

I.
DUTIES LAWYERS OWE CLIENTS

Lawyers do many things. They advise clients, negotiate for them, argue for them in courts and agencies, lobby for them in legislatures, and so on. Generalizing about lawyers is therefore risky. A public interest lawyer trying to preserve a poor person's government benefit and a business lawyer negotiating a billion-dollar merger are both lawyers, but that shows only that the word "lawyer" tells you little about what someone does.

Clients differ, too. The corporate executive who deals with lawyers every day and who may know more about the law than a junior associate is not the same sort of client as a criminal defendant with no previous experience with lawyers. It makes no sense to pretend these clients are equivalent.

Lawyers therefore live and practice in many different worlds. This class surveys some of those worlds and tries to give you a sense of how the same rule can mean different things in different contexts. We will begin, however, with an overview of three obligations all lawyers owe all clients: the duty of loyalty, the duty of care, and the duty of confidentiality.

Within the bounds of the law, the duty of loyalty requires the lawyer to put the client's interests ahead of the lawyer's own interests and to do nothing to harm the client. The duty of care requires the lawyer to act reasonably and live up to the standard of care of a reasonable lawyer doing similar work in similar circumstances. The duty of confidentiality requires the lawyer not to use client confidences for the lawyer's benefit, unless the information has become generally known, and not to disclose client information unless required by law to do so.

A. The Duty of Loyalty

RESTATEMENT OF THE LAW GOVERNING LAWYERS
("RESTATEMENT") §16(3)

All lawyers are fiduciaries, which is to say they owe clients fiduciary duties. What are those?

A fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith--in fact to treat the principal as well as the agent would treat himself. The common law imposes that duty when the disparity between the parties in knowledge or power relevant to the performance of an undertaking is so vast that it is a reasonable inference that had the parties in advance negotiated expressly over the issue they would have agreed that the agent owed the principal the high duty that we have described, because otherwise the principal would be placing himself at the agent's mercy. An example is the relation between a guardian and his minor ward, or a lawyer and his client. The ward, the client, is in no position to supervise or control the actions of his principal on his behalf; he must take those actions on trust; the fiduciary principle is designed to prevent that trust from being misplaced.

Burdett v. Miller, 957 F.2d 1375 (7th Cir. 1992) (Posner, J.)

Fiduciary duties are related to agency law. Agency is a type of fiduciary relationship, and agency law is the foundation for many rules specifically addressed to lawyers.¹ As the *Restatement (Third) of Agency*, §1.01 defines it,

Agency 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.

The fiduciary principle requires that agents place the principal's interests above their own. *Restatement (Third) of Agency*, §8.01, states the "General Fiduciary Principle" of Agency:

An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.

Fiduciary duties may be summarized under the general rubric of the duty of loyalty. *Owen v. Pringle*, 621 So.2d 668, 671 (1993) ("Each lawyer owes each client a second duty, not wholly separable from the duty of care but sufficiently distinct that we afford it its own label, viz. the duty of loyalty, or, sometimes, fidelity. We speak here of the fiduciary nature of the lawyer's duties to his client, of *confidentiality and of candor and disclosure.*").

This general duty implies several things. Agents may not: acquire a material benefit from a third party in connection with the agent's actions as an agent (§8.02); take a position adverse to the principal, or on behalf of a party adverse to the principal, regarding a matter related to the scope of the agency (§8.03); while an agent, compete with the principal or assist the principal's competitors (though an agent may prepare to compete with the principal during this time and compete with the principal, subject to certain restrictions, after the agency is over) (§8.04); use the principal's property, or either use or communicate the principal's confidential information for the benefit of the agent or a third party (§8.05); engage in "conduct that is likely to damage the principal's enterprise" (§8.10). Fiduciaries also must segregate the principal's property from

¹ For a general survey of the relationship between agency and lawyering, see Deborah A. DeMott, *The Lawyer As Agent*, 67 *FORD. L. REV.* 301 (1998). Professor DeMott summarizes the relationship this way:

The law of agency provides the foundational structure for many of the legal consequences that follow from the relationship between a lawyer and a client, as well as the relationship between an individual lawyer and a law firm. Definitional precision in the law aside, the lawyer-client relationship is a commonsensical illustration of agency. A lawyer acts on behalf of the client, representing the client, with consequences that bind the client. Lawyers act as clients' agents in transactional settings as well as in litigation. Moreover, a lawyer who is a member of a law firm acts as an agent of the firm in firm-related activity, as does an associate employed by a law firm and in-house counsel for a client organization. It is unsurprising, then, that the legal consequences of these relationships parallel the legal consequences of agency generally, even when they are not identical. In any agency relationship, for example, the agent's loyalty to the interests of the principal is a dominant concern, as is the loyalty of a lawyer to the client.

Despite its foundational significance, the law of agency does not by itself capture all of the legal consequences of relationships between lawyers and clients and between lawyers and others to whom the lawyer owes duties. In this context, agency is roughly comparable to the structural steel members that support a building and define its size and basic shape but do not govern how the building functions and looks. Lawyers are agents, but lawyers perform functions that distinguish them from most other agents. That a lawyer is an agent is sometimes irrelevant to the legal consequences of what the lawyer has done or has failed to do, making an unswerving focus on agency misleading. It is not surprising, then, that courts on occasion differentiate among agency's consequences, rather than according agency a monolithic or inexorable set of consequences.

their own and keep and render an account of money or property received or paid by the agent for the principal (§8.12).

Fiduciary duties are fundamental to practicing law. You must master them. In many respects they are intuitive but in others they are not. For example, you may be sued in tort for violating a fiduciary obligation even if you do a good job for your client (i.e., you satisfy the applicable standard of care). In some cases, fiduciary violations can lead to the forfeiture of your fee.

Perhaps most importantly, in the real world you must sometimes make fast decisions in complex situations that present many ethical problems. If you remember your fiduciary basics you have a much better chance of doing the right thing than if you don't, even if you forget the ins and outs of particular disciplinary rules.

“I did the best I could . . . to lose.”

Daniel Bibb had been a prosecutor for 21 years. His office had prosecuted two men, Olmedo Hidalgo and David Lemus, for the murder of a bouncer. Over time new evidence appeared suggesting Hidalgo and Lemus might be innocent. Bibb had not worked on the original case but was assigned to investigate it in light of the new evidence.

Bibb concluded the two men were not guilty. He recommended that the cases be dismissed but nevertheless was ordered to defend the convictions in court. He threw the case. He tracked down defense witnesses and helped defense lawyers prepare their testimony. He advised defense lawyers on strategy and helped them understand the new evidence he uncovered. After six weeks of hearings his superiors agreed to drop charges against Hidalgo and to retry Lemus (who was later acquitted).

Bibb resigned from the district attorney's office a year later. The consensus of ethics experts is that Bibb violated his duty of loyalty. As Professor Stephen Gillers of NYU put it, “[h]e's entitled to his conscience, but his conscience does not entitle him to subvert his client's case, . . . [i]t entitles him to withdraw from the case, or quit if he can't.”

B. The Duty of Care

RESTATEMENT §§16(2), 52

The second major duty applicable to lawyers is the duty of care. The duty of care should remind you of tort law. It requires lawyers to act carefully in performing work for clients. Care is judged by the prevailing standards of professional competence in the relevant field of law and geographic region. The *Restatement (Third) of Agency* provides some particular manifestations of the duty of care: Agents must: comply with the express and implied terms of any contract with the principal (§8.07); act only within the scope of their actual authority, and comply with all lawful instructions from the principal regarding the agent's actions for the principal (§8.09); and inform the principal of all facts material to the agency relation and all facts the agent knows or has reason to know the principal would want to have (§8.11).

The duty of care is not a fiduciary duty. The concept of loyalty corresponds with the notion of betrayal and faithlessness, while the concept of care corresponds with the notion of mistake or accident. When you see a duty of loyalty violation it is almost always because the lawyer acted out of self-interest rather than for the client's interest. In contrast, when you see a duty of care violation it is often because a lawyer was foolish, lazy, overextended, or debilitated.

“I have a high volume practice.... I’m like an over eager little puppy dog. The client comes in. I want to help them.”

Joseph Muto practiced immigration law. He focused on Chinese immigrants in New York City. He had over 450 matters pending at one point; at a disciplinary hearing he was unable to remember the names of four clients identified by disciplinary officials. He had no notes or calendar entries of meetings with these clients, or records of payment they made. Clients could not reach him, he did not give them business cards, he moved without informing them, and did not return calls placed to the only number he gave them, his home answering machine. He missed hearings and did not inform clients of the status of their matters.

Muto charged \$150 to represent clients in deportation hearings. An immigration attorney called by disciplinary officials testified he charged \$3,000 - \$8,000 for such services and could not imagine that they could be provided for \$100-\$200 per case.

Disciplinary officials portrayed Muto as receiving many cases from immigration service agencies, which performed much of the relevant paperwork (thus unlawfully practicing law). This relationship, they contended, explained why he “never met, spoke, or had meaningful contact with his clients.” Muto denied knowing involvement with the agencies, but the panel hearing his disciplinary case did not accept the denial. One might conjecture a relationship between Muto’s low fees and the agencies’ involvement in his cases.

*Muto was disbarred for neglecting his cases. He commented on an account of his case (Richard Abel: *LAWYERS IN THE DOCK* (2008)): “I admit that I got in over my head and never should have attempted a high volume low cost law practice. . . . My biggest mistake was that I took on more than I could handle in private practice. I never should have taken on so many cases. . . .”*

C. The Duty of Confidentiality

RESTATEMENT §§59-60

Lawyers also owe clients a duty not to use or disclose confidential information the lawyer learns while representing the client. Some of this information—confidential communications between a client and a lawyer with regard to legal services—is also covered by the attorney-client privilege. That is a rule of evidence, however, which applies in proceedings where the rules of evidence apply. The duty to maintain client confidences is broader. It applies all the time, and forbids lawyers from *using* client information for the lawyer’s own benefit as well as from *disclosing* such information. Sometimes lawyers use information by disclosing it but you can use information without disclosing it, too, as would be the case if you bought or sold securities based on a client’s material nonpublic information.

The duty of confidentiality created by agency law is qualified in an important way that the duty of confidentiality recognized by disciplinary rules is not. The *Restatement (Third) of Agency* §8.05(2) states that an agent has a duty “not to use or communicate confidential information of the principal for the agent’s own purposes or those of a third party.” The comment to this section, however, states: “an agent’s duty of confidentiality is not absolute. An agent may reveal otherwise privileged information to protect a superior interest of the agent or a third party. Thus, an agent may reveal to law-enforcement authorities that the principal is committing or is about to commit a crime. An agent’s privilege to reveal such information also protects the agent’s revelation to a private party who is being or will be harmed by the principal’s illegal conduct.”

Modern disciplinary rules provide narrower exceptions for disclosure by a lawyer. Model Rule of Professional Conduct 1.6 allows for disclosure only when a lawyer reasonably believes a client intends to commit an act reasonably certain to result in injury or death, or when the client is using or has used the lawyer’s services to commit a crime or fraud that has harmed the financial interests of a third party. (California’s Rule 3-100 provides an even narrower exception to the rule against disclosure.)

Attorneys who violate the duty of confidentiality generally do so either by acting carelessly or out of self-interest. It therefore would be logical to treat a lawyer’s obligations regarding client confidences as simply one aspect of the duties of loyalty and care. Most lawyers treat it separately, however, as do disciplinary rules, so it is best to consider it on its own. The duties of loyalty and care may help you think about confidentiality, however: One thing a careful, loyal lawyer does is to keep client confidences and not use them to advance the lawyer’s personal interests.

**“There was nothing else that
these lawyers could have done”**

Dale Coventry and James Kunz worked for the Cook County public defender’s office in Chicago. They represented Andrew Wilson, who was accused of murder. Wilson admitted to them that he had killed a security guard in an unrelated crime. Another man, Alton Logan, was convicted of killing that guard. He was sentenced to life in prison.

Wilson was convicted and sentenced to death. Coventry and Kunz asked Wilson to give them permission to disclose his confession after his death. He agreed. The lawyers signed a notarized affidavit stating they had obtained through privileged sources information showing that Logan was not guilty. It was dated March 17, 1982.

Wilson died in November 2007. Logan was then represented by Harold Winston, who had heard Coventry and Kunz had information that might help Logan. Winston spoke to Kunz, who then revealed the secret. In January 2008 the affidavit was submitted to the court. Alton Logan was declared innocent in April 2009.

According to one Illinois legal ethics expert, Kunz and Coventry had no choice but to remain silent about Wilson’s confession. That is a correct reading of the relevant rules.

Kunz has stated he would have revealed Wilson’s statements had Logan been sentenced to death. “I would have been prepared to lose my license,” says Kunz. “I wasn’t going to let him be executed. It would have been an ethical lapse, but the execution I couldn’t allow to happen.”

The current version of Model Rule 1.6(b)(1) permits (but does not require) a lawyer to disclose information “to prevent reasonably certain death or substantial bodily harm.” Before 2002, however, the rule allowed disclosure only to prevent the client from committing a criminal act likely to result in such harm.

Though agency principles such as fiduciary duties provide the basis for many disciplinary rules relevant to this course, they do not provide the basis for all. For example, Model Rules of Professional Conduct 4.2 through 4.4 forbid lawyers from communicating with persons they know to be represented by counsel, detail the manner in which lawyers must deal with unrepresented persons, and require lawyers to respect the rights of third parties.

One important category of rules not grounded in agency law works from the premise that lawyers are officers of the court as well as agents for their clients. Model Rules 3.1 – 3.9 impose obligations on lawyers designed to make advocacy fair and efficient, possibly at the expense of the client’s interest. Lawyers in firms are agents of their firms as well as of their clients, and

relations among lawyers within a firm can influence a lawyer's behavior in important ways. Model Rules 5.1-5.3 deal with the responsibilities of supervising and subordinate lawyers, while Rules 5.4-5.7 deal with some economic aspects of practice. You need to be aware of such non-fiduciary rules as well as those that embody fiduciary principles.

D. Duties of the Government Lawyer

The preceding discussion of the duties of care, loyalty, and confidentiality presume that the lawyer's client is a private party. What if the lawyer works for the government? The duty of loyalty works the same way. Government lawyers are fiduciaries, too. As with lawyers for private clients, they must put the interests of their client before their own and may not use the representation to advance their own interests. (Recall that Mr. Bibb was a government lawyer.)

Government lawyers owe duties of care and confidentiality, too, but these may require different things of the government lawyer than of the private lawyer. For example, Model Rule of Professional Conduct 3.8 sets forth "special responsibilities of a prosecutor," which include obligations to refrain from prosecuting cases not supported by probable cause (even if they might be winnable at trial), to make reasonable efforts to assure that an accused has been advised of the right to counsel and has been given an opportunity to obtain counsel, and not to seek waivers of important pretrial rights from persons not represented by counsel. The premise of these rules is that the prosecutor's obligation is to see justice done, not simply to win.

Regarding confidentiality, in some cases government lawyers may have an obligation to pursue evidence of past wrongdoing by government officials. *In re Bruce R. Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), put the matter this way:

The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government. As Judge Weinstein put it, "[i]f there is wrongdoing in government, it must be exposed.... [The government lawyer's] duty to the people, the law, and his own conscience requires disclosure...." Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 MAINE L.REV. 155, 160 (1966).

This view of the proper allegiance of the government lawyer is complemented by the public's interest in uncovering illegality among its elected and appointed officials. . . . Examination of the practice of government attorneys further supports the conclusion that a government attorney, even one holding the title Deputy White House Counsel, may not assert an attorney-client privilege before a federal grand jury if communications with the client contain information pertinent to possible criminal violations. . . . Lloyd Cutler, who served as White House Counsel in the Carter and Clinton Administrations, discussed the "rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute." Lloyd N. Cutler, *The Role of the Counsel to the President of the United States*, 35 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK No. 8, at 470, 472 (1980).

Accordingly, "[w]hen you hear of a charge and you talk to someone in the White House ... about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" *Id.* Similarly, during the Nixon administration, Solicitor General Robert H. Bork told an administration official who invited him to join the President's legal defense team: "A government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the President, I'll have to turn it over. I won't be able to sit on it like a private defense attorney." *A Conversation with Robert Bork*, D.C. BAR REP., Dec. 1997-Jan.1998, at 9.

Lindsey relied in part on a federal statute, 28 U.S.C. §535(b), providing that "[a]ny information . . . witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, or the witness, discoverer, or recipient, as appropriate" unless certain exceptions apply. The statute provides a basis for the practices recounted in the opinion. Not all government entities have such statutes, however.

The client of a government lawyer is some part of the government itself—such as the Justice Department, the EPA, the White House, etc., and not the particular officials who hold office at any given point in time. We will examine the rules applicable to government lawyers in connection with particular topics. For now, it is enough to know that government lawyers owe the same duties as private lawyers, but those duties may require different action of the government lawyer than they do of the lawyer for a private client.

E. An Overview of the Implications of Loyalty, Care, and Confidentiality

Several reasons justify making lawyers agents and fiduciaries for their clients. Agency law reduces the cost of contracting for legal services by supplying default rules governing relations between client and lawyer, as well as rules dealing with the lawyer's relationship with third parties on the client's behalf. Fiduciary rules protect the client from overreaching or opportunistic behavior by the lawyer. Different reasons are more prominent in some cases than others, however, and it is useful to begin this course by getting a sense of the issues to which these concepts apply.

Some of these reasons are utilitarian. For example, the law of agency generally imputes to the client the consequences of a lawyer's acts or omissions. Such imputation protects third parties whose interests a lawyer may affect and gives lawyers incentives to act carefully when representing clients. The first case below illustrates this type of reasoning.

In other cases, the risk is more that the lawyer will take advantage of the client than that the lawyer's mistakes will prejudice a third party. The second case below illustrates this type of reasoning. Notice in particular the distinction the court draws between competence—the malpractice claim—and the idea that a fiduciary may not take advantage of a principal.

This logic is clearest in cases where a plaintiff alleges a cause of action for breach of fiduciary duty, but it is not limited to such cases. It also extends to cases where a plaintiff alleges

some other tort but the defendant is a fiduciary. In such cases, the defendant's fiduciary obligations may alter the normal burdens of production or persuasion, making it easier for a plaintiff to prevail. The third case illustrates this type of reasoning.

United States
v.
7108 West Grand Avenue
15 F.3d 632 (7th Cir. 1994)

Easterbrook, Circuit Judge.

Claimants in this forfeiture proceeding pose the question whether their former attorney's gross negligence in representing their interests entitles them to another opportunity to litigate. The answer is No. Malpractice, gross or otherwise, may be a good reason to recover from the lawyer but does not justify prolonging litigation against the original adversary.

Feliberto Flores is in prison for federal drug offenses. See *United States v. Flores*, 5 F.3d 1070 (7th Cir.1993). The United States began forfeiture proceedings against three parcels of real property in his name, contending that they had been acquired with the proceeds of his drug business. Feliberto contends that he and his wife Isabellita retained Robert Habib to represent them in the forfeiture proceeding. Habib did not file a timely claim on Feliberto's behalf with respect to any of the three properties, and he filed a verified claim on Isabellita's behalf with respect to one parcel only. The United States filed a motion for default judgment concerning the property at 7108 West Grand Avenue (which is, by virtue of a Rule 54(b) judgment, the sole parcel in dispute on this appeal). Habib filed papers in opposition on behalf of Isabellita but did not contend that she has an ownership interest in the property. Feliberto is the sole record owner; Isabellita contends that an attorney other than Habib neglected to transfer a joint tenancy interest to her name. Habib did not request a stay under 21 U.S.C. § 881(i), which applies when a criminal proceeding is ongoing against a claimant. Neither Habib nor Isabellita appeared at the hearing on the motion for default judgment, which the district court granted. (Habib says that he had a conflicting engagement in another court, but this would be a reason to ask the court for a postponement, not to ignore the hearing.) Habib did not file a timely notice of appeal.

Represented by new counsel, Feliberto and Isabellita filed a motion under Fed.R.Civ.P. 60(b) for relief from the judgment. They blamed the lack of timely claims on Habib, and they contended that each had a good defense to the forfeiture action: Feliberto that he paid for the property with lottery winnings rather than drug money, Isabellita that she is an "innocent owner" under 21 U.S.C. § 881(a)(6). The district court denied this motion....

Feliberto and Isabellita insist that Habib was grossly negligent--that his acts were worse than merely negligent but short of intentional misconduct. They characterize Habib's efforts in this way in an effort to avoid the principle that an attorney's errors and misconduct are attributed to his clients. The clients are principals, the attorney is an agent, and under the law of agency the principal is bound by his chosen agent's deeds. So much is clear for an attorney's wilful misconduct.... It is equally clear for negligent errors.... None of these cases involves gross negligence, which the appellants see as an opening.

Yet why should the label "gross" make a difference to the underlying principle: that the

errors and misconduct of an agent redound to the detriment of the principal (and ultimately, through malpractice litigation, of the agent himself) rather than of the adversary in litigation? We know how to treat both ends of the continuum: negligence and wilful misconduct alike are attributed to the litigant. When the polar cases are treated identically, intermediate cases do not call for differentiation. Holding that negligence and wilful misconduct, but not gross negligence, may be the basis of a default judgment would make hay for standup comics. No lawyer would dream of arguing on behalf of a hospital that, although the hospital is liable in tort for staff physicians' negligence and intentional misconduct, it is not liable for their "gross negligence." The argument makes no more sense when presented on behalf of a lawyer or litigant....

"Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply. If the lawyer's neglect protected the client from ill consequences, neglect would become all too common. It would be a free good--the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either." *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir.1986). See also *United States v. Boyle*, 469 U.S. 241, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985) (client may be penalized when lawyer files a tardy tax return). A distinction between ordinary and gross negligence would put an end to "mere" negligence in federal litigation but would create a land office business in gross negligence....

It is unnecessary to ask the district court to determine where on the line from "mere" negligence to intentional misconduct attorney Habib's handling of this litigation falls, because the answer does not make any difference.

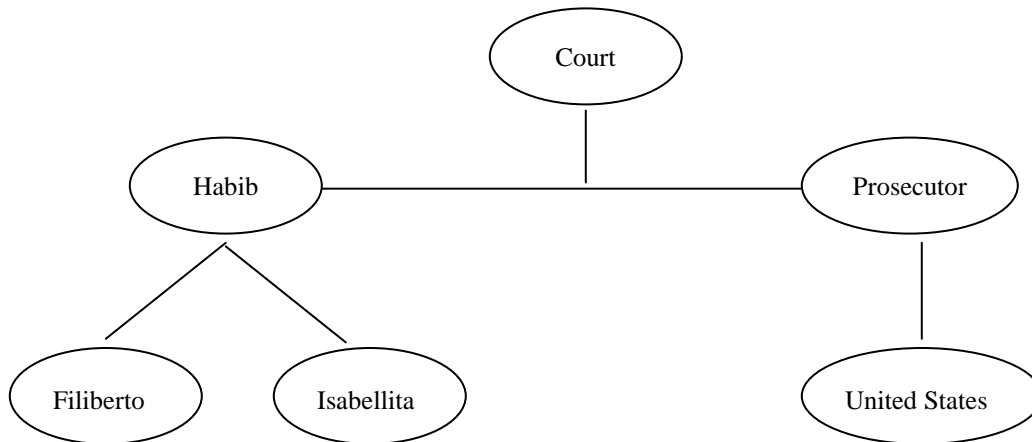
CASE QUESTIONS

1. What principle governs this case?
2. The court made an instrumental argument for holding Habib liable. What is it?
3. Suppose Habib had a really good excuse for failing to contest the forfeiture; suppose his wife or a child was seriously injured in an accident, for example. Would that affect the court's analysis?
4. In terms of the duties discussed above, what duty was breached in this case?

The clients in *7108 West Grand Avenue* suffered because their lawyer had power to act for them but failed to act. Most such cases like this would come out this way. As the Court of Appeals for the Eighth Circuit has said, "A litigant chooses counsel at his peril. Counsel's disregard of his professional responsibilities can lead to extinction of his client's claims." *Boorgaerts v. Bank of Bradley*, 961 F.2d 765, 767 (8th Cir. 1992).

THINKING DYNAMICALLY AND INTERACTIVELY I

Who had a stake in the situation described in *7108 West Grand Avenue*? Who did Habib’s actions affect and who would be effected by the court’s ruling? Obvious parties include Feliberto and Isabelita, Habib, the prosecutor, the U.S. government, and the court itself. Try this exercise. Imagine each of these parties as connected to each other, as if they are each different points in a web. You might picture the web as something like this:



Think about these relationships from the point of view of each participant. They each will have expectations of Habib. For example, Filiberto and Isabellita rely on Habib to represent them, while the prosecutor sees Habib as an adversary and as the representative of his clients.

Look at the court’s perspective on this diagram. When the court sees Habib, it sees not only his clients but also the prosecutor and the United States. Whatever decision the court makes will ripple through this web of connections. If the court lets Habib off the hook his clients get a second chance to oppose forfeiture of the property. But because each player in this web is connected to each other player such a decision would affect the prosecutor and the United States, too. The prosecutor would have to spend time getting back up to speed on the case and trying it—time that could be spent on another matter if the court refuses to let Habib off the hook. The United States would have to pay for that time. Even more importantly, letting you off the hook would also mean putting the case back on the trial court’s calendar, creating more work for the trial judge. Ruling for Isabellita, in other words, would impose costs on the other parties, including the party making the ruling.

If you were Habib, exercising judgment about this case would involve understanding how each player in the web sees you. You would have to think about the costs a ruling in your favor would impose on the government and the court. And what benefits would justify creating those costs? Filiberto and Isabellita might benefit, if they can keep their house. (Strictly speaking you would evaluate that benefit by discounting its value by the probability that they would win on remand.) But in this situation there is a way Filiberto and Rosalito could get relief without creating costs for third parties: They could sue Habib. That option minimizes costs and places liability on the party who most deserves it. If you were Habib, you would need to work through all this analysis to have a good sense of what was likely to happen to you if you ignored the filing deadlines and the hearing.

Judgment requires putting yourself in the place of each person affected by an action and asking yourself how the action affects that person. Once you understand that, you understand the interactive aspect of judgment. You still need to think about the dynamic aspect of judgment, however. The cost analysis mentioned above is one part of dynamic thinking. The effect of precedent is another part.

What would happen if courts let lawyers off the hook in order to save clients from lawyers' mistakes? Judge Easterbrook suggests that lawyers would be more careless, because they would face no serious consequences for their mistakes. If the court lets the client off the hook the client would have no damages (or at least low damages) and therefore probably would not sue the lawyer. If the lawyer knew he was unlikely to suffer consequences for making mistakes he would be less careful, which would lead to more mistakes, which would waste scarce court time, etc. (Later we will think dynamically in terms of how different parties would react to different actions.)

Tante
v.
Herring

264 Ga. 694 (1994)

Hunt, Chief Justice.

We granted certiorari to the Court of Appeals in *Tante v. Herring*, 211 Ga.App. 322, 439 S.E.2d 5 (1993) to determine whether the Court of Appeals was correct in upholding Laura and Bobby Herring's claims against their former attorney, T. Edward Tante. We affirm in part and reverse in part.

The Herrings retained Tante to pursue a claim for social security disability benefits for Mrs. Herring before the Social Security Administration. During his representation of Mrs. Herring, Tante appeared with her at a hearing before an administrative law judge and wrote a letter brief on her behalf. Thereafter, the administrative law judge issued a favorable award to Mrs. Herring. Tante's subsequent request for attorney fees for his work in representing Mrs. Herring, which request had been approved by both the Herrings, was approved by the administrative law judge.

The issues underlying this appeal involve the Herrings' action against Tante for legal malpractice, breach of fiduciary duty and breach of contract, all pertaining to Tante's adulterous relationship with Mrs. Herring during the period in which he was pursuing the disability claim on her behalf. The Herrings allege that Tante caused physical and mental harm to Mrs. Herring by taking advantage of confidential information regarding her emotional and mental condition to convince her to have an affair with him. The Herrings also allege Tante violated rules and standards of the State Bar of Georgia, violated his fiduciary duty, and breached his contract with the Herrings. The trial court granted partial summary judgment to the Herrings on the question of Tante's liability and denied summary judgment to Tante. The Court of Appeals affirmed.

The Court of Appeals correctly pointed out that the elements of an action for legal malpractice consist of employment of an attorney; failure of the attorney to exercise ordinary care, skill and diligence; and damages proximately caused by that failure. This is simply a corollary of the traditional formula for the elements necessary to a cause of action in tort: duty,

breach (failure to conform to the required standard) and damage proximately caused by the breach. It is axiomatic that the element of *breach* of duty in a legal malpractice case-- the failure to exercise ordinary care, skill, and diligence--must relate directly to the *duty* of the attorney, that is, the duty to perform the task for which he was employed. Of course, in an action for legal malpractice, the plaintiff must file with the complaint an expert's affidavit setting forth at least one negligent act constituting the alleged breach of duty and the factual basis for each claim of negligence. Although the Herrings did attach an expert's affidavit to their complaint, the expert did not set forth a negligent act which would constitute the basis for a claim of legal malpractice.

There is no evidence that Tante's conduct of which the Herrings complain had any effect on his performance of legal services under his agreement with the Herrings. Indeed, Tante obtained for Mrs. Herring precisely the results for which he was retained, the recovery of social security disability benefits. Contrary to the holding of the Court of Appeals, 211 Ga.App. at 324(2), 439 S.E.2d 5, a satisfactory result under an agreement for legal services by necessity precludes a claim for legal malpractice. Accordingly, the Court of Appeals erred in affirming the trial court's grant of summary judgment to the Herrings on their claim against Tante for legal malpractice.

However, we agree with the Court of Appeals, 211 Ga.App. at 327(3), 439 S.E.2d 5, that the Herrings have a claim against Tante for damages for breach of fiduciary duty. That claim is not one for professional malpractice based on negligence involving Tante's performance of legal services, and, therefore, no expert affidavit is required in support of it. The fiduciary duty in this context arises from the attorney-client relationship. Tante was a fiduciary with regard to the confidential information provided him by his client just as he would have been a fiduciary with regard to money or other property entrusted to him by a client.² Thus, the Herrings' claim is based on Tante's alleged misuse, to his own advantage, of confidential information in medical and psychological reports concerning Mrs. Herring obtained in and solely because of Tante's representation of her.³

Tante did not controvert the allegations that he took advantage of information contained in Mrs. Herring's confidential medical and psychological reports about her impaired emotional and mental condition, that Tante took advantage of that condition, convincing her to have an affair with him, resulting in physical and mental harm to the Herrings. *Id.*, 211 Ga.App. at 323, 439 S.E.2d 5. The Court of Appeals correctly noted that, as a fiduciary with regard to information shared with him by his client, Tante owed his client the utmost good faith and loyalty. By using information available to him solely because of the attorney client relationship to his advantage and to the Herrings' disadvantage, he breached that fiduciary duty. Accordingly, the Herrings may pursue their claim for damages resulting from that breach.

CASE QUESTIONS

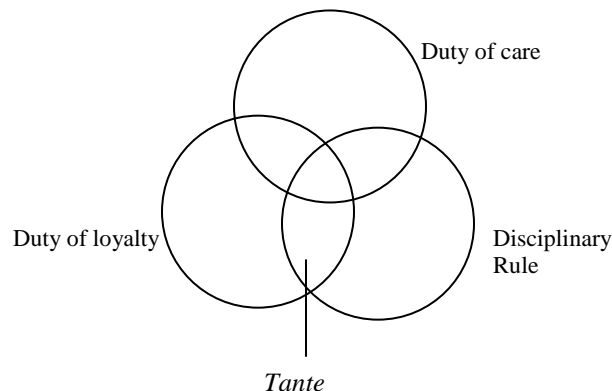
² Whether and to what extent a lawyer has a fiduciary duty to a client depends on the facts in each case. Here, however, there is no question that the confidential information shared with Tante arose out of the attorney-client relationship and that Tante was a fiduciary with respect to that information.

³ See Canon 4 of the Code of Professional Responsibility; Directory Rule 4-101(B)(3). This violation of the Code, does not, in and of itself, provide a private cause of action for damages. *Davis v. Findley*, 262 Ga. 612, 422 S.E.2d 859 (1992). Rather, the breach of fiduciary duty in this case, which, incidentally, constitutes a violation of the Code of Professional Responsibility, along with a claim of resulting damages, supports the claim for breach of fiduciary duty in this action. That claim does not depend on any violation of the Code of Professional Responsibility, and we do not here decide whether evidence of a violation of the disciplinary rules is relevant in a claim against a lawyer for legal malpractice or breach of fiduciary duty. Of course, the violation of the Code subjects Tante to disciplinary action. See, *Davis v. Findley*, *supra*; *In re: T. Edward Tante*, 264 Ga. 692, 453 S.E.2d 688, pending before this court.

1. What causes of action does the court mention? How do their elements differ?
2. Did Tante commit malpractice? Did he breach a contract with the Herrings?
3. Did Tante disclose any confidential information?
4. What is the relationship between the confidences Mrs. Herring confided to Tante and the cause of action in the case?
5. What is the point of the court's analogy between confidential information and money? What does it mean to say someone is a fiduciary with respect to information?
6. Did Tante breach any disciplinary rules? What is the relationship between those rules and the causes of action in the case?
7. In terms of the duties discussed above what duty was at issue in this case? (Hint: how did Tante's conduct differ from Habib's?)

MAPPING RISK

Tante illustrates an important point about the rules that apply to you. You can think of *Tante* as involving three sets of rules—the duty of care, the duty of loyalty, and disciplinary rules. You may depict them using Venn Diagrams, like this:



Tante breached the duty of loyalty and, the court tells us, a Georgia disciplinary rule, but he did not breach the duty of care. He did a good job but he is still liable. Under disciplinary rules different from Georgia's it would have been perfectly possible for *Tante* to have satisfied the duty of care and violated no rule of professional conduct but still be liable to Mrs. Herring. Each rule you are subject to, and each duty you owe, creates distinct obligations. Often they will point in the some direction—acts breaching the duty of loyalty often violate disciplinary rules, too—but that is not always true. You cannot infer from the fact that you have complied with one rule, such as the duty of care, that you are safe under the others. You have to determine each rule to which you are subject and analyze its requirements separately.

OVERLAPPING CAUSES OF ACTION I

The duty of loyalty and the duty of care are distinct duties but the cases do not distinguish cleanly between them. In part that is because plaintiffs often allege the same facts as a basis for causes of action for breach of fiduciary duty and for malpractice. Liberal pleading rules suggest they should be allowed to plead in the alternative and many jurisdictions are not too picky about distinguishing which facts support which claim. As we will see, some courts have dealt with this practice by dismissing fiduciary duty claims that duplicate duty of care claims, though these courts have not explained in any detail the reasoning for this rule. For an overview of this situation, see Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach As Legal Malpractice*, 34 HOFSTRA L. REV. 689, 699-701 (2006).

For now, it may be helpful to think of the core case of fiduciary duty in terms of the nature of the alleged breach and the nature of the remedy sought. In particular, the core fiduciary duty case is one in which the client-plaintiff alleges: (1) self-interested conduct by the lawyer either (a) at the expense of the client or (b) making use of the client's information or other resources to profit the lawyer; resulting in (2) a claim in which the client seeks either (a) damages for harm done or (b) disgorgement of the lawyer's profits. *Restatement* §§49, 53, 60(2).

Note that this core case centers on the lawyer's self-serving conduct rather than an innocent mistake. Simple incompetence, as might well be the case in *7108 West Grand Avenue*, presents a clear duty of care violation. Examples of core fiduciary duty cases include intentional use of client information for personal gain, discussed in Chapter 3.A.2, and unfair transactions with clients, discussed in Chapter 10.F.

There are hard cases, however, where incompetence and disloyalty seem to go hand in glove. A plaintiff may allege that a lawyer performed incompetently because of a conflict of interest between two current clients, for example. The lawyer may have acted self-interestedly in accepting the representation that created the conflict, blurring the lines between these two duties.

Disciplinary rules such as Model Rules 1.7 and 1.9 forbid conflicts of interest. Such rules are based on the risk of harm to clients, however, not actual harm. *E.g. Restatement* §121. It can be hard for a client to prove that a lawyer engaged in harmful misconduct and these rules provide clients with some peace of mind by forbidding representation where there is a risk of harm. A conflicted representation therefore may violate the duty of loyalty in a disciplinary sense even if it does not cause harm and thus does not support a civil cause of action. If a lawyer earns fees from a client while representing a conflicting interest the client may be entitled to disgorgement of fees, provided the conflict was severe enough, even if the client suffers no harm. *Restatement* §37. We will explore this and other problems of overlapping causes of action in more detail in Chapters 6 and 11.

Why should you care? Differences in these causes of action might affect whether a client may bring a claim against you and, if so, what it might be worth. Depending on the jurisdiction, the fiduciary duty cause of action might be treated differently from a malpractice cause of action in several respects: the need for expert witnesses to establish liability, the need to show damages

(and, relatedly, the standard of causation), the limitations period, and the availability of punitive damages.

Finally, courts in some jurisdictions have found a lawyer's fiduciary status relevant to the elements of causes of action that might at first glance seem unrelated to the practice of law. In general, the law presumes that (i) that clients trust lawyers to know and do what is best for the client; (ii) lawyers are the smart, experienced parties in the lawyer-client relationship; (iii) these facts give lawyers power over clients; (iv) which lawyers may misuse; and (v) which the law therefore must police in order to protect clients.

Barbara A. v. John G., 145 Cal. App. 3d 369 (1983) illustrates this point. John G. represented Barbara A. in a family law matter. The two became romantically involved during the representation. Barbara later alleged that she had sex with John but only after he promised her that he could not possibly get her pregnant. He did get her pregnant, of course. And it was a tubal pregnancy that required surgery that left Barbara sterile.

John later sued Barbara for \$1,520 in unpaid fees. She counterclaimed for fraud, battery, and infliction of emotional distress. Barbara argued that John's status as a fiduciary extended to their sexual relationship as well as his legal work. If so, he would bear the burden of showing that he had fully informed Barbara of all circumstances relevant to their sexual encounters and that she had freely consented after such disclosure.

The court did not accept the proposition that John's fiduciary status automatically extended to the parties' sexual relations. The court did leave open the possibility that Barbara could show that she trusted and relied on John to tell the truth, thus forming a "confidential relationship." John's status as her lawyer would be relevant to this factual inquiry but would not be decisive. Here is an excerpt from the opinion:

"[F]iduciary" and "confidential" have been used synonymously to describe "... any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he [or she] voluntarily accepts or assumes to accept the confidence, can take no advantage from his [or her] acts relating to the interest of the other party without the latter's knowledge or consent" Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client (see Frankel, *Fiduciary Law* (1983) 71 Cal.L.Rev. 795), whereas a "confidential relationship" may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship. The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.

Our Supreme Court has stated that "[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity" Further, the court has admonished that "[a] member of the State Bar should not under any circumstances attempt to deceive another person, ..." Numerous cases have applied these basic principles where an attorney

in breaching the fiduciary obligation has gained financial advantage. We can find no valid reason to restrict these principles to actions involving financial claims of a client and not to apply them to actions in which the client alleges physical damage resulting from a violation of the attorney's fiduciary obligation.

Generally, the existence of a confidential relationship is a question of fact for the jury or the trial court. Where a legally recognized fiduciary relationship exists, however, the law infers a confidential relationship, i.e., it becomes a question of law for the court. If the fact finder determines that a confidential relationship exists or the court determines as a matter of law that a fiduciary relationship exists, it is presumed that the one in whom trust and confidence is reposed has exerted undue influence. Because a presumption is no longer independent evidence, the effect of the presumption of undue influence is to shift the burden of proof to the fiduciary. (Evid. Code, §600, subd. (a); 1 Witkin, Cal. Procedure, Attorneys, *supra.*, § 51, p. 60.) The undue influence in the case before us is, of course, relevant on the issue of consent in appellant's cause of action for battery and on the issue of justifiable reliance in her cause of action for misrepresentation.

Nevertheless, the unique facts in the case before us compel a more cautious approach in imposing on respondent, as *a matter of law*, the highest fiduciary standard in all his relations with appellant, social as well as legal. The existence of a confidential relationship between appellant and respondent is more properly a question of fact for the jury, or court, who can better assess whether the legal relationship was dominant or whether the parties functioned on a more equal basis in their personal relations. Thus, appellant would have the burden of proving the existence of a confidential relationship. If such a relationship were established, respondent would then have the burden of proving that consent was informed and freely given in the battery cause of action, or, in the alternative, that her reliance was unjustified in the misrepresentation cause of action. To hold otherwise would have a chilling and far-reaching effect on any personal relations between an attorney and his or her clients. The possibility of a factual determination of a confidential relationship should be a sufficient warning to monitor the profession in personal or social relations with clients.

**BOUNDARY ISSUES I:
WHEN ARE YOU A LAWYER
AND WHEN ARE YOU JUST AN ORDINARY PERSON?**

When is a lawyer a lawyer and when is a lawyer just a person? May a lawyer represent a client during the day, wearing his "lawyer hat," as it were, and carry on a romance with the client in the evening? If you have a law degree is everything you do "lawyering"? Does the law always look at you as a lawyer, no matter what you are doing? If not (and the answer to these questions is "no"), what distinguishes your role as a lawyer from your role as an ordinary person? How do you know what hat you are wearing? Whatever rule the law lays down to distinguish between these roles, what purpose should such a rule serve? What values should it embody and express?

Tante and *Barbara A* both involve lawyers who became romantically involved with clients they represented. You might think that situation would be fairly rare. It happened often

enough, however, that we now have rules prohibiting such relationships unless they existed before the attorney began representing the client. Model Rule of Professional Conduct 1.8(j) provides that a lawyer “shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.” California Rule of Professional Conduct 3-120 includes a more lenient provision, which forbids post-representation relationships only if the relationship causes the lawyer to perform legal services incompetently. Cal. R. Prof. C. 3-120(b)(3). (It also specifies that lawyers may not “Require or demand sexual relations with a client incident to or as a condition of any professional representation.” *Id.* §3-120(b)(1). Why do you suppose that situation is specifically mentioned?)

Lawyers and law students often giggle over these rules but they provide a useful perspective on how the law regulates lawyers. As comment 17 to Model Rule 1.8(j) puts it,

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus a sexual relationship between lawyer and client can involve unfair exploitation of the fiduciary role, in violation of the lawyer’s basic ethical obligation not to use the trust of the client to the client’s disadvantage.

In other words, if you represent a client, when you do things with the client—even things that seem to have nothing to do with “lawyering”—the power you are presumed to have as a lawyer, and the trust you are presumed to hold, may affect your legal standing. If you do not represent the person in question, and you make sure no reasonable person could believe you do represent them, then you may act as an ordinary person. Your legal background may still come into play, as might happen if you entered into a contract and later had a dispute in which you argued that you did not understand its terms, but that is a collateral effect of your education not of duties you owe as a lawyer.

In reality the strength of this presumption varies depending on facts such as the client’s sophistication and the complexity and novelty of particular matters. A chief executive who hires and fires lawyers all the time, and who may know areas of the law better than many lawyers, is not the same sort of client as Mrs. Tante. The law does not ignore that fact on issues where client sophistication is relevant. The presumption never goes away completely, however. If it is to be rebutted, it will be the lawyer’s burden to rebut it.

That the presumption may vary does not mean the duties of care and loyalty are sometimes absent. They are always present. They may apply differently in different contexts (consent to waive a conflict might be easier to obtain from sophisticated than from unsophisticated clients, for example), but some duties apply equally to all clients (the duty to keep client confidences, for example) and neither the duty of loyalty nor the duty of care ever goes away.

**EXERCISE:
FRAMING LEGAL ETHICS**

An interesting aspect of *Barbara H* is the way fiduciary duties frame relationships between lawyers and clients. “Frame” here refers to a concept known as “framing,” popularized through research by psychologists Amos Tversky and Daniel Kahneman. They defined a frame as “the decision makers conception of the acts, outcomes, and contingencies associated with a

particular choice.” Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 455 (1981).

Tversky and Kahneman’s research showed that people respond differently to problems depending on how the problem is presented to them. To see their point, try this simple exercise.

Suppose there is an outbreak of some disease. Two programs are proposed to combat it. If program A is adopted, 200 people will be saved. If program B is adopted, there is a 1/3 chance that 600 people will be saved, and a 2/3 chance that no one will be saved. Now suppose that someone proposes programs C and D. If program C is adopted, 400 people will die; if program D is adopted, there is a 1/3 chance that no one will die, and a 2/3 chance that 600 people will die.

Choice One

Program A	Program B
200 Saved	1/3 Chance of 600 saved
	2/3 Chance of 0 saved

Choice Two

Program C	Program D
400 deaths	1/3 chance 0 deaths
	2/3 chance 600 deaths

For choice one, do you prefer program A or B? For choice two, do you prefer program C or D?

Tversky and Kahneman found that 72% of respondents favored program A, even though programs A and B are statistically equivalent. You might think that this result only shows that people do not like thinking about life and death in purely statistical terms, such as the “expected” number of lives saved or lost. But Tversky and Kahneman also found that respondents reversed preferences when it came to choice two: 78% of respondents preferred to gamble on program D rather than accept a sure loss of 400 lives. An aversion to statistical thinking does not explain the difference. Instead, people were more willing to take risks to avoid a choice when framed as a loss than they were when the choice was framed as a gain. (We will study loss aversion in more detail in Chapter Two.)

What does this have to do with legal ethics? Recall that in *Barbara H* the court says “the essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.” You can think of this as a frame that depicts clients as dependent people, who rely on and are thus vulnerable to lawyers, who in turn are sophisticated, powerful people who have power over clients.

Even if these features are not directly relevant in terms of the elements of a cause of action or defense, they may be very relevant to the way third parties such as judges, jurors, or disciplinary officials view causes of action or defenses. As you study the material in this course and move on into practice remember: You operate in the fiduciary frame.

**THE MAIN POINTS
TO RECALL FROM CHAPTER I ARE:**

- All lawyers owe fiduciary duties to clients

- Agency is one type of fiduciary relationship
- Most lawyers are agents and are bound by agency law
- The true fiduciary duty is the duty of loyalty. It requires lawyers to put the interests of their clients first—ahead of the lawyer’s personal interests
- The duty of care requires lawyers to act carefully as defined by the standards of practice for the relevant subject matter and geographic area
- When lawyers fail to act carefully, the law may hold the client responsible for the lawyer’s misconduct, leaving the client to settle up with the lawyer
- Lawyers may satisfy one duty, such as that of care, while breaching another, such as that of loyalty
- Fiduciary duties create their own cause of action (breach of fiduciary duty) and may affect elements of other causes of action, such as misrepresentation (by creating a duty to disclose)
- The law presumes lawyers are the sophisticated, powerful half of lawyer-client relationships; fiduciary duties reflect this presumption
- The strength of the presumption will vary according to context; Lawyers may rebut this presumption with respect to certain aspects of certain matters, but the fiduciary duties never go away and may not vary with client sophistication