footnote-ref-1)
2. Aberdeen Railway Co. v. Blaikie Bros., (1854) 1 Macq. 461 (H.L.) 471. [↑](#footnote-ref-2)
3. Restatement (Third) of the Law Governing Lawyers § 16(1) (2000). [↑](#footnote-ref-3)
4. See, e.g., Hanoch Dagan, *Private Law Pluralism and the Rule of Law*, *in* Private Law and the Rule of Law 158 (Lisa M. Austin & Dennis Klimchuk eds. 2014). [↑](#footnote-ref-4)
5. *Quoted in* Tim Dare, The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role 6 (2009). [↑](#footnote-ref-5)
6. *See*, *e.g.*, Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 Fordham L. Rev. 1339 (2006); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241 (1992); Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 Stan. L. Rev. 339 (1985). [↑](#footnote-ref-6)
7. Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in Evan Criddle, et al., eds. Fiduciary Government, (Cambridge University Press, 2018). [↑](#footnote-ref-7)
8. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 Wm. & Mary L. Rev. 513 (2015). [↑](#footnote-ref-8)
9. Andrew S. Gold, *The Internal Limits on Fiduciary Loyalty*, manuscript. [↑](#footnote-ref-9)
10. Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, 65 U. Toronto L.J. 285, 289 (2015). [↑](#footnote-ref-10)
11. *See* John C. P. Goldberg, *Pragmatism and Private Law*, 125 Harv. L. Rev. 1640 (2012) (describing commitments of new private law theory). [↑](#footnote-ref-11)
12. *See* Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga. L. Rev. 1 (2008). [↑](#footnote-ref-12)
13. *See* Deborah A. DeMott, *The Lawyer as Agent*, 67 Fordham L. Rev. 301 (1998). [↑](#footnote-ref-13)
14. *See* Charles M. Yablon, *The Lawyer As Accomplice: Cannabis, Uber, Airbnb, and the Ethics of Advising “Disruptive” Businesses*, 104 Minn. L. Rev. 309 (2019) (recognizing that lawyers face subtle ethical challenges when representing businesses whose activities can be described as “not quite legal”). [↑](#footnote-ref-14)
15. *See* Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 Tex. L. Rev. 993 (2017) (arguing that fiduciary theory, understood along classical republican lines, furthers the liberty of individuals by protecting them from domination by those to whom they have entrusted important aspects of their interests). [↑](#footnote-ref-15)
16. In conversation, Andrew Gold suggested that he and Henry Smith are keen to defend the public/private distinction because public law has a tendency to swallow up the distinctive morality of private law, which is in a “second-person key.” *See also* Andrew S. Gold & Henry E. Smith, *Sizing Up Private Law*, 70 U. Toronto L.J. 489(2020) (calling for renewed attention to the moral norms immanent within private law). The “second person” language calls to mind Stephen Darwall’s claim that morality is fundamentally about second-personal relationships of authority and accountability, animated by the value of mutual respect among free and equal persons. I have contended in recent work that second-personal accountability is at the ground level of an account of the moral value of a legal system, and therefore the legal profession. *See* W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. Rev. 107 (2019); W. Bradley Wendel, *The Problem of the Faithless Principal: Fiduciary Theory and the Capacities of Clients*, 124 Penn St. L. Rev. 107 (2019). Holding the line on the public/private distinction is therefore not simply a quixotic jurisprudential pursuit but a commitment that is related at a deep level to the normative foundations of the role of the legal profession. [↑](#footnote-ref-16)
17. *See*, *e.g.*, Irit Samet, *Guarding the Fiduciary's Conscience: A Justification of a Stringent Profit-Stripping Rule*, 28 Oxford J. Leg. Stud. 763 (2008); Peter Birks, *The Content of Fiduciary Obligation*, 34 Isr. L. Rev. 3 (2000); Conaglen, *supra* note \_\_, at 460-61. [↑](#footnote-ref-17)
18. Samet, *supra* note \_\_, at 764. [↑](#footnote-ref-18)
19. *See* Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 Geo. J. Legal Ethics 823 (1992). [↑](#footnote-ref-19)
20. ABA Model Rules of Prof’l Conduct, Rule 1.7(a)(2). [↑](#footnote-ref-20)
21. *See*, *e.g.*, Dynamic 3D Geosolutions LLC v. Schlumberger Ltd., 837 F.3d 1280 (Fed. Cir. 2016) (disqualifying a lawyer from representing a client whose interests are materially adverse to those of a former client, even in the absence of a showing of actual harm to the former client). [↑](#footnote-ref-21)
22. *See* Samet, *supra* note \_\_, at 766 (citing Lord Russell of Killowen in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL), 144G-145A, for the proposition that a breach of fiduciary duty “in no way depend on fraud, or absence of bona fides”). Curiously, the American rule on conflicts of interest does not include a specific *mens rea* term. It simply states that “a lawyer shall not represent a client” in circumstances that constitute a conflict of interest. Does this mean the rule is one of strict liability? In an important article, Nancy Moore analyzes the *mens rea* for conflicts with reference to other textual evidence, such as a comment providing that a lawyer’s ignorance of relevant facts caused by a failure to employ reasonable conflicts-checking procedures does not excuse a violation of the rule; on the basis of this evidence, she concludes that the rule should be interpreted as having a negligence mental state requirement. Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 Geo. J. Legal Ethics 1, 27-34 (2010). [↑](#footnote-ref-22)
23. Conaglen, *supra* note \_\_, at 453. [↑](#footnote-ref-23)
24. *Id.* at 457 (*quoting* Hilton v Barker Booth and Eastwood (a firm) [2005] UKJ-IL 8; [2005] I WLR 567 at [29]). [↑](#footnote-ref-24)
25. Birks, *supra* note \_\_, at 10; *see also* Bristol and West Building Society v. Motthew [1998] 1 Ch 1 (CA) 18 (Millett L.J.). [↑](#footnote-ref-25)
26. Conaglen, *supra* note \_\_, at 459-60. [↑](#footnote-ref-26)
27. Samet, *supra* note \_\_, at 764. [↑](#footnote-ref-27)
28. *Id.* at 769-70 (discussing Lionel Smith, *The Motive, Not the Deed*, *in* Rationalizing Property, Equity and Trusts 53 (Joshua Getzler ed. 2003)). [↑](#footnote-ref-28)
29. *Id.* at 773-74. A considerable body of empirical research, not cited by Samet, supports her claim. *See*, *e.g.*, Max H. Bazerman & Ann E. Tenbrunsel, Blind Spots: Why We Fail to Do What's Right and What to Do about It (2011); John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 Brook. L. Rev. 1177 (2005); Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 Soc. Just. Res. 223 (2004); Don Moore & George F. Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 Soc. Just. Res. 189 (2004); Mahzarin R. Banaji, Max H. Bazerman & Dolly Chough, *How (Un)ethical Are You?*, Harv. Bus. Rev. (December 2003); David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 Sloan Mgmt. Rev. 39 (Winter 1996). [↑](#footnote-ref-29)
30. Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, 65 U. Toronto L.J. 285, 289 (2015). [↑](#footnote-ref-30)
31. One of several excellent hypotheticals from Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 Fla. L. Rev. 251, 261-63 (2018). [↑](#footnote-ref-31)
32. In the original version of the hypothetical, the president also asked the lawyer to secure the agreement of the engineers to a salary that would be substantially lower than the federal minimum wage, which might subject the company to criminal penalties for knowing violation of the Fair Labor Standards Act (FLSA). *See id.* at 306-07. I wrote around the FLSA violation to make the hypothetical more difficult. [↑](#footnote-ref-32)
33. Deborah DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* Philosophical Foundations of Fiduciary Law 321 (Andrew S. Gold & Paul B. Miller eds. 2014). [↑](#footnote-ref-33)
34. ABA Model Rules of Prof’l Conduct, Rule 1.2(d). [↑](#footnote-ref-34)
35. Tremblay, *supra* note \_\_, at 310. [↑](#footnote-ref-35)
36. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 Wm. & Mary L. Rev. 513, 549 (2015). [↑](#footnote-ref-36)
37. *See*, *e.g.*, William H. Simon, The Practice of Justice (1998). [↑](#footnote-ref-37)
38. William M. Sullivan, et al., Educating Lawyers: Preparation for the Practice of Law145 (2007). [↑](#footnote-ref-38)
39. Deborah L. Rhode, In the Interests of Justice 66-67 (2000). [↑](#footnote-ref-39)
40. Deborah A. DeMott, *The Lawyer as Agent*, 67 Fordham L. Rev. 301, 305 (1998). [↑](#footnote-ref-40)
41. *See* Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, *in* Fiduciary Government 5 (Evan J. Criddle, et al., eds., 2018). [↑](#footnote-ref-41)
42. *Id.* at 6. [↑](#footnote-ref-42)
43. *See* Joseph Raz, The Authority of Law 16-27 (1979); Joseph Raz, Practical Reason and Norms 35-48 (1975). [↑](#footnote-ref-43)
44. Raz, *supra* note \_\_, at 39-40. [↑](#footnote-ref-44)
45. *Id.* at 40. [↑](#footnote-ref-45)
46. DeMott, *supra* note \_\_, at 303. [↑](#footnote-ref-46)
47. *Id.* at 305-06, 319. [↑](#footnote-ref-47)
48. *Id.* at 306. [↑](#footnote-ref-48)
49. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 Wm. & Mary L. Rev. 513, 519-20 (2015). [↑](#footnote-ref-49)
50. *Id.* at 521-22. [↑](#footnote-ref-50)
51. *Id.* at 519. [↑](#footnote-ref-51)
52. *Id.* at 521. [↑](#footnote-ref-52)
53. *Id.* at 523. [↑](#footnote-ref-53)
54. *Id.* at 548, 551. [↑](#footnote-ref-54)
55. *Id.* at 550-52. [↑](#footnote-ref-55)
56. *Id.* at 530, 535, 552-53. [↑](#footnote-ref-56)
57. *Id.* at 555-56. [↑](#footnote-ref-57)
58. Miller & Gold, *supra* note \_\_, at 561-62. [↑](#footnote-ref-58)
59. *See*, *e.g.*, Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699 (2013). [↑](#footnote-ref-59)
60. *Id.* at 721. [↑](#footnote-ref-60)
61. Simon, *supra* note \_\_, at 9. [↑](#footnote-ref-61)
62. *See* W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. Rev. 107 (2019); W. Bradley Wendel, *Law and Nonlegal Norms in Government Lawyers' Ethics: Discretion Meets Legitimacy*, 87 Fordham L. Rev. 1995 (2019); W. Bradley Wendel, *The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations*, 30 Can. J. L. & Juris. 443 (2017); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 Hastings L.J. 275 (2017); W. Bradley Wendel, *Lawyers as Quasi-Public Actors*, 45 Alta. L. Rev. 83 (2008). [↑](#footnote-ref-62)
63. *See* Ronald Dworkin, Law’s Empire 255 (1986) (arguing that an interpretation of law must take account of existing caselaw and legislation). [↑](#footnote-ref-63)
64. Andrew S. Gold, *The Internal Limits on Fiduciary Loyalty*, manuscript. [↑](#footnote-ref-64)
65. Gold, *supra* note \_\_, p. 7. [↑](#footnote-ref-65)
66. Restatement (Third) of the Law Governing Lawyers § 16(1) (2000) (emphasis added). [↑](#footnote-ref-66)
67. *See* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917). I have followed Matthew Kramer in substituting the term “liberty” for “privilege” in Hohfeld’s article. *See* Matthew H. Kramer, *Rights Without Trimmings*, *in* A Debate Over Rights 7, 7-8 n. (Matthew H. Kramer, N.E. Simmonds & Hillel Steiner, eds., 1998). [↑](#footnote-ref-67)
68. Hohfeld, *supra* note \_\_, at 769-70. [↑](#footnote-ref-68)
69. Based on the classic case, Sturges v. Bridgman, 11 Ch. D 852 (C.A. 1879). [↑](#footnote-ref-69)
70. Gold, *supra* note \_\_, p. 8. [↑](#footnote-ref-70)
71. *Id.* [↑](#footnote-ref-71)
72. *Id.*, pp. 8-9 (discussing T.M. Scanlon, *What We Owe To Each Other* 165-65 (1998)). This example inevitably calls to mind the old joke: A friend will help you move; a good friend will help you move a dead body. [↑](#footnote-ref-72)
73. *Id.*, p. 9. [↑](#footnote-ref-73)
74. *See*, *e.g.*, Air Turbine, Inc. v. Quarles & Brady, 165 So.3d 816 (Fla. Dist. Ct. App. 2015) (affirming summary judgment for the law firm in a legal malpractice action – “to the extent that any of the challenged conduct could be seen as fairly debatable, the attorney's advice was protected by judgmental immunity”); Seed Co. Ltd. v. Westerman, 62 F. Supp. 3d 56 (D.D.C. 2014) (no liability where there was an unsettled issue over the requirement of submitting an English-language translation of a foreign patent application); Biomet, Inc. v. Finnegan Henderson LLP, 967 A.2d 662 (D.C. Ct. App. 2009) (judgmental immunity doctrine provides that an informed professional judgment made with reasonable care and skill cannot be the basis of a legal malpractice claim). [↑](#footnote-ref-74)
75. Paul D. Carrington, Stewards of Democracy: Law as a Public Profession (1999); Anthony T. Kronman, The Lost Lawyer (1993); Samuel Haber, The Quest for Authority and Honor in the American Professions 1750-1900 (1991); Robert W. Gordon, *Why Lawyers Can’t Just Be Hired Guns*, *in* Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation 46 (Deborah L. Rhode, ed., 2000). For an excellent history of the collapse of this ideal, see Rebecca Roiphe, *The Decline of Professionalism*, 29 Geo. J. Legal Ethics 649 (2016). [↑](#footnote-ref-75)
76. *See* Harlan Fiske Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 14 (1934). [↑](#footnote-ref-76)
77. Kronman refers to the capacity of a good lawyer to view the situation of a client with both sympathy and detachment, an attitude that combines perception, imagination, and independence. *See* Kronman, *supra* note \_\_, at 66-74. [↑](#footnote-ref-77)
78. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1, 14-15 (1988) (*quoting* Alexander Hamilton, *Federalist* No. 35). [↑](#footnote-ref-78)
79. *See* David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 Vand. L. Rev. 717, 722-23 (1988) (reporting this incident). On other occasions Brandeis acted as more of a traditional zealous advocate. For example, he publicly defended the anticompetitive business practices of his client, the United Shoe Company. When he subsequently spoke out against the same practices, he was accused of disloyalty, and this alleged betrayal of a client was an issue in his Supreme Court confirmation hearings. *See* Yablon, *supra* note \_\_, at 323-25. [↑](#footnote-ref-79)
80. 1 Philip Jessup, Elihu Root 132-33 (1938), *quoted in*, *e.g.*, Thomas D. Morgan, The Vanishing American Lawyer 62-63 (2010); Mary Ann Glendon, A Nation Under Lawyers 37 (1994). [↑](#footnote-ref-80)
81. Simon, *supra* note \_\_, at 26-29 (criticizing this conception of legal ethics). [↑](#footnote-ref-81)
82. *Quoted in* Roiphe, *supra* note \_\_, at 663. [↑](#footnote-ref-82)
83. James M. Buchanan & Gordon Tullock, The Calculus of Consent 13 (1962). [↑](#footnote-ref-83)
84. *Id.* at 35. [↑](#footnote-ref-84)
85. Theodore Roosevelt, *The Harvard Spirit* (June 28, 1905), in IV Presidential Addresses and State Papers 407, 419-20 (1910), *quoted in* Yablon, *supra* note \_\_, at 325 n.77. [↑](#footnote-ref-85)
86. Stone, *supra* note \_\_, at 7. [↑](#footnote-ref-86)
87. Roiphe, *supra* note \_\_, at 672. [↑](#footnote-ref-87)
88. Oliver Wendell Holmes, Jr., who of course is known for his insistence on debunking the pretentions of law, to the point of being corrosively cynical, once wrote that lawyers ought to be content to simply do their jobs “without waiting for an angel to assure us that it is the jobbest job in jobdom.” Letter from O.W. Holmes to Morris R. Cohen (May 27, 1917), *in* *The Holmes-Cohen Correspondence*, 9 J. Hist. Ideas 3, 10 (1948), *quoted in* David Luban, *The Bad Man and the Good Lawyer*, 72 N.Y.U. L. Rev. 1547, 1549 (1997). [↑](#footnote-ref-88)
89. Roiphe, *supra* note \_\_, at 673. [↑](#footnote-ref-89)