The Faces of Loyalty: A Comment on Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*

Deborah A. DeMott*

As Professor Hillman's paper observes, while the centrality of fiduciary obligation is unquestioned in disputes between partnerships and their erstwhile partners, the content of the obligation is variable and open to question.[1] Moreover, the rhetoric in which the obligation is conventionally stated appears to be in tension with the conduct permitted in some of the cases. Although the rhetoric of fiduciary obligation abhors the pursuit of private advantage, the cases often allow defecting partners to thrive at the expense of their former firm.

One explanation for the elusive quality of fiduciary obligation is that its imposition serves a number of distinct functions justified by different rationales, which make the results variable with context. Agents, trustees, and employees are fiduciaries, as are officers and directors of corporations, controlling shareholders, and investment advisors. The specific content of the duty applicable to each category or role varies, however, as does the justification for imposing the duty.

In this paper, I explore various traits in the partnership relationship that attract the imposition of fiduciary obligation. My thesis is that many of the puzzling features in the cases dealing with defecting partners can be explained by the unusual posture of partners as compared to other fiduciaries. A partner in a law firm occupies a position that triggers the imposition of fiduciary obligation on at least two, and maybe as many as four, distinct bases. When the question is the propriety of the partner's tactics in leaving the firm, these distinct rationales for fiduciary obligation vary in the force with which they

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* Professor of Law, Duke University School of Law.

1. *See generally* Robert W. Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 997 (1998).

apply and in the specific duties that they impose. Additionally, the rationales differ in the significance given to the partner's notification of an intended withdrawal, while the actual role that the partner played within the firm is relevant in some instances but not in others. Like Professor Hillman, I characterize members of a law firm as "partners" regardless of the formal associational form chosen by the firm.[2]

As an initial matter, consider the distinct bases on which law firm partners are treated as fiduciaries. Each basis appears straightforward at first, but on reflection, the bases become more complicated. First, as a member of the firm, a general partner is an agent and thus has authority to bind the firm as to conduct that appears to carry on partnership business in the usual way.[3] Moreover, as the firm's agent, the partner may have apparent authority to act, even when the partner does not appear to be carrying on the partnership's existing business in the usual way.[4] The fact that a law firm partner is the firm's agent makes the firm responsible for the partner's interactions with third parties – in particular, clients – so long as the partner's acts appear to be tied to the firm's usual business, tied to its law practice, or otherwise authorized. Wearing its agency face, fiduciary obligation requires the agent to obey the principal's instructions, to use care, to be loyal to the principal, and to use authority only to serve the principal's interests known to the agent. Complications stem from the fact that a lawyer is also an agent of the lawyer's clients and owes fiduciary duties to them as well as to the firm. The lawyer is thus a dual fiduciary with principals whose interests generally converge, but may on occasion diverge.[5]

Second, distinct from the consequences of the partner's representative position in interactions with third parties, a partner in a law firm has access to and effective control over other people's property. In the withdrawal context, disputes focus on the departing partner's use of tangible assets that belong to the firm as well as information about the firm, about its operations, and about its clients. Fiduciary obligation unsurprisingly prohibits theft and the unconsented-to use of others' property entrusted to the fiduciary and requires the fiduciary to account for and to disgorge the fruits of unconsented-

2. *See id.* at 1001 (discussing use of term "partner").

3. UNIF. PARTNERSHIP ACT (1914) § 9(1) [hereinafter UPA]; REVISED UNIF. PARTNERSHIP ACT (1994) § 301(1) [hereinafter RUPA].

4. *See, e.g.*, Kansallis Fin. Ltd. v. Fern, 659 N.E.2d 731, 735 (Mass. 1996) (stating that partnership may be vicariously liable for partner's act that expanded scope of partnership business when partner's act "is within the generic description of the type of partnership involved").

5. *See generally* Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301 (1998) (providing further elaboration on convergence and divergence of lawyer's dual fiduciary duty to clients and to firm).

to use. The characterization of the lawyer's and the firm's ongoing relationships with clients presents a major complication. Such relationships, like the clients involved, are of value but are not "property" as the law conventionally defines the term.

Third, a partner's exercise of governance rights within the firm places the partner in the position of participating in collective decision-making with consequences for other partners. Here, the force of the fiduciary constraint becomes less clear. Unlike a director of a corporation, a partner does not participate in firm decision-making and thus does not vote on partnership matters as an elected or appointed representative of others. The general partnership form does not differentiate between the role of equity ownership and the role of firm governance as does the corporate form.[6] Moreover, a partner's exercise of voting and other governance rights in a general partnership is not fully comparable to the management position that a general partner occupies within a limited partnership.[7] Corporate law is clear that a director's duty is to exercise care and to act in a manner reasonably believed to serve the corporation's best interests.[8] Professor Hillman's paper illustrates that such duties might apply as well, in modified form, to partners in a general partnership when they assume formal management or governance roles.[9] In any event, the partnership structure complicates matters because the defecting partner is the beneficiary of fiduciary obligation owed to the partner by fellow partners.

Fourth, a partner in a law firm may be the recipient of the trust and confidence of other partners. Other partners may look to the partner for advice, may be candid in sharing information with the partner, and, in general, may believe that they need not be guarded in their dealings with the partner. The degree to which fellow partners repose special trust and confidence in each other is highly variable, no doubt even within the same firm. Fiduciary obligation prohibits the recipient of special trust and confidence from abusing the relationship to the fiduciary's advantage or to the detriment of the person reposing that trust. Although courts recognize that relationships of special trust and confidence warrant the imposition of fiduciary obligation, the burden

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6. *See* Deborah A. DeMott, *Agency and the Unincorporated Firm: Reflections on Design on the Same Plane of Interest*, 54 WASH. & LEE L. REV. 595, 595-96 (1997) (noting lack of differentiation among roles in unincorporated firms).

7. In a limited partnership, only the general partner, as such, is an agent of the firm. *See* REVISED UNIF. LIMITED PARTNERSHIP ACT (1976) §§ 303, 403 [hereinafter RULPA] (stating that limited partners are not liable to third parties unless they are also general partners and that general partners are liable to third parties and other partners).

8. *See, e.g.*, MODEL BUS. CORP. ACT § 8.30 (1984) (amended 1997) (setting forth standards for directors' behavior).

9. *See generally* Hillman, *supra* note 1.

is on the beneficiary to show that such a relationship existed, and the content of the required showing varies among jurisdictions.[10]

Three hypotheticals, based on the analysis in Professor Hillman's paper, illustrate divergences among these bases for treating partners as fiduciaries. First, consider the consequences of the proposition that a partner is an agent of the firm.

> *Hypothetical 1.* Amy is a senior partner in a large firm that primarily does transactional and litigation work for business clients. Amy has been successful in developing, pretty much from scratch, a practice representing venture capital firms. Over Amy's vocal opposition, the firm's management committee adopts a policy requiring partners, "whenever feasible," to associate junior partners in the firm in their work on behalf of clients. Separately, the firm has long required a partner, prior to undertaking the representation of a new client, to circulate a memorandum to the firm's New Matters Committee, which determines whether to accept the representation. Amy violates both firm policies categorically by declining to associate junior partners in her work and by undertaking new client matters without prior consent from the New Matters Committee. Amy subsequently announces her intention to leave the firm and to establish her own practice. Thereafter, she continues to violate both policies.

Regardless of her motivation, Amy's conduct appears to contravene her duties as an agent to obey her principal's instructions, in this instance those of the law firm. Amy's disregard of the firm's policy regarding new matters is especially troublesome because it places the firm at risk of conflict if the interests of a client with a new matter accepted by Amy are adverse to the interests of any of the firm's existing clients. The firm may choose to expel Amy for her disregard of this policy, especially if her disregard is deliberate and recurrent.

The firm's ability to terminate its agency relationship with Amy illustrates a fundamental point about the operation of agency doctrine. The common law of agency presupposes the existence of a principal who is competent and is able to assess the agent's performance in relation to the principal's interests. Built into the agency relationship is the principal's fundamental ability to take self-protective actions by giving interim instructions to the

10. *Compare, e.g.*, Rajala v. Allied Corp., 919 F.2d 610, 614 (10th Cir. 1990) (applying Kansas law and stating that imposition of fiduciary obligation requires clear and convincing evidence establishing "conscious assumption" of duty to act for another's benefit) *with* Curl v. Key, 316 S.E.2d 272, 275 (N.C. 1984) (stating that fiduciary relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith").

agent and by determining to terminate the agent. The question raised by Professor Vestal's paper about the extent of a partnership's right to terminate a partner is beyond the scope of this paper,[11] but it is worth noting that a principal in an agency relationship always has the power to terminate the agent's authority.[12] The principal's exercise of the power may breach an express or implied contract with the agent[13] or, under extreme circumstances in many jurisdictions, constitute a tort.[14]

Amy's disregard of the firm policy to acquaint her clients with junior partners presents different issues. If Amy is planning to leave the firm or is considering doing so without having formed an intention to leave, it is not surprising that she would want to restrict access to her clients. Amy's duty as an agent, however, endures as long as she is an agent of the firm; announcing that she plans to leave does not privilege her to disregard the firm's rules.

The fiduciary character of an agent's position furnishes the agent with a benchmark for interpreting the principal's instructions that functions as an integral element in the principal's ability to exercise control over the agent. The agent's duty is to interpret instructions that are incomplete, ambiguous, or otherwise open to question in a manner that is reasonable and that serves the principal's interests known to the agent. It will often be reasonable for the agent to seek the principal's clarification when the import of the principal's instruction is not clear. Due to the fiduciary benchmark, the principal need not draft fully contingent statements of instructions to the agent or bear the risk that the agent will exploit gaps or loosely drawn instructions to serve the agent's interests rather than those of the principal. In this light, recall how the firm has stated its antihoarding directive. Amy's fiduciary duty as an agent obligates her to interpret the policy in light of the firm's interests known to her.[15] Amy might, for example, wish to interpret "wherever feasible" to mean "whenever attractive to me," that is, never. But such an interpretation would conflict with her fiduciary duty as an agent unless Amy has a reason-

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11. *See generally* Allan W. Vestal, *Law Partner Expulsions*, 55 WASH. & LEE L. REV. 1083 (1998).

12. *See* RESTATEMENT (SECOND) OF AGENCY § 118 (1957) (allowing termination of agent's authority upon manifestation by principal).

13. *See, e.g.*, Wieder v. Skala, 609 N.E.2d 105, 110 (N.Y. 1992) (concluding that law firm's firing of associate raised valid claim of breach of contract when firing was precipitated by associate's compliance with ethical obligation).

14. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 378-79 (Cal. 1988) (noting that termination of employee under circumstances that contravene public policy supports tort claim).

15. *See* RESTATEMENT (SECOND) OF AGENCY, *supra* note 12, § 33 (providing that interpretation of agency agreement shall proceed according to contract law, including consideration of purposes of parties as known to each other).

able basis for believing that the firm wishes her to interpret the policy in that manner.

A complicating factor is Amy's position as the agent of her clients who owes fiduciary duties to them as well as to the firm. It is reasonable for Amy to take the clients' interests into account in interpreting the firm's directives. Indeed, the primacy of Amy's professional and fiduciary duties to her clients requires her to accord priority to their interests. Amy might be justified in believing that a mandate from the firm to associate other lawyers in her work would compromise the quality of legal service that the clients receive. Although Amy is a dual agent who owes fiduciary duties to the firm as well as to her clients, the clients' interests trump those of the firm in the event of conflict. Certainly, Amy's perception of her clients' interests in relation to those of the firm may well be influenced by her own interest, making Amy a potentially problematic voice for her clients in this context. A final complication stems from the fact that Amy's clients are clients of the firm as well.[16] The firm's claims against Amy do not privilege it to disregard or compromise the clients' interests. The firm's fiduciary responsibility toward its clients, even toward those who choose to follow Amy to her new firm, calls into question the propriety of aggressive measures that may preclude clients from exercising their right to choose counsel.[17]

Next, consider the consequences of the partner's access to and control over the firm's property.

> *Hypothetical 2.* Bruce is a junior partner in a medium-sized law firm that does only intellectual property work. Bruce plans to establish a small firm with two law school classmates. As the partnership agreement requires, Bruce announces his intention to withdraw from the firm to his partners thirty days in advance of his planned departure date. At night and on weekends, Bruce secretly uses computer equipment on the premises of his current firm to prepare solicitation materials to send to

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16. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 26 cmt. h (Proposed Final Draft No. 1, 1996) (stating that when client retains lawyer in firm, firm assumes responsibility for that client).

17. Accordingly, like Professor Hillman, I am skeptical of the legitimacy of a broad retaining lien. *See* Hillman, *supra* note 1, at 1029 (discussing retaining liens). I disagree with Mr. Corwin who notes that because client files are firm property, the firm has the right to retain them in the absence of a clear directive from the client to the contrary. *See* Leslie D. Corwin, *Response to* Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms, 55 WASH. & LEE L. REV. 1055, 1069 (1998). The firm would, as a fiduciary, be subject to the same benchmark regarding the interpretation of a principal's instructions that is applicable to an individual agent like Amy. The client should not bear the risk if instructions have been stated with less than perfect clarity when its agent, the law firm, reasonably knows or should know what the client wishes the firm to do.

clients and to establish accounting and information management systems for his new firm. The law firm has not used this equipment for some time, having replaced it with new equipment. Bruce decided to use the firm's equipment after investigating the cost of leasing or purchasing comparable equipment for his new firm.

The fact that Bruce has announced his planned departure does not privilege him to use the firm's property without consent. As a member of the partnership, Bruce certainly has an interest in firm property, but his individual ownership interest as a partner does not give him a right to use firm property that is superior to the right of any of his fellow partners.[18] Bruce's duty is to account for the value he received through the unconsented-to use of firm property, perhaps measured by the cost Bruce would otherwise have incurred to obtain comparable computer services.[19] The fact that the partnership was not using the equipment and would likely not be able to show any loss as a result of Bruce's usage is beside the point. The firm may or may not object strenuously to Bruce's usage when it comes to light. The firm is likely to object very strongly, however, if Bruce copies and removes software that the firm has had custom-designed at great cost.

What is intriguing in this scenario is that, as Professor Hillman's paper illustrates, different principles would apply to Bruce's improper solicitation of clients.[20] Suppose Bruce, having used the firm's computer equipment to generate solicitation materials, sends the materials to the firm's clients prior to announcing his plan to withdraw. Professor Hillman argues that improper solicitation, which is a breach of fiduciary obligation, is actionable only in a tort-dominated framework in which demonstrable harm flowing from the breach of duty is an element of the cause of action.[21] This view contrasts with the structure of non-tort-based litigation involving alleged breaches of fiduciary duty in which the beneficiary of the duty does not bear the burden of demonstrating harm as an element of the cause of action.[22] It is, of course,

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18. RUPA clarifies what had been a disputed point. *Compare* RUPA (1994) § 203 (stating that property acquired by partnership is not property of partners individually) *with* UPA (1914) § 25 (stating that partner is co-owner of partnership property). *Cf.* People v. Zinke, 555 N.E.2d 263, 267 (N.Y. 1990) (finding that general partner in limited partnership did not commit larceny by misappropriating partnership funds).

19. *See* UPA § 21(1) (requiring partners to account to partnership for any benefits received from it).

20. *See* Hillman, *supra* note 1, at 1016-19 (discussing causation of loss as element of claim for improper solicitation).

21. *See id.* at 1016-17 (discussing tort cause of action for breach of fiduciary duty).

22. *See, e.g.*, Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994) (finding that absence of damage to beneficiary does not bar claim that fiduciary acted disloyally); Thorpe v. CERBCO, Inc., 676 A.2d 436, 445 (Del. 1996) (same).

necessary that the court have a basis upon which to award a remedy. Remedies in fiduciary litigation, however, are often restitutionary in nature and are based on the gain realized by the fiduciary.[23]

Bruce's liability for this breach of fiduciary obligation is much less certain than is his liability for his unconsented-to use of the firm's property, even though the burden is on Bruce to disprove causation and even though Bruce may be vulnerable to professional disciplinary action in the absence of demonstrated harm to the firm flowing from the improper solicitation.[24] In both instances, however, Bruce's position in the firm provides the reason that his conduct is problematic. The firm linked him with clients, just as it gave him access to the computer system. A basic difference is that the firm's clients are not its property, although information about the clients could be treated as a form of property, and access to the clients may initially come to the lawyer through the firm itself. Even a client who comes to the firm through a connection to an individual partner receives legal services under the firm's auspices rather than those of the partner. The clients nonetheless are not under the firm's control to the degree that conventional notions of property require; the clients are always free to leave and to choose new counsel, including representation by a withdrawing partner.

In many respects, moreover, the underlying norms applicable to competition differ from those applicable to the unconsented-to use of another's property. Although a variety of legal rules provide categorical protection against private takings of another person's property, protection to a comparable degree is not available against competition. Competition enjoys a much wider social approval than does theft. Even freely-made agreements not to compete confront obstacles to enforcement. For example, courts do not enforce lawyers' agreements not to compete, and such agreements contravene professional standards applicable to the legal profession because they impede the client's ability freely to choose counsel.[25]

This underlying difference between competition and unconsented-to use is also manifest in the effect given to a partner's notification that the partner plans to depart. As analyzed in Professor Hillman's paper, *Meehan v. Shaughnessy*[26] treats notification as a fair warning to the firm that the soon-to-depart partner will likely solicit clients, a competitive behavior to which the firm may respond with its own counter-solicitation.[27] It would, in contrast, not be rea-

23. *See, e.g.*, *Thorpe*, 676 A.2d at 445 (awarding damages to corporation from fiduciary based on advantage that fiduciary received).

24. *See* Hillman, *supra* note 1, at 1018-19 (discussing causation requirements and possible disciplinary action even in absence of demonstrable harm).

25. *See* Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989).

26. 535 N.E.2d 1255 (Mass. 1989).

27. Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264-65 (Mass. 1989).

sonable in the hypothetical to treat Bruce's notification of his planned departure as encompassing a proposal to use the firm's property unless it objects affirmatively.

Finally, consider the consequences of a partner's participation in firm governance in a setting in which fellow partners have reposed trust in the partner.

> *Hypothetical 3.* Charles is a corporate finance partner in a medium-sized business firm. Charles has been with the firm for thirty years, after having joined it as an associate upon his graduation from law school. Several of his fellow partners regularly seek his advice on personal investment decisions. Charles has played a major role on the firm's management committee for the last five years; among other things, he structured the complicated ownership and borrowing structures that enabled the firm to buy the building that houses its office. All members of the management committee determined in January that the firm was too small to thrive in an increasingly competitive market and that a merger with a compatible firm was the best solution. Charles was a member of the team that investigated possible merger partners and that, in April, negotiated the terms of a merger with another medium-sized firm. It became evident in the negotiations that the merger partner was delighted by the prospect of an expanded practice that included the corporate finance specialty work done by Charles and his group in the firm. Two weeks after the firm announced the merger, Charles announced that he would be leaving to join a very large firm that wished to expand into his finance specialty.

The hypothetical does not presuppose that Charles has improperly solicited clients or his colleagues at the old, and now merged, firm to join him at the new firm. Additionally, Charles has not engaged in unconsented-to use of the old firm's property and has not contravened the firm's policies and directives applicable to the conduct of his practice. My guess, however, is that if we could measure the outrage of Charles's soon-to-be former partners, it might well exceed that of Bruce's or Amy's partners. Moreover, regret at the loss of Charles's practice is likely to be transformed into an acute sense of betrayal because of the fact that Charles actively participated in firm governance and ushered in a merger that presupposed, to some degree, his continued membership in the firm.

This hypothetical diverges from the others in a more basic manner as well. A well-drafted partnership agreement might easily address much of Amy's and Bruce's conduct. In contrast, the consequences of Charles's active participation in firm governance and of his fellow partners' trust in him are difficult to capture and to address in the firm's partnership agreement. In

Charles's situation, legal consequences turn on matters of degree and nuance arising from the partners' ongoing relationship, one facilitated no doubt by the partnership agreement but not fully specified by it.

Professor Hillman's paper argues that a partner who is seriously contemplating withdrawal should inform other partners "when the firm is making a material decision or commitment of resources in reliance on the partner's continued membership in the firm."[28] The partner is especially likely to have a duty of disclosure "when the partner actively participates in the planning" that is premised on the partner's continuing membership.[29]

Charles might respond that he was free to withdraw from the firm at any time, that he did not make affirmative representations about his present intentions, and that he did not affirmatively induce his firm to commit additional resources to his practice. He did not, that is, urge the firm to increase the staffing or the technological support available to him. Charles might also argue that the law firm's decision to merge was not made "in reliance" on his continued membership. His practice was attractive to his former firm, as well as to the merger partner, but Charles is likely to argue that the merged firm should bear the burden of establishing reliance, which allows Charles to take comfort in the fact that many factors, none individually dispositive, may have made the merger partners attractive to each other. Charles would also argue that the merged firm should bear the burden on reliance because such reliance is an element of the cause of action for breach of fiduciary duty. In the absence of reliance on his continued membership, Charles would not have breached his duty. After all, Charles might argue that the merger partner could have asked him whether he planned to leave or was currently considering leaving, and its failure to do so is relevant to whether the merger partners relied on his continued membership. On matters such as leases and equipment financing, the partners could have asked Charles to commit himself individually by contract. It may be that such inquiries and requests were not made of Charles because his fellow partners trusted him, believing that pointed inquiries and demands would belie the texture of the partners' relationship and coarsen it.

The merger negotiations may have cast a new light for Charles on his relationship with the firm. Until the negotiations explicitly or implicitly quantified the value of individual partners' practices, Charles may never have considered with such intensity just how valuable his practice might be to another law firm. Charles may also have initially participated in the negotiations with enthusiasm and then developed doubts, but resolved to keep them to himself. Perhaps Charles thought to himself, "I'm not sure that I'll like the

28. Hillman, *supra* note 1, at 1007.

29. *Id.* at 1007 n.34.

culture of this new firm, especially now that I've seen these folks up close and personal. I'll give it six months, and if I'm not happy, I'm out of here." Charles is, in Professor Hillman's terminology, "seriously contemplating withdrawal," but subject to a major, albeit subjectively determined, contingency.[30]

In this scenario, in contrast with the others surveyed in this paper, the operation of fiduciary obligation is especially sensitive to context. Evidence of the texture of the partners' relationships with each other may establish that Charles's fellow partners did not see him as their representative, but as the representative only of his own interests and perhaps of those of his practice group. Relatedly, if no one trusted Charles, he had no one to betray.[31] In such a partnership, partners' observed behavior would belie the grand rhetoric of fiduciary obligation, which would not serve as a useful guide to protecting one's own interests as a partner. Although fiduciary rhetoric may support and reinforce patterns of trusting and trustworthy behavior, it cannot create them.

Even if his fellow partners demonstrably did not trust him, in the hypothetical Charles assumed a formally representative role on the firm's management committee and in the merger negotiations. Charles would argue that a partner, like a shareholder, is privileged to vote and to otherwise exercise the partner's rights in an entirely self-interested manner. His former partners would characterize Charles's role in more expansive terms while conceding, however, that Charles would have been free as a partner to vote against the merger based solely on his assessment of his own interests. By participating in the merger negotiations, Charles likely helped to shape the transaction presented to his fellow partners for their approval. His formal participation, moreover, is likely to be characterized as behavior that signaled his ongoing participation in the firm and that induced other participants in the transaction not to make inquiries of him that they might otherwise have made.

The difficulty with this line of argument is that Charles was free to leave the firm in any event. His position is not comparable to a corporate director who, as an incident to negotiating a merger, indulges in insider trading or undisclosed self-dealing transactions. These transactions constitute breaches of the director's fiduciary obligation, regardless of whether the corporation's shareholders, or its other directors, demonstrate that they trusted the misfeasant director. Even if Charles's governance role within the firm is analogized to that of a corporate director, recent cases shy away from obliging directors to be loyal to a contemplated merger transaction in addition to

30. *Id.* at 1007.

31. *Cf.* Don King Prods., Inc. v. Douglas, 742 F. Supp. 741, 769-70 (S.D.N.Y. 1990) (finding boxer's testimony that he lacked confidence in fight promoter to be inconsistent with claim that boxer reposed trust and confidence in promoter).

directors' unquestioned fiduciary duties to the corporation and to its shareholders.[32]

The firm's position may be strengthened by the fact that Charles assumed an additional representative role on the committee that investigated prospective merger partners and that negotiated the merger terms. Charles would argue that the duties he assumed by virtue of this position were limited to a duty to use care, to act in good faith, and to abstain from self-dealings such as undisclosed side deals with merger partners. As a package, however, these duties may not constitute a duty of loyalty to the deal itself that would oblige Charles to remain with the firm or to disclose his plans to leave.

In short, deciding whether Charles breached his fiduciary obligation is heavily dependent on factual circumstances. Depending on how the court allocates the burden, the firm may or may not be able to demonstrate reliance on Charles's continued membership, or Charles may or may not be able to demonstrate that the merger would have happened regardless of whether the partners believed that he was likely to remain a member of the firm. By assuming a formally representative position, Charles may have allayed concerns and discouraged inquiries by his former partners. Finally, Charles is more likely to be held to have breached his fiduciary obligation to the extent that his former partners demonstrably trusted him, in particular, trusted him to be a person whose overt behavior would be congruent with his private plans.

A more precise resolution of the situation does not emerge if one applies the relevant provisions of the Revised Uniform Partnership Act (RUPA). Upon initial inspection, RUPA is enormously helpful to Charles's soon-to-be former partners because it imposes a duty on partners to disclose information even in the absence of inquiry. Under RUPA Section 403(c), each partner has the duty to furnish "without demand, any information concerning the partnership's business and affairs."[33] The duty is owed to "a partner," and the information is that "reasonably required for the exercise of the partner's rights and

32. For starters, to impose such a duty would conflict with directors' ongoing fiduciary responsibility to shareholders, which does not end when directors approve a merger agreement. *See* Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 48 (Del. 1993) (holding that provisions in merger agreement "may not validly define or limit the directors' fiduciary duties under Delaware law or prevent . . . directors from carrying out their fiduciary duties"). Moreover, at least under Delaware law, a director is not under a duty to consider the interests of the corporation's prospective new controlling shareholder in determining whether to accept a business opportunity presented to the director individually that is also of interest to the prospective controlling shareholder. *See* Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 158-59 (Del. 1996) (finding that director may consider only situation at time opportunity arises and that he does not have to look at another party's uncertain plans).

33. RUPA (1994) § 403(c)(1).

duties under the partnership agreement or this Act."[34] Charles's former partners will argue that to exercise their rights and duties, they required information about Charles's plans, intentions, hopes, aspirations, conjectures, or reflections on his life that bore upon the objectives that the firm sought to achieve through the merger or the likelihood of consummating an otherwise attractive transaction. "Information" itself is not a defined term in RUPA, and it would surely be helpful to all other partners to have a better assessment of the likely stability of Charles's membership in the firm, which in this context is information concerning the partnership's "affairs," if not its "business."

Charles is not likely to define "information concerning the firm" so broadly. Charles may also be reassured by the fact that however broadly or narrowly it is defined, the disclosure obligation created by RUPA Section 403(c) is not a fiduciary obligation. Charles's failure to disclose, if it violates Section 403(c), may not trigger the distinctive remedies for breach of fiduciary duty, like disgorgement of profit, punitive damages, or the imposition of a constructive trust. RUPA Section 404(e), which provides that "[a] partner does not violate a duty or obligation under this Act or under the partnership agreement merely because the partner's conduct furthers the partner's own interest," will be of additional comfort to Charles. [35] Charles will argue that his failure to make disclosure did not violate Section 404(b) because Section 404(e) leaves him free to make a self-interested decision to consider leaving the firm and because he protected his personal planning process by not volunteering information about it.

Separately, RUPA Section 404(d) requires a partner to discharge duties to the partnership and to other partners and to exercise rights, whether created by the statute or by the partnership agreement, "consistently with the obligation of good faith and fair dealing."[36] The RUPA drafters' comments characterize good faith and fair dealing as a contractual rather than a fiduciary concept.[37] The statute does not, however, define the terms "good faith" and "fair dealing," which leaves open the possibility of a judicial definition based on observed experience in litigated cases.[38]

In a dispute governed by RUPA, the answers are no more certain, but the issues differ from those raised by the state of the law reflected in Professor Hillman's paper.[39] To begin with, the operative content of RUPA's significant provisions is open to question. As litigation fleshes out the meaning of

34. *Id.*

35. *Id.* § 404(e).

36. *Id.* § 404(d).

37. *Id.* § 404 cmt. 4.

38. *Id.*

39. *See generally* Hillman, *supra* note 1.

RUPA's provisions, it will be particularly important to note whether courts give a broad or a narrow swath to the scope of a partner's duty to disclose "information concerning the partnership's business and affairs" when the information concerns the partner's own plans, intentions, and hopes.[40] The task of reconciling RUPA's duty of "good faith and fair dealing" with its explicit protection of partner conduct furthering the partner's own interests also awaits judicial resolution.

The principles articulated in Professor Hillman's paper reflect accommodations between the demands imposed by fiduciary obligation, themselves variable with the context and with the role of a particular actor, and the freedom of clients to choose counsel. Moreover, partners who withdraw from a firm to practice law under other institutional auspices do not appear especially villainous as defendants when compared to the broader genre of litigation applying fiduciary norms, even when the erstwhile partners compete with excessive zeal.

40. RUPA (1994) § 403(c)(1).