



The Moral Aspect of a Lawyer's Fiduciary Duty

It remains axiomatic that lawyers acting on behalf of clients are subject to exacting duties of a fiduciary nature. See Geoffrey Hazard, Jr. and William Hodes, 1 *The Law of Lawyering*, §4.12 (3d ed) (citing Restatement of the Law Governing Lawyers, §56, Comment b). See generally, Restatement of the Law Governing Lawyers, §2, Comment d (referring to requirement of good moral character for admission to bar in most states).

The standard applicable to a fiduciary encompasses a "legal or moral recognition of trust, reliance, or dependence," Sarah W. Holtman, "Fiduciary Relationships," *The Encyclopedia of Ethics*, 545-49 (2nd ed. 2001). See generally, Stephen Bainbridge, "Catholic Social Thought and the Corporation" (2003) (discussing influence of Catholic theology on corporate governance), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=461100.

Formulations of the key aspects of fiduciary duties include the well-known definition by Judge Benjamin Cardozo as the Chief Judge of the New York Court of Appeals in the 1928 case of *Meinhard v. Salmon*, in which he insists that: (i) fiduciaries must be held to a higher standard than what is applicable to the normal marketplace transaction; (ii) exceptions to this standard undermine the duty of loyalty; and (iii) neither courts nor regulators should consciously weaken the fiduciary standard.

The religious origin of fiduciary principles has been traced to both the Old and New Testaments. See Susan Atherton, et al., "Fiduciary Principles: Corporate Responsibilities to Stakeholders," 2 *Journal of Religion and Business Ethics*, 8 (2011). Fiduciary law is traceable to developments in ancient Roman law and early English law which defined fiduciary relationships as both moral and legal relationships of trust. *Id.* at 10. See generally, Charles Fried, "The Lawyer as Friend, The Moral Foundation of the Lawyer-Client Relationship," 85 *Yale L.J.* 1060 (1976).

In a secular and pluralistic society such as the United States, it may be controversial in some circles to talk of morality as a basis of fiduciary duties, where there may be contested views of what constitutes moral behavior. For example, Stephen Gillers has argued that: "When lawyers act within the rights-adjudging apparatus..., its cloak of legitimacy should insulate them against charges of immorality based on a client's ends." Stephen Gillers, "Can a Good Lawyer Be a Bad Person," 2 *J. Inst. for Study of Legal*

Ethics, 131, 147 (1999). Still another respected writer on the topic of legal ethics, Monroe Freedman, has urged that: lawyers have a moral obligation of justification for actions they take on behalf of clients, which (I would add), includes actions taken in furtherance of their fiduciary duties. See Monroe H. Freedman, "The Lawyer's Moral Obligation of Justification," 74 *Tex. L. Rev.* 111 (1995).

Some writers propose that agreeing to represent a client carries with it the possibility of interfering with the moral autonomy of the lawyer. See Judith McMorrow and Luke Scheuer, "The Moral Responsibility of the Corporate Lawyer," Boston College Law School Faculty Paper, 29 (2010), available at <http://lawdigitalcommons.bc.edu/lspf/268>. Other legal ethics experts advance the position that a lawyer's advice should include a discussion of the moral dimensions of the means and ends of a client's project. *Id.* (citing Thomas L. Shaffer and Robert F. Cochran, Jr., *Lawyers, Clients and Moral Responsibility* (1994)). See generally J. Ratnaswamy, "The Lawyer as Moral Actor and the ABA Model Rules," *The Bench* (January/February 2012).

Even in our increasingly secular world, respected members of our profession still maintain the position that "lawyers must assume moral responsibility for the consequences of their professional actions." Deborah Rhode, "Ethical Perspectives on Legal Practice," 37 *Stan. L. Rev.* 389, 643 (1985).

Prof. Larry Ribstein has published extensive scholarship on the fiduciary duty of partners, which I cannot do justice to in this short essay. See generally, *Bromberg and Ribstein on Partnership*, (Aspen Publishers 2011). I am certain that my recently departed learned friend would have commented nonetheless on this short ethics column but for his untimely passing. The legal profession has suffered a great loss with his death.

Consistent with a lawyer's duty to comply with positive civil law, a lawyer's fiduciary duty to act in the best interests of those on whose behalf the lawyer is acting, remains consistent with Judeo-Christian altruistic principles on which our country and its legal system were founded, and on which the basic concept of fiduciary obligation is grounded. It remains helpful to examine the origins of a duty in order to understand it better. So too, an appreciation of the moral aspects of fiduciary duty should illuminate its contours. ♦

Francis G.X. Pileggi is the Member-in-Charge of the Wilmington, Delaware, office of Eckert Seamans Cherin & Mellott, LLC. His e-mail address is fpileggi@eckertseamans.com. He summarizes the corporate and commercial decisions of Delaware Courts, as well as providing commentaries on legal ethics, at www.delawarelitigation.com. He is a member of the Richard K. Herrmann Technology AIC.