

## AGENTS AND ADVISORS

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Like advisors, agents pose challenges for scholarly accounts of fiduciary obligation. Neither fits well within definitions of fiduciary status that turn on whether an actor has discretionary authority over the legal or practical interests of another, which would trigger a fiduciary's distinctive duties of care and loyalty. In particular, providing advice does not necessarily run in tandem with the power to bind its recipient to transactions corresponding to the advice; an agency relationship situates the agent as subject to the principal's control, which seems discordant with possessing discretionary authority.

Separately, neither an advisor nor an agent serves as a substitute for the advisee or the principal. When the assumed prototype for a fiduciary relationship is a trust, an ownership structure in which the trustee—who serves as a substitute for the settlor in dealing with trust property—owes duties to the trust's beneficiaries,<sup>1</sup> neither agents nor advisors fit the fiduciary category. An agent, empowered to take action that affects the principal's legal relations, serves as an extension of the principal's legal personality; an advisor's function is enhancing the quality of judgments made by the advisee, not substituting for the advisee in making judgments. As a consequence, dominant academic accounts cast agents as interlopers in the fiduciary realm, notwithstanding long-established doctrine establishing that agents are fiduciaries as a categorical matter regardless of a given relationship's factual specifics.<sup>2</sup> And the trust prototype daunts the law's more complex treatment of advisors, who can owe fiduciary duties depending on the context in which advice is given and other specifics of the parties' relationship, not on the ex-ante assignment of an actor to a particular category.<sup>3</sup>

In a recent article, *Advisors as Fiduciaries*, Professor Arthur Laby examines the roles of advisors in multiple contexts and elaborates justifications for whether and when advice-giving does (and should)

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1. RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. L. INST. 2003) (defining “trust” as “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”).

2. See, e.g., Samuel L. Bray, *Fiduciary Remedies*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW [hereinafter FIDUCIARY LAW HANDBOOK] 449, 460–61 (Evan J. Criddle et al. eds., 2019) (This work contrasts remedies in agency law with other fiduciary categories. “[T]he Restatement (Third) of Agency speaks the language of fiduciary duties, yet those duties do not shape the available remedies to the same extent as in trust law and in fiduciary law more generally.”).

3. See Daniel Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relations*, in FIDUCIARY LAW HANDBOOK, *supra* note 2, at 4.

trigger the imposition of a suite of distinctively fiduciary duties of care and loyalty.<sup>4</sup> Professor Laby's article is a major intervention in fiduciary-law scholarship because it examines in depth the justifications for fiduciary status and articulates why many advisors are treated as fiduciaries.<sup>5</sup> As this Response explains, Professor Laby's intervention turns on re-situating questions about the fiduciary status of advisors into a framework that focuses on an advisor's activity and relationships with clients, not a priori (or taxonomic) categories that turn on the possession of discretionary authority over another's assets or interests more generally.<sup>6</sup> Beyond academic theory, Professor Laby's article has practical implications because it helps to clarify analysis in a category of cases where courts have not reached consensus.<sup>7</sup> Moreover, the stakes are significant. Advising is a common-place activity integral to many professions and pervasive in day-to-day life. Additionally, the remedies available for breach of a fiduciary duty are distinctive.<sup>8</sup> Gain-based remedies are tightly linked to the fiduciary duty of loyalty,<sup>9</sup> underscoring for advisors the importance of avoiding or disclosing conflicts between the advice given and the advisor's own interests.<sup>10</sup>

Professor Laby's article is also a springboard for reflection on agency law, a long-standing misfit within a fiduciary realm dominated by trust-law prototypes and inquiry into whether an actor possesses discretionary authority.<sup>11</sup> As Professor Laby points out, many years ago I identified the possession of discretion as a common theme in accounts of fiduciary obligation.<sup>12</sup> My perspective now is grounded in the implications of agency law for fiduciary theory. This Response begins by identifying the analytic steps that undergird Professor Laby's sophisticated and comprehensive account of advisors. The Response then explores the implications of agency law's persistence as a fiduciary category in light of Professor Laby's account of advisors. A brief conclusion highlights why and how these questions matter.

Many theoretical accounts of fiduciary law—unlike Professor

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4. See Arthur B. Laby, *Advisors as Fiduciaries*, 72 FLA. L. REV. 953, 959–60, 964–75 (2020).

5. See *id.* at 957.

6. See *id.* at 957–58.

7. *Id.* at 956 & n.2 (noting split among courts concerning advisors' fiduciary status).

8. *Id.* at 957.

9. Bray, *supra* note 2, at 452.

10. Laby, *supra* note 4, at 1011.

11. Or, if not a misfit, a special snowflake. See Evan J. Criddle et al., *Introduction*, in FIDUCIARY LAW HANDBOOK, *supra* note 2, at ix, xxi (volume's treatment “explains how agency law has incorporated fiduciary principles in idiosyncratic ways that reflect the principal's power to direct and supervise the agent and the agent's power to bind the principal”).

12. Laby, *supra* note 4, at 981 (discussing Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 915 (1988)).

Laby's—use a framework that focuses on types of actors and their status, determined as an initial matter in taxonomic fashion. In contrast, Professor Laby's inquiry into advisors initially focuses on activity and its consequences: advisors seek trust from their advisees by inviting them to repose trust, leading to reliance and vulnerability.<sup>13</sup> The fiduciary duty for advisors “grows out of the nature of the trust relationship,” with the objective of preventing harm that can stem from misplaced trust as well as furnishing a distinctive set of remedies when trust is betrayed.<sup>14</sup> Also crucial to Professor Laby's account is that the context in which the activity of advising occurs serves to designate clear cases in which an advisor owes a fiduciary duty, such as lawyers who advise clients but do not have discretionary authority over their assets.<sup>15</sup> In many clear cases, advisors, like lawyers who are characterized as fiduciaries, are professionals; they give advice as an essential component of an expert service, for which, one way or another, they receive compensation.

As Professor Laby acknowledges, advice-giving by itself does not necessarily trigger fiduciary consequences.<sup>16</sup> Context matters to explain, for example, why registered investment advisors owe fiduciary duties but car mechanics typically do not. Only rarely would advising be the dominant point of hiring a mechanic or serve as the primary basis for compensation; and most mechanics do not hold themselves out as advisors as opposed to skilled providers of non-advisory services. The stakes are also relevant in defining context. For most people, advice concerning vehicle repairs carries lower stakes than financial advice about life savings, which feature more prominently in clients' overall financial stories. And the remedial consequences when an advisor breaches a fiduciary duty may matter, at least implicitly, in assessing the advisor's status. A car mechanic may well give advice that is conflicted—for example, to repair an older vehicle that does not warrant it—but the conflict and its ramifications are likely to be more evident than advice given in the context of investing in financial products and investment strategies.

To be sure, as fiduciary-law scholarship has deepened over the years, canonical accounts encompass cases in which courts analyze particular facts and circumstances to determine, on an ad hoc basis, whether to characterize a particular relationship as fiduciary. In Daniel Kelly's assessment of ad-hoc fiduciaries, they include instances in which a financial advisor “cultivates a relationship of trust,” having held out expertise, to an “inexperienced [client who] relies on her advice and

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13. *See id.* at 958.

14. Laby, *supra* note 4, at 956.

15. *Id.* at 973–74.

16. *Id.* at 958.

reposes complete trust in” the advisor.<sup>17</sup> To be sure, advisees’ experience is not a binary concept; it varies across a spectrum. An advisor may owe fiduciary duties to an advisee who is not completely inexperienced in business or investing, in particular when the advisor has superior knowledge and expertise about complex transactions configured by the advisor that generate substantial and undisclosed conflicts of interest.<sup>18</sup> Professor Laby also notes that courts often determine whether an advisor should be deemed an ad hoc fiduciary “against a backdrop dominated by status-based fiduciaries,”<sup>19</sup> in which some advisors—like lawyers and trustees—occupy a defined role from which fiduciary status follows without inquiry into specifics of a relationship.<sup>20</sup>

Might the fact that some advisors will always be treated as fiduciaries “lead other advisees to assume that advice giving, even if done by someone who is not a status-based fiduciary, is a fiduciary enterprise?”<sup>21</sup> Professor Laby characterizes this as a “spillover effect” that may shape advisees’ expectations “as an empirical matter,” but should not operate as “an independent reason to impose a fiduciary duty” on advisors who are not status-based fiduciaries.<sup>22</sup> But agency-law doctrine suggests such a reason when an advisor has constructed an appearance that shapes advisees’ reasonable expectations. The doctrine of apparent authority is the most prominent doctrine in agency law that ascribes legal significance to the creation of appearances, which occurs when a manifestation by a principal that an agent has authority to act on the principal’s behalf<sup>23</sup> shapes the understanding and thus the reasonable behavior of third parties. Agency-law doctrines respond to third-party risks created through constructed appearances of authority or of agency itself.<sup>24</sup> In particular, through the constructed appearance of an agent’s authority, a principal can entice a third party to commit to a transaction within the scope of the agent’s apparent authority, while reserving the option of later

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17. See Kelly, *supra* note 3, at 3, 4.

18. See Bamford v. Penfold, 2020 WL 967942, at \*2–3, \*5 (Del. Ch. Feb. 28, 2020) (defendant served as business and financial advisor to plaintiff, his close friend for decades whose sophistication did not extend to complex business structures and tax-related issues; defendant, *inter alia*, did not disclose related-party transactions with business entity in which plaintiff invested, including those facilitated by reorganization of entity). In *Bamford*, the court held that the complaint’s allegations of a “deep and intimate friendship” were “sufficiently strong to contribute to an inference of a fiduciary relationship,” detailing that the defendant “exercised control over significant assets and oversaw [the plaintiff’s] personal finances,” and the plaintiff “trusted and relied on” the defendant, “who had superior knowledge and expertise,” all in “the context of a close and intimate friendship that reached a familial level.” *Id.* at \*11.

19. Laby, *supra* note 4, at 998.

20. *Id.*

21. *Id.*

22. *Id.* at 999.

23. RESTATEMENT (THIRD) OF AGENCY §§ 2.03 & 3.03 (AM. L. INST. 2006).

24. *Id.*

disavowing the transaction, to the principal's advantage but the third party's disadvantage, although the third party reasonably believed the appearance to be true and acted accordingly.<sup>25</sup> Likewise, an advisor who engenders advisees' expectations of loyalty by positioning her services as comparable to those of status-based fiduciaries – knowing (or hoping) that advisees are likely to believe her construction of an apparent “fiduciary enterprise”—furnishes a reason to hold her to the consequences of that constructed appearance.

Finally, in Professor Laby's account, the texture of the parties' relationship over time matters.<sup>26</sup> The relationship between two parties may evolve from a non-fiduciary relationship to a fiduciary one, with the provision of advice serving as a trigger.<sup>27</sup> Likewise, seeking and obtaining trust, an essential component of advisory relationships in Professor Laby's account,<sup>28</sup> may occur quickly or more gradually. One implication Professor Laby leaves largely unexplored is whether evolution operates in only one direction. That is, if an advisee becomes skeptical about an advisor, at some point might their relationship lose its fiduciary dimension? A client might manifest lessened trust through additional inquiries to the advisor, lessened compliance with the advice, or enhanced monitoring, among other possibilities. As Professor Laby notes, “[t]rust is not all or nothing,”<sup>29</sup> and a client who, despite skepticism, follows an advisor's recommendation necessarily reposes enough trust in the advisor to comply with the advice.

Professor Laby's challenge to the view that only actors who possess discretionary authority are subject to fiduciary duties<sup>30</sup> also carries implications for agents and agency law. In contrast to the unsettled or context-dependent status of advisors, authoritative accounts of agency law characterize agents as fiduciaries and treat an agent's fiduciary status as a central feature in an agency relationship.<sup>31</sup> Writing in 1889 in a still-

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25. For a fuller account, see Deborah A. DeMott, *The Platform as Agent*, in *INTERMEDIARIES IN COMMERCIAL LAW* (Paul S. Davies & Tan Cheng-Han, eds.) (forthcoming Sep. 2022). More broadly, agency doctrine is alert to the multiple ways in which principal and agent may collude with each other to the disadvantage of third parties. See George M. Cohen, *Law and Economics of Agency and Partnership*, in 2 *OXFORD HANDBOOK OF LAW AND ECONOMICS* 399, 403 (Francisco Parisi ed., 2017).

26. See Laby, *supra* note 4, at 957.

27. *Id.* at 975.

28. *Id.* at 956.

29. *Id.* at 1005, n.349.

30. *Id.* at 957.

31. The successive Restatements of Agency reflect the uncontroversial proposition that agents serve as fiduciaries. RESTATEMENT OF AGENCY § 13 (AM. L. INST. 1933) (“An agent is a fiduciary with respect to matters within the scope of his agency.”); RESTATEMENT (SECOND) OF AGENCY § 1(1) (AM. L. INST. 1958) (“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”); RESTATEMENT (THIRD) OF AGENCY § 1 (AM.

influential account of agency law in the United States, Floyd R. Mechem observed that “[r]eliance upon the agent’s integrity, fidelity and capacity is the moving consideration in the creation of all agencies . . . .”<sup>32</sup> Of course, agents with power to bind their principals to transactions appear to satisfy—at least most of the time—the conventional requisite for fiduciary status. This is because such an agent possesses discretionary authority either through the control of the principal’s property<sup>33</sup> or power over the principal’s affairs,<sup>34</sup> and thus the power<sup>35</sup> “to change the principal’s legal or practical position.”<sup>36</sup>

But given the range of agency relationships, the issue is not so simple. In particular, what does “discretion” require? Suppose the principal confers authority on the agent in terms that leave the agent no choice about what to do, for example, through precise specifics about the terms of the transaction the principal desires. Does the agent possess “discretion” as required by dominant academic accounts of fiduciary law? Although the principal has not authorized the agent to make any choice on the principal’s behalf, what the agent does, in compliance with the principal’s instructions, will affect the principal’s legal relations by binding the principal to a transaction with a third party.

Why might it matter whether the agent is a fiduciary? The agent might perfectly execute the principal’s instructions but additionally (and without the principal’s consent) self-deal or otherwise obtain personal benefit in connection with the transaction, perhaps by front-running the transaction executed for the principal with a transaction on the agent’s own behalf.<sup>37</sup> Or the agent might fail to inform the principal that the third party is willing to deal on more advantageous terms, induced to silence

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L. INST. 2006) (“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.”).

32. 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 454, at 300 (1889).

33. Laby, *supra* note 4, at 979.

34. *Id.*

35. In the agency context, “power” is preferable to “authority” because it encompasses an agent who commits the principal to a third party via apparent authority, not actual authority. As between principal and agent, an act that binds the principal to a third party via only apparent authority constitutes a straightforward breach of the agent’s duty to act only within the scope of actual authority. RESTATEMENT (THIRD) OF AGENCY § 8.09(1) (AM. L. INST. 2006). The agent has a duty to indemnify the principal against any loss suffered by the principal as a consequence. *Id.* cmt. b.

36. Laby, *supra* note 4, at 979–80.

37. *See, e.g.,* Brandeis Brokers Ltd. v. Black, [2001] 2 Lloyd’s Rep. 359 (QB) (Eng.) (treating front-running as a breach of fiduciary obligation; broker in metals futures front-ran clients’ orders, then later allocated purchase to itself or to client at its election with knowledge of subsequent movements in market).

by payment from the third party.<sup>38</sup> The agent's duty to account for the benefits obtained through side dealings or other departures from loyalty stem from the agent's fiduciary status and the distinctive remedies associated with breach; it's no defense to the agent that the transaction conducted on the principal's behalf complied with the principal's instructions.<sup>39</sup>

Long-settled agency law treats these examples (and many others) as easy examples of an agent's breach of the fiduciary duty of loyalty. This disjunction between decisional law and theory requires rethinking what "discretion" means in this context. Perhaps discretion requires not that an agent be empowered to choose among transactional alternatives on the principal's behalf but only—and consistently with a dictionary definition of 'discretion'—that the agent have "the freedom to decide on a course of action."<sup>40</sup> The agent possessed "agency" as a person with capacity to assert control over the agent's own decisions,<sup>41</sup> or freedom to decide what to do, albeit disloyally to the principal. Acting as an extension of the principal's legal personality,<sup>42</sup> the agent should act consistently with a reasonable belief of what the principal wishes for the agent to do, which would not be true of disloyal conduct. The consequences for the principal of consenting to a legally-consequential extension of the principal's personality—including imputed knowledge of facts known to the agent and material to the agency relationship—justifies treating an agent as a fiduciary, distinct from questions about the agent's possession of discretion.

Moreover, the definitional requisites for any agency relationship fit uneasily into conventional accounts of fiduciary relationships because, however defined, an agent's discretion co-exists with and may be overshadowed by the principal's power to control the agent. As Samuel Bray writes of agency relationships, throughout their duration "the principal tends to be present, uncowed, and able to assert control."<sup>43</sup> The implications of this structural property may conflict with positing that an agent has meaningful discretion, overshadowed as its exercise would always be by the principal's ongoing capacity to exercise control. Relatedly, in common-law agency doctrine, when a principal loses legal capacity to do an act, the agent loses actual authority to do the act, underscoring how central the principal's capacity for control is to the

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38. See RESTATEMENT (THIRD) OF AGENCY § 8.01, illus. 3 (AM. L. INST. 2006).

39. *Id.* § 8.01, cmt. b.

40. CONCISE OXFORD ENGLISH DICTIONARY 410 (11th ed. 2008) (defining 'discretion' as "1. the quality of being discreet. 2. the freedom to decide on a course of action").

41. RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. b (AM. L. INST. 2006) (discussing varied meanings of 'agency' in the law, philosophical and literary studies, and economics).

42. DeMott, *Fiduciary Principles in Agency Law*, in FIDUCIARY LAW HANDBOOK, *supra* note 2, at 24.

43. Bray, *supra* note 2, at 461.

ongoing existence of an agency relationship.<sup>44</sup> Of course, although a principal has an ongoing capacity to control an agent, including the power to give interim instructions to the agent, slippage occurs. Put differently, possessing the capacity to control does not mean that control will be exercised, exercised perfectly, or exercised in time to prevent misconduct by the agent.

Professor Laby's fine article concludes with the observation that "the discretionary authority view of the fiduciary relationship . . . is not universally valid."<sup>45</sup> That view is inadequate to explain why many advisors who lack discretion over their clients' assets are appropriately treated as their advisees' fiduciaries. And the discretionary authority view carries potential to mislead courts away from focusing on signal aspects of an advisor's activity, including whether the advice-giving was primary to the advisor's role and whether the advisor held out or represented itself as a source of expert advice. This Response illustrates additional infirmities of the discretionary authority account as applied to common-law agents. Centering the requisites for a fiduciary relationship on the possession of discretionary authority can call into question whether agents are fiduciaries, notwithstanding agency's long (if distinctive) place in the fiduciary canon. This further discrepancy between academic theory and the law furnishes an additional reason to rethink the theory.

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44. RESTATEMENT (THIRD) OF AGENCY § 3.08(1) (AM. L. INST. 2006). In the Third Restatement, but not its predecessors, termination for this reason is effective only when the agent has notice of the principal's loss of capacity; the termination is effective as against a third party only when the third party has notice. *See id.* cmt. b (noting that most recent cases reject prior rule, which treated a principal's loss of capacity as an event that automatically terminated an agent's authority, regardless of whether an agent or a third party had notice).

45. Laby, *supra* note 4, at 1021.