

LAWYER CODES ARE JUST ABOUT LICENSURE, THE LAWYER'S
RELATIONSHIP WITH THE STATE: RECALLING THE COMMON LAW
AGENCY, CONTRACT, TORT, TRUST, AND PROPERTY PRINCIPLES THAT
REGULATE THE LAWYER-CLIENT FIDUCIARY RELATIONSHIP

Charles E. Rounds, Jr.*

EXECUTIVE SUMMARY	773
I. INTRODUCTION	775
II. AGENCY LAW AND THE LAWYER-CLIENT RELATIONSHIP	784
A. <i>Introduction</i>	784
B. <i>Breaches of Fiduciary Duty by the Lawyer-Agent</i>	785
1. Introduction	785
2. Self-Dealing in Breach of the Lawyer-Agent's Duty of Undivided Loyalty	786
3. Conflicts of Interest in the Agency Context That Do Not Involve Self Dealing	789
4. Fiduciary Duties Incident to the Agent's General Duty of Loyalty: Full Disclosure and Confidentiality	791

*Charles E. Rounds, Jr. is a tenured professor of law at Suffolk University Law School in Boston and the author of fourteen editions of *Loring: A Trustee's Handbook* (Wolters Kluwer Law & Business-Aspen Publishers), which has been cited in numerous judicial decisions and articles, as well as excerpted in the Restatement (Third) of Trusts. CCH has also incorporated the handbook into several of its electronic products. In July 2007, the NYU Journal of Law and Business published *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*. The law review article was co-authored by Prof. Rounds and Andreas Dehio (Heidelberg University, Germany). For over thirty years, Prof. Rounds, an Academic Fellow of the American College of Trust and Estate Counsel (ACTEC) and Resident Fellow of the Beacon Hill Institute (BHI), has been writing about, as well as lecturing and consulting on, fiduciary issues, particularly social investing, social security partial privatization, the legal structuring of mutual funds, and the marginalization of the fiduciary relationship in the American law school curriculum. On numerous occasions he has served as a litigation consultant and expert witness. Prof. Rounds' full biography, including a link to the mutual fund law review article, may be obtained by visiting his faculty web page.

a. <i>Agent's Duty of Full Disclosure When There Is Self-Dealing or Multiple Principals</i>	792
b. <i>Agent's Duty of Confidentiality When There Are Multiple Principals</i>	793
C. <i>Equitable Remedies Available to the Client-Principal: Making the Client Whole</i>	795
D. <i>Conclusion</i>	799
III. TORT LAW AND THE LAWYER-CLIENT AGENCY RELATIONSHIP	799
A. <i>Standards of Care</i>	800
B. <i>Statutes of Limitation</i>	801
C. <i>Incorporation Cannot Limit the Lawyer-Agent's Liability to the Client-Principal in Tort</i>	802
D. <i>Conclusion</i>	802
IV. CONTRACT LAW AND THE LAWYER-CLIENT AGENCY RELATIONSHIP	803
A. <i>Introduction</i>	803
B. <i>The Lawyer-Client Compensation Contract</i>	804
C. <i>Self Dealing Transactions Between the Lawyer-Agent and the Client-Principal</i>	805
D. <i>When a Lawyer-Agent in Dealing with Third Parties Exploits for Personal Purposes Information Gleaned in the Course of Representing the Client-Principal</i>	807
V. THE INTERSECTION OF THE LAWYER- CLIENT AGENCY RELATIONSHIP AND THE TRUST RELATIONSHIP: THE PROPERTY DIMENSIONS OF LEGAL REPRESENTATION	809
A. <i>Introduction</i>	809
B. <i>Sometimes Trust Principles Can Dictate the Very Character and Scope of a Lawyer-Client Agency Relationship</i>	810
1. <i>Who Is the Client?</i>	810
a. <i>The Attorney-Client Privilege</i>	811
b. <i>The Lawyer-Agent's Legal Malpractice Liability</i>	812
2. <i>The Lawyer-Agent As Trustee</i>	813

2008] *LAWYER CODES & COMMON LAW* 773

<i>C. How Ignorance of Basic Trust and Property Doctrines Can Generally Degrade the Quality of a Legal Representation.....</i>	816
1. Standing To Sue a Trustee for a Breach of Trust.....	816
<i>a. The Non-charitable Trust.....</i>	816
<i>b. The Charitable Trust.....</i>	817
2. Liabilities of the Agent of a Trustee That Are Incident to a Breach of Trust	819
3. Necessary Parties in a Breach of Trust Litigation: The Due Process Considerations	820
4. The External Contractual and Tort Liabilities of a Trustee	821
VI. CONCLUSION.....	822

EXECUTIVE SUMMARY

Lawyer codes, such as the Model Rules of Professional Conduct (the “Rules”), could not be more explicit: They are “designed . . . to provide a structure for regulating conduct through disciplinary agencies,” not “to be a basis for civil liability.”¹ Rather, it is the common law as occasionally tweaked by statute that regulates the private legal relationship of lawyer-client, specifically the laws of agency, contract, tort, trusts, and property, with the laws of agency pulling the laboring oar. The Rules are just about licensure, i.e., the lawyer’s relationship with the state.² Disbarment in and of itself is not a remedy that can make a client whole.³ Still, it is understandable why a law student might labor under the misconception that the Rules are a self-contained body of law that exists to “protect clients,” or a law firm might consider the Rules its sole ethical lodestar, or that the jurist might look to the Rules for guidance, even authority, in an action brought by a client against his or her lawyer for a breach of the duty of loyalty. After all, a course in the Rules or their equivalent is mandatory in the law schools, whereas in most law schools a discrete course in the common law agency or trust relationship is either on the elective side of the

¹ MODEL RULES OF PROF’L CONDUCT Scope (2002).

² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2001).

³ See *id.* § 1 cmt. f (discussing the availability of civil liability for violations of lawyer regulations).

curriculum, or more likely no longer offered at all. The Rules even have their own separate bar examination.

The Rules, however, are little more than a *mélange* of selected equitable and legal analogs. They presume, among other things, that those who are subject to them, or charged with their enforcement, have internalized basic agency, trust, and property doctrine, to include when that doctrine intersects and implicates the laws of tort and contract. They also presume a general familiarity with equitable remedies.

The body of the Article is a primer on how common law principles—particularly those marbled through the laws of agency, trusts, and property—implicate, inform, and regulate the private attorney-client agency relationship. Contracting in a fiduciary environment and torts committed by fiduciaries round out the Article's substantive coverage. If nothing else, having all this material so critical to the private ordering of the lawyer-client fiduciary relationship finally collected and assembled in one place should prove enormously useful to law students, practitioners, and jurists alike.

The Article is actually a companion to one we recently published in the *New York University Journal of Law and Business* in collaboration with Andreas Dehio, University of Heidelberg, Germany.⁴ A theme of the NYU article was that the common law informs the Investment Company Act of 1940 (the "Act"), not the other way around.⁵ The common law is self-contained and more than adequate to protect mutual fund investors. All the Act does is invoke the common law and tweak it a bit at the margins. The Act would be gibberish without the common law. In this Article we remind the reader that the Rules do even less. They leave undisturbed the common law insofar as it regulates the private lawyer-client fiduciary relationship. We conclude by recommending that law schools return discrete courses in the common law relationships of agency and trust to the required side of the curriculum. Failing that, the seasoned practitioners, the complete lawyers among us, need to assume the responsibility for somehow imparting our law's basic anatomy to those of their brothers and sisters coming on line. The common law, of which the relationships of agency and trusts are

⁴ See Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U. J.L. & BUS. 473 (2007).

⁵ *Id.*

critical components, is the bedrock upon which all our statutory and regulatory edifices are constructed, including the lawyer codes.

I. INTRODUCTION

The lawyer's Model Rules of Professional Conduct (the Rules) could not be more explicit: They are "designed . . . to provide a structure for regulating conduct through disciplinary agencies," not "to be a basis for civil liability."⁶ Rather, it is the common law as occasionally tweaked by statute that regulates the private legal relationship of the lawyer-client: specifically the laws of agency, contract, tort, trusts, and property, with the laws of agency pulling the laboring oar.⁷ The Rules are just about licensure, the lawyer's relationship with the state.⁸ Disbarment in and of itself is not a remedy that can make a client whole.⁹

Still, it is understandable why a law student might labor under the misconception that the Rules are a self-contained body of law that exists to "protect clients,"¹⁰ or a law firm might consider the Rules its sole ethical

⁶MODEL RULES OF PROF'L CONDUCT Scope (2002).

⁷RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2001).

⁸That having been said, a court rightly or wrongly might well look to the licensure rules that regulate the lawyer's relationship with the state for guidance in determining whether a lawyer-agent has charged an unreasonably high fee such that there has been a breach of his or her fiduciary duty to the client-principal or whether the equitable remedy of fee forfeiture is warranted and appropriate under a given set of facts and circumstances. *See id.*

⁹*See id.* § 1 cmt. f (discussing the availability of civil liabilities when a lawyer is not complying with the regulations).

¹⁰Of the thousands of students who completed the author's course on the fiduciary aspects of the private agency and trust relationship, which was offered from 1978 to 2005 at Suffolk University Law School, most began the semester laboring under this misconception. This was all the more troubling as most had already taken the mandatory "professional responsibility" course. Once in awhile someone would suggest that a lawyer-code exists to benefit the legal "profession," and maybe on the margins "society." In fact, the Model Rules of Professional Conduct standard for informed consent to a rule violation may well be lower and thus less client-friendly than the standard for informed consent to a breach of fiduciary duty under either common law agency or trust principles. *See* CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING: A TRUSTEE'S HANDBOOK § 7.1.1 (2008). No wonder, some "question the wisdom of allowing those who will be regulated to write the regulations." STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 3 (7th ed. 2005). At the very least, the focus of a lawyer code is on the state, the collective, rather than the individual. As authority for this proposition, one need only quote from the Preamble to the Model Rules of Professional Conduct itself: "Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when

lodestar, or that the jurist might look to the Rules for guidance, even authority, in an action brought by a client against his or her lawyer for a breach of the duty of loyalty.¹¹ After all, a course in the Rules or their equivalent is mandatory in the law schools, whereas in most law schools a discrete course in the common law agency or trust relationship is either on the elective side of the curriculum, or more likely no longer offered at all.¹²

A course in contracts does not a lawyer make. “When a debtor,” for example, “delivers money or other property to a third person with instructions to pay a particular creditor, the relationship that arises may be a contract for the benefit of the creditor, an agency for the debtor, or a trust.”¹³ Yet, today, for the law student wishing to know the common law, not just know about the common law, it is generally catch as catch can. The student must troll the elective courses for critical common law content not covered in Contracts, Torts, and Property, e.g., the fiduciary aspects of the agency or trust relationship. In some cases, he or she must look beyond the course catalog altogether, e.g., equity’s maxims and their 21st century applications.¹⁴ An elective course in partnerships or corporations may well cover the apparent authority of employee-agents to bind their employer-principals in contract and tort, and perhaps the mutual fiduciary duties of

properly applied, serve to define that relationship.” MODEL RULES OF PROF’L CONDUCT Preamble: A Lawyer’s Responsibilities (2002).

¹¹See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2001) (discussing how lawyer codes can inform the adjudication of fee disputes between the private parties and the nature of the equitable relief that is to be granted, if any).

¹²In 1908 when the American Bar Association adopted the original Canons of Professional Ethics, instruction in the core equity-based relationships of agency and trust, as well as the core law-based relationships of contract, tort, and property, was mandatory in most, if not all, the law schools. It most certainly never occurred to those who had been encouraging the bench and the bar to endorse and adopt a lawyer code that by the end of the century instruction in the two private fiduciary relationships would no longer be required in most American law schools. Back then, lawyer codes presumed a bench and bar that were thoroughly grounded in the common law, as the focus of such codifications was merely on licensure, the lawyer’s relationship with the state. That is still the focus. There has been no appreciable expansion in the scope and coverage of the Canons of Professional Ethics, or its successor codifications. On the other hand, we have seen a considerable pedagogical undermining over time of the common law foundations upon which those regulatory edifices were constructed.

¹³AUSTIN W. SCOTT, WILLIAM F. FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 35.1.9 (5th ed. 2006).

¹⁴For a list of the classic equity maxims, see ROUNDS & ROUNDS, *supra* note 10, § 8.12. The accompanying footnotes generally support the proposition that these maxims are still very much regulating the rights and liabilities of real people.

business partners, but neither topic has much relevance in the context of the lawyer-client agency relationship. A lawyer generally cannot bind a client in contract or otherwise without the client's express consent.¹⁵ Nor can a lawyer's fiduciary duties to his or her law partner in any way limit the lawyer's fiduciary duties to the client.¹⁶ The interests of the client-principal are paramount. A cursory perusal of standard Agency texts reveals that the fiduciary aspects of the agency relationship are at best a curricular afterthought, and have been so for some time.¹⁷

The common law contractual relationship has fared better than the agency relationship in the academy. The Contracts requirement has survived the many curricular "reform" programs unleashed upon the common law over the last fifty years—at least so far.¹⁸ To our knowledge Contracts is still universally required. Even so, a cursory review of some standard Contracts casebooks and textbooks suggests that in the typical Contracts course, there is little coverage of contracts between agent-fiduciaries and their principals, or between trustees and their beneficiaries.¹⁹

¹⁵See Deborah A. DeMott, *The Lawyer as Agent*, 67 *FORDHAM L. REV.* 301, 305 (1998) (noting that "some decisions—whether to settle and whether to appeal, how a criminal defendant should plead, and whether a criminal defendant should testify or waive jury trial—are the client's to make unless the client has authorized the lawyer to make the particular decision, regardless of any prior or general grant of authority from the client to the lawyer"); see also *id.* at 308 ("A third party's belief that the lawyer had authority to commit or execute is not protected by the doctrine of apparent authority unless the belief is traceable to expressive conduct attributable to the client.").

¹⁶See *id.* at 310 ("Within agency generally, a subordinate agent within a hierarchical chain of agents who breaches a duty the agent owes to a third party is not shielded from liability to the third party because the agent complied with instructions from a superior agent.").

¹⁷Professor Warren A. Seavey's 1964 edition of *Handbook of the Law of Agency* devotes only ten of its 286 pages to the agent's duty of loyalty to the principal. See WARREN A. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 147–54 (1964).

¹⁸We note, however, that the Harvard Law School is in the process of "constricting" its Contracts course. See Paras D. Bhayani & Javier C. Hernandez, *Law Profs Overhaul 1st Year Courses*, THE HARVARD CRIMSON, available at <http://www.thecrimson.com/article.aspx?ref=514774>.

¹⁹That the 1952 one volume edition of *Corbin on Contracts* contains no coverage whatsoever of such contracts is probably understandable and excusable; at that time, Agency and Trusts were discrete required courses in most law schools. This is no longer the case in most law schools. Nevertheless, the 2008 edition of Hogg, Bishop, and Barnhizer, *Contracts, Cases and Theory of Contractual Obligation* devotes just two pages of text (out of 1062) to contracts that are affected by a relationship of trust and confidence. See JAMES F. HOGG, CARTER G. BISHOP & DANIEL D. BARNHIZER, *CONTRACTS, CASES AND THEORY OF CONTRACTUAL OBLIGATION* 627–29 (2008).

This is regrettable, as a lawyer is an agent-fiduciary who has typically entered into an associated compensation contract with his or her client-principal, and who also may well be holding property in trust for that client-principal. It would be entertaining to be a fly on the wall when some brave soul attempts to explain fiduciary agreements in the Contracts course or in the course on the Rules to a class comprised of students who have had little or no formal instruction in agency and trust relationships.

The Torts course too has survived more or less unscathed. Still, there is a prevalent misconception that the lawyer as agent owes the client a “fiduciary” duty not to commit malpractice:

References to a “fiduciary duty of care” are common, and fiduciaries routinely owe a duty of care. Of course, many other people also owe a duty of care. More importantly, while the content of that duty of care may be stated in terms of ordinary negligence or gross negligence, depending on context, the intensity of the duty of care is not dependent on whether the person acting is a fiduciary. In short, the duty of care is “not distinctively fiduciary.”²⁰

The lawyer’s duty to the client not to engage in malpractice is grounded in law, not equity, unless the duty of loyalty is implicated.²¹ This is a critical distinction that may well have a bearing on the types of relief that are available to the client in a malpractice action.²² The Rules are a *mélange* of selected equitable and legal analogs. They presume, among

And only one sentence is devoted to the lawyer-client relationship: “Law students should particularly note that lawyers are agents of their clients and as such owe their clients fiduciary duties.” *Id.* at 628.

²⁰D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1409 (2002) (citations omitted).

²¹See GILLERS, *supra* note 10, at 619–20 (suggesting that in a given lawyer-client relationship whether the legal tort of malpractice and the equitable breach of fiduciary duty can be seen as “hermetically distinct categories” will depend on the particular facts and circumstances).

²²See Ray Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 255–56 (1994) (noting that “extraordinary equitable remedies such as constructive trust, equitable lien, and rules of tracing” are available to a client-principal whose lawyer-agent has engaged in an unauthorized act of self dealing in breach of the lawyer-agent’s duty of undivided loyalty to the client-principal) (citing GEORGE E. PALMER, *LAW OF RESTITUTION* § 2.11, at 141–47 (1978)). *Cf.* ROUNDS & ROUNDS, *supra* note 10, § 7.2.3 (discussing the panoply of equitable remedies that may be available to a trust beneficiary who has brought a successful breach of fiduciary duty action against the trustee).

other things, that those who are subject to them or charged with their enforcement have internalized basic agency and trust doctrine, and are generally familiar with equitable remedies:

The lawyer codes draw much of their moral force and, in many particulars, the detailed description of their rules from preexisting legal requirements and concepts found in the law of torts, contracts, agency, trusts, property, remedies, procedure, evidence, and crimes. Thus, lawyer codes particularize some general legal rules in the particular occupational situation of lawyers but are not exhaustive of those rules.²³

The trust has not fared well at all in most law schools, although almost every practicing lawyer at any given time is either acting as a trustee or interacting in some way with a trustee, or both. Usually it is both.²⁴ In only a few law schools is Trusts a separate course, let alone a required one.²⁵ In one law school in 1940, Agency (three semester hours) and Equity and Trusts (six semester hours) were required.²⁶ At some point thereafter, instruction in the trust, a critical common law legal relationship, became inappropriately linked with instruction in the will, a creature of statute.²⁷ It was inevitable that the Wills and Trusts course (or Trusts and Estates

²³RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2001).

²⁴The marginalization of the trust in the American law school is regrettable because the common law of trusts will govern who is and is not the client when a lawyer represents a mutual fund trustee in the commercial context, the trustee of a family trust in the personal context, or the trustee of an endowment in the charitable context. Moreover, when client funds are entrusted to a lawyer, the client must look first and foremost to the common law of trusts, not the jurisdiction's lawyer code, to safeguard his or her equitable property rights.

²⁵*Cf.* Charles E. Rounds, Jr., *The Case for a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School, Together with a Model Fiduciary Relations Course Syllabus*, 18 REGENT U. L. REV. 251, 252 (2005–2006).

²⁶*See* Suffolk University Law School's 1940 Course Catalogue (on file with author).

²⁷This ill-considered linkage is particularly unfortunate because, while the will has seen its best days, the trust relationship is enjoying an astounding renaissance in both the personal and the commercial contexts. *See generally* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984); John H. Langbein, *The Twentieth Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997); James P. Hawley & Andrew T. Williams, *The Emergence of Fiduciary Capitalism*, 5 CORP. GOVERNANCE 206 (1997).

course) would find its way conceptually into the specialty pigeon hole of estate planning, and eventually be relegated to the elective side of the curriculum. That is in fact what has happened in most of the law schools. The law schools threw out the common law baby with the bathwater.

Beyond the scope of this Article is a discussion of how this assault on the common law in academia poses practical problems for the general day-to-day operations of the bench and the bar. That topic we have already covered in another article.²⁸ This Article is actually a companion to one we recently published in the New York University Journal of Law and Business.²⁹ A theme of the NYU article was that the common law informs the Investment Company Act of 1940 (the “Act”), not the other way around. The common law is self-contained and more than adequate to protect mutual fund investors.³⁰ All the Act does is invoke the common law and tweak it a bit at the margins.³¹ The Act would be gibberish without the common law. In this Article, we remind the reader that the Rules do even less: they leave undisturbed the common law insofar as it regulates the private lawyer-client relationship. The Rules are about the lawyer’s relationship with the state. Again, the critical task of regulating the rights, duties and obligations of the private relationship is largely left to the common law of agency, contracts, torts, trusts, and property. As noted above, disbarment is not itself a remedy that can make a client whole.³²

If the Rules cannot be properly understood divorced from their common law context, lawyers first and foremost being common law agent-fiduciaries, and if the Investment Company Act of 1940 is gibberish separated from its common law foundation, then the marginalization of the common law in the American law school is indeed regrettable. Our sense is that the solution, if there is one, lies somewhere out there in the real world. A culture of codification and regulation has so taken root in the American law school that there is probably no turning back.³³ It is likely that a

²⁸ Rounds, *supra* note 25.

²⁹ See Rounds & Dehio, *supra* note 4.

³⁰ See *id.* at 511–14.

³¹ See *id.* at 513–14.

³² See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. f (2001) (discussing civil liability as a possibility when the lawyer is not fulfilling his or her duty to the client).

³³ The Harvard Law School faculty, for example, has recently endorsed a plan to “constrict” its coverage of the common law in the first year, specifically the content of the required Contracts,

tenured law school faculty would look with condescension and bewilderment, if not outright hostility,³⁴ upon any proposal to move instruction in the two core equity-based “common law” relationships, agency and trusts, back to their rightful places of honor on the required side of the curriculum, along with the law-based relationships.³⁵ (When we characterize the agency, which is actually a legal construct, and the trust, which is a creature of equity, as “equity-based” relationships, we mean that equity has taken a particular interest in enforcing them, each being a classic fiduciary relationship.³⁶)

Such a proposal “to turn back the clock” would be dismissed out of hand and collective attention then turned to reducing still more the credit hours allocated to Contracts, Torts, and Property. The less doctrine, the better. Doctrine is for the small picture folk.³⁷ Nor would an expansion of the ABA-mandated course on the Rules to encompass instruction in the fiduciary aspects of agency law and the fundamentals of trust law politically or practically be an option.³⁸ No, any solution most certainly

Torts, and Property courses, this so as to make room for, among other things, a course on legislation and regulation. See Bhayani & Hernandez, *supra* note 18.

³⁴ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2191 (1993) (The emotional dimension of the conflict between the abstract scholars and the practical scholars in the legal academy is evident in the responses the author received to an article in which he suggested that “if law schools continue to stray from the principal mission of professional scholarship and training, the disjunction between legal education and the legal profession will grow and society will be the worse for it.”) (quoting Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 41 (1992)).

³⁵ When we say the agency and trust is “equity-based,” we mean that equity has taken a particular interest in enforcing them, each being a fiduciary relationship.

³⁶ See HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, *MODERN EQUITY* 518 (10th ed. 1976) (noting that “[i]t is an inflexible rule of a Court of Equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict”) (quoting *Bray v. Ford* [1896] A.C. 44, 51). While the trust itself is a creature of equity, the agency is not. The agency is a common law construct. See generally Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51 (1981). In the Middle Ages, however, the “germs” of both relationships were virtually indistinguishable. See SCOTT, *supra* note 13, § 8, at 88.

³⁷ See Edwards, *supra* note 34, at 2194. (“[T]he ‘impractical’ scholars often view their doctrine-oriented colleagues as engaged in ‘uninteresting’ work, unworthy of pursuit by true intellectuals.”).

³⁸ That would run counter to the sentiment that now prevails in most law school faculties, namely that there should be fewer credit hours devoted to the traditional required courses, not

would have to come from outside the academia. One solution might be for law firms to band together to create remedial institutes designed to inculcate in new hires critical common law doctrinal principles, particularly the marginalized equity-based ones.³⁹

The body of this Article is a primer on how common law principles—particularly those marbled through the laws of agency, trusts, and property—implicate, inform, and regulate the private attorney-client agency relationship.⁴⁰ Contracting in a fiduciary environment and torts committed by fiduciaries round out the Article's substantive coverage.⁴¹ If nothing else, having all this material so critical to the private ordering of the lawyer-client relationship finally collected and assembled in one place should prove useful to law students, practitioners, and jurists alike.

In Part II, we review the core principles of agency law that regulate and inform generally the lawyer-client relationship, to include what can

more. To be pedagogically sound, an expanded course on the lawyer's Model Rules of Professional Conduct which adequately fills in the massive common law doctrinal gaps that have developed in the curriculum of the American law school would require many more than three credit hours. Recall that in 1940, one law school had devoted six semester hours to instruction in Equity and Trusts alone, with three more devoted to Agency. Moreover, it is not pedagogically sound to develop a course on general common law agency principles around the attorney-client agency relationship; too many idiosyncrasies exist. A lawyer, for example, could owe fiduciary duties to a prospective client, notwithstanding the fact that an agency relationship generally requires the agent's consent. See DeMott, *supra* note 15, at 312–14. In any case, a few tenured academics are still left who would be immediately qualified to teach such an expanded course. The pedagogical breach most certainly would have to be filled by seasoned adjuncts.

³⁹It is our sense that the reason that young lawyers allegedly cannot write, a complaint we academics hear repeatedly from members of the practicing bar, is not that there are too few writing courses in the law schools, but that the traditional core curriculum has been gutted. Whatever a law student may be receiving for his or her tuition dollar, it generally no longer includes the full kit of doctrinal tools so necessary for a proper sorting out of the rights, duties, and obligations of the parties, whether in writing or otherwise.

⁴⁰The Article is essentially a fiduciary CliffsNote, which will have to do until something better comes along. "CliffsNotes . . . are a series of student study guides available primarily in the United States. The guides present and explain literary and other works in pamphlet form or online. Endorsers say the guides help readers understand complex works, while detractors say they let students avoid even reading them." Wikipedia, *Cliffsnotes*, available at <http://en.wikipedia.org/wiki/CliffsNotes>.

⁴¹The agency and the trust are the two classic fiduciary relationships. A contractual relationship, on the other hand, is not a fiduciary relationship, though it may give rise to an associated agency or a trust. Compensated legal representation is an example of the former; a clients' funds trust account is an example of the latter.

constitute a breach of fiduciary duty by a lawyer-agent and what equitable remedies may be available to the client-principal.

In Part III, we review how the law of torts can intrude upon the lawyer-client agency relationship, with a particular focus on standards of care and statutes of limitation. We note that incorporation generally cannot limit the lawyer-agent's liability in tort to the client-principal.

In Part IV, we review how fiduciary principles can sometimes constrain the enforceability of contracts that are incident to agencies, such as compensation and commercial contracts between lawyer-agents and their client-principals. Also considered are transactions between lawyer-agents and third parties that involve the exploitation of confidential client information.

Part V, in which we consider the property dimensions of legal representation, specifically the intersection of the lawyer-client agency relationship and the trust relationship, has two sub-parts. The first sub-part deals with how trust principles can sometimes dictate the very character and scope of the lawyer-client agency relationship. It is not always certain, for example, who is and is not the client when a lawyer represents a trustee. It is also common for lawyer-agents to hold the funds of client-principals in trust. In such cases, the law of trusts generally trumps the laws of agency. The other sub-part deals with how ignorance of basic trust and property doctrines can generally degrade the quality of a legal representation. Counsel's ignorance as to who has standing to sue a trustee, as to the liabilities of the trustee's agents, as to the necessary parties to a breach of trust litigation, or as to the external contractual and tort liabilities of the trustee can lead to a legal representation that is at best operationally inefficient and at worst chaotic.

In Part VI we conclude by recommending that law schools return discrete courses in the common law relationships of agency and trust to the required side of the curriculum. Failing that, the practicing bar should assume responsibility for imparting our law's basic anatomy to those coming on line. The common law, of which the relationships of agency and trust are critical components, is the bedrock upon which all our statutory and regulatory edifices are constructed. It also regulates the lawyer-client relationship itself, with the laws of agency pulling the laboring oar. Lawyer codes are just about licensure, the lawyer's relationship with the state.⁴²

⁴²RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2001).

II. AGENCY LAW AND THE LAWYER-CLIENT RELATIONSHIP

[An a]gency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.⁴³

A. Introduction

It is settled law that the lawyer-client relationship is a common law agency relationship, the client being the principal and the lawyer being the agent.⁴⁴ Being an agent-fiduciary, the lawyer owes the client a duty of undivided loyalty.⁴⁵ This translates into a duty to act solely in the interest of the client as to matters within the scope of the representation.⁴⁶ Incident to the general duty of loyalty are a number of sub-duties, the critical two being the duty to keep the affairs of the client in strict confidence⁴⁷ and the duty to furnish the client with all information that is material to the representation, to include any information that if disclosed would work a hardship on the lawyer personally.⁴⁸ It is the duty of confidentiality that makes even scriveners agent-fiduciaries.⁴⁹ The fiduciary duties that a lawyer owes his or her client override even the mutual fiduciary duties that law partners owe one another.⁵⁰

⁴³RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

⁴⁴See DeMott, *supra* note 15.

⁴⁵See RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

⁴⁶*Id.* § 8.01 cmt. b.

⁴⁷See *id.* § 8.05 cmt. c.; cf. SEAVEY, *supra* note 17, at 252 (noting that a lawyer is a special category of agent: “[h]aving been employed by a client, it is improper for him, after termination of the relation, to take proceedings adversely to the client, if he might have obtained information which would be of use to him in the subsequent proceeding”).

⁴⁸RESTATEMENT (THIRD) OF AGENCY § 8.11 cmt. B (2006).

⁴⁹See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1404 (2002) (suggesting that even a scrivener is an agent-fiduciary in that the scrivener must deal with the client-principal’s confidential information and other such “critical resources” for the client-principal’s exclusive benefit); *id.* at 1403–04 (suggesting that it is possible to have a non-property based relationship as principal agent; critical resources can qualify as protected under the duty of loyalty).

⁵⁰See DeMott, *supra* note 15, at 309–11.

B. Breaches of Fiduciary Duty by the Lawyer-Agent

1. Introduction

An equitable breach of fiduciary duty in the agency context and the commission of the legal tort of malpractice are two different things.⁵¹ Take a commercial transaction of some sort that Jones wishes to enter into with a third party. Jones retains a lawyer to represent Jones in the matter. Jones is the principal. The lawyer is the agent. If the lawyer-agent in the course of representing Jones, the client-principal, engages in an unauthorized act of self dealing or improperly furthers the interest of the third party at the expense of Jones, then we have a breach of the duty of loyalty. The duty of undivided loyalty is what distinguishes the fiduciary relationship from other relationships.⁵² The lawyer could well also have failed to exercise due care in representing Jones in the transaction, such as by failing to properly clear title to some real estate such that the Jones was economically disadvantaged.⁵³ We address the topic of fiduciary malpractice in Section III.

Also, an agency relationship is not a contractual relationship.⁵⁴ Nor is a contractual relationship an agency relationship.⁵⁵ For an agency relationship to arise, there need not be an exchange of consideration.⁵⁶ The lawyer and the client, of course, may well also be parties to an ancillary compensation contract, but the lawyer-client relationship first and foremost is a fiduciary one, not a contractual one.⁵⁷ Thus the contract that is incident to a fiduciary relationship is subject to special rules.⁵⁸ These rules we

⁵¹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 50 cmt. a (2001).

⁵² See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006).

⁵³ Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (2001); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 (2001).

⁵⁴ SEAVEY, *supra* note 17, § 3, at 4.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. b (2001) (confirming that “[l]awyers . . . owe their clients greater duties than are owed under the general law of contracts”).

⁵⁸ See, e.g., RESTATEMENT (SECOND) OF AGENCY § 390 cmt. e (1958) (providing that “[i]f . . . in the case of attorney and client, the creation of the relation involves peculiar trust and confidence, with reliance by the principal upon fair dealing by the agent, it may be found that a fiduciary relation exists prior to the employment and, if so, the agent is under a duty to deal fairly with the principal in arranging the terms of the employment”).

discuss in Section IV. Again, the compensation contract between a lawyer and his or her client is incident to the agency relationship, not the other way around.⁵⁹

Nor is the lawyer-client agency relationship a trust relationship, though a separate trust relationship may arise incident to the lawyer-client agency relationship. Take a classic life insurance contract. The insurance company is generally not an agent of the insured, and thus owes the insured no fiduciary duties, such as the duty to segregate the premium from its general assets.⁶⁰ “Under agency principles,” however, “the lawyer is subject to liability for failure to segregate client property and keep proper records and must account for any profits resulting from the lawyer’s misuse of the property.”⁶¹ In other words, under agency principles the lawyer is required to act as a trustee of the funds of his or her clients:

A single person may be both agent of, and trustee for, another. One who undertakes to act on behalf of another and subject to the other’s control is an agent, but one who is vested with title to property held for a principal is a trustee. In such a case, it is ordinarily the agency relationship that predominates, and the principles of agency, rather than those of trust, apply.⁶²

2. Self-Dealing in Breach of the Lawyer-Agent’s Duty of Undivided Loyalty

An act of self-dealing in breach of the lawyer-agent’s duty of undivided loyalty to his or her client can be direct or indirect.⁶³ It can be subtle or blatant. Whatever the case, when it comes to fiduciary self dealing, “equity looks to the intent rather than to the form.”⁶⁴ Take a land transaction in which the lawyer represents the seller. Under common law agency

⁵⁹ *See id.*

⁶⁰ *See, e.g.,* Hartford Cas. Ins. Co. v. N.H. Ins. Co., 628 N.E.2d 14, 17–19 (1994); *cf.* SCOTT, *supra* note 13, § 14, at 184–200 (distinguishing the trust from the third party beneficiary contract); *id.* § 8, at 88–98 (distinguishing the trust from the agency).

⁶¹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 44, cmt. c (2001) (citing RESTATEMENT (SECOND) OF AGENCY §§ 382, 398, 402–04, & 427).

⁶² SCOTT, *supra* note 13, at 66.

⁶³ RESTATEMENT (THIRD) OF AGENCY § 8.03 reporter’s note c (2006).

⁶⁴ SNELL’S EQUITY 106 (John McGhee, ed. 31st ed. 2005).

principles, the lawyer-agent may not secretly scheme to later purchase the land from the buyer for the lawyer's own personal account; this in order to keep the lawyer-agent from turning around and selling the land for a profit to a third party who has been waiting in the wings.⁶⁵ This assumes that the principal, that is the client-seller, did not give the lawyer-agent his or her informed consent to engage in this particular act of self-dealing.⁶⁶ By saying "informed" we mean that the client-principal must actually understand the facts and law applicable to the lawyer-agent's particular act of self-dealing.⁶⁷

As to the client-principal, the lawyer-agent would be in breach of the duty of undivided loyalty in at least two respects: Engaging in an act of self-dealing and furthering the interests of others at the client-principal's expense.⁶⁸ The lawyer-agent failed to give the client-principal advance notice of the flipping scheme, to include the identity of the third party (the ultimate transferee);⁶⁹ and, most likely, disclosed to the buyer and the third party (the ultimate transferee) confidential information, namely the price for which the client-principal was willing to part with the land.⁷⁰

In the event that it was reasonable for the buyer to believe that the lawyer was acting as some kind of exclusive agent for the buyer in the transaction, then under common law agency principles the lawyer also would be in breach of the duty of undivided loyalty to the buyer in self dealing with the subject property.⁷¹ Moreover, the lawyer would have had a

⁶⁵ See RESTATEMENT (THIRD) OF AGENCY § 8.05 cmt. b (2006).

⁶⁶ See *id.* § 8.06.

⁶⁷ See *Cleary v. Cleary*, 692 N.E.2d 955, 959 (1998). In cases where the lawyer-agent is in a conflict of interest with the client-principal, the client-principal must have "full knowledge," i.e., an actual understanding, not only of the law and facts applicable to the conflict but also of the conflict's implications for the client-principal. *Id.* This is appropriate as the subjective understanding standard would certainly apply were the lawyer-agent not conflicted, e.g., if he or she were rendering advice in the capacity of independent counsel to the client-principal in connection with a self-dealing transaction between the client-principal and another agent of the client-principal. *Id.* at 958. In any event, the client's signature on a consumer-type conflict disclosure statement, in and of itself, would not be conclusive evidence that the client's consent to the lawyer's act of self dealing was an informed one.

⁶⁸ RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006); *id.* § 8.05; *id.* § 8.03.

⁶⁹ *Id.* § 8.11.

⁷⁰ *Id.* § 8.05.

⁷¹ *Id.* § 8.03, cmt. b. ("[A]n agent who acts on behalf of more than one principal in a transaction between or among the principals has breached the agent's duty of loyalty to each principal through undertaking service to multiple principals that divides the agent's loyalty.").

duty to disclose to the buyer the existence and intentions of the third party (the ultimate transferee) waiting in the wings, as well as a duty not to disclose to the third party (the ultimate transferee) the price that the buyer was willing to part with the property.⁷² In other words, the lawyer in acting as an agent to both the seller-client and the innocent buyer without the informed consent of either risks having to make both whole in the event both are harmed by his two timing. “[A]n agent who acts on behalf of more than one principal in a transaction between or among principals has breached the agent’s duty of loyalty to each principal through undertaking service to multiple principals that divides the agent’s loyalty.”⁷³

On the other hand, if the buyer had knowingly assisted the lawyer-agent in the lawyer-agent’s breach of fiduciary duty to the client-principal, then under the equitable doctrine of unclean hands, the buyer may well not be afforded a remedy.⁷⁴ Moreover, the buyer could be held personally liable to the client-principal for any harm to the client-principal that was occasioned by the breach.⁷⁵ Liabilities would be essentially joint and several. The buyer not being a BFP could well be declared by some court in the exercise of its equitable powers a constructive trustee of the property for the benefit of the transferor and ordered to re-convey the property.⁷⁶

As to the third party (ultimate transferee), presumably no fiduciary duties were owed. If the third party were a BFP, he or she could keep the

⁷²*Id.* § 8.11 cmt. b.

⁷³*Id.* § 8.03 cmt. b.

⁷⁴See SNELL’S EQUITY, *supra* note 64, at 98–99 (noting that the equity maxim: “He who comes into equity must come with clean hands” is related to *ex turpi causa non oritur actio* of the common law). “[A]n occupier may be debarred from setting up an equitable license if his conduct in relation to the property has been damaging to the legal owner.” *Id.*

⁷⁵RESTATEMENT (THIRD) OF AGENCY § 8.01 reporter’s notes d (2006) (confirming that “intentionally causing an agent to breach the agent’s fiduciary duty to the principal is a well-established theory of liability”). One must note, however, that “[t]he liability of a person who provides substantial assistance or encouragement to an agent in the agent’s breach of fiduciary duty may be measured differently from the agent’s liability because the tortfeasor who provides assistance or encouragement ‘is responsible only for harm caused or profits that he himself has made from the transaction, and he is not necessarily liable for the profits that the fiduciary has made nor for those that he should have made.’” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 874, cmt. c.); see also SNELL’S EQUITY, *supra* note 64, at 690–93.

⁷⁶See SNELL’S EQUITY, *supra* note 64, at 690–93; ROUNDS & ROUNDS, *supra* note 10, § 3.3 (discussing the remedial device of the constructive trust, as well as the rights, duties, and obligations of the constructive trustee).

land.⁷⁷ If, however, the third party knowingly participated with the lawyer-agent in breaching duties that the lawyer-agent owed to the client-principal, to the buyer, or to both, then the third party may well have to give up the land.⁷⁸

3. Conflicts of Interest in the Agency Context That Do Not Involve Self Dealing

Not all breaches of fiduciary duty involve self dealing, although most do. In most fiduciary conflict cases involving lawyers there is a self dealing element lurking somewhere, even if it is only a desire to “get the business” or a desire to “keep the business.” Take a multi-generational class of family members who are collectively operating a closely held business, where some members are more equal than others. The lawyer-agent purports to represent all members in matters relating to the conduct of the enterprise and estate planning. In the words of Justice Brandeis, he or she would act as “lawyer for the situation.”⁷⁹ As soon as the patriarch informs the lawyer-agent that he wants to devise the corporation to the oldest son, but that the other client-principals are to be kept in the dark, the lawyer-agent has a conflict of interest problem. If the lawyer-agent keeps the information confidential in order not to “lose the business,” then we have a multi-principal conflicted agency that is, at least in part, being fueled by fiduciary self-dealing.

Let us assume that a lawyer-agent negligently wanders into some conflict of interest situation. There is no direct or indirect agent-fiduciary self dealing. In fact the lawyer is not even taking any compensation. Just as the law of torts has a negligence category, so does the law of agent-fiduciaries. We find the lawyer-agent representing both the seller-principal and the buyer-principal in a land transaction. Or perhaps we find the lawyer-agent representing the husband-principal and the wife-principal in an estate planning matter, with each client-principal having children by a prior marriage. The seller needs the highest possible sales price. The buyer needs the lowest possible one. The wife wants 50% of the marital estate to

⁷⁷ See SNELL'S EQUITY, *supra* note 64, at 65–78 (but “[w]here the same solicitor acts for both parties to a transaction, any notice he acquires is imputed to each party”); *id.* at 76.

⁷⁸ See RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1965); SNELL'S EQUITY, *supra* note 64, at 692 n.50.

⁷⁹ See ROUNDS & ROUNDS, *supra* note 10, § 8.38 (discussing Louis Brandeis' controversial representation of the Warren “family” prior to his elevation to the United States Supreme Court).

go to her children and 50% to go to his. The husband, who owns 90% of the marital estate, wants the 90% to go to his children.

These conflicts of interest should be obvious to anyone. If the lawyer-agent only recognized them he or she would gladly insist that each client-principal retain separate independent counsel and withdraw from all the representations. Forget about the lawyer codes with all their inscrutable convolutions, over-lawyered qualifications, and double-back cross-referencing. What does the law of agency have to say about all of this: the body of law that actually governs such matrices of conflicting relationships.

We start with the following black letter principle: One may not be an agent for two or more principals whose interests are in conflict.⁸⁰ There is a limited exception: The principals may give their informed consents to a conflicted agency.⁸¹ If each client-principal gives the lawyer-agent his or her informed consent to the conflict, then the lawyer-agent may represent the client-principals jointly.⁸² For the consent to be sufficiently “informed,” however, each client must be of full age and legal capacity, free of undue influence, be apprised of and subjectively understand all material facts that relate to the conflict, and subjectively understand the full legal implications of the conflict.⁸³ There is a critical caveat, however: No secrets may be kept between and among the parties,⁸⁴ as under certain circumstances, the lawyer-agent’s silence could put one of the client-principals at a disadvantage. We are talking about legal representation here. If the lawyer is to act merely as a mediator, that is if he or she is a mediator who happens to be a lawyer, then contract rather than agency principles would apply. But if, as in the case of the land transaction, the lawyer-agent is either directly or indirectly involved in price negotiations, or if, as in the case of the estate plan, the lawyer is involved in the planning for a shifting around of someone’s property interests, then it is hard to see how equity would tolerate a simultaneous representation of both the seller and the buyer, or the husband and the wife, as the case may be. If both the buyer and seller

⁸⁰ See RESTATEMENT (THIRD) OF AGENCY § 8.03 cmt. b (“Likewise, an agent who acts on behalf of more than one principal in a transaction between or among the principals has breached the agent’s duty of loyalty to each principal through undertaking service to multiple principals that divides the agent’s loyalty.”).

⁸¹ See *id.* § 8.06 (stating the requirements for valid consent by a principal to conduct by an agent that would otherwise breach the agent’s fiduciary duty).

⁸² *Id.*

⁸³ See *id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 193 cmt. a (1981).

⁸⁴ RESTATEMENT (THIRD) OF AGENCY § 8.06 cmt. d (2006).

have retained the lawyer-agent merely to clear the title, and for no other purpose, or if the husband and the wife have retained the lawyer-agent merely to advise them on the rights, duties, and obligations of trustees, then that may be another matter. After all, in the land transaction matter, it is in the interest of both parties that the title be cleared, and in the estate planning matter, it is in the interest of both parties that they have a working knowledge of fiduciary matters. In other words, in each case the agency relationship would have been so limited that the interests of the client-principals would not be in conflict, at least with respect to the matters covered by the lawyer-agent's representation.

4. Fiduciary Duties Incident to the Agent's General Duty of Loyalty: Full Disclosure and Confidentiality

As we have seen, an agent-fiduciary, that is an agent vested with discretion, owes the principal a general duty of loyalty.⁸⁵ The lawyer-agent is no exception. Incident to the general duty of loyalty are two critical sub-duties, the duty of full disclosure and the duty of confidentiality.⁸⁶ Thus, when it comes to legal representation, it essentially comes down to this: the lawyer-agent has an ongoing affirmative duty to furnish the client-principal with all material information that is in the lawyer-agent's possession and relevant to the agency, whether or not the client-principal asks for the information.⁸⁷ What constitutes material information? Material information is any information the client-principal would need to have in order to adequately further and protect his, her or its interests, whether in the courts or non-judicially,⁸⁸ as well as to refine and adjust the scope of the agency on an ongoing basis.⁸⁹ The other sub-duty is one of silence.⁹⁰ All

⁸⁵*Id.* § 8.01.

⁸⁶*Id.* § 8.11 (discussing the duty of disclosure); *id.* § 8.05(2) (recognizing duty of confidentiality).

⁸⁷*See id.* § 8.11, cmt. b ("An agent owes the principal a duty to provide information to the principal that the agent knows or has reason to know the principal would wish to have.").

⁸⁸Thus, "[I]f an agent has acted beyond the scope of the agent's authority, the agent's duty to the principal may require the agent to inform the principal of the unauthorized action and the courses of action reasonably open to the principal." *Id.*

⁸⁹*See id.* ("Information that the agent provides to the principal may enable the principal to reconsider a course of action that the principal has previously decided upon, leading the principal to revise or rescind prior instructions given to the agent and thereby enabling the principal to shape how the agent's actions may affect the principal's legal relations with third parties in light of developments reported by the agent.").

material information relevant to the agency may not be disclosed by the lawyer-agent to third parties, nor exploited for the benefit of the lawyer-agent or third parties, unless the lawyer-agent is duly authorized to do so by the client-principal, or required to do so by statute.⁹¹

When the lawyer-agent is not in breach of the duty of loyalty and serves only one client-principal, these two duties are fully compatible. It is when the lawyer-agent is engaging in acts of self-dealing, whether authorized or unauthorized, that the duty of full disclosure is likely to be implicated.⁹² When the lawyer-agent is serving multiple client-principals, both sub-duties are likely to be implicated and may well come in conflict. In fact, at the point when they do come in conflict is the point when the agency, be it a legal representation or some other type of agency, should cease and the parties go their separate ways.⁹³ These are the matters we take up next.

a. Agent's Duty of Full Disclosure When There Is Self-Dealing or Multiple Principals

A lawyer-agent who intends to engage in an unauthorized act of self-dealing has a duty to so inform the client-principal.⁹⁴ So also must the lawyer-agent keep the client-principal fully informed during the self-dealing transaction and after it has been consummated.⁹⁵ Conflicts of interest not involving self-dealing likewise implicate the lawyer-agent's duty of full disclosure⁹⁶ as do authorized acts that would otherwise constitute breaches of the duty of loyalty.⁹⁷ If the lawyer-agent intends to

⁹⁰See *id.* § 8.05 (recognizing that the duty of confidentiality keeps an agent from sharing information).

⁹¹See *id.* § 8.05(2).

⁹²See *id.* § 8.01 cmt. c, illus. 8.

⁹³See *id.* § 8.06 cmt. d(2) ("If an agent's duties of confidentiality to one principal prevent the agent from fulfilling the duties of disclosure that the agent owes to any other principal, the agent breaches the agent's duties by continuing to act on behalf of the principal or principals to whom the agent may not make the required disclosure.").

⁹⁴See *United States v. Szur*, 289 F.3d 200, 212 (2d Cir. 2002) (holding that a stockbroker had a duty to inform a prospective purchaser of a block of stock that the attendant transaction costs would be exorbitant); see also *id.* § 8.11.

⁹⁵See RESTATEMENT (THIRD) OF AGENCY § 8.11, reporter's notes b (2006) ("Information about an agent that an agent may have a duty to provide to the principal may include the fact that the agent has breached duties owed to the principal.").

⁹⁶See *id.* § 8.11 cmt. b.

⁹⁷See *id.* § 8.11.

make or does make a fraudulent misrepresentation to the client-principal, the lawyer-agent must make full disclosure to the client-principal.⁹⁸

The lawyer-agent who represents multiple client-co-principals has a duty to fully disclose to each client-co-principal everything that that lawyer-agent says and does during the course of the agency that is relevant and material to the agency,⁹⁹ a duty that continues sometimes even after the agency's termination.¹⁰⁰ A two-party communication between the lawyer-agent and client-co-principal A must be disclosed to client co-principal B, to the extent the contents of the communication are relevant and material to the agency.¹⁰¹ Even when what is communicated is not relevant and material, that there was a communication may well be a fact that would warrant being disclosed to the agent-co-principal who was not party to the communication.¹⁰²

b. Agent's Duty of Confidentiality When There Are Multiple Principals

A lawyer-agent who renders legal services to a client-principal has a duty to the client-principal to keep the client-principal fully informed and the two-party communications between them in strictest confidence.¹⁰³ When there are multiple client-co-principals, however, these duties are incompatible. Something has to give. The simplest way out is for each client-co-principal to waive the right to confidentiality, at least as to all relevant and material communications between and among the parties to the agency.¹⁰⁴

A waiver by the client-co-principals of the right to be kept fully informed is probably a dead end. The lawyer-agent who is told a critical material fact by a client co-principal on condition that the lawyer-agent not

⁹⁸ *See id.*

⁹⁹ *Id.* § 8.06(2).

¹⁰⁰ *Id.* § 8.11 cmt. c (“[A] former agent may be subject to a duty to continue to furnish material information to a now-former principal when it is foreseeable to the agent that the principal will continue to rely on the agent for information and the agent does not inform the principal that no further information will be provided.”).

¹⁰¹ *See id.* § 8.11.

¹⁰² *See id.* § 8.11 cmt. b (“A principal’s decisions may also be affected by information about . . . the agent’s conduct once the agent has been retained by the principal.”).

¹⁰³ *See id.* § 8.11; *see also id.* § 8.05.

¹⁰⁴ *See id.* § 8.06.

disclose the fact to the other client-co-principal is put in an untenable situation.¹⁰⁵ “I have an illegitimate child whom I am supporting but don’t tell my wife when she comes in for estate planning advice,” says the husband, the other client-co-principal. Even though each spouse has duly executed a waiver of the right to be kept fully informed,¹⁰⁶ the lawyer-agent may not knowingly assist one client-co-principal in making a fraudulent misrepresentation to another client-co-principal,¹⁰⁷ or to anyone else for that matter.¹⁰⁸ The fact that the lawyer is in a fiduciary relationship with both the victimizer and the victim will make it difficult, if not impossible, for the lawyer to mount a credible defense that he was an unwitting accomplice.¹⁰⁹ If he did not know that the wife not only “would wish to have” the information but “would need to have it” in order to make rational estate planning decisions, estate planning being the very subject of the agency, then the lawyer should have known it.¹¹⁰

¹⁰⁵ See *id.* § 8.06 cmt. d(2) (“If an agent’s duties of confidentiality to one principal prevent the agent from fulfilling the duties of disclosure that the agent owes to any other principal, the agent breaches the agent’s duties by continuing to act on behalf of the principal or principals to whom the agent may not make the required disclosure.”).

¹⁰⁶ See *id.* § 8.06 cmt. b (“[A]n agreement that contains general or broad language purporting to release an agent in advance from the agent’s general fiduciary obligations to the principal is not likely to be enforceable.”).

¹⁰⁷ See *id.* (“[A]lthough a person may empower another to take action without regard to the interests of the person who grants the power, the law applicable to relationships of agency . . . imposes mandatory limits on the circumstances under which an agent may be empowered to take disloyal action.”). Surely a waiver executed by a client-principal that purports to empower a lawyer-agent to commit acts of fraud, deceit, misrepresentation and other such torts against the client-principal would be void as against public policy.

¹⁰⁸ RESTATEMENT (SECOND) OF TORTS § 525 (1977) (“One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.”). The law does not require that victim and victimizer be in a fiduciary relationship. *Id.*; see also *id.* § 875 (“Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.”). Again, neither tortfeasor need be in a fiduciary relationship with the victim for liability to attach.

¹⁰⁹ *Id.* § 526 (“A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.”).

¹¹⁰ See RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006) (“An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or

C. Equitable Remedies Available to the Client-Principal: Making the Client Whole

Lawyer codes are of little help when it comes to fashioning equitable relief.¹¹¹ Again, they are more about licensure than restitution, more about the profession than the client. License suspension or disbarment may benefit the public at large, but it is of little practical value to the individual client who has been harmed wrongfully and economically:

Traditional sanctions for violating a lawyer code create a present or prospective impediment to the lawyer's right to practice, ranging in ascending severity from informal or formal admonition to suspension or, in most jurisdictions, permanent disbarment.¹¹² Other sanctions may be available either in general, such as a requirement to pay costs, or in specific instances apparently warranting them, such as ordering restitution or suspending sanctions during a period of probation during which the lawyer will submit to guidance of a lawyer mentor or other monitoring of the lawyer's practice.¹¹³

should know when . . . the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal . . .").

¹¹¹ However, a court rightly or wrongly might well look to the licensure rules that regulate the lawyer's relationship with the state for guidance in determining whether a lawyer-agent has breached his or her fiduciary duty to the client-principal by charging a fee that is unreasonably high and whether the equitable remedy of fee forfeiture is warranted and appropriate under the circumstances. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b. (2001).

¹¹² See *id.* § 5.

¹¹³ *Id.* at § 5 cmt. b.; cf. RESTATEMENT (THIRD) OF AGENCY § 8.01 note d (2006) (confirming that a breach of fiduciary duty may be the basis for professional sanctions against a lawyer-agent) (citing *State ex rel. Neb. State Bar Ass'n v. Flores*, 622 N.W.2d 632, 644–45 (Neb. 2001) (involving a lawyer who had breached his duty of loyalty as holder of a nonclient's durable power of attorney)). That IOLTA income is not even diverted into a fund for the benefit of individual clients who are the victims of lawyer defalcation, but for purposes that purportedly benefit the society as a whole is yet another example of the collective focus of the legal profession and its lawyer codes. See discussion *infra* Part V.B.2 of this Article for a discussion of the mechanics of IOLTA and how it subverts the individual focus of common law agency and trust fiduciary principles applicable to the lawyer-client relationship. The Model Rules of Professional Conduct celebrates its collective focus in the narcissisms of its Preamble, that is, the assertion that lawyers play a vital role in the very preservation of society itself. MODEL RULES OF PROF'L CONDUCT Preamble: A Lawyer's Responsibilities (2002).

Because a “common law” breach of fiduciary duty is an equitable, not a legal concept, assessment of damages is not necessarily the only remedy available to our aggrieved client-principal.¹¹⁴ Besides an equitable damages assessment,¹¹⁵ there are the equitable remedies of accounting,¹¹⁶ injunction,¹¹⁷ specific performance,¹¹⁸ restitution,¹¹⁹ reparation,¹²⁰ denial of compensation,¹²¹ contract rescission,¹²² and ordering the lawyer-agent to make good the client-principal’s litigation costs out of the lawyer-agent’s own pocket.¹²³ Likewise, if a lawyer-agent is also a trustee of the client-principal’s property and breaches his or her duty of loyalty as trustee, then the lawyer-agent could be held personally liable in equity for the reasonable

¹¹⁴RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d(1) (2006) (damages as equitable relief).

¹¹⁵SNELL’S EQUITY, *supra* note 64, at 449 (“Monetary awards made by courts of equity are traditionally known as equitable compensation.”).

¹¹⁶*See* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d(1) (2006) (“If through the breach the agent has realized a material benefit, the agent has a duty to account to the principal for the benefit, its value, or its proceeds.”); *see also* SNELL’S EQUITY, *supra* note 64, at 441 (equitable accounting in the context of the agency relationship).

¹¹⁷*See* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d(1) (2006) (“Under appropriate circumstances, an agent’s breach or threatened breach of fiduciary duty is a basis on which the principal may receive specific nonmonetary relief through an injunction.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 55 cmt. d (2001) (“Injunctions and declaratory relief for violations of a lawyer’s fiduciary and other duties are also available under the usual principles governing such relief.”).

¹¹⁸*See* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d(1) (2006) (“Under appropriate circumstances, an agent’s breach or threatened breach of fiduciary duty is a basis on which the principal may receive specific nonmonetary relief . . .”).

¹¹⁹*Id.* (“The law of restitution and unjust enrichment also create a basis for an agent’s liability to a principal when the agent breaches a fiduciary duty.”).

¹²⁰*See* ROUNDS & ROUNDS, *supra* note 10, § 7.2.3.9 (discussing the equitable remedy of specific reparation).

¹²¹*See* RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. d(2) (2006) (“[A]n agent’s breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent’s disloyalty.”).

¹²²*Id.* § 8.01, cmt. d (“Because it constitutes a material breach of the contract by the agent, an agent’s breach of fiduciary duty may also privilege the principal to terminate the principal’s relationship with the agent in advance of a time set for termination in any contract between them.”); *see also* SNELL’S EQUITY, *supra* note 64, at 182–84 (contract rescission).

¹²³*See, e.g.,* Tarnowski v. Resop, 51 N.W.2d 801, 805 (Minn. 1952) (confirming that requiring an agent to bear the burden of the principal’s litigation costs is an equitable remedy that may be available to a principal whose agent has breached his or her fiduciary duty to the principal, provided the costs were a consequence of the breach).

legal fees of the client-principal's new lawyer, that is to the extent the fees were incurred in bringing to light and remedying the breach of trust.¹²⁴

Tracing orders¹²⁵ and imposition of constructive trust orders¹²⁶ also may be available to client-principals whose property rights have been impinged upon by the wrongful actions of lawyer-agents. Technically, however, tracing and the imposition of a constructive trust are not equitable "remedies":

Occasionally other processes of equity are described as equitable remedies. The constructive trust is sometimes described thus, and so is the process of tracing in equity. Yet these are not so much remedies as part of the process of establishing the substantive rights of the parties. By holding, for example, that there is a right to trace property and that the recipient is bound by a constructive trust, the court is able to decide what order to make; but the tracing and the constructive trust can hardly be said to be a "remedy," at all events in the sense that an injunction or a decree of specific performance is a remedy.¹²⁷

The court in the exercise of its discretionary equitable powers may even mix a cocktail of equitable remedies.¹²⁸ The goal is to make the client-principal whole. Moreover under the equitable doctrine of election of remedies, the client-principal will have some say in what the ingredients are.

¹²⁴ See ROUNDS & ROUNDS, *supra* note 10, § 7.2.3.7 (reduction or denial of compensation and/or assessment of attorneys' fees and other costs against the trustee personally).

¹²⁵ See SNELL'S EQUITY, *supra* note 64, at 685–89 (following and tracing in equity).

¹²⁶ See RESTATEMENT (THIRD) OF AGENCY § 8.01, reporter's notes d(1) (2006) ("A court may construct a remedy when an agent profits through a breach of fiduciary duty by imposing a constructive trust on the agent's profits."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 cmt. a (2001) (noting that the equitable remedy of imposition of a constructive trust may be available to a client-principal whose legal or equitable rights have been violated by actions of the lawyer-agent, the subject of the constructive trust being property to which the lawyer-agent has wrongfully taken the legal title).

¹²⁷ SNELL'S EQUITY, *supra* note 64, at 314–15.

¹²⁸ See RESTATEMENT (THIRD) OF AGENCY § 8.01 reporter's note d (2006) ("By rescinding a contract, a principal does not lose a claim for damages against an agent when rescission alone does not restore the principal's position.").

Where remedies are alternative and inconsistent, a claimant must elect between them. The election need not be made until a claimant is able to make an informed choice, but should not be unreasonably delayed to the prejudice of the defendant. Normally the election should be made before judgment but, in exceptional cases, the election may be made later than that.¹²⁹

If the land ends up in the hand of a BFP, the BFP may keep the property.¹³⁰ If the ultimate title-holder is not a BFP, then the ultimate title-holder may be declared by the court a constructive trustee of the land and ordered to convey the land to the client-principal (the original seller). On the other hand, the client-principal may elect to go after the lawyer-agent. The client-principal might seek to have the lawyer-agent turn over to the client-principal the profit he or she personally made on the self dealing transaction, as well as a damage amount computed on the basis of the profit the buyer made on the transaction with the ultimate title-holder.¹³¹ The lawyer-agent may well also be required to disgorge whatever legal fees the client-principal paid to the lawyer-agent and to reimburse the client-principal for the costs of the breach of fiduciary action itself. Or the non-BFP and the lawyer-agent collectively might be required to make the client-principal whole. There is, however, generally no room in equity for windfalls and double recoveries:

There is no reason in principle, [sic] why different types of equitable relief should not be granted in respect of the same breach of equitable duty. Thus, a court may decree specific performance and a pecuniary performance; it may also award compensation for any delay in performance provided that there is a legal or equitable duty that supports a claim for such compensation. In such cases, the only limitation on the remedies will be that double recovery is to be avoided. As a result, in many cases, equitable remedies are to be regarded as being cumulative rather than alternative.¹³²

¹²⁹ SNELL'S EQUITY, *supra* note 64, at 454.

¹³⁰ SEAVEY, *supra* note 17, § 64(B).

¹³¹ *Id.* § 4(B).

¹³² SNELL'S EQUITY, *supra* note 64, at 455.

D. Conclusion

One could go on and on. The point is that it is asking an awful lot of a course on the Rules to cover other than in the most superficial way all the equity-based material that is both the context for the lawyer-client agency relationship and the source of the analytical tools that one needs to sort out the rights, duties, and obligations of the parties to that private relationship. A course that primarily deals with either the third-party-focused doctrine of *respondeat superior* or the ability of an agent to bind the principal in contracts with third parties is not only covering the margins of the general law of agency but material that that has little to do in any case with the specific agency relationship of lawyer-client: “A third party’s belief that the lawyer had authority to commit or execute is not protected by the doctrine of apparent authority unless the belief is traceable to expressive conduct attributable to the client.”¹³³

III. TORT LAW AND THE LAWYER-CLIENT AGENCY RELATIONSHIP

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.¹³⁴

As we have noted, a generalized duty of loyalty is the *sine qua non* of the lawyer-client agent-fiduciary relationship. Even when the client has given the lawyer informed consent to self-deal, such as to serve as the compensated trustee of a trust that the lawyer has drafted for the client, there is a general overarching duty on the part of the lawyer to act solely in the interest of the client as to matters encompassed by the representation.¹³⁵ A limited permission to self-deal does not abrogate the lawyer’s general duty of loyalty to the client.¹³⁶ Thus the lawyer would have an affirmative duty to make sure that the consent was actually an informed one, as well as

¹³³ DeMott, *supra* note 15, at 308.

¹³⁴ RESTATEMENT (SECOND) OF TORTS § 299A (1965).

¹³⁵ See ROUNDS & ROUNDS, *supra* note 10, § 6.1.3.3 (appointment of scrivener as trustee).

¹³⁶ See *id.*

an ongoing duty not to double-dip, that is not to charge both a legal fee and a trustee fee for the same service.¹³⁷

A. *Standards of Care*

On the other hand, a particular duty of care is not a *sine qua non* of the fiduciary relationship: “The essence of an action for malpractice is violation of a standard of care. A breach of fiduciary duty, however involves violation of a standard of conduct, not a standard of care.”¹³⁸

The trustee of a condominium trust, for example, is generally held to a business judgment standard of care.¹³⁹ The trustee of a trust for widows and orphans would generally be held to a prudence standard, unless the terms of the trust were to provide otherwise.¹⁴⁰ A physician, who is generally in neither an agency nor a fiduciary relationship with his or her patient, is held to a high standard of care.¹⁴¹ The standard of the care that

¹³⁷ See *id.* § 8.4 (noting that when the trustee is also counsel to the trust, the practice of charging on a time basis for the legal work and on a percentage basis for the trust administration work at minimum gives the appearance that the trust is being double-billed).

¹³⁸ Anderson & Steele, *supra* note 22, at 249. Nowhere is the confusion of a legal duty of care with a fiduciary duty more evident than when it comes to the duties that the directors of a corporation owe its shareholders. The corporation is a statutory agency and trust hybrid nestled in the interstices of those two fundamental legal relationships. A corporate director, though neither an agent of the shareholders nor a trustee of corporate assets, owes common law fiduciary duties both to the entity and to the shareholders. Common law agency and trust principles inform the nature and scope of those duties. Entire symposia are devoted to sorting out and coming to grips with the interrelationship of the duties of care, good faith, and loyalty in the corporate context. See, e.g., Barbara K. Bucholtz, Symposium: *Disputed Concepts in Contemporary Business Association Law: Discussions on Fiduciary Duty and Capital Lock-in*, Symposium Foreword, 41 TULSA L. REV. 405 (2006). What would have been self-evident to the classically-trained academic (and the complete lawyer, for that matter) is today the subject of much earnest wheel-reinventing. We have all been too long away from the common law mother ship. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006) (“When an agent’s agreement with a principal confers discretion on the agent to take action in the agent’s sole discretion, the agent has a duty to exercise discretion in good faith.”); UNIF. TRUST CODE § 814(a) (2005) (“Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as ‘absolute,’ ‘sole,’ or ‘uncontrolled,’ the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interest of the beneficiaries.”); see also RESTATEMENT (THIRD) OF TRUSTS § 87, cmt. c (2005).

¹³⁹ See ROUNDS & ROUNDS, *supra* note 10, § 9.12 (the condominium trustee).

¹⁴⁰ See *id.* § 6.1.1 (the duty to be generally prudent).

¹⁴¹ See RESTATEMENT (SECOND) OF TORTS § 299A (1965).

an airline pilot is held to *vis a vis* the passengers is similarly high, although the pilot is in neither an agency nor a contractual relationship with them.¹⁴² The pilot is in an agency and contractual relationship with the airline; the passengers are in a contractual relationship with the airline; but the pilot is neither an agent of nor in a contractual relationship with the passengers. That the pilot is not a fiduciary *vis a vis* the passengers has no bearing on the duty of care he or she owes them.¹⁴³ The duty, however, is a legal one, not an equitable one, and the relief is legal and not equitable, and thus generally limited to damages.

The standard of care that an estate planning lawyer is held to is a legal standard, though the lawyer is an agent-fiduciary.¹⁴⁴ The negligent failure to insert a proper tax clause in a trust is a tort, not an equitable breach of fiduciary duty.¹⁴⁵ Absent special facts, a malpractice action against a lawyer is a tort action, not a breach of fiduciary duty action.¹⁴⁶ “Although the actions for breach of fiduciary duty and malpractice are . . . distinct from each other, it is . . . possible for the same set of facts to give rise to both actions when the circumstances indicate that the attorney has breached both the appropriate standards of care and of conduct.”¹⁴⁷ A breach of a lawyer-agent’s fiduciary duty to keep the client-principal fully informed, for example, may also have a bearing on whether in a given situation there also has been an act of malpractice.¹⁴⁸

B. Statutes of Limitation

Even in a “pure” legal malpractice tort action, however, the fact that the lawyer happens also to be an agent-fiduciary may well cause the period of the applicable tort statute of limitations to begin to run not from the time when the act of malpractice was committed but from the time when the client-principal first became “aware” of the act of malpractice and its import. Though the common law fiduciary principle may have been

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Anderson & Steele, *supra* note 22, at 245.

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* at 250; *see, e.g.*, Holmes v. Drucker, 411 S.E.2d 728, 729 (Ga. Ct. App. 1991) (involving a lawyer who negligently failed to file a lawsuit in a timely matter—a tortious act—and then lied to the client about the negligence in breach of his fiduciary duty to the client).

¹⁴⁸ *See* RESTATEMENT (THIRD) OF AGENCY § 8.11 cmt. d (2006).

marginalized in the law schools, in the real world it is ubiquitous and pervasive:

Thus the fact that a client lacks awareness of a practitioner's malpractice implies, in many cases, a second breach of duty by the fiduciary, namely, a failure to disclose material facts to his client. Postponement of accrual of the cause of action until the client discovers, or should discover, the material facts in issue vindicates the fiduciary duty of full disclosure; it prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure.¹⁴⁹

C. Incorporation Cannot Limit the Lawyer-Agent's Liability to the Client-Principal in Tort

Finally, either by statute or regulation it is generally the case that incorporation cannot limit the legal liability of a lawyer-agent for a tort committed by the lawyer-agent against the client-principal;¹⁵⁰ nor under common law agency principles could incorporation insulate the lawyer-agent from liability in equity for the breach of a fiduciary duty that the lawyer owed client-principal. Moreover, "[w]ithin agency generally, a subordinate agent within a hierarchical chain of agents who breaches a duty the agent owes to a third party is not shielded from liability to the third party because the agent complied with instructions from a superior agent."¹⁵¹

D. Conclusion

In a civil action that is instituted by a client-principal against the lawyer-agent, it is critical that there be a strict demarcation in the pleadings between the tort counts and the breach of fiduciary duty counts, if any.

¹⁴⁹Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421, 429 (Cal. 1971).

¹⁵⁰See Dirk G. Christensen & Scott F. Bertschi, *LLC Statutes: Use by Attorneys*, 29 GA. L. REV. 693, 700 ("LLC statutes generally shield a member's personal assets from claims against the limited liability company; however, with regard to professional services, these statutes hold an individual personally liable for the acts and omissions he personally committed or supervised but relieve the others from vicarious personal liability.").

¹⁵¹DeMott, *supra* note 15, at 310. "[A] lawyer who is a member or an associate in a firm is the firm's agent as well as the client's agent." *Id.* at 309.

Otherwise, judicial chaos will reign. When there is a failure on the part of the bench and the bar to “make pertinent distinctions among the various causes of action for attorney wrongdoing, . . . [whether out of] . . . ignorance, a lack of awareness, or other inadvertence, then the rights of the parties may be balanced akimbo and the ultimate decisions unjust.”¹⁵² The Rules are of no help in sorting all this out.

IV. CONTRACT LAW AND THE LAWYER-CLIENT AGENCY RELATIONSHIP

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.¹⁵³

A. Introduction

An agent-fiduciary may enter into an enforceable contract with his or her principal, provided the exchange of consideration is not incident to some breach of fiduciary duty that the agent-fiduciary owes the principal.¹⁵⁴ For the terms of a contract between a lawyer-agent and his or her client-principal to be enforceable, they must be objectively fair.¹⁵⁵ Thus, the lawyer-agent may not exploit for personal advantage confidential information obtained in the course of the representation. Confidential information acquired prior to formalization of the representation also is not exploitable. Nor is the lawyer-agent necessarily freed from these constraints once the formal representation ceases.

This is the default law. It goes without saying that if the client gives his or her subjective informed consent to the exploitation or is represented by independent counsel in the transaction, then the contract is less vulnerable to attack, at least on a breach of fiduciary duty theory.

In the context of the lawyer-client agency relationship, we are most likely to see this intersection of agent-fiduciary law and contract law in three situations: (1) The contract that the lawyer-agent enters into with the client-principal for compensation; (2) a contract that the lawyer-agent

¹⁵² Anderson & Steele, *supra* note 22, at 261.

¹⁵³ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

¹⁵⁴ *Id.* § 193 cmt. a.

¹⁵⁵ *Id.* § 173 cmt. b.

enters into with the client-principal the subject of which is property that is owned by the client-principal; and (3) a contract that the lawyer-agent enters into with third parties that involves the exploitation of confidential information that the lawyer-agent acquired in the course of representing the client-principal.

B. The Lawyer-Client Compensation Contract

As to the contract that the lawyer-agent enters into with the client-principal for compensation, there are several things to keep in mind. The first and foremost is that an agency is not a contract. The second is its corollary, namely that one of the elements of an agency is not the exchange of consideration.¹⁵⁶ That is not to say that the agent might not have been motivated to enter into the agency relationship because the parties also will be entering into a compensation contract incident to the agency. This is obviously how most legal representations work. In other words, the lawyer-agent and the client-principal typically are simultaneously in two relationships: one of agency, an equity-based legal relationship, and one of contract, a pure legal relationship. Again, an agency relationship in and of itself is not also a contractual one:

Additionally, the consensual aspect of agency does not mean that an enforceable contract underlies or accompanies each relation of agency. Many agents act or promise to act gratuitously. While either acting as an agent or promising to do so creates an agency relation, neither the promise to act gratuitously nor an act in response to the principal's request for gratuitous service creates an enforceable contract.¹⁵⁷

What are the practical implications of all of this? It is that if the bargained for compensation from the perspective of the client-principal is not objectively fair and reasonable under all the circumstances, then he or she in equity is entitled to rescind the contract, and perhaps even get back some or all of what was paid to the lawyer-agent. Equity trumps the law:¹⁵⁸

¹⁵⁶ See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

¹⁵⁷ *Id.* cmt. d.

¹⁵⁸ See *Fischer v. Machado*, 58 Cal. Rptr. 2d 213, 215 (Cal. Ct. App. 1996) (“[T]he existence of the fiduciary relation modifies all agency agreements and creates rules which do not apply to

A person is not ordinarily subject to a fiduciary duty in making terms as to compensation with a prospective principal. If, however, as in the case of attorney and client, the creation of the relation involves peculiar trust and confidence, with reliance by the principal on fair dealing by the agent, it may be found that a fiduciary relation exists prior to the employment and, if so, the agent is under a duty to deal fairly with the principal in arranging the terms of the employment.¹⁵⁹

As mentioned above, the equitable defenses available to the lawyer-agent would be subjective informed consent, acquiescence, or ratification. And, of course, if the client-principal had been represented by independent counsel when the terms of the compensation contract had been hammered out, then that would be a defense as well. Still, agencies are generally terminable at the will of either party.¹⁶⁰ Thus, going forward, the client-principal would still have an untrammelled right to terminate the representation itself, regardless of the terms of the associated contract.¹⁶¹ Moreover, in equity the lawyer-agent post termination of the agency would not be entitled to be compensated for personal services that had not been rendered.¹⁶²

C. *Self Dealing Transactions Between the Lawyer-Agent and the Client-Principal*

We turn now to the situation where a lawyer-agent enters into a contract with the client-principal to acquire property owned by the client. If the property is the subject of the representation, e.g., the lawyer-agent has been retained to clear the title to a parcel of real estate, or if the lawyer-agent is privy to confidential information relating to the property, e.g., the lowest price the client-principal is willing to accept for the property, then the terms

contracts in which one party is not an agent for the other.”) (quoting *Haurat v. Superior Court*, 50 Cal. Rptr. 520, 523 (Cal. App. 1966)).

¹⁵⁹ RESTATEMENT (SECOND) OF AGENCY § 390 cmt. e (1958).

¹⁶⁰ RESTATEMENT (THIRD) OF AGENCY § 3.06 (2006).

¹⁶¹ See George L. Blum, Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed Under Contingent-fee Contract is Discharged Without Cause*, 56 A.L.R. 5th 1 (1998) (confirming that the client-principal always has an unfettered right to discharge the lawyer-agent with or without cause).

¹⁶² See, e.g., *id.*

of the contract must be fair to the client-principal.¹⁶³ If the contract is incident to some unexcused breach of fiduciary that the lawyer-agent owed the client-principal, then the contract may be unenforceable, or if the property has changed hands, the client-principal may be entitled in equity to get it back, as well as to such other equitable relief as will make the client-principal economically whole.¹⁶⁴

The client-principal may of course give his or her informed consent to terms that are not fair, either in advance or by ratification.¹⁶⁵ For the consent to be sufficiently informed, however, the lawyer-agent would have to furnish the client-principal with all information to which the lawyer-agent is privy that might be of use to the client-principal, such as the existence of a third party who might be willing to purchase the property at a higher price or that the lawyer-agent was planning to flip the property to a third party and make a profit thereby.¹⁶⁶ In addition, the client-principal would have to actually understand the facts and the law applicable to the lawyer-agent's self dealing.¹⁶⁷

Of course, if the client were represented in the self-dealing transaction by special independent counsel, there would be no need for the self dealing lawyer to assure himself or herself that the client actually understood the applicable facts and law. That would be the job of independent counsel. Still, for the contract to be enforceable, the self dealing lawyer would have a residual fiduciary duty to the client-seller to fully disclose to the independent counsel all relevant information to which the self dealing lawyer is privy, including information that is adverse to the self dealing lawyer's own interests.¹⁶⁸ Again, equity trumps the law in such cases.

¹⁶³ RESTATEMENT (SECOND) OF AGENCY § 390 cmt. a (1958).

¹⁶⁴ See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (2006) (remedies for breaches of fiduciary duty in the context of the agency relationship).

¹⁶⁵ RESTATEMENT (SECOND) OF AGENCY § 390 cmt. a (1958).

¹⁶⁶ *Id.*

¹⁶⁷ See *id.* (“[T]he agent’s duty of fair dealing is satisfied only if he reasonably believes that the principal understands the implications of the transaction.”).

¹⁶⁸ See *id.*

D. When a Lawyer-Agent in Dealing with Third Parties Exploits for Personal Purposes Information Gleaned in the Course of Representing the Client-Principal

Finally, there is the situation in which a lawyer-agent in dealing with third parties exploits information gleaned in the course of representing the client-principal for the lawyer-agent's own personal advantage. Much will depend upon whether this is done at the client's expense. It is self-evident that the lawyer-agent may not compete with the client-principal without the client-principal's informed consent.¹⁶⁹ Nor may the lawyer-agent enter into an enforceable contract with a third party to disclose client-principal confidences.¹⁷⁰ "A promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy."¹⁷¹

On the other hand, if the lawyer-agent gets wind of a business opportunity in the course of the representation that is not exploitable by the client-principal, then the opportunity is exploitable by the lawyer-agent, provided the interests of the client-principal are in no way adversely affected by the exploitation and confidential information is not disclosed without the client-principal's informed consent.¹⁷² Thus, the lawyer for an oil company who visits an oil rig in the course of the representation may participate in a cattle auction that is underway on an adjacent parcel.

The lawyer, however, may not purchase for his or her own account the adjacent parcel itself without the client's informed consent if there is any likelihood that there is oil beneath the surface:

Action by an agent that competes with the principal's business or assists a competitor of the principal, when connected to the agency relationship, contravenes the general fiduciary principle . . . because it is contrary to the

¹⁶⁹ RESTATEMENT (THIRD) OF AGENCY § 8.04 cmt. b (2006).

¹⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 193 cmt. a, illus. 1 (1981).

¹⁷¹ See *id.* § 193.

¹⁷² See HANBURY & MAUDSLEY, *supra* note 36, at 523 (confirming that the exploitation by a lawyer-agent of an investment opportunity discovered in the course of representing a client-principal is not *per se* a breach of the duty of loyalty, but rather liability "must depend on the facts of the case").

principal's interest, although the agent does not use the principal's property or confidential information.¹⁷³

The self dealing would be doubly egregious if the company's engineer, also a common law agent of the company, were to disclose to the lawyer-agent the existence of the oil, but each were to hold back this information from the oil company, the common employer-principal.¹⁷⁴ Both the lawyer-agent and the engineer-agent are fiduciaries,¹⁷⁵ each with a duty to act solely in the interest of the common principal, the oil company, and each with a duty not to participate in the other's breach. Thus the lawyer-agent might end up being liable not only for his or her breach of fiduciary duty, but for the consequences of the engineer-agent's breach, and *vice versa*.¹⁷⁶ Even if the lawyer-agent declined to get involved, he or would have a duty to disclose to the client-principal the engineer-agent's disloyalty.¹⁷⁷ The failure to do so might saddle the lawyer-agent with liability for the consequences of that disloyalty.¹⁷⁸ By the failure to disclose, the lawyer-agent is not only violating his or her own fiduciary duties but aiding and abetting the violation of the engineer-agent's.¹⁷⁹ Common law employees such as law professors, as well as practicing lawyers, are agent-fiduciaries, which is one more reason why a discrete Agency course should again be on the required side of a law school's curriculum.¹⁸⁰ As to the equitable remedies, it is whatever will make the client-principal, in this case the oil

¹⁷³ RESTATEMENT (THIRD) OF AGENCY § 8.04 cmt. b (2006).

¹⁷⁴ *See id.* § 8.01 cmt. c ("When a principal is an organizational entity, an agent has a fiduciary obligation to the entity.").

¹⁷⁵ *See id.* ("Thus, the fiduciary principle is applicable to gratuitous agents as well as to agents who expect compensation for their services, and to employees as well as to nonemployee professionals, intermediaries, and others who act as agents.").

¹⁷⁶ *See id.* § 8.04 cmt. b ("Action by an agent that competes with the principal's business or assists a competitor of the principal, when connected to the agency relationship, contravenes the general fiduciary principle . . . because it is contrary to the principal's interest, although the agent does not use the principal's property or confidential information.").

¹⁷⁷ *Id.* § 8.11 (duty to provide information).

¹⁷⁸ *Id.* § 8.11 cmt. b.

¹⁷⁹ *Id.* § 8.02 cmt b; *see also* *Twenty First Century L.P.I. v. LaBianca*, 19 F. Supp. 2d 35, 41–42 (E.D.N.Y. 1998) (finding third parties who submitted inflated invoices to agents in exchange for kickback payments made to agents liable for aiding and abetting agents' breach of fiduciary duty).

¹⁸⁰ A law professor is an agent of the academic institution that employs the professor, not of his or her students.

company, whole.¹⁸¹ The lawyer-agent, who could not qualify as a bona fide purchaser, could well be compelled to sell the land to the oil company-principal at the lower of the price that the lawyer-agent had paid for it and its current fair market value.¹⁸² In the meantime, the lawyer-agent would be a constructive trustee of the subject property.¹⁸³ The legal and other costs attendant with making the client-principal whole might well have to be absorbed personally by the lawyer-agent.¹⁸⁴

V. THE INTERSECTION OF THE LAWYER- CLIENT AGENCY
RELATIONSHIP AND THE TRUST RELATIONSHIP: THE PROPERTY
DIMENSIONS OF LEGAL REPRESENTATION

A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.¹⁸⁵

A. *Introduction*

Every lawyer needs a working understanding of fundamental trust principles. A Fidelity or Vanguard mutual fund is a trust;¹⁸⁶ a trust is usually associated with an employee benefit plan; trust principles generally apply to charitable corporations as well as charitable trusts.¹⁸⁷ The point is that trusts are not just for estate planning. They also serve as instruments of commerce.¹⁸⁸ Even the lawyer whose practice does not involve the drafting of trust instruments must know the law of trusts, not about the law of trusts. This is because he or she at any given moment is likely to be representing a trustee; to be suing the lawyer for some trustee; to be suing a trustee on

¹⁸¹ RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (2006).

¹⁸² *Id.*

¹⁸³ *Id.* § 8.01 reporter's notes.

¹⁸⁴ *Id.* § 8.01 cmt. d (2).

¹⁸⁵ RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

¹⁸⁶ See generally Rounds & Dehio, *supra* note 4.

¹⁸⁷ See ROUNDS & ROUNDS, *supra* note 10, § 9.8.1.

¹⁸⁸ See generally John H. Langbein, *The Secret Life of the Trust: The Trust As an Instrument of Commerce*, 107 YALE L.J. 165 (1997).

behalf of some client; to be attempting to reach entrusted property on behalf of some client or for the lawyer's own account; to be making a restricted gift to a charity; or, at the very least, to be holding clients' funds in trust. Let there be no misunderstanding: A retainer is held in trust by the lawyer for the lawyer's convenience but for the benefit of the client.¹⁸⁹ It is the client, not the lawyer, who owns the equitable interest in, and possesses a general *inter vivos* power of appointment over, the entrusted property.¹⁹⁰

B. Sometimes Trust Principles Can Dictate the Very Character and Scope of a Lawyer-Client Agency Relationship

The law of trusts can have much to say about the very nature and scope of the lawyer-client relationship, such as the limits of trust counsel's liability to the beneficiaries for the tort of legal malpractice¹⁹¹ and the duties of a lawyer in whom clients' funds have been entrusted.¹⁹² A lawyer who advises and represents a fiduciary, particularly a trustee, is likely to face a peculiar set of challenges. And the Rules are of no help whatsoever when it comes to identifying and dealing with those challenges.

1. Who Is the Client?

One challenge is to determine who actually is and is not the trust counsel's client. This ambiguity is rooted in the peculiar nature of the trust relationship, a creature of the English chancery court: The trustee has the legal title to the underlying trust property and as to the world is the owner of the property.¹⁹³ In equity, however, it is the beneficiary who owns the economic interest.¹⁹⁴

So whom does trust counsel represent? Is it the trustee, the legal owner? Is it the beneficiary, the equitable owner? Or is it both of them

¹⁸⁹ See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

¹⁹⁰ See *id.* (stating that the entrusted principal is freely available to the client "upon demand," which is tantamount to a general *inter vivos* power of appointment in the client); see also *ROUNDS & ROUNDS*, *supra* note 10, § 8.1 (powers of appointment).

¹⁹¹ See *ROUNDS & ROUNDS*, *supra* note 10, § 8.8 (whom trust counsel represents).

¹⁹² See *id.* § 6.1.3.4 (speculating on whether a lawyer-trustee may have a common law fiduciary duty to inform clients that the equitable property interest in their funds is being taken by the state under the auspice of the state's IOLTA program); see also *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003) (confirming that an IOLTA diversion constitutes a taking).

¹⁹³ See *ROUNDS & ROUNDS*, *supra* note 10, ch. 1.

¹⁹⁴ See *id.* § 5.3.1 (nature and extent of the trust beneficiary's equitable property interest).

simultaneously? While the common law of trusts is state specific and far from uniform across the jurisdictions, it seems reasonably settled that while the relationship between the trustee and the beneficiaries remains non-adversarial, the beneficiary is at least entitled to examine trust counsel's legal opinions.¹⁹⁵ While the lawyer may not be representing the beneficiary, the lawyer's representation of the trustee is somewhat more porous than would otherwise be the case were the client not a fiduciary. On the other hand, once the relationship turns adversarial, the better view is that the lawyer represents the trustee, and only the trustee.¹⁹⁶ This is generally so notwithstanding the fact that in equity the trustee, particularly the trustee who is not in breach of trust, is entitled to have the lawyer's fees paid from the trust estate.¹⁹⁷

One court has held that absent special facts, trust counsel at all times represents only the trustee.¹⁹⁸ This is consistent with general agency principles: "Should we decide that a trustee's attorney owes a duty not only to the trustee but also to the trust beneficiaries, conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee." A lawyer who has forgone formal instruction in agency and trusts runs a very real risk of not only not being able to recognize when those relationships intersect in a given situation but also not being able to sort out the implications of that intersection for the parties affected. Legal malpractice insurance carriers take note.

a. The Attorney-Client Privilege

In the real world, whom trust counsel represents will have a bearing on whether or not a trustee in a given situation is entitled to assert the attorney-client privilege against the beneficiary.¹⁹⁹ Much will depend on the particular facts and circumstances, as well as where we are in the timeline:

As to communications uttered *after* the onset of hostilities, the answer is an unequivocal "yes." As to communications uttered *before* the onset of hostilities, the answer is a

¹⁹⁵ See *id.* § 8.8 (whom trust counsel represents).

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* § 3.5.2.3 (trustee's right in equity to exoneration and reimbursement for attorneys' fees).

¹⁹⁸ See *Spinner v. Nutt*, 631 N.E.2d 542, 544–45 (Mass. 1994).

¹⁹⁹ See ROUNDS & ROUNDS, *supra* note 10, § 8.8.

hedged “no.” One court in denying a trustee the right to assert the attorney-client privilege against his beneficiary found persuasive the fact that counsel fees had been paid from the trust estate. The Restatement (Third) of Trusts, on the other hand, downplays the significance of “who pays.” In any case, the prudent trustee should assume that any prefrontation communications with counsel are discoverable and act accordingly.²⁰⁰

b. The Lawyer-Agent’s Legal Malpractice Liability

Whom trust counsel represents also has a bearing on his or her liability for legal malpractice.²⁰¹ If the lawyer represents the trustee and only the trustee, then the beneficiary may well lack the requisite standing to bring a malpractice action against the lawyer, even if the malpractice damaged in some way the equitable interest.²⁰² The lawyer owed no duty to the beneficiary.²⁰³ If the trustee declines to bring the action, then the lawyer may well be off the hook.²⁰⁴ Today, the trustee’s personal liability would likely hinge on whether counsel had been prudently selected and on whether reliance on counsel had been reasonable.²⁰⁵ A mistaken reliance on advice of counsel traditionally was no defense to an action against the trustee for a breach of trust, and certainly was no defense if the malpractice had led to a misdelivery of the trust property.²⁰⁶

The situation would be different, however, if the lawyer were also the trustee and the lawyer were rendering legal services to “the trust.” This is because under classic principles of trust law, a trust is actually not an entity but a tangle of relationships, the subject of which is property;²⁰⁷ and because under the laws of agency, one cannot be one’s own agent: “Despite

²⁰⁰ See *id.* (referring to *Floyd v. Floyd*, 615 S.E.2d 465, 482 (S.C. Ct. App. 2005); RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. f, reporter’s notes (2006)).

²⁰¹ See ROUNDS & ROUNDS, *supra* note 10, § 8.8.

²⁰² See, e.g., *Spinner*, 631 N.E.2d at 542.

²⁰³ See, e.g., *id.*

²⁰⁴ See, e.g., *id.*

²⁰⁵ See ROUNDS & ROUNDS, *supra* note 10, § 8.32 (discussing whether a trustee may escape liability for making a mistake of law if the trustee acted in good faith on advice of counsel).

²⁰⁶ See *id.* § 8.32 (discussing whether a trustee may escape liability for making a mistake of law if the trustee acted in good faith on advice of counsel).

²⁰⁷ See *id.* § 3.5.1 (nature and extent of the trustee’s estate).

their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal."²⁰⁸

Thus, when the trustee and trust counsel are one and the same, the beneficiary would have the requisite standing to bring a "legal malpractice" action directly against the lawyer-trustee.

2. The Lawyer-Agent As Trustee

Perhaps the most obvious reason, and certainly the most practical reason, why the lawyer needs a working understanding of the trust relationship is simply this: Most practicing lawyers, whatever their specialties, will have occasion at one time or another to hold the property of their clients in trust for the benefit of those clients.²⁰⁹ The entrusted retainer particularly comes to mind.²¹⁰ With respect to entrusted clients' funds, the lawyer is simultaneously in two fiduciary relationships with the client, one of agency and the other of trust. Each brings with it a duty of full disclosure as to matter within the scope of the relationship.²¹¹

Small sums and large sums that are to be held for a short period of time belonging to clients are perhaps another matter. They may be subject to the IOLTA disclosure exception. Under the auspices of the state's IOLTA program, which is generally a creature of the rules of state's highest court rather than of legislation, the lawyer is required to commingle and place in a single bank account all such clients' funds.²¹² The lawyer is a common law trustee of the funds.²¹³ Each client is both a beneficiary of, and the holder of, a general *inter vivos* power of appointment over, his or her *pro rata* share of the fund.²¹⁴ Nonetheless, usually by judicial fiat, the lawyer is required to divert the client's *pro rata* share of the interest income thrown off by the fund into a special account for disbursement to organizations

²⁰⁸ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

²⁰⁹ See generally *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

²¹⁰ See *id.* at 163.

²¹¹ See SEAVEY, *supra* note 17, 238–39 (agent's fiduciary duty to principal to provide information); ROUNDS & ROUNDS, *supra* note 10, § 6.1.5.1 (trustee's fiduciary duty to beneficiary to provide information).

²¹² See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003).

²¹³ See *id.* at 223–25.

²¹⁴ See *id.*

selected not by the client class but by the court or its agents.²¹⁵ IOLTA rules suggest that the lawyer has no duty to disclose to his or her clients the diversion.²¹⁶ IOLTA has been and continues to be controversial, if only because the United States Supreme Court has ruled that the IOLTA gross income stream is the property of the clients—not of the court, an instrumentality of the state—and its diversion is in fact and in law a taking.²¹⁷ That under the auspices of an IOLTA the property of clients is being taken by the state is entirely in keeping with longstanding principles of property and trust law:

The rule that “interest follows principal” has been established under English common law since at least the mid-1700’s. Not surprisingly, this rule has become firmly embedded in the common law of the various States. The Court of Appeals in this case, two of the three judges of which are Texans, held that Texas also follows this rule, citing *Sellers v. Harris County*. Indeed, in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, we cited the *Sellers* opinion as demonstrative of the general rule that “any interest . . . follows the principal.”²¹⁸

If interest has always followed principal, just as the shadow the body, then why is the IOLTA diversion of the gross income earned on clients’ funds not an unconstitutional taking? Because the value of their just compensation is “nil,” at least five justices of the Court have so reasoned.²¹⁹

²¹⁵ See *Phillips*, 524 U.S. at 163.

²¹⁶ See, e.g., Massachusetts IOLTA Committee, *General Information About IOLTA*, <http://www.maiolta.org/General%20Information%20About%20IOLTA.htm> (last visited Feb. 10, 2008) (suggesting that Massachusetts lawyers need not inform their clients of the diversion of their funds to the state under the auspices of the state’s IOLTA program). The Massachusetts IOLTA Committee is a creature of the Supreme Judicial Court of Massachusetts. *Id.*

²¹⁷ *Phillips*, 524 U.S. at 163 (IOLTA income the property of the client); see also *Brown*, 538 U.S. at 241 (diversion of the IOLTA income stream into the coffers of the state constitutes a taking); SCOTT, *supra* note 13, 102–03 (“Despite their widespread acceptance, these . . . [IOLTA] . . . programs have always been controversial, in large part because they appear to deprive clients of the interest in their funds.”).

²¹⁸ *Phillips*, 524 U.S. at 165–66 (citing *Freeman v. Young*, 507 So.2d 109, 110 (Ala. Civ. App. 1987)) (citations omitted).

²¹⁹ *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 864 (9th Cir. 2001), *aff’d sub nom. Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

Over the years, objections have been raised that the IOLTA concept violates a number of longstanding agency, trust, and property doctrines, not to mention the general principle of separation of powers. To the extent a recipient organization engages in political activity, even the First Amendment may be implicated, an issue that has been raised but never squarely addressed by the Court.²²⁰ As Justice Kennedy noted in his dissent: “The First Amendment consequences of the State’s action have not been addressed in this case, but the potential for a serious violation is there.”²²¹

The point of this discussion is not to re-fight the IOLTA wars of yesteryear.²²² Rather it is to put forth yet one more reason why it is not in the public interest for law schools to turn out lawyers who, though agent-fiduciaries, lack a thorough grounding in the equity-based relationships of agency and trusts. While IOLTA may be here to stay, a lawyer should at least understand that the IOLTA exception to a trustee’s common law duty to account to the beneficiary for the income earned on entrusted funds is limited to lawyers. Landlords, for example, are still generally required to account down to the last penny for income earned on entrusted tenants’ funds. There is some irony here in that landlords *qua* landlords are generally not agent-fiduciaries while lawyers *qua* lawyers generally are.

So far the IOLTA concept has not metastasized beyond the legal profession. It still only applies when it is not possible for a lawyer to generate net income from the funds that a client has entrusted to the lawyer.²²³ Today, trust accounting technology has evolved to the point where that will seldom be the case.²²⁴

²²⁰ See *Brown*, 538 U.S. at 253 (Kennedy, J., dissenting).

²²¹ *Id.* at 253.

²²² See *id.* at 241–53.

²²³ See *id.* at 253.

²²⁴ Each year fewer and fewer students graduate from law school having had formal instruction in the difference between trust accounting income and trust accounting principal. It is the author’s experience that law students, even after having taken the ABA-mandated course on the Model Rules of Professional Conduct, would allocate the gain on the sale of an entrusted block of securities to the income account rather than the principal account. Recall that there can be no IOLTA income diversion if the property that is entrusted to the lawyer by a client is neither “small” nor to be held for a “short period of time.” In such cases, traditional common law trust accounting principles are applicable.

C. How Ignorance of Basic Trust and Property Doctrines Can Generally Degrade the Quality of a Legal Representation

We have touched on how the law of trusts often plays a role in regulating the rights and liabilities of the parties to the lawyer-client agency relationship itself. We now turn to how ignorance of certain fundamental trust principles can lead to legal representations that are at best operationally inefficient and at worst chaotic. We refer to the following matters:

- Who has standing to sue a trustee for breach of fiduciary duty
- The liabilities of a trustee's agents and others to the beneficiaries
- Who are necessary parties in trust litigation
- The external liabilities of the trustee

1. Standing To Sue a Trustee for a Breach of Trust

a. The Non-charitable Trust

A lawyer-agent who represents a client-principal aggrieved by a trustee's breach of trust needs to sort out who has the requisite standing to sue the trustee and who does not. In the case of a non-charitable trust, it is generally the current beneficiaries, the presumptive remaindermen, if any, and the guardian *ad litem* on behalf of the unborn and unascertained equitable interests, if any.²²⁵ Generally those with vested equitable interests are not the only ones who would have standing; those whose interests are currently contingent would as well.²²⁶ So too would any co-trustees and any holders of powers granted by the terms of the trust, whether fiduciary or non-fiduciary.²²⁷

While it is settled law that the trust beneficiary (broadly defined to include the holders and objects of powers of appointment), and, of course, co-trustees, if any, have standing to bring an action against a trustee for a breach of trust, the settlor or creator of a trust who is dissatisfied with how

²²⁵ See ROUNDS & ROUNDS, *supra* note 10, § 5.7 (the necessary parties when litigating a trust matter); *id.* § 8.14 (when a guardian *ad litem* or special representative is needed; virtual representation issues).

²²⁶ *Id.*

²²⁷ *Id.*

the trust is being administered may not. The lawyer will have an uphill battle on the standing issue, unless the settlor had reserved an equitable interest or a non-fiduciary power of appointment, or unless the settlor is a cotrustee, the possessor of some administrative power such as a right of trustee removal, or a trust protector.²²⁸ Black letter law has been, for some time, that the settlor of a trust lacks the standing, *qua* settlor, to seek its enforcement.²²⁹ This principle, however, has always had its exceptions.²³⁰ In any case, it would seem that under the laws of agency, a lawyer-agent whose knowledge of these fundamental principles of trust and property law (powers of appointment being addressed in the Restatement of Property not the Restatement of Trusts)²³¹ is incomplete would have a fiduciary duty to so inform the prospective client-principal.²³² The prospective client-principal also would be entitled to know whether the client-principal is to be charged for the time it takes the lawyer-agent to fill in such critical knowledge gaps.²³³

b. The Charitable Trust

Whether the donor to a charity has standing, or should have standing, to seek enforcement of the terms of the benefaction also is generally a question of trust law, as the gift is likely to have been made either to the trustees of a charitable trust or to a charitable corporation, which is a trust-corporation hybrid that is more trust-like than corporate-like.²³⁴ It has been settled common law for centuries in England and in her former colonies that it is the attorney general (in the U.S. the state attorney general) as agent of the *parens patriae* who has standing to seek enforcement of charitable trusts:

It is the duty of the king, as *parens patriæ*, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the crown for all

²²⁸ See *id.* at ch. 4 (interests remaining with the settlor).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 11.1–24.4 (1986) (powers of appointment).

²³² RESTATEMENT (THIRD) OF AGENCY § 8.11 cmt. c (2006).

²³³ *Id.*

²³⁴ See ROUNDS & ROUNDS, *supra* note 10, § 5.4.1.8 (2008) (standing to enforce charitable trusts); *id.* § 9.81 (charitable corporations are more trusts than corporations).

forensic purposes. On this foundation rests the right of the attorney general in such cases to obtain by information the interposition of a court of equity. To the like effect are the opinions of Lord Redesdale in *Attorney General v. Mayor &c. of Dublin*, and *Corporation of Ludlow v. Greenhouse*; of Lord Keeper Bridgman in *Attorney General v. Newman*; of Sir Joseph Jekyll in *Eyre v. Shaftsbury*; and of Lord Hardwicke in *Attorney General v. Middleton*; which also state that the jurisdiction of the court of chancery over charities was exercised on such informations before the *St.* of 43 Eliz. This duty of maintaining the rights of the public, and of a number of persons too indefinite to vindicate their own, has vested in the Commonwealth, and is exercised here, as in England, through the attorney general.²³⁵

Whether a disgruntled donor-settlor would have standing as well is far less certain. Much could depend upon how certain provisions of the charitable trust were drafted.²³⁶ Occasionally the court will grant standing to someone with a special interest in the trust, for example, to a clergyman in a matter involving a trust that was established to maintain the church's rectory.²³⁷ On the other hand, one court has ruled that a client whose lawyer had embezzled funds belonging to the client lacked the requisite standing to seek enforcement of a trust established under the auspices of the state's highest court, though the very purpose of the trust was to assist clients who were the victims of such illegal activity.²³⁸

After the horse is out of the barn, the disgruntled donor/settlor is best served by the lawyer who cost-effectively and efficiently sorts out the standing issues at the outset of the representation. It may well be that the

²³⁵ *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 579 (1867) (citations omitted).

²³⁶ See ROUNDS & ROUNDS, *supra* note 10, § 4.1.1.2 (donor-friendly charitable trust provisions and strategies). In any case, opportunities for hands-on training in the drafting of agency and trust agreements are few and far between in the law schools, whose clinical programs tend to be criminal or quasi-criminal in orientation. Drafting a pleading for the defendant in a DUI case? No problem. Drafting powers of attorney? That is another matter. By the way, what is a power of attorney?

²³⁷ See *id.* § 9.4.2 (standing to enforce charitable trusts).

²³⁸ See, e.g., *Indeck v. Clients' Sec. Bd.*, 879 N.E.2d 57, 62 (Mass. 2008) (noting that "the Fund's resources come not through an appropriation of public monies, but from the annual registration fees paid by Massachusetts attorneys to the Board of Bar Overseers").

only realistic option is to pen a letter to the state attorney general beseeching him or her to get involved. Any more lawyering and we could have a churning situation.²³⁹ A lawyer-agent who churns the representation breaches his or her fiduciary duty of loyalty to the client-principal.²⁴⁰

2. Liabilities of the Agent of a Trustee That Are Incident to a Breach of Trust

We have briefly touched on who does and does not have standing to bring a breach of trust action against a trustee. But what if the trustee is insolvent or otherwise judgment proof? Are those with standing, as a practical matter, without recourse? Not necessarily. Any third party who knowingly participates with a trustee in a breach of trust is liable to the beneficiary for any loss caused by the breach.²⁴¹ And it would be self-evident to the complete lawyer that there would certainly be some hope for the client lurking at the intersection of the laws of trust and agency. It has long been settled law that an agent of a trustee who participates with the trustee in a breach of trust shares with the trustee liability for the adverse consequences.²⁴²

Thus the investors in a typical trustee mutual fund likely would have standing under common law agency and trust principles if nothing else to sue a fund sponsor for participating with the fund trustees in a breach of their fiduciary duties to the investors.²⁴³ This is because it has long been a practice in the mutual fund industry for the trustees of a fund to delegate out operational and investment management functions to an agent, with the agent being more often than not the very entity who had sponsored the

²³⁹It is hard to see how a lawyer or a jurist who has had no formal instruction in the fundamentals of trust law can intuit all these issues without having something fall between the cracks. Today, the average law school graduate is unlikely even to have a core understanding of the attorney general's *parens patriae* agency function and its implications, namely that in any litigation involving a charitable trust or corporation the state attorney general is likely to be an indispensable party. Whether the litigation involves how deferential a university has been to donor intent in the administration of her endowments or whether it is how the Red Cross has administered its charitable receipts, the state attorney general most likely will have to be served.

²⁴⁰RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006) (“[T]he agent has a duty to exercise . . . discretion in good faith.”).

²⁴¹RESTATEMENT (SECOND) OF TRUSTS § 326 (1959).

²⁴²See generally ROUNDS & ROUNDS, *supra* note 10, § 7.2.9.

²⁴³See generally Rounds & Dehio, *supra* note 4.

establishment of the fund in the first place.²⁴⁴ The contract which the fund sponsor enters into with the trustees is incident to that agency relationship.²⁴⁵ This is the Fidelity structural model.²⁴⁶

As to the procedure for bringing an action against the agent of a trustee, under equitable principles it is first and foremost the responsibility of the trustee to bring the action against the third party.²⁴⁷ The trustee is both the title-holder of the subject property and the one who is the principal in the agency relationship with the third party. If for whatever reason the trustee declines to do so, the beneficiary may step into the shoes of the trustee and bring the action in equity.²⁴⁸ Derivative-type actions were being brought in the trust context long before the statutes that gave rise to the modern business corporation, which is merely an agency and trust statutory hybrid, came on the scene.²⁴⁹

3. Necessary Parties in a Breach of Trust Litigation: The Due Process Considerations

We have touched briefly on the standing issues in litigation against a trustee. We also have touched on who in addition to the trustee might be brought in as party defendants. Now we touch on the due process considerations, namely who are entitled to notice in any piece of litigation that involves the rights, duties and obligations of the parties to the trust relationship. It is imperative, particularly when hostilities break out between the trustee and the beneficiaries, that the lawyers see to it that all parties who have an interest in the matter are given adequate opportunity to

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See ROUNDS & ROUNDS, *supra* note 10, § 5.4.1.8 (“The Trustee is the one primarily responsible for seeing to it that harm done to the trust by a third party . . . is remedied.”).

²⁴⁸ See *id.* § 5.4.1.8 (right and standing of beneficiary to proceed in stead of trustee against those with whom the trustee has contracted, against tortfeasors, and against the trustee’s agents).

²⁴⁹ *But see* George L. Gretton, *Trusts Without Equity*, 49 INT’L & COMP. L.Q. 599, 599 (2000) (“[T]he slogan of modern comparative law—‘compare function rather than form’—does not work for the trust. One cannot identify the function of the trust because there is no such function. The trust is functionally protean. Trusts are quasi-entails, quasi-usufructs, quasi-wills, quasi-corporations, quasi-securities over assets, schemes for collective investment, vehicles for the administration of bankruptcy, vehicles for bond issues, and so on and so forth. In software terminology, trusts are emulators.”).

join the litigation, arbitration, or mediation.²⁵⁰ Otherwise, any decrees of the court or agreements struck may not be final and binding on those who have not received adequate notice.²⁵¹ Counsel to the trustee of a trust with unborn or unascertained equitable interests needs to be particularly attentive to such due process considerations. Deciding whether the appointment of a guardian *ad litem* to represent such interests is called for should be near the top of his or her list of action items.

It is particularly distressing when it dawns on counsel deep into an expensive and time-consuming piece of litigation that the appointment of a guardian *ad litem* should have been sought at the outset in order that any decrees that are ultimately issued from the court are binding on the unborn and unascertained. In other words, the goal of achieving some finality would be an illusive one in the absence of the appointment of a guardian *ad litem*. Under common law agency principles, each lawyer-agent would have a fiduciary duty to his or her client-principal to see to it that the client-principal actually and fully understood the collective and individual malfeasances and nonfeasances of counsel and any adverse implications thereof, such as perhaps the need to return to square one and seek the appointment of a guardian *ad litem* on whom a copy of the complaint can be served.²⁵²

4. The External Contractual and Tort Liabilities of a Trustee

For the reader who still doubts that the fundamental common law legal relationships of agency, contract, torts, trusts and property are inter-related, co-dependent, and should never be viewed and taught in isolation, we call attention to the external liabilities of trustees. Recall that a trustee has the legal title to the trust property. As to the world, the trustee is the owner of the property. Thus, as to the world it was classic default common law that the trustee was personally liable for the contracts that the trustee entered into with third parties on behalf of the trust.²⁵³ Tort liability as well ran to the trustee personally, not to the beneficiaries.²⁵⁴ Take a trust that has as its

²⁵⁰ See ROUNDS & ROUNDS, *supra* note 10, § 5.7.

²⁵¹ See *id.* § 8.14.

²⁵² See RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006) (duty of agent to provide information to the principal that is relevant to the representation).

²⁵³ See ROUNDS & ROUNDS, *supra* note 10, § 7.3.1 (trustee's contract liability as legal owner to nonbeneficiaries).

²⁵⁴ See *id.* § 7.3.3 (trustee's tort liability as legal owner to nonbeneficiaries).

corpus a residence. The trustee was personally liable on the contract that the trustee entered into with a third party to install a swimming pool in the back yard, and personally liable in tort should the pool turn out to be an “attractive nuisance” to the neighborhood children. This liability of the trustee to third parties incident to the possession of the legal title is what is meant by external legal liability, as distinguished from the trustee’s internal legal and equitable liability to the beneficiary.²⁵⁵

In recent years we have seen some legislative cutting back of this traditional external liability in the tort context.²⁵⁶ And as far as the trustee’s contractual liability to third parties is concerned, there are a number of counter-measures that counsel to the trustee can take to limit the recourse of third parties to just the trust property.²⁵⁷

VI. CONCLUSION

This Article has touched on just a few of the critical equity-based principles that inform and regulate the lawyer-client agency relationship. Agency and trusts need to re-join contracts, property (legal interests), and torts at their traditional and rightful places of honor on the required side of the law school curriculum.²⁵⁸ We are not optimistic, however, that in this day and age there would be academics in sufficient numbers ready, willing, or even immediately qualified to so “turn back the clock.” If that is indeed the case, then it is in the public interest that the seasoned practitioners, the complete lawyers among us, step forward and take over the task of imparting our law’s basic anatomy to those of their brothers and sisters who

²⁵⁵ It should be noted that a trustee is generally entitled to be reimbursed from the trust estate for the reasonable premium costs of insuring the trustee against such external liabilities. *See id.* § 3.5.2.3 (trustee’s right in equity to exoneration and reimbursement).

²⁵⁶ *See id.* § 7.3.3 (trustee’s tort liability as legal owner to nonbeneficiaries).

²⁵⁷ *See id.* § 7.3.2 (agreements with nonbeneficiaries to limit a trustee’s contractual liability). The first year Contracts and Torts courses are probably not where this critical material should be covered, however, as the students would not have had any formal exposure to the law of trusts. This would have been the case even in the days when Trusts was on the required side of the curriculum. To those contemplating applying to law school, as well as to the clients of those who have recently graduated, we caution: “*Caveat emptor!*”

²⁵⁸ Even those programs that are designed to replicate a real world experience in an academic setting, such as the legal writing classes, the moot courts, the street clients, the externships, the problem solving exercises, and the mediation role playing, as a practical matter presuppose that the students have received such an “indoctrination.” This presumption underlies the summer programs abroad as well.

2008]

LAWYER CODES & COMMON LAW

823

are coming on line.²⁵⁹ The common law, of which the two equity-based relationships of agency and trusts are critical components, is the bedrock upon which all our statutory and regulatory edifices are constructed. It also orders the lawyer-client relationship itself, with the laws of agency pulling the laboring oar. As we noted at the outset, the lawyer's Model Rules of Professional Conduct are, by their own admission, just about licensure, the lawyer's relationship with the state. They were never "designed to be a basis for civil liability."²⁶⁰

²⁵⁹Certainly this academic-practitioner role reversal would be as inefficient as it would be bizarre. Doctrinal instruction is best delivered in the classroom, while the practice experience is best acquired OJT, provided there is adequate supervision. As far as we know, medical students are still dissecting cadavers on the premises of the medical schools and receiving their practical training OJT in the working hospitals. But perhaps more to the point of this Article, basic anatomy is still taught in all the medical schools.

²⁶⁰MODEL RULES OF PROF'L CONDUCT Scope (2002).