

# The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations

*University of Toronto Law Journal, Forthcoming*

44 Pages Posted: 25 Feb 2015

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Date Written: February 23, 2015

## **Abstract**

No one doubts that lawyers have fiduciary duties. Yet the justification and scope for those duties is surprisingly unclear. Case law grounds fiduciary duties on the fiduciary's exercise of discretionary authority. But discretionary authority is only an occasional - and potentially ethically problematic - aspect of the lawyer's role, not its defining feature. Further, case law has been neither clear nor consistent in defining the specific obligations that attach to the lawyer's duty of fiduciary loyalty. Academic literature on fiduciary duties provides only a partial and somewhat unsatisfactory explanation for the lawyer's fiduciary status when viewed in light of the normative foundations of the lawyer's role and case law. Academic literature on the lawyer's role is, however, also unsatisfactory insofar as while it explains the lawyer's duty of loyalty, it does not provide any means for analyzing how breaches of that duty ought to be categorized in private law.

This paper attempts to reduce the confusion over the meaning and extent of the lawyer's fiduciary obligations. It argues that the content of the lawyer's fiduciary duties should be informed by the normative structure of fiduciary obligations and by the normative structure of the lawyer-client relationship. The lawyer-client relationship operates at the intersection of private obligation and public duty, and the scope and force of the lawyer's fiduciary duties reflect that intersection. When understood in this way, the principle underlying the lawyer's fiduciary status continues to emphasize discretion. It focuses, however, not on the lawyer's exercise of discretion but rather on the lawyer's provision of the advice and advocacy necessary for the client's exercise of discretion.

Analyzed through these foundations, lawyers ought to be held liable for fiduciary breach in three circumstances: 1) where they violate obligations to clients as a consequence of a conflict of interest or duty; 2) where they undercut the very nature of the representation they undertook to provide; and 3) where, through failing to provide information, or

providing the client with misinformation, they undermine the client's ability to make decisions.

**Keywords:** Legal Ethics, Fiduciary Duties, Jurisprudence, Private Law

**Suggested Citation:**

Woolley, Alice, The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations (February 23, 2015). University of Toronto Law Journal, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=2568970>