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Fiduciary Legal Ethics, Zeal, and Moral Activism

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Georgetown Journal of Legal Ethics, Vol. 33, Issue 2, 275.

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Fiduciary Legal Ethics, Zeal, and Moral Activism

DAVID LUBAN*

ABSTRACT

The recent turn to fiduciary theory among private lawyer scholars suggests that "lawyer as fiduciary" may provide a fresh justification for legal ethics distinct from moral and political accounts propounded by theorists in recent decades. This Article examines the justification and limits of fiduciary legal ethics. In the course of the investigation, it argues that the fiduciary relation of lawyer to client as defined in the ethics codes does not align perfectly with fiduciary principles in other legal domains, such as agency, trust, or corporate law.

Lawyers are fiduciaries of their clients. Does that mean lawyers can never throttle back on partisan zeal for moral reasons? So it might seem, and so some scholars have argued. Ethics rules permit lawyers to withdraw from representations they find morally repugnant, but not to represent clients with diminished zeal. And yet there are cases, such as peeking at metadata inadvertently transmitted in documents sent by an adversary, or exploiting scrivener's errors, where many lawyers understandably back off from the sternest implications of partisan zeal. Such cases call into question whether "lawyer as fiduciary" tells the whole story. An adequate theory of the lawyer-client fiduciary relationship must define the limits to fiduciary zeal as well as justify the fiduciary relationship itself. Otherwise, invoking the word "fiduciary" merely relabels the moral problem of partisan zeal rather than resolving it.

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* University Professor, Georgetown University Law Center. This Article was written for a conference on fiduciary theory and legal ethics held at Kylemore Abbey, Ireland in summer 2019. The author is grateful to the participants in the conference for helpful comments. © 2020, David Luban.

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INTRODUCTION

The client-lawyer relationship, it is often said, originates in agency law because lawyers are agents of their clients. As agents, they are bound by fiduciary obligations to their clients. These obligations are the *fons et origo* of at least one strand of legal ethics. My primary aim in this Article is to explore some familiar questions about the moral limits of zealous partisanship in light of fiduciary theory. A more programmatic secondary aim is to ask whether the recent "fiduciary turn" in legal theory offers fresh theoretical illumination in legal ethics. Is the appeal to fiduciary obligation a sufficient answer to doubts about the morality of partisan zeal? Does fiduciary theory provide new resources for approaching the issue? To these questions, my answer is a qualified skepticism—not an outright no, but rather a "not yet shown." The concluding Section of the Article explains why.

As a rough-and-ready conception of fiduciary relationships, let me borrow from Ethan Leib and Steven Galoob's paper on fiduciary political theory: a fiduciary relationship is characterized by discretion, trust, and vulnerability.[1] The client trusts the lawyer, and because the lawyer is the legal expert, the client is vulnerable to lawyer misconduct. In carrying out the client's business, the lawyer inevitably makes discretionary judgments, and discretion must be exercised on the client's behalf, never on the lawyer's own behalf. The discretion-trust-vulnerability triad seems like a plausible starting point for explaining why fiduciary obligations characterize the client-lawyer relationship. The lawyer's fiduciary obligation to the client is to exercise discretion ("independent professional

1. Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1826 (2016). Leib and Galoob take these three elements from a 1987 decision of the Canadian Supreme Court, Frame v. Smith, [1987] 2 S.C.R. 99, 102 (Can.).

judgment" in the ethics vernacular) on behalf of the client's interests, the client being the sole beneficiary of the relationship.[2]

A central aim of fiduciary obligations in principal-agent relationships is to prevent self-dealing on the part of agents, and that laudable aim is reflected in the many conflict-of-interest rules that form a prominent part of legal ethics codes.[3] Even beyond the letter of the ethics rules, the no-self-dealing obligation appears in other ethics-related doctrines, for example the judge-made "hot potato" rule that prohibits lawyers from dropping a client ("like a hot potato") in order to represent a more lucrative potential client.[4] Rules barring venal self-dealing are arguably the heartland of fiduciary law, and as such they are a familiar and uncontroversial part of the law of lawyering.

Not all the ethics rules derive from lawyers' fiduciary obligations to clients. Some aim to protect the integrity of the judicial process, even if that protection disadvantages the client.[5] But perhaps those rules too could be analyzed as fiduciary obligations. How so? Lawyers are said to be "officers of the court." Perhaps that anodyne phrase could be thought of as akin to a principal-agent relationship, in which the lawyer is, in an attenuated way, a fiduciary for the court. That would be a controversial analysis. Unlike the conflict-of-interest rules, which everyone understands to be fiduciary in origin, reading obligations to the court as fiduciary obligations is a stretch because lawyers are neither agents of the court nor trustees of the judicial process. But theorists with ambitions to expand fiduciary theory from private to public law may be receptive to stretching the notion to encompass the "officer of the court" role.[6] In what follows, I will not pursue that line of thought, but will assume only the more conventional and uncontroversial view that lawyers' fiduciary obligations run to their clients.

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2. For rules emphasizing independent professional judgment see, for example, MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1, 1.8(f)(2), 2.1 (2018) [hereinafter MODEL RULES]. In the predecessor to the *Model Rules*, the *Model Code of Professional Responsibility* (1969), the fundamental conflict of interest canon (Canon 5) reads: "A lawyer should exercise independent professional judgment on behalf of a client."

3. In the *Model Rules of Professional Conduct*, protections against self-dealing include the comprehensive conflict of interest rules, R. 1.7–1.12, but also a few other rules, such as R. 1.5 (regulating lawyers' fees), R. 1.15 (safeguarding client property in the lawyer's possession), and R. 1.18(c)–(d) (extending conflict-of-interest protections to prospective clients). What I am calling "self-dealing" is closely related if not identical with what Henry E. Smith labels "opportunism." Henry E. Smith, *Why Fiduciary Law Is Equitable*, PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261 (Andrew Gold & Paul Miller, eds., 2014).

4. Picker Int'l, Inc. v. Varian Assocs., Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987).

5. MODEL RULES R. 3.1–3.6, 8.2(a), and 8.4(d) are the most pertinent.

6. This line of thought is not the same as W. Bradley Wendel's important idea that lawyers' ethics requires fidelity to law. *See* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2012). By that phrase, Wendel means two different things: the first is fidelity in interpreting the law when the lawyer is advising clients about what the law requires; the second is presumptive faithful obedience to the law, in particular to the law of lawyering.

I. ZEAL

My focus is going to be on a feature of legal ethics taken by many to be the most central and distinctive principle in the standard conception of lawyers' fiduciary obligations: client representation should be *zealous*. The lawyer is not only an agent of a client-principal; the lawyer (especially, but not only, in advocacy roles) is the client's *partisan*—her champion. In the famous and often-quoted words of Lord Henry Brougham:

> 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 amongst 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 upon others.[7]

Brougham added: "Separating the duties of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."[8]

The U.S. ethics codes are less florid than Lord Brougham: they do not dwell so lovingly on alarm, torments, and destruction, nor do they encourage advocates to proceed reckless of consequences—at least not in so many words. But the first ABA ethics code, adopted in 1908, employed an unmistakably Broughamesque, if slightly toned-down, idiom: lawyers owe "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability."[9] The second ABA code (1969) is a bit cooler in its rhetorical temperature (in fact, the adjective "warm" no longer modifies "zeal"): it speaks of zeal *within the bounds of the law*, presumably as a caution to lawyers and a reassurance to the public.[10] But it also reminds lawyers that their duty is "to seek any lawful objective through legally permissible means," which is not really a doctrinal change from Brougham's fiery credo.[11]

The current *Model Rules of Professional Conduct* eliminate the word "zeal" from the text of the rules, moving it to the non-binding explanatory comments and the preamble. The pertinent Rule itself requires only "reasonable diligence" on the client's behalf.[12] Is this a doctrinal change? Some commentators fear that it is, and lament that the zeal requirement is now endangered.[13] I don't believe it; I attribute the change in wording to caution about what an enforceable rule can

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7. 2 CAUSES CELEBRES: TRIAL OF QUEEN CAROLINE 3 (1874).

8. *Id.*

9. CANONS OF PROF'L ETHICS Canon 15 (1908).

10. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law") [hereinafter MODEL CODE].

11. *Id.*

12. MODEL RULES R. 1.3.

13. *See, e.g.*, Lawrence J. Vilardo & Vincent E. Doyle III, *Where Did the Zeal Go?*, A.B.A. LITIG. J. (Fall 2011).

require. An enforceable requirement of "zeal" might invite disciplinary complaints against lawyers who have not done every last thing the client asked.[14] Perhaps implicit in the change of wording is Tim Dare's distinction between mere zeal and "hyperzeal," in order to make it clear that reasonably diligent (i.e., merely-zealous) lawyers will not face discipline for not doing everything under the sun on their clients' behalf.[15] The fact remains that lawyers also will not face discipline for hyperzeal, that is, for *doing* everything under the sun on their clients' behalf, no matter how ruthless, so long as the law permits it.[16] And to my knowledge, no observer of the legal profession has detected diminished levels of lawyerly hardball in the decades since the *Model Rules* came to dominate the regulatory environment. As Deborah Rhode has remarked, large-firm practice prides itself in leaving no stone unturned on the client's behalf, provided lawyers can bill by the stone.[17] A partner in a major litigation firm once explained to me that the first thing she does when defending a law suit is file a counter-claim—a warning shot letting the other side know they are now in a war. I asked: doesn't there have to be a non-frivolous basis for the counter-claim? She smiled at my naiveté. In her world there is always enough ammo for a counter-claim—that is why they are a major litigation firm. Zeal, be it "mere" or "hyper," remains alive and well in the legal culture of the *Model Rules* era.

Importantly for present purposes, the explanatory comment to Model Rule 1.3 couches the principle of zeal in terms that sound fiduciary in character: "A lawyer must ... act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[18] Commitment and dedication to the interests of the client sound in the key of fiduciary obligation. Arguably, then, fiduciary ethics might explain lawyers' duty of zeal, just as it explains the conflict-of-interest rules.

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14. The late Geoffrey Hazard, Jr., who drafted the *Model Rules*, explained that one of his goals was to turn the obligatory/hortatory/precatory mishmash of the previous codes into an ordinary hard-law document that lawyers can interpret in ordinary lawyerly ways. Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 REC. BAR N.Y.C. 77, 89 (1981). Hazard was steely in his outlook, and even though the ABA took care to insert a caution that the *Model Rules* are not meant as a standard of malpractice liability, Hazard knew full well that in malpractice cases, with dueling experts opining on the standard of care, the *Model Rules* would be salient—and thus an enforceable standard requiring "zeal" might provoke a gold-rush of malpractice suits as well as disciplinary complaints.

15. Tim Dare's writing elaborates the distinction. *See* TIM DARE, The COUNSEL OF ROGUES?: A DEFENSE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (2009); Tim Dare, *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers*, 7 LEGAL ETHICS 24 (2004). The term "hyperzeal" originates in my own book. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 397 (1988) [hereinafter LAWYERS AND JUSTICE].

16. A lawyer "shall abide by the client's decisions concerning the objectives of representation," MODEL RULES R. 1.2(a), and no rule prohibits lawyers from taking lawful action to advance those objectives.

17. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985).

18. MODEL RULES R. 1.3 cmt. 1.

II. THE ISSUE POSED: FIDUCIARY LEGAL ETHICS AND MORAL ACTIVISM

Let us accept that fiduciary legal ethics includes zeal as a central component. I am interested in how much latitude that gives the lawyer for "moral activism"—my name for a morally ambitious approach to legal ethics in which the lawyer may temper zeal on the client's behalf for moral reasons.[19] Most typically, the moral reason would be that some lawful action on the client's behalf would seriously and unjustifiably shaft a third party or damage an important public interest.[20] Activism is my own approach to legal ethics, set out and defended in *Lawyers and Justice*.[21] Other writers on legal ethics sympathetic to this approach (even though they do not use the label "moral activism" and disagree with me on significant points) include Robert Gordon, Gerald Postema, Deborah Rhode, the late Thomas Shaffer, William Simon, and Richard Wasserstrom.[22]

In our intellectual history of modern philosophical legal ethics, Brad Wendel and I classify these writers, as well as some of their opponents, as the "First Generation" ("First-Gen") of theoretical legal ethicists.[23] What characterizes the First Generation is the belief that central to legal ethics is a question in moral philosophy: whether a zeal-based professional role morality that is sometimes inconsistent with common ("lay") morality, or with substantive justice, can be justified. Edward Dauer and Arthur Leff tee up the issue in their description of the lawyer's role, a late-twentieth century update of Lord Brougham's provocation:

> When one desires help in those processes whereby and wherein people are treated as means and not as ends, then one comes to lawyers, to us. . . . A lawyer is a person who on behalf of some people treats other people the way that bureaucracies treat all people—as nonpeople.[24]

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19. My first effort to expound and defend moral activism is LUBAN, LAWYERS AND JUSTICE, *supra* note 15, but I have done so in many publications since.

20. Let me emphasize the word "lawful"—we are not talking about criminal or fraudulent acts on the client's behalf, only lawful but morally repugnant acts.

21. LUBAN, LAWYERS AND JUSTICE, *supra* note 15, at 160–74.

22. *See, e.g.*, Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Rhode, *supra* note 17; Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE (1998); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975). These are representative works by authors who have written many works on legal ethics.

23. David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337 (2017). Other First-Gen legal ethicists, notably Monroe Freedman, Charles Fried, Geoff Hazard, and Stephen Pepper, reject this approach and defend a view closer to the neutral partisan conception of the lawyer's role. Susan Koniak, one of the most brilliant and original writers on legal ethics, is hard to classify, but I think of her as First-Gen. Equally hard to classify, but also First-Gen, is ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

24. Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977).

That does not sound good. A role morality that discounts the interests of non-clients to zero or near zero—that self-consciously treats other people as means rather than ends—does not sound like morality at all.

Obviously there are justifications of the role morality: most prominently the requirements of the adversary system and the appeal to the value of client autonomy before the law.[25] But if, as I believe, those justifications do not fully succeed, then the lawyer will be unable to shunt moral responsibility off onto the system, or to dismiss harms to third parties or to substantive justice as collateral damage in pursuit of client autonomy—regrettable, but blameless. Moral activism is simply my name for a view that takes lawyers' moral agency as an inevitability that is not so easily deflected by appeal to systemic values.[26]

Important later writers think the First Generation made a fundamental mistake by placing the philosophical problem of role morality at the center of legal ethics. These writers argue that the lawyer's role should be analyzed politically, not morally, and that subordinating the lawyer's moral convictions to those of clients with very different convictions is a political requirement of pluralism.[27] Among writers who view legal ethics through the lens of pluralist political theory rather than moral philosophy are Wendel himself, Tim Dare, Kate Kruse, Daniel Markovits, Norman Spaulding, and Alice Woolley—a disparate group Wendel and I label "Second Generation."[28] In our brief history of theoretical legal ethics, Wendel and I wonder whether fiduciary theory might yield a Third Generation of philosophical legal ethics, and for purposes of this Article that is a proposition I want to investigate.[29]

Arguably, tempering zeal and thereby failing to maximize client outcomes violates the lawyer's fiduciary obligation to the client. And so, the picture of lawyers as fiduciaries and agents of clients seems to rule out moral activism. In a comprehensive and spirited paper, Professor Charles Silver has argued for precisely that conclusion in what he calls a private-law defense of zeal, grounded in the

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25. For a forceful version of the latter, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986).

26. *See generally* David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437 (2008); David Luban, *How Must a Lawyer Be? A Reply to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101 (2010).

27. *See, e.g.*, Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2003); DANIEL MARKOVITS, A MODERN LEGAL ETHICS (2008); Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 COLO. L. REV. 104 (2003). The most explicit statement of this argument is set out in W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010).

28. Luban & Wendel, *supra* note 23, at 352–55, nn.18, 50, & 68 (citing representative works). I myself remain an unreconstructed First-Generation moral activist, and I have criticized some of the Second-Generation writers. For my critique of Markovits: David Luban, *Review of Markovits*, A Modern Legal Ethics, 120 ETHICS 864 (2010). Of Wendel: David Luban, *Misplaced Fidelity*, 90 TEXAS L. REV. 673 (2012); and my responses to several critics including Kruse, Spaulding, and Wendel: Luban, *The Inevitability of Conscience: A Response to My Critics*, *supra* note 26.

29. Luban & Wendel, *supra* note 23, at 364.

fiduciary character of the principal-agent relationship.[30] One might add that the fiduciary relationship is not only a legal relationship, it is a moral relationship as well—in Cardozo's famous plummy words from *Meinhard v. Salmon*, "the punctilio of an honor the most sensitive."[31] Apparently, honor the most sensitive rules out moral activism. Does it?

A. THE *MODEL RULES* AS *LEX SPECIALIS* DEFINING FIDUCIARY LEGAL ETHICS

As a first step in the inquiry, we must ask where in the positive law we should turn to discover concretely what fiduciary legal ethics is. Is the source of law the ethics codes and their related jurisprudence (the "law of lawyering"), or is it more general and time-hallowed principles of agency and fiduciary law? My answer is the former: for example, the *Model Rules of Professional Conduct*.[32] Under the doctrine of *lex specialis*, a subject-matter-specific rule takes precedence over a more general rule on the same subject.[33] The idea underlying the doctrine is that the subject-matter-specific rule makers are presumptively more deliberate about the subject-matter than rule makers who devised general law, without necessarily considering the unique characteristics of every specific subject-matter that may fall under it.

Lex specialis implies that the specific contours of the lawyer's role as agent and fiduciary of the client are those of the law of lawyering, not of general contract, fiduciary, or agency law pertaining to the same requirements. Thus, for example, as it pertains to lawyers, the fiduciary obligation of undivided loyalty is set out by the conflict-of-interest rules in the *Model Rules*, not by general principles of fiduciary relationships, and not by analogies drawn from the fiduciary law governing corporate directors or trustees (except, of course, when the lawyer is working in a non-representative role as a corporate director or trustee). No doubt fiduciary principles shaped the ethics rules, but the latter, and not more general

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30. Charles Silver, *A Private Law Defense of the Ethic of Zeal* (Texas Law, Pub. Law & Legal Theory Research Paper Series, Pub. Law Research Paper No. 638, 2016), *available at* http://ssrn.com/abstract=2728326 [https://perma.cc/22M9-VKJ4].

31. 164 N.E. 545 (N.Y. 1928).

32. The *Model Rules* are by no means the only source of law regulating lawyer conduct, but for simplicity, I will focus on them as the embodiment of professional ethics. *Cf.* Richard W. Painter, *Fiduciary Principles in Legal Representation*, *in* OXFORD HANDBOOK OF FIDUCIARY Law 267 (Evan Criddle et al. eds., 2019). Painter asserts that such sources as the *Model Rules* and *Restatement (Third) of the Law Governing Lawyers* "provide valuable guidance concerning the scope of lawyers' fiduciary duties," which is certainly true. My claim is somewhat stronger, namely that the law of lawyering defines the scope of lawyers' fiduciary duties.

33. In full, the principle reads: *lex specialis derogat legi generali*—"specific law overrides general law." The principle has particular bite when the *lex specialis* contradicts the general law. At first it may appear that when there is no contradiction, the *lex specialis* doctrine is irrelevant. Not so. Under another time-hallowed maxim, the interpretive canon *expressio unius*, those things *not* included in the *lex specialis* are presumptively excluded—even if they might be included in more general law on the same subject. In the present context, the point is this: however broad fiduciary principles of zeal in general agency law may be, it does not follow that the principle of zeal in legal ethics is any broader than the *lex specialis*.

fiduciary law, are the source to which we must turn to see what "fiduciary" means in the law of lawyering.

This is not to deny that more general fiduciary principles could be used as a moral yardstick for evaluating and criticizing developments in the law of lawyering. To take a pointed example: over the past thirty years, the ABA has struggled repeatedly over *Model Rules* amendments setting out exceptions to confidentiality, in which proposed exceptions invariably must overcome the skepticism of lawyers who believe that confidentiality is a paramount fiduciary obligation of lawyers.[34] The organized Bar has long opposed laws, such as the Sarbanes-Oxley Act's reporting requirements,[35] that might turn corporate lawyers into gatekeepers or whistleblowers.[36] Susan Koniak argues that the Bar did not cover itself with glory in these fights, and I agree.[37] Be that as it may, confidentiality hardliners might appeal to general fiduciary duties of confidentiality to oppose rule changes that could turn lawyers into corporate snitches.[38]

I note in passing that fiduciary ethics might, on the same basis, provide grounds for narrowing the ABA's expansive and self-protective confidentiality exception in cases of lawyer-client disputes; unsurprisingly, the Bar has never objected to this exception, and indeed broadened it in transitioning from the previous *Code of Professional Responsibility* to the *Model Rules*.[39] Daniel Fischel acidly comments that:

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34. For a study of these early intra-Bar conflicts, see generally Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQ. 677 (1989). Later episodes of debate and conflict over expanded exceptions to confidentiality are matters of the author's personal recollection.

35. 17 C.F.R. § 205.3 (2018).

36. *See, e.g.*, Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILLANOVA L. REV. 725, 799–808 (2004) (detailing efforts by the Washington and California State Bars to oppose Sarbanes-Oxley reporting requirements, and arguing that these efforts are "a vivid example of the Bar demonstrating its commitment to its vision of lawyering, in which the duty of confidentiality takes center stage, and any law of the state that seeks to diminish or interfere with that duty is trumped, deemed invalid, marginalized and disparaged").

37. Susan Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075 (1993), and Susan Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992) are especially deep-cutting critiques of the Bar on this issue.

38. The term "corporate snitch" appears in Jennifer Wheeler, *Section 307 of the Sarbanes-Oxley Act: Irreconcilable Conflict with the ABA's Model Rules and the Oklahoma Rules of Professional Conduct*, 56 OKLA. L. REV. 461 (2003). Richard Painter argues that Sarbanes-Oxley's "reporting up" requirement is actually a manifestation of the lawyer's fiduciary duty to the corporate client. Painter, *supra* note 32, at 274. More problematic, however, is Sarbanes-Oxley's "reporting out" provision, 17 C.F.R. § 205.2(b)(2) (2019), which permits lawyers to reveal confidences if material violations of securities law would substantially injure investors, or if the client is perpetrating a fraud on the SEC. The ABA rewrote Model Rule 1.13(c)(2) to allow lawyers to comply with the regulation.

39. In the former *Code of Professional Responsibility*, lawyers could reveal client confidences to collect fees and defend themselves and their associates against accusations of wrongful conduct. MODEL CODE DR 4-101(C)(4). The *Model Rules* expand that exception to include any claim by a lawyer against a client, not only fee-related claims. MODEL RULES R. 1.6(b)(5). As for accusations of wrongdoing against the lawyer, the exception "does not require the lawyer to await the commencement of an action or proceeding." MODEL RULES R. 1.6(b)(5) cmt. 10. In other words, the disclosure of client confidences can be a preemptive strike.

> [t]he lawyer's interest in collecting a fee is apparently a higher priority than exonerating an innocent defendant about to be convicted of a capital crime or helping a distraught family locate an abducted child. Confidentiality means everything in legal ethics unless lawyers lose money, in which case it means nothing.[40]

Fischel's comment highlights the peculiarity that this confidentiality exception pits lawyer interests against those of the very client to whom the lawyer owes a fiduciary obligation.

In addition to providing criteria for evaluating ethics rules, it may be that general fiduciary principles (if there are such things) can help in resolving ambiguities in the *Model Rules*. A natural inference from fiduciary ethics is that unclear rules regulating the fiduciary relationship should be read in the way most favorable to the beneficiary—an analogue to the principle of lenity in criminal law that requires reading ambiguous statutes in the way most favorable to the defendant.[41] Call this interpretive principle the "Principle of Pro-Client Interpretation." That might be one way in which general fiduciary principles could take local primacy over a Model Rule that is unclear as applied to a particular set of facts. For example, in a borderline conflict-of-interest case, the Principle of Pro-Client Interpretation might draw on analogies with fiduciary law from other fields to conclude that the lawyer has violated the "punctilio of an honor the most sensitive" by straddling the borderline.[42] It remains the case, however, that where the

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40. Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 10 (1998) (citing Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV 783, 811–15 (1977)).

41. The rule of lenity (known in other countries as *in dubito pro reo*) has been recognized in U.S. law for two centuries, and Chief Justice Marshall wrote in 1820 that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." United States v. Wiltberger, 18 U.S. 76, 95 (1820).

42. Meinhard v. Salmon, 249 N.Y. 458, 464 (1928). To illustrate with a real-life case of borderline conflict of interest, suppose that a New York law firm representing a newspaper in libel cases concurrently represents a wealthy suspected sexual predator who fears that his victims may go public and ruin him. On behalf of the suspected predator, the firm hires spies to find out what potential dirt the newspaper's reporters have on him, with an eye to suppressing the stories. Is there a prohibited conflict of interest between the two clients? Not necessarily: the newspaper has signed an advance waiver of conflicts of interest with the law firm. Specifically, a clause in the retainer agreement states that the firm might engage with clients "where the interests of the other persons, and the Firm's representation of them, may be against the [newspaper's interests]." Matt Ford, *David Boies's Complicated Conflicts*, THE ATLANTIC (Nov. 8, 2017), https://www.theatlantic.com/politics/archive/2017/11/weinstein-boies/545273/ [https://perma.cc/5ME9-QUQS]. A 2006 ethics opinion of the Association of the Bar of the City of New York took the position that, if a client is sophisticated, "blanket or open-ended advance waivers that are accompanied by relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable." N.Y.C. Bar, Formal Op. 2006–1 (2006). There is no doubt that the newspaper is a sophisticated client, so it is a borderline question whether the law firm has violated the conflicts rules. Obviously, though, spying on your own client on behalf of another client strays far from the "punctilio of an honor the most sensitive." That is certainly what the newspaper—the *New York Times*—thought when Boies Schiller pulled this stunt on behalf of its client Harvey Weinstein. *See* Ronan Farrow, *Harvey Weinstein's Army of Spies*, THE NEW YORKER (Nov. 6, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies [https://perma.cc/Y3V4-PCVB]. Firing the firm, the *Times* complained, "Such an operation is

ethics rule is clear, *lex specialis* implies that it takes primacy over any more general fiduciary principle on the same topic.

To summarize, I am suggesting three propositions about the relationship between codified legal ethics norms and general norms of fiduciary law (supposing there are such things):

> P1: Particular ethics rules, as *lex specialis*, take precedence over general fiduciary norms governing the same topics. However,
>
> P2: General fiduciary norms may nevertheless provide a standard or yardstick for criticizing particular ethics rules.
>
> P3: Fiduciary legal ethics arguably includes the Principle of Pro-Client Interpretation, under which general fiduciary norms should be used to resolve ambiguities, or fill gaps, in the *lex specialis* of ethics rules.

Conceptually, P1 and P2 tug in opposite directions. P2 is more "Platonic," hinting that there is something like a univocal Form of the Fiduciary, which embodies itself in different legal domains.[43] P1 is more "Aristotelian," suggesting that the concept "fiduciary" has analogous or equivocal, but not univocal, meanings when predicated across (legal) categories, say from corporate law to trust law to agency law to legal ethics.[44] I do not suggest that P1 flat-out contradicts P2, but they do

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reprehensible. . . . Whatever legalistic arguments and justifications can be made, we should have been treated better by a firm that we trusted." Miriam Rozen, *NYT Fires Boies: "We Should Have Been Treated Better,"* AM. LAW. (Nov. 7, 2017), https://www.law.com/americanlawyer/2017/11/07/boies-work-for-weinstein-raises-ethicists-eyebrows/?slreturn=20200126123523 [https://perma.cc/US69-FSRW]. Under the Principle of Pro-Client Interpretation, the ethics rules must surely be interpreted to exclude secret spying from the scope of the advance waiver. A fiduciary ethic requires no less.

43. In Plato's philosophy, a form (or Idea, *eidos*) is an abstract, ideal entity—a universal—that subsumes the concrete particulars that fall under its concept. Forms are discussed in many of Plato's dialogues, but most famously in the *Republic*, where Socrates and his interlocutors discuss the Form of the Good. PLATO, REPUBLIC 517b–c, *translated in* THE REPUBLIC OF PLATO 196 (Allan Bloom trans., 1968).

44. Aristotle divides all things into ten categories, and notices that similar words may be predicated of entities in different categories (sometimes but not always signified grammatically by differences in word-endings): for example, 'bravery' belongs to the category of qualities, while 'the brave' are a set of humans, who fall in the category of substances. What I call "analogous or equivocal meanings," Aristotle calls *paronymous* terms. ARISTOTLE, CATEGORIES 1a1–15, 1b25–11b6, *translated in* 1 THE COMPLETE WORKS OF ARISTOTLE 3, 4–18 (Jonathan Barnes ed., J.L. Ackrill trans., 1984). More intuitively: an Aristotelian will notice that the word "good" means something different but analogous (*i.e.*, paronymous) in phrases like "a good meal," "a good example," "a good lawyer," and "a good nap"—and so the Aristotelian will deny the Platonic notion that all of these partake of the Form of the Good. ARISTOTLE, NICOMACHAEAN ETHICS bk. I, ch. 6, at 1096a12–1096b30, *translated in* 2 THE COMPLETE WORKS OF ARISTOTLE 1732–33 (Jonathan Barnes, ed., W.D. Ross & J.O. Urmson, trans., 1984). So too, fiduciary obligation may mean something different but analogous in trust law, corporate law, agency law, and legal ethics. Here I am in agreement with Gregory Klass, who notes that "[t]he relationships that generate fiduciary obligations share family resemblances," that is, overlapping similarities that need not imply the existence of any one form they all hold in common. Gregory Klass, *What if Fiduciary Obligations are Like Contractual Ones?*, CONTRACT, STATUS, & FIDUCIARY L. 94 (Paul B. Miller & Andrew S. Gold, eds. 2016). The philosophical term of art "family resemblances," to denote what I call analogous or equivocal, but not univocal, meanings, originates in Wittgenstein's critique of the Platonic claim that items denoted by the same name have "one thing in common which makes us use the same word for all." Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS 31e–32e (3d ed. trans. G.E.M. Anscombe, 1958).

represent competing theoretical impulses. Fiduciary theorists may have reason to embrace both: on the one hand, to analyze fiduciary obligation in general terms, and on the other to avoid conflating the different fiduciary doctrines in different fields of law.

B. CONTRACTING AROUND THE ETHICS RULES

How basic is the fiduciary character of the ethics rules? Can lawyers, clients, and third parties contract around the client protections built into the ethics rules? In other words, are the ethics rules, including the lawyer's fiduciary obligation to clients, merely default terms in the retainer agreement, the protections of which clients can waive?[45] The answer is clearly yes in the case of some rules, because they expressly provide that the client can give informed consent to lawyer conduct that would violate the rules without consent.[46] What about the others?

The issue of contracting around the ethics rules popped up in the 1990s, over the question of who controls the client-lawyer relationship when the client is an insured and the insurer is paying for defense counsel under a subrogation clause in the insurance contract.[47] The relationship between insured and insurer is fraught with potential conflicts of interest.[48] The *Model Rules* are clear: the lawyer's undivided loyalty goes to the client regardless of who pays.[49] The insurance bar countered that the insurance contract can include clauses in the insurance policy to contract around these ethical prohibitions; Professors Silver and Syverud wrote a classic article defending the latter point of view.[50]

However, the ABA ethics committee disagreed, arguing that "the Rules of Professional Conduct—and not the insurance contract—govern the lawyer's obligations to the insured."[51] The *Restatement (Third) of the Law Governing Lawyers*

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45. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (asserting that "[a]ctual contracts always prevail over implied ones").

46. These include rules about limiting the scope of representation, MODEL CODE R. 1.2(c), revealing client confidences, and representing certain potentially conflicting interests.

47. *See* Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994); Kent D. Syverud, *What Professional Responsibility Scholars Should Know About Insurance*, 4 CONN. INS. L.J. 17 (1997); Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27 (1997); Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997).

48. For example: the insured wants to accept a settlement below the ceiling of the coverage, but the insurer prefers to risk going to trial, even though if they lose at trial the judgment might be well above the ceiling. Or, conversely, a physician sued for malpractice wants to go to trial to vindicate her professional reputation, but the insurer wants to settle. Or, the lawyer learns confidential client information that would benefit the insurer but damage the client if revealed to the insurer—for example, information that might void the coverage.

49. MODEL RULES R. 1.7(a)(2), 1.8(f), & 5.4(c).

50. Silver & Syverud, *supra* note 47. Their theory is that the insurer and insured are co-clients, and as such they can agree to waive some of counsel's fiduciary obligations to the insured. That is true, the authors argue, even if the insurance contract does not explicitly state that the insurer is co-client with the insured.

51. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-403 (1996).

sides with the ethics committee's position.[52] This example illustrates two points: in the law of lawyering, the fiduciary duty of undivided loyalty takes primacy over contract law, in the sense that it cannot be contracted around; but also, the *Rules of Professional Conduct* set the terms of that fiduciary duty. The first point helps confirm the centrality of fiduciary ethics in at least one important chunk of legal ethics: the conflict-of-interest rules. The second point helps confirm that these rules are the *lex specialis* of fiduciary obligation in legal ethics.

III. EITHER GO AWAY OR GO ALL THE WAY IN

Let us turn from these preliminary observations to the main question: What should a lawyer do if she confronts a decision in which zealous representation inflicts collateral damage on adversaries, other third parties, or the public interest, that she thinks is morally wrong? Under the *Model Rules*, she must either swallow her moral qualms and proceed full speed ahead on the client's behalf, or withdraw. If her qualms create a "significant risk" that she will throttle back her representation of the client, then under Rule 1.7(a)(2) she *must* withdraw. For if she throttles back, her representation of the client will be "material[ly] limited" by "a personal interest of the lawyer," which creates a concurrent conflict of interest.[53] But even if there is no risk of throttling back, under Rule 1.16(b)(4), she *may* withdraw if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[54] Either way, the only remedy a lawyer has for a crisis of conscience is withdrawal. If you do not withdraw, set your qualms aside and full speed ahead. In the unforgettable words of singer Gracie Slick, "either go away or go all the way in."[55]

Of course, there are counter-texts in the rules to this stark conclusion. Rule 1.2(a) allocates choice of tactics to lawyers, not clients. Crucially, the comment to Rule 1.3's requirement of diligence asserts that "[a] lawyer is not bound . . . to press for every advantage that might be realized for a client."[56] Yet it is hard to see how this non-binding explanatory comment is consistent with the lawyer's

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52. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134(2) cmts. d, f (2016) [hereinafter THE RESTATEMENT]. The insured may consent to allow the insurer to direct aspects of the lawyer's representation, but not if the insurer's instructions would create a non-consentable conflict of interest. "With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured . . ." or else withdraw. *Id.* at cmt. f. Likewise, the lawyer cannot reveal client confidences to the insurer that might void the coverage. THE RESTATEMENT, Reporter's note to §134(2), cmt. f, at 415.

I note that Easterbrook and Fischel are mistaken when they assert that "[a] client may hire a lawyer with a conflict of interest, waiving the right to conflict-free representation" and "[a]ll rules [governing the attorney-client relationship] are freely variable by contract in advance." Easterbrook & Frischel, *supra* note 45, at 429, 432. Unless the lawyer reasonably believes it is possible to provide competent and diligent representation to each affected client, a concurrent conflict of interest is non-consentable. MODEL RULES R. 1.7(b)(1). Thus, the duties of loyalty, competence, and diligence are non-waivable.

53. MODEL RULES R. 1.7(a)(2).

54. MODEL RULES R. 1.16(b)(4).

55. GRACE SLICK, HEY FREDERICK (RCA Records 1969).

56. MODEL RULES R. 1.3 cmt. 1.

fiduciary obligation to the client, and a proponent of a fiduciary ethics for lawyers should insist that the comment gets it wrong: as the client's agent, the lawyer *is* bound to press for every advantage that might be realized for a client, unless the client instructs or permits the lawyer to dial it back.

What else can the lawyer suffering moral pangs do? Under the *Rules*, the lawyer has the prerogative of trying to change the client's mind: lawyers *may* counsel clients about "moral . . . factors[] that may be relevant to the client's situation."[57] I would argue for an even stronger interpretation of the *Rules*: that the lawyer *must* counsel the client about moral factors. The rule of communication requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[58] So, if proceeding with the case raises moral red flags (paradigmatically, because it inflicts alarm, torments, or destruction on a third party or the public interest) and the client seems oblivious to the problem, the lawyer *must* explain the moral objection that the client seems to have overlooked. That is because moral considerations are reasonably necessary to permit the client to make informed decisions.

I realize that this reading of the *Rules* as *requiring* the lawyer to try moral suasion on the client is unorthodox, but it follows from a literal reading of the rule. One counter-argument is that the lawyer's moral judgments are not "information," but merely opinions. Without getting into the thickets of meta-ethical controversy over the existence of "moral facts," I would simply respond that the news that a prudent, intelligent lawyer, who is on the client's side, nevertheless has moral qualms about the representation is the kind of news that may influence the client's calculations. Even a venal client may reason that "if my own lawyer thinks this stinks, maybe I don't want to risk a public relations disaster"; and a non-venal client may be persuaded on the merits to change course.

Or is the stronger counter-argument that moral considerations are not "reasonably necessary to permit a client to make informed decisions"?[59] There is no basis for that proposition other than cynical moral skepticism, illicitly projected by the lawyer onto the client, in breach of the agent's fiduciary obligation not to substitute her own views—in this case, her dismissal of the relevance of moral considerations—for the client's. For that is precisely what a lawyer who withholds her moral concerns from the client is doing: the lawyer is deciding for the client that they are not reasonably necessary for informed client decisions. Conceivably, such withholding violates Rule 2.1's requirement that lawyers "exercise independent professional judgment and render candid advice."[60] Rule 2.1 makes it clear that candid advice may include "moral, economic, social and

57. MODEL RULES R. 2.1.
58. MODEL RULES R. 1.4(b).
59. *Id.*
60. MODEL RULES R. 2.1.

political factors[] that may be relevant to the client's situation."[61] If it be objected that offering such advice might compromise the client-lawyer relationship by imposing the lawyer's moral views on the client's, the reply is straightforward: voicing moral concerns is not the same as imposing them. It is failure to bring them up that amounts to substituting the lawyer's judgment for the client's.

Regardless of whether moral suasion is merely permitted or (as I think) required, the picture under the *Model Rules* is this: if a lawyer has scruples about some action taken on behalf of the client's best interest, she is permitted (I say required) to raise the moral problem with the client. If the client insists on proceeding, the lawyer must obey or quit. The dictum in the Comment to Rule 1.3[62] about not being bound to press for every advantage that might be realized for a client is just that—a dictum—that fiduciary ethics must reject.

For obvious reasons, this can become an uncomfortable ethical stance. Is there anything in between "go away" and "go all the way in"? In this Section, I illustrate the difficulty with two examples in which many lawyers might prefer, and adopt, a third path. In doing so, they may violate fiduciary ethics in a morally activist direction. Alternatively, the examples might show that the fiduciary obligation of zeal is not as stark as commentators such as Professor Silver believe.[63] For present purposes, though, let us suppose that fiduciary legal ethics indeed contains a strong requirement of zeal. In the argument to follow, when I speak of "fiduciary ethics," it is with that understanding.

A. A FIRST AWKWARD IMPLICATION: PEEKING AT METADATA

The first example is the issue of whether to peek at metadata in electronic documents sent to the lawyer by the adversary, which the adversary has neglected to scrub, possibly out of technological ignorance. Let us suppose that several lawyers in the adversary's firm worked on the document, and inserted comment balloons using a "track changes" function. And let us suppose the adversary accepted the changes and transmitted the document without realizing that a simple mouse-click would restore the comment balloons. Suppose as well that information in the metadata may be very helpful to one's client; perhaps it even makes the difference between winning or losing. A comment balloon may contain a tip-off about a crucial smoking gun document in a contentious products-liability lawsuit. If you don't mine the metadata, you won't know. To peek or not to peek?

The argument in favor of exploiting the metadata is very clear, and was set out years ago by Monroe Freedman: your duty is to your client, not to the adversary.[64] If your adversary inadvertently faxes you confidential documents (remember fax

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61. *Id.*

62. MODEL RULES R. 1.3 cmt. 1.

63. *See generally* Silver, *supra* note 30.

64. Monroe Freedman, *The Errant Fax*, LEGAL TIMES, Jan. 23, 1995, at 26. When Freedman wrote, the issue was not metadata but fax machines, when an adversary carelessly faxes you a confidential document.

machines?), zeal on the client's behalf requires that you make use of the information windfall.[65] In Freedman's view, the ABA Formal Opinion that held otherwise made a flawed argument: it harrumphed about the ethical importance of client confidences, blurring the distinction between your undeniable obligation to protect your own client's confidences and your non-existent obligation to protect your adversary's.[66] Peek in good conscience—otherwise you are failing your client.[67]

As far as I can see, under the fiduciary ethic, Freedman got it exactly right. In parallel fashion, if the adversary sends you a document without scrubbing its metadata, you must, as a fiduciary, examine that metadata and use it to the client's benefit.

The *Model Rules* were later amended to require lawyers receiving inadvertently-sent documents, including inadvertently-sent metadata, to promptly notify the sender.[68] But the amended rule conspicuously does not forbid the lawyer from reading the documents and metadata or using the information. Some jurisdictions went further and explicitly prohibited reading the errantly-sent metadata, but in jurisdictions that follow the *ABA Model Rules*, the "Freedman problem" (to peek or not to peek?) remains.

Or does it? Some ethics committees forbid peeking on the ground that it is dishonest[69]—an argument that would presumably apply even without a rule that explicitly prohibits peeking. One of these is the District of Columbia.[70] I mention this because I was a member of the D.C. Bar Ethics Committee that wrote the metadata opinion, and I vividly recall our debates.[71] Most of the lawyers on the committee thought that peeking at metadata is contemptible—the moral equivalent of rifling through your opponent's briefcase while the opponent is out of the room.[72] We concluded that peeking violates Rule 8.4(c), the all-purpose prohibition of "conduct involving dishonesty, fraud, deceit, or misrepresentation."[73]

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65. *Id.*

66. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-368 (1992).

67. Freedman, *supra* note 64.

68. *See* MODEL RULES R. 4.4(b) cmt. 2.

69. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 749 (2001) (concluding that "use of such information . . . [is] conduct 'involving dishonesty, fraud, deceit or misrepresentation'"); Ala. Office of Gen. Counsel, Op. RO-2007-02 (2007) (finding that "[t]he unauthorized mining of metadata by an attorney to uncover confidential information would be a violation of . . . Rule 8.4").

70. D.C. Bar, Ethics Op. 341 (2007), *available at* https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion341.cfm [https://perma.cc/MNA7-WYAD].

71. I am not revealing confidential committee deliberations: ethics committee meetings are open to the public.

72. D.C. Bar, Ethics Op. 341, n.4 (2007), *available at* https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion341.cfm. [https://perma.cc/MNA7-WYAD].

73. MODEL RULES R. 8.4(c). We could have rested the opinion on D.C.'s version of Rule 4.4(b) because, unlike the ABA Model Rule, it prohibits reading inadvertently-sent writing if the lawyer knows before reading it that it has been inadvertently sent. *See* D.C. RULES OF PROFESSIONAL CONDUCT R. 4.4(b). This was not a slam-dunk interpretation, because the purpose of the recently-enacted Rule 4.4(b) "was to address the inadvertent disclosure of entire documents (whether electronic or paper)," not metadata in documents intentionally

Our vote was unanimous, but there is an argument grounded in fiduciary ethics against our conclusion that peeking is dishonest. Recall the Principle of Pro-Client Interpretation mentioned earlier.[74] Here, a pro-client interpretation would require the committee *not* to find that peeking at the metadata is dishonesty prohibited by Rule 8.4(c).[75]

Why the latter? Because, notoriously, "dishonesty" is a context-sensitive concept. Conduct can be dishonest in one context but not in another, and especially not in contexts where the conduct is otherwise lawful, and consists in exploiting an unforced error by an adversary. Other jurisdictions' opinions found that peeking is *not* dishonest, a signal that peeking is *malum prohibitum* rather than *malum in se*, as the dishonesty argument assumes.[76] Declaring that peeking is dishonest was an interpretive stretch of Rule 8.4(c), and under the Principle of Pro-Client Interpretation, the only interpretive stretches allowed within a fiduciary relationship are those that promote the beneficiary's interests.

It might be thought that this argument about fiduciary ethics proves too much. Would it not follow that under this understanding of fiduciary ethics you should also peek in your adversary's briefcase if she carelessly leaves it unattended in your company? After all, she should have taken her briefcase with her instead of leaving it in the room with a zealous partisan on the other side, bound by a fiduciary obligation to maximize client outcomes. But it seems absurd to deny that peeking in the briefcase is dishonest. So maybe the same thing must be said about peeking at the metadata; that is what our committee thought.[77]

There is a crucial difference: peeking in someone else's hand luggage violates settled privacy norms that do not exist in the newfangled world of metadata; for one thing, it may uncover personal information about the briefcase's owner, one of the reasons such privacy norms evolved. Even in the old-fangled world of briefcases and papers, there might be hard cases. What if the confidential papers are not in the briefcase, but carelessly left on the table, in plain view, when the adversary steps out of the room? Is it dishonest to glance across the table and read them upside down? Maybe, but it is not obvious that this is more dishonest than exploiting adversary counsel's negligent failure to meet a filing deadline.

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sent. D.C. Bar, Ethics Op. 341, 2 (2007). Plausibly, we concluded that the "no-read" principle should nevertheless apply to "an inadvertently transmitted portion of a writing that is otherwise intentionally sent." *Id.* As I recall, our reason for not resting on this argument was that the rule had been enacted only a few months earlier, and we were not confident that it was intended to reach metadata. For that reason, we supplemented it with the broader argument that peeking is dishonest.

74. *See supra* text accompanying notes 41 and 42.

75. Obviously, peeking at the metadata is not fraud, deceit, or misrepresentation—so dishonesty is the only Rule 8.4(c) issue.

76. D.C. Bar, Ethics Op. 341, *supra* note 70 (noting that "other ethics opinions take a different view and have concluded that neither Rule 8.4(c) nor any other ethics rule prohibits the review of metadata"). These include ABA Formal Opinion 06-442 and Maryland Bar Opinion 2007-09. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006); Md. State Bar Ass'n Ethics Comm., Op. 2007-09 (2007).

77. D.C. Bar, Ethics Op. 341, *supra* note 70.

Freedman would likely insist that the lawyer *must* read them if failure to do so risks disadvantaging the lawyer's client.[78]

In our committee deliberations, I thought Freedman had the better of the rules-based argument, but I nevertheless voted with the committee because I am a moral activist and I thought "no peeking" was the morally right result—although I must confess that during our deliberations I took a certain amount of glee in pressing Freedman's side of the argument, much to the annoyance of every lawyer in the room.

Now I am pretty sure that my colleagues on the committee are not moral activists across the board. But they were on this issue. Their revulsion against peeking was visceral—an honorable lawyer just does not do things like that. This moral reaction is inconsistent with a strong fiduciary ethic of zeal on behalf of the client's interests.[79] In other words, a group of ethically committed and very sophisticated lawyers drawn from all walks of practice *rejected* fiduciary ethics on moral grounds in this case. For them, "the punctilio of an honor the most sensitive"[80] pointed away from the client's interest, and in the direction of moral activism, at least on this one issue.

B. MORE AWKWARD IMPLICATIONS: CORRECTING A SCRIVENER'S ERROR

The second example comes courtesy of a friend and colleague who is a distinguished mergers-and-acquisitions partner at a New York law firm. He was closing a deal, and the lawyer on the other side prepared the draft of the agreement. That lawyer goofed: the draft he prepared bore no resemblance to the deal the parties had agreed to verbally, and it was hugely advantageous to my friend's client and disadvantageous to the drafting lawyer's client. It was, in other words, a deadly scrivener's error in favor of my friend's client. Furthermore, the very real advantage it gave to my friend's client would not be readily detected until much later, if ever.

When my friend discusses this example in the continuing legal education ("CLE") classes he teaches to practicing lawyers, he presents several options:

(1) leave the error uncorrected;
(2) ask the client for permission to correct the error;
(3) inform the client that he is planning to correct the error, but without asking the client's permission; or
(4) correct the error without telling the client.

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78. *See generally* Freedman, *supra* note 64.

79. And what if the client says, "If you won't mine the metadata, send the file to me and I'll mine the damn metadata myself."? Should the ethics rules force the client to forego an advantage she could lawfully exploit if she was representing herself pro se?

80. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

My friend adds that he knows this client very well, and the client would never grant permission to correct the error. This was a client who would take the money and run. So Option #2 would be futile. Option #3 would provoke a crisis if the client responds by ordering the lawyer not to correct the error, and the lawyer digs in and insists on correcting it. And Option #4 arguably violates Model Rule 1.4(a)(2)'s requirement to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"[81] and 1.4(b)'s requirement to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions."[82]

It seems clear that the lawyer aiming solely to maximize the client's interests should choose Option #1, leaving the error uncorrected and thereby getting a windfall deal for the client. One response is that Option #1 would be a pretty thin picture of what the fiduciary lawyer's responsibilities are. According to the analysis I gave earlier of Model Rule 1.4(b),[83] the lawyer should consult with the client, pointing out that the draft agreement bears little resemblance to what the parties had agreed to in the negotiation, and that the honorable thing to do is correct the error. But then, when the client responds "Honor-schmonor," the lawyer must obey or quit. Either go away or go all the way in. As in the metadata case, I regard this as an uncomfortable result. So do many lawyers. You will not be surprised to learn that lawyer audiences split on the issue.

There is some weak authority to support Options #3 and #4. ABA Informal Op. 86-1518 concludes that a lawyer in a contract negotiation can notify the other party of a scrivener's error by that party, without consulting the client (Option #4)—but the opinion expressly "does not reach the issue of the lawyer's duty if the client wishes to exploit the error."[84] Citing this opinion, the ABA's Ethical

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81. MODEL RULES R. 1.4(a)(2).

82. MODEL RULES R. 1.4(b).

83. *See supra* text accompanying notes 58–59.

84. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1518 (1986). The reasoning of this opinion is, in any case, rather weak. Without consulting the client, how can the lawyer know if the client wishes to exploit the error? First, the ethics committee argues that the lawyer has no Model Rule 1.4 obligation to inform the client that the lawyer is correcting the error because no client decision is implicated: the client had already accepted the agreement in its non-erroneous form. *See id.* This argument clearly refers to Rule 1.4(b), which pertains to client decisions, but it ignores Rule 1.4(a)(2)'s obligation to reasonably consult with the client about the means by which the client's objectives are to be accomplished. *See id.* Possibly the ABA's ethics committee did not think such consultation is "reasonably" necessary—but that conclusion begs the question. Or perhaps the committee thought that a deal the client has accepted fulfills the client's objectives by definition because the client has accepted it. That ignores the client's right to modify his objective in mid-representation—as well as this particular client's broader definition of the objective as profit maximization. Clients often accept deals in the give-and-take of negotiations that don't fulfill their initial objectives—that is what happens in compromise. Second, the informal opinion argues that revealing the scrivener's error would not violate confidentiality because correcting the error is "impliedly authorized in order to carry out the representation." ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1518 (1986). The reference is to Model Rule 1.6(a). MODEL RULES R. 1.6(a) (permitting disclosure of information "impliedly authorized in order to carry out the representation"). But this conclusion even more obviously begs the question, which is precisely whether correcting other parties' scrivener's errors is impliedly authorized. It should also be noted that ABA ethics opinions are not binding on any court.

Guidelines for Settlement Negotiations asserts that lawyers should correct scrivener's errors in settlement agreements regardless of what the client wants (Option #3).[85] Yet the Guidelines hedge by stating that failure to do so "would be unprofessional, if not unethical."[86] This hedged language (is it or is it not unethical?) tellingly confirms how uncertain the ethical norm is.

One response to the scrivener's error case might be that agency law does not permit principals to instruct their agents to engage in conduct "likely to injure the agent's business reputation" or that "will injure the agent's reasonable self-respect"—which is precisely what the client was doing in my friend's case.[87] But the *lex specialis* governing the legal profession recognizes no such duty of client-principals to their lawyer-agents. Lawyers who place their business reputations above the client's interests and instructions have a conflict of interest.[88] And no rule (or informal professional norm) states that a client who asks the lawyer to do something the lawyer loathes has thereby breached a duty of the client to the lawyer.[89] This doctrine in agency law has no purchase in legal ethics. Here we have further confirmation that fiduciary principles of other areas of law cannot automatically be assumed to apply to the law governing lawyers.

There is one additional legal wrinkle to this case, which I bring up because it highlights another potentially disturbing implication of fiduciary ethics. Under Model Rule 1.6(b), a lawyer is permitted (but not required) to reveal client confidences if a client fraud utilizing the lawyer's services would cause substantial injury to the financial interests of another.[90] Failure to correct the scrivener's error

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85. ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations 38, 57 (2002).

86. *Id.* The Guidelines' position in any case does not support Option #4: (1) The caution against exploiting the other party's drafting errors is a gloss on Guideline section 4.3.5, which cautions against exploiting an opposing party's error "that was induced by the lawyer or the lawyer's client," *id.* at 56, which is not the case here. (2) Besides ABA Informal Opinion 86-1518—which expressly does not reach the issue when the client wants to exploit the error—the Guidelines cite a 1939 New York City ethics opinion that finds that the lawyer must first urge the client to correct the scrivener's error, and only if the client refuses should the lawyer do so. *Id.* at 57 (citing N.Y. City Ethics Op. 477 (1939)). This opinion contradicts the assertion that the lawyer may correct the error without consulting the client. In other words, it supports Option #3, not Option #4. (3) The Guidelines are designed for settlement negotiations, not business deals. This is a difference that matters, because a settlement in litigation must be presented to the court, and presenting a settlement that amounts to an unenforceable contract may violate the duty of candor to the court embodied in MODEL RULES R. 3.3. *See* ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations, at 38.

87. RESTATEMENT (THIRD) OF AGENCY § 8.15 cmt. d, at 413 (AM. LAW. INST. 2006). Section 8.15 sets out the principal's duty to deal fairly with the agent. *Id.*

88. MODEL RULES R. 1.7(a)(2).

89. This is rather obvious, and it is reflected in Model Rule 1.2(a), 1.2(b), and 1.16(b)(4). MODEL RULES R. 1.2(a) (stating that the client, not the lawyer, sets the objectives of the representation); MODEL RULES R. 1.2(b) (stating that the representation is not an endorsement of the client's views); MODEL RULES R. 1.16(b)(4) (stating that it is permitted, but not required, for the lawyer to withdraw if the client "insists upon taking action that the lawyer considers repugnant"—but not suggesting that the client has breached a duty to the lawyer by so insisting).

90. MODEL RULES R. 1.6(b)(2).

may be a contractual fraud by omission, although that is by no means clear.[91] That conclusion would depend on whether the scrivener's error amounts to a change in the material facts underlying the bargain (arguable either way), and whether the fact that it was "the other guy's fault" negates the fraud (also arguable either way).[92]

Suppose for the sake of argument that failure to inform the other party of the scrivener's error is indeed a fraud by omission, which would significantly harm the other party's financial interests. In that case, the *Model Rules* permit counsel to disclose, regardless of client desires.[93] That raises a question: What guidance does the fiduciary ethic give about how to utilize an ethics rule that merely permits, but does not require, the lawyer to spoil the client's windfall by divulging the scrivener's error?

One possible answer is that the *Model Rules*' permission to disclose shows that disclosing is no violation of the fiduciary ethic—remember that the *Model Rules* define the *lex specialis* of the fiduciary ethic as it pertains to lawyers. But another possible answer is analogous to the Principle of Pro-Client Interpretation: just as the law of lawyering should be interpreted in the most pro-client way, perhaps the discretionary calls granted to lawyers by the *Rules of Professional Conduct* must be exercised in the most pro-client way. Certainly that is the path of least resistance for lawyers who want to keep their clients happy.

My friend corrected the error without telling the client. Furthermore, he believes that every M&A partner he knows in every large law firm in New York would do the same. In his view, fair dealing with others is part of the discretion that goes with the lawyer's role.

But does this not show that here, as in the metadata case, the *sensus communis* of at least one segment of the bar runs flatly contrary to the fiduciary ethic of zealous representation, and perhaps flatly contrary to the *Model Rules*? Remember, even if you disagree with my argument that the rule of communication requires the lawyer to raise moral issues with the client, the black letter of Rule 1.2(a) says that lawyers must consult with clients on tactics. For that matter, Rule 1.4(a)(1) requires the lawyer to promptly inform the client on any matter that requires the

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91. *See, e.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 98 cmt. d.

92. Significantly, it is precisely this issue that the U.S. Supreme Court deliberately ducked in the explosive case *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018), where the government accused public interest lawyers representing a pregnant undocumented minor of fraud by omission because they did not inform the government that she was receiving the abortion that the government opposed sooner than the government believed. As a result, government lawyers failed to apply immediately for an emergency stay of a court ruling in her favor, and in the interim she had the abortion. *Id.* The Solicitor-General asked the Court to sanction her counsel, arguing they had perpetrated fraud by omission by not telling the government that the procedure had been rescheduled (notwithstanding her counsel's duty of confidentiality). The Court did not sanction her counsel, but it also did not discuss the legal issue of fraud by omission. *Id.*; *see* David Luban, *The SG's Empty Ethics Case Against Jane Doe's Lawyers*, BALKINIZATION WEBLOG (Dec. 26, 2017), https://balkin.blogspot.com/2017/12/the-sgs-empty-ethics-case-against-jane.html [https://perma.cc/7M46-XRCJ].

93. MODEL RULES R. 1.6(b)(2).

client's informed consent, and accepting or rejecting a draft deal from another party is just such a matter. Yet my friend corrected the scrivener's error without mentioning anything to his client, and I think this is the right answer. He did not go away, but neither did he go all the way in.

C. SHARKS AND PROFESSIONAL COURTESY

One interesting feature of both the metadata and scrivener's error cases is that they arise in lawyers' dealings with other lawyers—colleagues—and not with laypersons. A cynic might recollect the joke in which, after a shipwreck, sharks eat everyone in the water except the lawyers. Asked why they spared the lawyers, the sharks reply: "Professional courtesy." Is that what is going on? Is it that lawyers are touchy about harming other lawyers, in a way they are not touchy about harming third parties? Do lawyers think "There but for the grace of God go I," or fear for their reputations in a legal community of repeat players?

I must admit that this thought crossed my mind during our Ethics Committee deliberations about the metadata issue. We had just approved an opinion on a very different subject, in which the majority of the committee supported a narrow, literalist reading of an ethics rule to permit lawyers to write aggressive debt collection letters.[94] All the lay members of the committee thought the letters were borderline extortionate. But the lawyers on the committee were adamant that it would be unfair to lawyers not to read the D.C. Rule strictly and narrowly. The lawyers might get grievances filed against them.[95]

I was struck by the contrast between our two opinions: when it comes to protecting lawyers from grievances by third parties, we read the rules very strictly. When it comes to protecting lawyers from their own carelessness in handling metadata, we read them loosely. Professional courtesy among sharks?

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94. D.C. Bar, Ethics Op. 339 (2007) (discussing the threat of criminal referral in civil debt collection matter).

95. These are my personal recollections. A form letter sent to debtors by debt-collection lawyers cited a D.C. law making it a crime to settle a debt with a bad check, and warned that bounced checks may be referred to the authorities for prosecution. The question was whether this letter violates the D.C. rule that forbids threatening criminal referral to gain advantage in civil cases. D.C. RULES OF PROFESSIONAL CONDUCT R. 8.4(g). On the surface, the answer is no: the letter does not threaten to prosecute if the recipients don't pay up, only if they pay with a bad check. But two consumer representatives on the committee—savvy laypersons—pointed out, first, that a lot of the poor people who get these letters barely read English and won't understand the difference, and second, that the prominent words "crime" and "prosecution" are likely to scare those people into paying debts that—a third point—they often don't even owe. Their arguments persuaded me.

The lawyers on my committee disagreed. But, at the behest of the committee's laypersons (including me), my colleagues added language warning that collection letters must not blur the threat to prosecute bad checks with the threat to prosecute non-payment; they added a footnote drafted by the lay members quoting the D.C. statute against extortion and warning lawyers not to cross the line. (Hopefully the language of the extortion statute might have the same kind of *in terrorem* effect on debt collection lawyers that they want their collection letters to have on recipients.). But we ultimately approved the collection letters. *See* D.C. Bar, Ethics Opinion 339, *supra* note 94.

I am leery about reading bad motives into lawyers' visceral reactions in the metadata and scrivener's error cases. I think the reaction was, simply, that peeking at metadata or exploiting the scrivener's error is *wrong*, and the client is not entitled to windfalls obtained by the lawyer doing something wrong.

D. VULNERABILITY

There might be a way for defenders of fiduciary ethics to arrive at the honorable answer in the scrivener's error case. Recall that a defining feature of fiduciary relationships lies in the vulnerability of the client. My friend's greedy client was by no stretch of the imagination vulnerable.[96] In a case of genuine client vulnerability, the answer might be different. For example, suppose that a public defender observes, after her client is sentenced, that through a scrivener's error the judge and clerk have entered a sentence of six months when the actual sentence was sixty months. Should the lawyer correct the error?

My friend, the M&A lawyer, presents this version as well to his CLE audiences. Unsurprisingly, where many lawyers favor correcting the scrivener's error in the M&A case, almost none do in the criminal sentencing case. There are several obvious explanations for this *volte face*, but one is the conspicuous vulnerability of the indigent client.[97] Perhaps, then, a version of fiduciary legal ethics highlighting client vulnerability can explain the inconsistent intuitions some might have about these two versions of the scrivener's error story.

I am inclined to doubt that this argument from client (in)vulnerability succeeds, though. Even in the M&A example, the client is at the mercy of the lawyer's decision—to correct or not to correct—and I take it that this is the kind of vulnerability of beneficiaries to their fiduciaries Leib and Galoob have in mind.[98]

One might find another argument within fiduciary theory to back up the vulnerability intuition. As agency handbooks make abundantly clear, and as discussed earlier, a central policy behind the fiduciary theory is to protect principals against self-dealing by their agents.[99] The primary evil fiduciary obligation guards against is opportunistic self-interest on the part of agents.[100] The *Restatement*

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96. *See supra* text accompanying note 1. As Andrew Gold notes, "vulnerability is a matter of degree, and the mechanisms for limiting vulnerability likewise vary across different fiduciary settings." Andrew S. Gold, *The Fiduciary Duty of Loyalty*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 385, 400 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

97. I note in passing the obvious difference that in the criminal sentencing hypothetical, correcting the scrivener's error does not fall under any of the permissive exceptions to the rule of confidentiality. However, one might readily devise a "vulnerable client" hypothetical involving a contractual scrivener's error that does fall under MODEL RULES R. 1.6(b)(2). Suppose the lawyer is representing a victimized spouse in a divorce action, who is receiving a very unfair settlement because of an inferior bargaining position, and the scrivener's error is in her favor and memorializes a fair settlement.

98. Leib & Galoob, *supra* note 1.

99. *See supra* text accompanying notes 2 and 3.

100. Thus, the *Restatement (Third) of Agency* spells out the agent's fiduciary obligation to the principal in rules most of which are expressly prohibitions on self-dealing, and the illustrative cases concern self-dealing. RESTATEMENT (THIRD) OF AGENCY §§ 8.01–8.05, at 249–323 (AM. LAW. INST. 2006).

(Third) of Agency barely considers cases where the principal-agent divergence is based on the agent's sense of moral decency rather than the agent's greedy self-interest.[101]

Recall that Rule 1.7 declares it a conflict of interest if a lawyer foregoes a client advantage because of a personal interest of the lawyer. Earlier I read "personal interest" to include a lawyer's moral interest.[102] But perhaps the personal interests the drafters had in mind were primarily less high-minded and more venal self-interests. One might hope so, because classifying morality as a "personal interest" misses the force of moral convictions, namely that morality stakes a claim to generality, rather than being strictly personal. Perhaps a lawyer has a "personal interest" in not rifling another lawyer's briefcase, not peeking at the metadata, and not exploiting the adversary's scrivener's error. But it is not a *merely* personal interest. It is an interest based on the conviction that peeking, rifling, and exploiting are *wrong*. Not just "wrong for me," but "wrong for anyone."

Perhaps, then, a proponent of fiduciary ethics can argue that where self-dealing is not the issue, the fiduciary can indeed disadvantage the client for moral reasons. That would be a way to reconcile fiduciary ethics with moral activism, at least in some cases. Yet that strikes me as a highly unorthodox version of fiduciary ethics. Professor Silver's view that fiduciary theory is an argument against moral activism is more orthodox.[103]

CONCLUSION: MAGIC SOLVING WORDS

In that case, I am inclined to say: so what? The word "fiduciary" is not an argument against moral activism. The claim that client-lawyer relations are subsumed under principal-agent or fiduciary relations needs to be the *conclusion* of an argument, not the premise. And the claim that fiduciary obligations and client loyalty outweigh countervailing moral obligations also must be the conclusion rather than the premise of an argument.

In his classic realist manifesto *Transcendental Nonsense and the Functional Approach*, Felix Cohen complained that lawyers often use legal terms as "magic

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101. I find only one illustrative example in the *Restatement (Third) of Agency* in which the agent breaches the fiduciary obligation to the principal to curtail harm to third parties. RESTATEMENT (THIRD) OF AGENCY § 1.01, at 25 (AM. LAW. INST. 2006) (finding that a tobacco company manager who fails to properly market cigarettes because of concern about harmful effects of cigarette smoking has breached a fiduciary obligation). Another illustrative example, in which the agent selling an artwork owned by the principal corrects a misapprehension of the purchaser is described as a duty of good faith in exercising discretion that is "distinct from an agent's fiduciary duties." *Id.* at 252–53, § 8.01 cmt. b. Mechem's classic treatise sets out the agent's duty of loyalty to the principal in fifty-five numbered sections, almost all of which are prohibitions on self-dealing. 1 Mechem on Agency §§ 1188–1239, at 867–910 (2d ed. 1914). Only one of the fifty-five so much as mentions moral conflicts between principal and agent (and warns that agents must not set themselves up as judges of "what is just and fair"). *Id.* at 868, § 1190.

102. *See supra* text accompanying note 53.

103. *See* Silver, *supra* note 30.

solving words" that in reality beg the question.[104] To take a legal ethics example, everyone understands that "officer of the court" is often little more than a wand we wave to criticize lawyer chicanery at trial and pre-trial.[105] Without being cashed out into specific prohibitions, independently defended on their merits, it is a magic solving phrase. We must take care that "fiduciary" does not become an equal and opposite incantation. Words *name* problems, they do not *solve* problems.

Presumably, fiduciary moral theories aim to provide the missing arguments on the merits. For example, some theorists hold that the basis of fiduciary obligation is the moral value of loyalty.[106] Or perhaps, as Professor Silver argues, it follows from the fact that agents' words and commitments are attributed to the principal that the agent must not deviate from doing what the principal has entrusted the agent to do.[107] Or perhaps fiduciary obligations arise from the moral importance of keeping faith (*fides*), that is, not breaking trust, with the beneficiary.[108] Or perhaps the fiduciary-beneficiary relationship helps realize the beneficiary's autonomy.[109]

All these arguments have force, but as arguments for lawyerly zeal, they all beg the question in the same way. They identify a genuinely important value furthered by fiduciary relationships, but without explaining why that value outweighs the alarms, torments, and destruction visited on others. Or, if it is conceded that each value furthered by the fiduciary relationship has moral limits on its pursuit, the arguments do not identify where to draw the lines. Loyalty has its limits, and invoking loyalty simply leaves us with the question of where the limit to loyalty lies. Being trusted by someone to further their interests does not by

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104. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 820 (1935).

105. I don't mean that "officer of the court" cannot have real meaning. For a remarkable effort to put content into this phrase, see Deborah Hussey Freeland, *What Is a Lawyer? A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS U. PUB. L. REV. 425 (2012).

106. *See, e.g.*, Irit Samet, *Fiduciary Loyalty as Kantian Virtue*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 3, at 125; Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 3, at 176; Gold, *The Fiduciary Duty of Loyalty*, supra note 97. As Gold points out, fiduciary law sometimes treats loyalty as mere absence of conflict, but sometimes treats it as affirmative devotion. Gold, *The Loyalties of Fiduciary Law*, at 183–86. The argument for zeal would understand loyalty as affirmative devotion.

107. Silver, *supra* note 30.

108. That was the original meaning of "fiduciary" in Roman law, which recognized a kind of contract called a *contractus fiduciae* in which a purchaser agreed to sell property back to the seller. C. P. SHERMAN, ROMAN LAW IN THE MODERN WORLD 182–83 (1922). I am told by Fr. Ladislas Orsy that crusaders entered into such contracts with the trusted caretakers of their land during their absence. Of course, the Latin *fides* is the genealogical root of "fiduciary." Modern writers grounding fiduciary obligations in trust include Tamar Frankel, FIDUCIARY LAW 78 (Oxford Univ. Press 2010), and Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEG. STUD. 285, 297 (1989).

109. *See* Samet, *supra* note 106, at 131; Hanoch Dagan & Sharon Hannes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 3, at 105.

itself make it right to further those interests come what may. As Annette Baier reminds us,

> Trust is not always a good, to be preserved. There must be some worthwhile enterprise in which the trusting and trusted parties are involved, some good bread being kneaded, for trust to be a good thing. If the enterprise is evil, a producer of poisons, then the trust that improves its workings will also be evil, and decent people will want to destroy, not to protect, that form of trust.[110]

Likewise, furthering another's autonomy matters only to the extent that one person's autonomy matters more than the harms inflicted on others to secure it—and that is a dubious proposition at best.[111] Entering a principal-agent relationship does not abdicate the agent's own powers of moral choice, nor does it remove the need to make moral judgments about where to draw the lines.

In effect, all these arguments claim that fiduciary obligations provide exclusionary reasons to subordinate that power of choice and judgment to the client's interest.[112] But the appeal to exclusionary reasons always requires one to show *why* reasons are exclusionary, even in cases with strong first-order moral reasons to the contrary. In short, all these arguments have force, but until we can answer the question of how much force they have in the face of countervailing reasons, "loyalty," "agency," "trust," and "autonomy" have themselves become magic solving words that solve nothing.

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110. Annette C. Baier, *Trust and Its Vulnerabilities*, TRUST: THE TANNER LECTURES ON HUMAN VALUE 110 (1991).

111. *See* Luban, *Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1005, 1035–43 (1990) (arguing that autonomy is not a self-standing value—rather, it is a surrogate for other values, which are of undeniable but not unlimited importance).

112. An exclusionary reason pertaining to *X* is a second-order reason not to evaluate *X* by balancing first-order reasons. To illustrate with a trivial and non-moral example: suppose a parent tells a young child "Tidy up your room!" and the sulky child asks why. The first-order reasons might be that the mess looks awful, that the toys on the floor will get lost or stepped on, and that it's impossible to vacuum the rug. Instead the parent responds with an exclusionary reason: "Because your mother told you to!"