SCHULICH SCHOOL OF LAW, DALHOUSIE UNIVERSITY

LAWS 2216
CURRENT ISSUES IN CORPORATE LAW: FIDUCIARY LAW

DR. LEONARD I. ROTMAN

SYLLABUS – WINTER TERM, 2019

Wednesdays 9:00 a.m. – 11:20 a.m.

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him.
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> -Fletcher Moulton LJ in *Re Coomber; Coomber v. Coomber*, [1911] 1 Ch 723 at 728-9.

> Our Supreme Court of Canada has led the way in the common law in extending fiduciary responsibilities and remedies but it has not provided as much guidance as it usually does in emerging areas of law. The law in this respect has been extended by our highest court not predictably or incrementally but in quantum leaps so that judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern. Many lawyers plead cases in the alternative not knowing where the line should be drawn.
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> - McEachern CJBC in *A (C) v Critchley* (1998), 166 DLR (4th) 475 at para 75 (BCCA).

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1. COURSE DESCRIPTION/PURPOSE

It is rather simple to describe a person, relationship, or obligation as fiduciary. Infusing that description with substance is a far more difficult task. Justice Felix Frankfurter recognized this difficulty in the U.S. Supreme Court's decision in *Securities & Exchange Commission v Chenery Corp.*, where he wrote:

> … [T]o say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

Understanding fiduciary law thus requires not only knowing what that law *is*, but also what it *is for*. While some other courses may provide a very limited glimpse of fiduciary law through a case or two, that glimpse is taught through the lens of an entirely different subject and is not provided with any context or

understanding of the complexity and importance of the fiduciary concept.

Fiduciary law is a rapidly expanding area of law that overlaps with a variety of other legal spheres. Although its application is quite complex, it may be described briefly as a manner of regulating certain socially and economically important forms of dependent and interdependent relationships in contemporary society.

Some of the most important relationships in contemporary society require individuals to place their trust and confidence in others, with the risk that that trust and confidence may be abused. Where the latter occurs, mere compensation may be insufficient to redress the wrong that occurred. More importantly, widespread inability to rely upon the good faith discharge of duties by others threatens cooperation and inhibits productivity and efficiency. Fiduciary law assists in protecting the reliance of individuals on the cooperative efforts of others without the need for monitoring. It imposes harsh duties on fiduciaries to act selflessly and provides a wide range of relief to wronged beneficiaries. Unlike ordinary heads of civil obligation like Contract law, Fiduciary law is designed to maintain social and economic integration on a more fundamental level. This is expressed through the foundational principles of fiduciary obligation.

While the description of certain persons as fiduciary is commonplace, knowledge of the implications of that description, both for those said to owe fiduciary duties as well as those affected by the decisions, actions, or inactions of the former, is insufficient.

As the most doctrinally pure expression of Equity, the fiduciary concept does not ascribe to hard and fast rules; it is governed, instead, by a series of principles that provide the parameters of the judicial discretion that lies at its foundation. While this discretion is often pointed to as a basis for describing the fiduciary concept as uncertain, it is consistent with the fiduciary concept's roots in broad, equitable notions of justice and conscience. Furthermore, this discretion is not unfettered, but is tempered by the presence of the fiduciary principles that provide the parameters of judicial discretion in the same way that equitable maxims historically reigned in the judicial exercise of discretion without having the safety of a binding system of precedent that governed the application of the common law.

While the lack of definition is not an insurmountable impediment to the use of the fiduciary concept, the ability to understand "fiduciary" as a broad, theoretical, or conceptual construct, which enables it to remain a workable and productive entity, does not lend itself to understanding in an "exact way." Such an "exactness of understanding" is antithetical to the innate and necessary abstraction of the fiduciary concept. This creates an inherent paradox that lies at the centre of fiduciary law.

The enigmatic character of the fiduciary concept is illustrated by some pervasive dichotomies. Fiduciary law is one of the most broadly-based areas of law, in terms of its application to disparate relationships and fact situations; judges and commentators, however, constantly warn us that it is being used too often and with regard to too many forms of interaction. The fiduciary concept enjoys widespread popular currency, but judges, practitioners and academics often decry the lack of any generally accepted definition of what a fiduciary relationship is. Certain relations have long been characterized as fiduciary, such as

trustee-beneficiary and guardian-ward, but such characterizations are not, themselves, conclusive indications of whether an individual relationship of that ilk is fiduciary. Finally, even where fiduciary duties are said to apply to a given relationship, they do not necessarily apply to all facets of that relationship. Remarkably, in spite of the confusion and contradiction surrounding it, the fiduciary concept has continued to appear frequently and prominently in pleadings, judgments, and academic writings.

One problem, however, is that that confusion has resulted in it appearing too frequently, or more frequently than is warranted. Indeed, one of the difficulties in fiduciary law is its overuse. Fiduciary law was never intended to apply to the garden variety of cases. Rather, it was established for use only where the laws of contract, tort and unjust enrichment were silent or deficient. Yet, even in those circumstances, it applies solely in regard to socially or economically important or necessary interactions of high trust and confidence creating implicit dependency and peculiar vulnerability. Fiduciary law is not a basis of liability one ought to go looking for upon initial observation, but only after determining that the other bases of civil obligation are somehow insufficient to address the nature of the concern arising out of the particular relationship in question.

Fiduciary law prescribes a particular manner of thinking about the social, economic, and legal worlds we occupy which then informs our legal decision making process. Fiduciary law is the most broadly-applicable avenue of civil obligation in existence, spanning the realm of contract, tort, and unjust enrichment, but also including the range of subjects that focus on the interpersonal affairs of individuals, like Family law, Labour law, Health law, and the like. Fiduciary jurisprudence is also one of the most complex and least understood areas of contemporary law. Jurisprudence and legal commentary indicate that both lawyers and judges misuse fiduciary principles for reasons inconsistent with fiduciary law's conceptual foundation. Although fiduciary law has experienced tremendous growth over the past few decades, its origins date back to the seminal case of *Keech v Sandford* in 1726. However, the indiscriminate and generally unexplained use of fiduciary law and fiduciary principles, particularly to justify results-oriented decision making, has created a confused and problematic jurisprudence. For this reason, as with Trusts, fiduciary law is one of those subjects that is extremely difficult to fully comprehend without having had the benefit of guidance from a person knowledgeable in the subject matter to teach its ins and outs.

The goal of the course is to clarify and contextualize the fiduciary concept by examining its ideological, historical, and jurisprudential foundations. This introductory examination provides all-important context for the subsequent discussion of existing fiduciary theories. Looking at these theories uncovers foundational fiduciary principles that will be developed into an operational vision of the fiduciary concept that accounts for the unique nature and function of the fiduciary concept vis-à-vis other bases of civil obligation. This operational vision, in turn, sets the stage for developing a functional approach to the fiduciary concept that provides the conceptual framework with enhanced shape and substance by providing students with knowledge of how to ascertain whether a breach of fiduciary duty exists, key factors that indicate relationship fiduciarity, and the process of attributing responsibility for the actual or potential harm or loss flowing from such a breach. The course then provides an understanding and analysis of the measures of relief available for breaches of fiduciary duty and the exemplary nature of fiduciary relief generally.

This course will provide the means for students to develop their understanding of the basic premises of the fiduciary concept as well as the policies that animate it. In particular, the course will examine the principles and guidelines that: (1) regulate the conduct of those persons (the fiduciaries) who are obliged to act in others' interests and; (2) safeguard the interests of those others whom fiduciaries are bound to serve (the beneficiaries of the relationship). We will examine a number of relationships that have been found to be fiduciary in nature, discuss why they ought, or ought not, be seen as fiduciary, and investigate what describing someone as a fiduciary entails. This will be accomplished by examining the various theories that animate fiduciary relations, the implications of describing relationships as fiduciary, and the means of relief available for breaches of fiduciary obligation.

The course has significant practical application, since it examines the requirements of proof for demonstrating the existence of fiduciary relations, equitable understandings of causation, remoteness, intervening act, etc., the principles and bases of equitable relief, and the range of equitable remedies for breaches of fiduciary duty, including constructive trusts, disgorgement, equitable compensation, etc.

The fiduciary concept is relevant to a number of courses and subjects offered in the law school, including: Aboriginal and Indigenous Law courses, Business Associations, Contracts, Ethics, Family Law, Health Law, Labour Law, Professional Responsibility Restitution/Remedies, Securities Regulation, Trusts, and Wills and Estates.

While the predominant focus of the course will be on Canadian materials, relevant cases and issues from other jurisdictions will also be covered. These issues will be uncovered through an examination of case law and class discussion. Specific issues to be examined are listed below under "Topics."

2. LEARNING OUTCOMES

This course will provide the means for students to develop their understanding of the basic premises of the fiduciary concept as well as the policies that animate it. In particular, the course will examine the principles and guidelines that: (1) regulate the conduct of those persons (called fiduciaries) who are obliged to act in others' interests and; (2) safeguard the interests of those others whom fiduciaries are bound to serve (the beneficiaries of the relationship).

The course will provide students with the tools to identify the various constituent elements that unite the theory of fiduciary obligations with its practical application. Students will learn how fiduciary law may properly facilitate situationally-appropriate justice in ways that the ordinary laws of civil obligation cannot. They will also learn that fiduciary law complements the laws of contract, tort, and unjust enrichment and is designed to augment those areas of law, not supplant them.

After taking this course, students will learn why certain individuals ought, or ought not, be regarded as fiduciary, and investigate what describing someone as a fiduciary entails, both for the individuals concerned, as well as for the relationships they participate in and societal interests more generally. Students will obtain a critical perspective on the purpose, theory, use, and effect of the fiduciary concept

in a wide variety of scenarios. The course will assist in the development of a fiduciary "instinct" that will provide students with the ability to assess fact situations for their fiduciary character, thereby providing them with the ability to take advantage of an additional measure of civil liability that supplements traditional methods of contract, tort, and unjust enrichment. Students will learn why the fiduciary concept came into existence and how it has grown in use over time. They will also understand the benefits and detriments associated with the fiduciary concept's use, including what it might provide to potential clients, how and when to appropriately include it in their pleadings, as well as important evidentiary and remedial issues pertaining to its use.

Students will learn that, despite its potential to apply to virtually any fact scenario, the fiduciary concept is to be implemented only where its application is warranted by the facts in question and in a manner consistent with fiduciary standards. More specifically, the fiduciary concept ought not be used as a substitute for reforming deficiencies in existing areas of law. Students will also learn that the uncertainty and confusion that the fiduciary concept has generated is not endemic to it, but ensues from ill-informed uses of fiduciary principles or the unquestioned adherence to precedent without truly considering the appropriateness of its application to the situation at hand.

In addition to understanding the fiduciary concept's historical and theoretical origins, students will learn about its practical implementation. Students will learn how fiduciary obligations and equitable remedies more generally affect laws of civil obligation. Students in the course will learn that fiduciary law, as an equitable cause of action, does not follow common law understandings of causation or remedy in assessing liability. They will also learn about distinctions in the nature of a plaintiff's burden of proof, the defenses available to putative fiduciaries, and the measures of relief available once a breach of fiduciary duty is found to exist. For this reason, students would benefit tremendously from learning about its application and how it can avoid many of the problems that arise in civil litigation from the discovery process up to the determination of proof of fiduciary duty at trial, what constitutes a breach of that duty, and the application of situationally-appropriate relief once a determination of breach has been made.

These very practical matters are not addressed in any other law school course, even where fiduciary obligations are expressly discussed. For this reason, the course will be of significant benefit to students in any jurisdiction where the fiduciary concept is used.

3. REQUIRED READINGS

Required course readings are found in the following materials:

Available in the Bookstore:

FL Leonard I. Rotman, *Fiduciary Law*, (Toronto: Thomson/Carswell, 2005).

Available on Brightspace:

CB Leonard I. Rotman, *Fiduciary Law Casebook*, Schulich School of Law.

Links for Downloading:

Galambos *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247.

Download at:
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7823/index.do?r=AAAAAQAIZ2FsYW1ib3B

Elder Soc. of Alta. *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261.

Download at:
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7938/index.do

Fiduciarity Leonard I. Rotman, "Understanding Fiduciary Duties and Relationship Fiduciarity" (2017) 62 McGill LJ 975-1042.

Download at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3078806

Holy Grail Leonard I. Rotman, "Fiduciary Law's 'Holy Grail': Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91 BU L Rev 921-71.

Download at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925138

Rotman Leonard I. Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016) 2 CJCCL 497-536.

Download at:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2819199

4. METHOD OF INSTRUCTION/CLASS PARTICIPATION

The course will be comprised of a combination of lectures, student presentations, practicums, and class discussion. I will generally lecture when introducing new material/concepts or at the beginning of new sections of the course. I hope to stimulate as much class discussion as possible by working with the materials and from the introductions I provide.

Students should focus both on the facts/issues in the readings and attempt to draw links or analogies between cases/issues to provide a greater context for understanding the development of applicable laws and policies. Although I generally do not direct specific questions at individuals, students should be sufficiently knowledgeable about the day's readings to follow, initiate and participate in class discussion.

As indicated in "Method of Evaluation," below, students will receive a participation grade in this class.

5. SUBMISSION OF MAJOR PAPERS AND ASSIGNMENTS

Major papers and assignments must be submitted in hard copy. Students should hand papers in to the place stipulated by the instructor and ensure they are date and time stamped. Please read the law school policy on late penalties:
https://www.dal.ca/faculty/law/current-students/jd-students/academic-regulations.html

Please note students may also be required to provide an identical electronic copy of their paper to the instructor by the due date. Papers may be submitted by the instructor to a text-matching software service to check for originality. Students wishing to choose an alternative method of checking the authenticity of their work must indicate to the instructor, by no later than the add/drop date of the course, which one of the following alternative methods they choose:

a) submit copies of multiple drafts demonstrating development of their work
b) submit copies of sources
c) submit an annotated bibliography

Students Requests for Accommodation:

Requests for special accommodation for reasons such as illness, injury or family emergency will require an application to the Law School Studies Committee. Such requests (for example, for assignment extensions) must be made to Associate Dean Michael Deturbide or the Director of Student Services as soon as possible, before a scheduled exam or a deadline for an assignment, and will generally require medical documentation. Retroactive accommodation will not be provided. Please note that individual professors cannot entertain accommodation requests.

Students may request accommodation for either classroom participation or the writing of tests and exams due to barriers related to disability, religious obligation, or any characteristic under the Nova Scotia *Human Rights Act*. Students who require such accommodation must make their request to the Advising and Access Services Center (AASC) at the outset of the regular academic year. Please visit www.dal.ca/access for more information and to obtain the Request for Accommodation – Form A. Students may also contact the Advising and Access Services Centre directly at 494-2836.

Plagiarism:

All students must read the University policies on plagiarism and academic honesty http://academicintegrity.dal.ca/ and the Law School policy on plagiarism http://www.dal.ca/faculty/law/current-students/jd-students/academic-regulations.html. Any paper or assignment submitted by a student at the Schulich School of Law may be checked for originality to confirm that the student has not plagiarized from other sources. Plagiarism is considered a serious academic offence which may lead to loss of credit, suspension or expulsion from the law school, or even revocation of a degree. It is essential that there be correct attribution of authorities from which facts and opinions have been derived. Prior to submitting any paper or other assignment, students should read and familiarize themselves with the policies referred to above and should consult with the instructor if they have any questions. **Ignorance of the policies on plagiarism will not excuse any violation of those policies**.

6. METHOD OF EVALUATION

The grading for this course will be comprised of 3 parts:

1. **Research paper: 70% of the course grade;**
2. **Paper Topic Presentations: 20% (10% each) of the course grade;**
3. **Class Participation: 10% of the course grade.**

Paper Topics: Research paper topics need not be restricted to issues covered in class, but obviously need to have a fiduciary law focus. They may look at single issues, comparative studies, or involve theoretical analyses. While not a course requirement, you may speak to me about your paper topic to ensure that it is feasible, there are adequate materials available, and that you have sufficient time to work on it. I am happy to assist you in selecting paper topics or to discuss your paper with you over the course of the term. I will read and comment on brief outlines, but not paper drafts, since that would restrict my ability to assist in the development of paper topics and to assist students in teasing out particular issues or obstacles with their paper topics should they arise. I am happy to work with students to help ascertain or refine paper topics.

Evaluation of Papers: Papers will be assessed on the basis of a variety of factors, including analysis, argument, organization, insight, comprehensiveness of research, the ability to combine case precedent and academic commentary with your own thoughts, the ability to provide an even-handed discussion of the topic, and persuasiveness.

Paper Length: The maximum length for the major paper will be 25 pages, not including cover page, bibliography and appendices. Papers are not to exceed this maximum length or be subject to penalty. Subject to this guideline, the length of the paper ought to reflect the space required to create a cogently-argued and well-written piece adequate to the topic chosen.

Due Date: **Fri., Dec. 12, 2019, at noon**. Late penalties will be assessed according to faculty policy on late submissions: https://www.dal.ca/faculty/law/current-students/jd-students/academic-regulations.html

Evaluation of Papers: Papers will be assessed on the basis of a variety of factors, including analysis, argument, organization, insight, comprehensiveness of research, the ability to combine case precedent and academic commentary with your own thoughts, the ability to provide an even-handed discussion of the topic, and persuasiveness.

Potential technical problems should be anticipated in advance by always backing up your work (i.e. having two copies), such as on a flash/thumb drive, and not waiting until the last minute to print your paper. The only guaranteed thing about technology is that it will fail and usually when you need it the most. Expect this and you will avoid problems that might adversely affect your grade in the course.

You must submit both a hard copy and electronic copy of your paper. Electronic copies are to be sent to me at lrotman@dal.ca. Hard copies are to be submitted to Julie Harnish at reception in the general office. She will give you a receipt and stamp the date and time on your papers. **Failure to provide BOTH a hard copy and electronic copy of your paper by the deadline entails that the paper is not properly submitted and late penalties may be imposed**.

Paper Requirements: All papers MUST include the following:

1. **a title page that includes your name, my name, and the name of the course;**
2. **a list of references (statutes and case law), and;**
3. **a bibliography [including all published and unpublished materials you refer to** (other than statutes and cases), **not just those cited in the footnotes – see "General rule of thumb for citations and references" below].**

Citations:

Papers are to use footnotes rather than endnotes. Footnotes must correspond to the McGill Style Guide. **All case law citations must be made to printed sources where these exist rather than their electronic equivalents**. Citations need not be to official reporters, but should be to major reporter series where possible (*i.e.* something in the library). Parallel citations are not required. **Pinpoint cites are required (where applicable), either to official paragraph numbers or page numbers in reported judgments**, but not to paragraphs or pages corresponding to electronic sources (since those may pertain only to those sources). **Articles must also be cited to page numbers in their printed sources rather than to the web, SSRN or any other electronic database**.

General rule of thumb for citations and references:

1. If you make specific reference to, or quote, a source (article, book, case, section(s) of a statute, etc.), it must be footnoted with a pinpoint citation (*i.e.* specific page, paragraph, or section

reference);

2. If you make a general reference to a source, it should be footnoted, but to the source generally and not to any specific page, paragraph, or section number contained within it;

3. If your idea was informed by a source, but not by any specific element of it, the citation method in #2, above, should be used;

4. If you have used and footnoted a source, it should also be included in either the list of references OR bibliography, depending upon the type of source it is (refer back to the descriptions, above);

5. If you have read or perused a source, but have not footnoted it because it did not fall within any of the above rules of thumb, it should nonetheless still be included in either the list of references OR bibliography, as appropriate, because it formed part of your research leading to the production of your paper.

6. If you are still unsure about what to do, please consult with me or a reference librarian.

Paper Topic Presentations: Students will do 2 presentations on their paper topics during the term.

1. **First Presentation**: This presentation is intended to be more general, approx. 10 minutes in length, and providing an outline and overview of your topic sufficient to inform the class about what your paper is about and may include, *inter alia*, your methodology, any working hypotheses, questions to be answered, theoretical analyses, etc.

For this presentation, each student is to print and distribute, or provide an electronic copy to me to post to the course Brightspace site, a brief, point-form handout, 1-2 pages in length, before or at the time they begin their presentations to the class.

2. **Second Presentation**: This presentation is more refined than your initial presentation, approx. 20 minutes in length, and providing more detail about methodology, establishing hypotheses, and answering questions posed, with more specific reference to sources relied upon (primary and/or secondary). It should demonstrate that you have been working through your paper topic and can demonstrate that you have learned more about fiduciary law generally, as well as its precise applicability to your topic.

For this presentation, each student is to print and distribute, or provide an electronic copy to me to post to the course Brightspace site, a brief, point-form handout, 3-4 pages in length, before or at the time they begin their presentations to the class. This handout shall include a working introduction, a skeletal outline of the sections of the paper, as illustrated by the creation of headings and subheadings, and

Precise dates for student presentations will be determined according to the number of students enrolled

in the class and the length of time necessary to hold all presentations. **What exists in the detailed course syllabus is subject to change once the class size is ascertained**.

Class Participation: The class participation grade assigned will account for regular attendance, discussion in class (assessed on the quality rather than quantity of participation), essay topic presentation and participation in practicums and other exercises.

7. HELPFUL INFORMATION ABOUT TERM PAPERS

A major research paper, such as the paper in this course, requires a considerable amount of work thinking, researching, thinking some more, drafting, editing, re-writing, more editing, and spell-checking. It is not something that can be done properly (or well) at the last moment. The final details (re-reading the paper, editing, and spell-checking) are just as important as the initial researching and writing. Bearing this in mind, please regard the final stages of paper polishing as being on par with the more substantive researching and writing of the paper. You do not want the quality of your work marred by careless mistakes.

A useful discussion of important considerations when writing a term paper follows:

WRITING RESEARCH PAPERS: 10 TOP TIPS

By Marshall B. Kapp
The Law Teacher (Fall, 1999)

Virtually all law students write at least one legal research paper during their law school career, besides composing the usual array of briefs, memos, and legal instruments. In the experience of grading hundreds of legal research papers, I have accumulated an assortment of pet peeves and compiled a list of tips that other law teachers may find useful to share with their students at the outset of the writing endeavor. Most of these suggestions fall in the category of common sense, which is precisely why they need to be set forth explicitly. Here, I present my "top ten" list.

1. Analyze and synthesize; don't just paraphrase.

Don't thankfully latch onto one article directly on your topic, wish that you had written that very article, and then spend 25 pages just paraphrasing it, even with proper attribution (i.e., many footnotes, but most of them being id's). In real legal practice, you will rarely be lucky enough to find one unassailable authority that conclusively and unarguably resolves your issue. If you can find incontrovertible authority on "all fours" with your case, by all means rely on it. Most of the time, however, the law has to progress by analysis that synthesizes, mainly through analogy and distinction, different pieces of a puzzle. Research papers should reflect that complex process.

2. Avoid sweeping generalizations unless you can back them up with authority.

Legal writing involves argument and persuasion based on a reasoning process beginning with supportable premises, not the mere assertion of a proposition. Statements such as "Congress should repeal the ERISA preemption because all HMO executives care only about the bottom line" may be a hit on the political campaign trail but detract markedly from credibility in legal writing, unless supporting sources can be cited.

3. Avoid the "obvious."

Unless you are making a really unassailable proposition, such as "The earth revolves around the sun," using terms such as "obviously," "clearly," "of course," "unarguable," "simply," "certainly," and "well known" raise enormous red flags for the reader.

If you have authority for a proposition, cite it. If you don't have any authority, perhaps the proposition is not as "obvious" as you thought. Besides, if your point is really that "obvious" to everyone, why waste time and space restating it? And, how can you be so sure that another lawyer won't come along and disagree with the proposition that you thought was so "clear"?

4. Name one.

Similarly, terms such as "any," "several," "numerous," "some," and "widely held" raise flags unless there is citation to examples. Think about how you would respond to a reader who sees such a term used, questions your accuracy, and demands, "Name one!" If you cannot, your bluff has been successfully called.

5. Don't apologize for your positions.

You rarely need to preface your statements with introductory quasi-apologies or such equivocations as "In my opinion," "I think," "I believe," or "I feel." First, the reader of legal writing really doesn't care what the author "thinks," "believes," or "feels." In this genre, the only things that matter are what you can prove or logically support through reasoned analysis and argument.

Second, the reader automatically assumes that any proposition for which you do not cite authority must be your own opinion, so there is no need for the reminder. Just make your points and let them be evaluated for what they're worth.

6. Any particular law in mind?

Avoid making broad statements such as "doing X is illegal" unless you can explain which specific statute, regulation, or common law rule is being violated, and why. Be especially cautious about making the claim that "doing X is unconstitutional" unless you can back up that claim with one or more constitutional clause(s).

7. Cite primary sources.

In a legitimate legal discussion, even the least strict constructionists at least begin by examining and citing the relevant law itself. Constitutional clauses, statutes, regulations, and judicial decisions are the primary building blocks of legal analysis; everything else is, literally, commentary. You can't write a good legal research paper based solely on citations to secondary sources such as law review articles and textbooks. You have to begin with the actual law. Then, you can argue about interpretation. Legal readers, in the first instance, want to know what the law itself says, rather than what some law professor has to say.

8. No gratuitous comments.

Legal writing is not the place for gratuitous comments (e.g., "We should not forget that..." or "Unfortunately, the court disagreed...") or throwaway lines. Words are the attorney's only tool, so law students must learn to write as though every statement counts. In the same vein, use of rhetorical questions (e.g., "Why, you might ask ...") should be minimized in legal writing, in favor of declarative statements. The reader wants to know your position on the issues, and providing your position as an answer to a rhetorical question may strike many readers as a bit condescending or patronizing.

9. Keep the tone serious.

Legal writing does not have to be somber and boring. Indeed, it ought to be creative and interesting. Creativity and provocation must take place, however, within a serious tone. Certain techniques that may fit well into certain other forms of writing (e.g., humor, rhetorical questions, a "whiz bang!!" feel) detract from the purpose of a legal research paper, which is to persuade the reader to agree with – and ultimately to act upon – your argument. The worst criticism that can be leveled against an attorney is "He/she is dishonest," but the next most devastating is "He/she's a joke." An attorney is of little value to the client if others won't take the attorney seriously, and law students should learn how to begin to earn that respect through their writing style.

10. Proofread.

In Evidence and elsewhere in the curriculum, law students learn about presumptions and burdens of proof. When it comes to evaluating a law student's – and eventually a practicing attorney's – writing and the arguments being made in that writing, most readers start with a presumption that sloppy writing (e.g., misspellings, erroneous punctuation, noun-pronoun disagreement, grammatical mistakes) connotes sloppy thinking. Too many mechanical errors in a text can be so distracting that they obscure almost totally the argument the writer is trying to make. In today's word-processing age, there is no excuse for turning in a paper that has not been thoroughly reviewed. The student can catch up on sleep after the paper has been submitted.

ABOUT THE AUTHOR:
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8. OFFICE HOURS AND COMMUNICATION

My office is located in Room W425 of the law school (overlooking the front of the building). My office phone number is (902) 494-4293.

I will maintain regular office hours this term on Tuesdays from 11:00 a.m. – noon. I am also available to meet you at other times, either by appointment or by chance. Please feel free to drop by my office, discuss matters after class, or arrange for us to meet at a mutually convenient time. You may also feel free to send me questions by e-mail at lrotman@dal.ca.

If you have specific questions that you would like answered in person, please email me the question ahead of time, if possible, so that I may provide a more fulsome answer that we may discuss when we meet. Alternatively, I can send you my response by email and, once you look it over, decide whether you wish to schedule an in-person follow-up meeting.

9. E-MAIL COMMUNICATION

Please ensure that all e-mail communication emanates from your Dalhousie e-mail address. This will reduce the chance of transmitting computer viruses or malware and avoid me mistaking your message as spam and deleting it. **To assist with the latter, please indicate on the "RE: " line of your message that you are in my Fiduciary Law class** to avoid having me accidentally delete your message, such as "Re: Question from Fiduciary Law Student S.C. Hulich."