

# Fiduciary Duties on the Temporal Edges of Agency Relationships

By

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## I. Introduction

The common law of agency imposes duties that principal and agent owe to each other, including an agent's fiduciary duties to the principal. Although not mirror images, these duties usually run parallel in duration because most of the time, a principal's duties, like an agent's, are coterminous with the relationship. This Chapter explores situations in which temporal lines of demarcation do less work. The absence of a fully formed relationship of agency does not mean that the parties owe each other no duties of any sort. Likewise, a relationship's end does not obviate continuing obligations stemming from the now-concluded relationship. The character and content of duties on the peripheral edges of relationships vary, as do the justifications for imposing duties and whether they are derived from doctrines apart from agency law.

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Additionally, issues at the temporal edges of agency relationships vary in whether their resolution yields to bright-line determinations or requires fact-specific and nuanced inquiries. The ubiquity of agency relationships—spanning otherwise-disparate contexts, including organizational settings—makes these issues matter.<sup>1</sup>

Among fiduciary relationships, agency is distinctive because both principal and agent hold ongoing power to terminate the relationship at will, albeit in breach of contract. The distinctive structure of agency—empowering both parties to act unilaterally to end their relationship, often preceded by a process of reflection and planning—assures the presence of issues about duties on the periphery of termination. This dimension of agency’s distinctive structure has implications for broader accounts of fiduciary obligation, especially those grounded in cognitive dimensions of an actor’s loyalty. Agency doctrine generally permits an employee or other agent to plan to compete with the principal following termination; but empowered to end the relationship at any time, an agent’s commitment to it may always appear contingent, at least as seen in retrospect by a now-former principal. Of course, a principal who appreciates agency’s implications may attempt to structure the relationship’s terms to protect its interests. Additionally, agency doctrine, applicable to ongoing relationships between parties whose

<sup>1</sup>*See* *Great Minds v. Fedex Office & Print Servs., Inc.*, 886 F.3d 91, 95 (2d Cir. 2018) (noting “mundane ubiquity” of agency relationships; licensor’s counsel failed to address agency relationships linking licensees with non-employee copying service when terms of license, which permitted reproduction and distribution for non-commercial purposes by licensee, did not prohibit delegation whether to licensee’s employees or non-employee agents).

perspectives and preferences may shift over time, accommodates interim bargaining to adjust a relationship's terms going forward, each party always empowered to exit. This is not the structure that underlies what's often assumed to be the prototype for a fiduciary relationship, a donative trust.

The Chapter opens by sketching aspects of the formation and termination of common-law agency relationships. Requiring no formality to create, agency relationships are also relatively fragile, in contrast with legal relationships grounded in property interests, donative trusts, limited-liability entities, or bilateral contract. Next, the Chapter identifies and examines the distinct bases on which agents might owe duties to prospective principals, including the possibility of a distinct status or category, "agent-in-waiting," with the consequence that fiduciary duties would apply to all actors within the category. The Chapter then examines the duties owed by principals and agents following the termination of an agency relationship as well as the more contestable stage that precedes termination. Implications for more general or theoretical accounts of fiduciary law conclude.

## II. The formation and termination of agency relationships

Agency relationships are distinctive among fiduciary relationships, including those, like agency, for which fiduciary character is ascribed by status or legal convention.<sup>2</sup> Outside these settled categories, courts impose fiduciary duties in particular relationships in response to specific circumstances, in particular the potential for opportunism and abuse when one party

<sup>2</sup>On status-based fiduciary relationships, see Andrew S. Gold & Paul B. Miller, *Introduction*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 1, 2-3 (2014).

invites and a vulnerable party reposes trust.<sup>3</sup> As Daniel Kelly observes, these cases usually fall “along the borderline ... between an arms-length transaction, in which each party may act according to its own self-interest, and a fiduciary relationship, in which the law requires a party to act in the sole or best interests of another.”<sup>4</sup> A signal trait of agency law is the relative ease and informality with which two parties may create an agency relationship and, later on, exit from it. The common law defines agency as “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.”<sup>5</sup> Creating a common-law agency relationship does not require compliance with specified formalities, such as the execution of a written instrument, nor does it require any filing with the state comparable to the requisites to form a corporation or other type of limited-liability business entity. In this respect an agency relationship resembles a general partnership, which is formed when parties agree to co-own a business for profit and requires no compliance with specified formalities. The parties’ intention to formalize their relationship later on, structuring it through a to-be-formed limited-liability entity, does not preclude the existence of a general partnership.<sup>6</sup>

<sup>3</sup>See Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, in OXFORD HANDBOOK OF FIDUCIARY LAW 12 (Evan J. Criddle et al. eds. 2019).

<sup>4</sup>*Id.* at 4.

<sup>5</sup>RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

<sup>6</sup> For implications, see Christine Hurt, *Startup Partnerships*, 69 B.C. L. Rev. \_\_\_ (forthcoming).

Agency law also enables principal and agent, as between themselves, to define the scope of their relationship, including by specifying domains in which the agent may act free of fiduciary duties to the principal.<sup>7</sup> More generally, the law recognizes that another type of legal relationship—such as a debtor-creditor relationship—may co-exist with agency and confer rights on the agent to act in ways contrary to the principal’s interests, as would a securities broker who liquidates an over-margined account notwithstanding the client’s objections.<sup>8</sup> The law also recognizes relationships that resemble agency’s most basic consequence because one actor’s conduct affects the legal position of another but the agent-like actor has an economic interest distinct from the relationship that privileges actions taken solely to benefit that actor and that supports contractual provisions controlling when and how the relationship may be terminated.<sup>9</sup> Corporate law acknowledges and defines roles for an important category of agents, corporate officers.

Although agency is consensual, an enforceable contract between principal and agent need not accompany or underlie its creation; many agency relationships are formed gratuitously.<sup>10</sup> Thus, a relationship of common-law agency may link an agent to a principal prior to any an

<sup>7</sup>For these possibilities, see Deborah A. DeMott, *Defining Agency and Its Scope (II)*, in *COMPARATIVE CONTRACT LAW 396* (Larry A. DiMatteo & Martin Hogg, eds., 2016).

<sup>8</sup>For more on the defined scope of agency relationships, see *id.* at 403.

<sup>9</sup>RESTATEMENT (THIRD) OF AGENCY § 3.12. Conventional examples are powers, given as security, to protect a legal or equitable title held by the power’s holder, as well as powers to exercise voting rights associated with securities or membership interests.

<sup>10</sup>*Id.* § 1.01, cmt. d.

enforceable contract. As a consequence, agency relationships can arise with fluidity and lack the harder-edged moment of formation or initiation integral to conventional accounts of contract formation.<sup>11</sup> Some agents—corporate officers, for example—may commence acting in a *de facto* capacity, in advance of compliance with formal requisites, including those imposed by a firm’s governance documents.<sup>12</sup> Many contemporary statutes enable agency-like relationships typified by precisely-drawn triggers that initiate the relationship and the duties that follow, such as durable powers of attorney.<sup>13</sup>

Simple to form, agency relationships are also terminable at will by either principal or agent, albeit in breach of any contract between them. A principal has power to terminate the agent’s actual authority to act on the principal’s behalf by making a manifestation of revocation to the agent. Likewise, an agent has power, through a manifestation to the principal, to terminate

<sup>11</sup>For a critique of hinging contractual obligations on “a specific hypothetical moment of contract formation,” see Shawn J. Bayern, *The Nature and Timing of Contract Formation*, in *COMPARATIVE CONTRACT LAW* 77, 88.

<sup>12</sup>*See* *In re the Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006)(defining “*de facto* officer” as “one who actually assumes possession of an office under the claim and color of an election or appointment and who is actually discharging the duties of that office, but for some legal reason lacks *de jure* legal title to that office.”

<sup>13</sup>*See* *Estate of Alford v. Shelton*, 89 N.E.3d 391(Ill. 2017)(applying Ill. Comp. Stat. 45/2-10.3(a)(West 2010); child designated as successor agent in parents’ durable powers of attorney owed no fiduciary duties prior to exit of original agent).

their relationship by renouncing authority.<sup>14</sup> More vividly, “you’re fired” and “I quit” operate as performative utterances to end an agency relationship, even when a contract between the parties provides otherwise.<sup>15</sup>

Why are common-law agency relationships so relatively fragile? And why does agency law privilege one party’s present preferences over both parties’ inconsistent earlier preferences to bind themselves to an ongoing relational commitment? The underlying premise of agency is consent, in particular, the principal’s consent on an ongoing basis to legally-effectual representation by the agent. By revoking an agent’s actual authority, the principal retrieves or calls back an extension of the principal’s own legal personality.<sup>16</sup> Renouncing and thereby terminating an agency relationship also frees the agent from most constraints imposed by the

<sup>14</sup>RESTATEMENT (THIRD) OF AGENCY. § 3.10. If the “agent” instead holds a power given as security, it may be made irrevocable, typically by a term in the written instrument creating or evidencing the power. *Id.* § 3.12.

<sup>15</sup>Unless, as discussed above, the “agent” holds a power expressly made irrevocable that is supported by a distinct economic interest.

<sup>16</sup>For this rationale, see Francis Reynolds, *When is an Agent’s Authority Irrevocable?*, in *MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE* 259, 259 (Ross Cranston, ed., 1997). On the implications of understanding an agent as an extension of the principal’s legal personality—and not as a substitute for the principal—see Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 321, 322 (Andrew S. Gold & Paul B. Miller eds., 2014)(hereinafter DeMott, *Fiduciary Character*).

relationship, including the agent’s duty to comply with the principal’s lawful instructions and the agent’s fiduciary duty of loyalty to the principal. Possessing a unilateral power to terminate should lower a prospective agent’s anticipated costs of undertaking to act on behalf of any particular principal, including an employer. Although the agent may be obliged to forego attractive opportunities during the relationship, opportunities of the same type may rightfully become available once the agent exits the relationship.<sup>17</sup>

Agency doctrine overall mixes immutable characteristics—including the agent’s fiduciary duties to the principal and the unilateral powers held by principal and agent to terminate the relationship—with those subject to agreement between agent and principal, including agreements defining the scope of the agency relationship to privilege conduct by the agent that would otherwise breach the agent’s duties to the principal, as discussed above. Thus, subject to limits grounded in public policy concerns, an agent may agree not to compete with the principal following termination.<sup>18</sup> An agreement may also contain provisions that price out the cost to the agent of early termination by the principal, as in many executive employment agreements. In other relationships, contract provisions—typically drafted by the agent—may impose fees on the principal if the principal terminates the relationship within a set period. Termination or exit fees charged by asset managers (“investment advisers” in the United States), although fairly common, can be problematic.<sup>19</sup> Assets under management in a client’s account

<sup>17</sup>RESTATEMENT (THIRD) OF AGENCY § 3.10, cmt. b.

<sup>18</sup>*Id.* § 8.04, cmt. b.

<sup>19</sup>Jason Zweig, *The Intelligent Investor: Should You Have to Pay A Fee to Fire an Adviser?*, WALL ST. J., July 26, 2014.

belong to the client as principal, not the manager, who holds the assets as an agent who is the client's fiduciary. Often clients exit a management relationship when they're unhappy with the manager, which implies that an exit fee can operate as a penalty geared to retain clients and can function inconsistently with the adviser/manager's fiduciary duty to place the clients' interests before its own as their agent.

Just as a prospective agent may owe duties to the principal prior to the formation of an agency relationship or a contract encapsulating the parties' agreement, terminating an agency relationship does not end all duties the parties owe each other. Some linger post-termination, echoing the operation of an agent's "lingering authority" to bind the principal, that is, the appearance of authority that may survive following the termination of actual authority.<sup>20</sup> Additionally, when an agent contemplates terminating the relationship—perhaps in the prospect of competing with the principal—the agent's commitment to the principal and orientation toward its interests may no longer be as whole-hearted as loyalty requires as assessed in retrospect by the now-former principal. Even when the agent's conduct does not contravene duties of loyalty, investing effort and ingenuity to prepare for new adventures can sap the agent's diligence on behalf of the (present) principal.<sup>21</sup>

Long-established doctrine permits an agent to take otherwise-lawful steps to prepare to

<sup>20</sup>RESTATEMENT (THIRD) OF AGENCY § 3.11 and cmt. c. "Lingering authority" requires that the third party's belief that the agent acts with authority be reasonable. *Id.*

<sup>21</sup>An agent's duties of performance require that the agent "act with the care, competence, and diligence normally exercised by agents in similar circumstances," subject to any agreement with the principal. *Id.* § 8.08.

compete once an agency relationship is terminated,<sup>22</sup> and to do so without disclosure to the principal.<sup>23</sup> When preparations to compete overlap with continued service, ambiguity can cloud inquiries into the agent's conduct and motives. For example, consider an agent/employee whose duties require visible interactions with major customers of the principal/employer's business. When the agent is especially responsive and effective in customer-facing interactions, was the agent motivated to solidify a relationship that will follow her to a competitor? Or simply to do good work on behalf of the principal?<sup>24</sup> As elaborated below, permissible (and secret) preparations to compete imply that an agent's duty of loyalty to the principal, or at least its scope or intensity, may diminish when the agent contemplates ending the relationship. Of course, if an agent abandons her plan and decides to stay, the duty of loyalty should resume its earlier

<sup>22</sup>*Id.* § 8.04; *accord*, RESTATEMENT OF EMPLOYMENT LAW § 8.04, cmt. c. (AM. LAW INST. 2015).

<sup>23</sup>An agent's duties include "a duty to use reasonable effort to provide the principal with facts that the agent knows...when the facts are material to the agent's duties to the principal ...." RESTATEMENT (THIRD) OF AGENCY § 8.11. This general duty does not encompass the fact that the agent plans to compete with the principal. *Id.* § 8.04, cmt. c. Nor does the agent's fiduciary duty of loyalty require disclosure. *Id.*

<sup>24</sup>*Id.* § 8.04, cmt. c. Overall, if an agent who plans to exit does not explicitly solicit the principal's customers or employees to join the competing enterprise, the fact that customers or employees follow the agent does not establish disloyalty on the agent's part; excellent work performance itself is not an indicium of disloyalty. *Mercer Mgmt. Consulting, Inc. v. Wilde*, 920 F. Supp. 219, 234 (D.D.C. 1996).

dimensions.

The prospect of fiduciary duties that precede the formation of an agency relationship, like the duties that linger following termination and that may dim if not lessen preceding termination, complicates schematic accounts of fiduciary relationships that position parties at arms length prior to and following a relationship. A visual or mechanical metaphor may help conceptualize these peripheral duties: the purchaser of a switch to control an electric light has a choice between an on-off toggle function, or a dimmer control through a rheostat that enables a user to vary the light's degrees of brightness. Agency doctrine operates at times more like a dimmer switch than an on-off toggle, in particular in the inception and expiration of fiduciary duties. This lack of precise demarcation increases the need for fact-specific inquiries to resolve disputed situations, a consequence not unique to agency law.<sup>25</sup> Bright-line determinations are not absent from cases applying agency law, just not universal.

### III. Agents' duties preceding agency relationships

Prospective principals and agents owe duties to each other derived from other bodies of law, including tort law. In one line of cases, an employee of a brokerage firm defrauds investors who are not—or at least not yet—clients of the firm, acting without either actual or apparent authority to bind the firm and through transactions that explicitly are not conducted through the firm. But the employee's association with the firm enabled the employee to identify prospects to

<sup>25</sup>For an example, see Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 UNIV. ILL. L. REV. 235, 276 (2018)(observing that “[t]he simple truth is that persons enter and leave our lives at times distinct from crowning acts”).

defraud, while a known association with the firm lent plausibility to the employee's conduct. In the brokerage context, it's well established that an agency relationship begins only when a client places an order and the broker agrees to execute it.<sup>26</sup> However, if the firm acted negligently in hiring its employee—perhaps one with a prior history of client complaints or regulatory infractions—or in supervising or retaining the employee, the firm could be subject to liability on a tort theory. Accepting this theory, a recent case analogized the premise for the brokerage firm's liability to the liability of a burglar alarm company that hires, as a door-to-door salesman, a felon known to be violent who kidnaps a prospective alarm-system customer.<sup>27</sup> An employee's fraud also subjects the employee to liability to the prospective customer. The brokerage firm's liability is direct, not vicarious; the employee acted without actual or apparent authority on behalf of the firm but the firm itself, if negligent, is subject to liability.<sup>28</sup>

Apart from law of general applicability, prospective agents are subject to duties to prospective principals in particular domains. Relationships between lawyers and prospective clients are instructive, given that lawyers are treated as their clients' agents for many purposes.<sup>29</sup> Only to a client does a lawyer owe the full complement of duties that reflect the fiduciary

<sup>26</sup>*Le Marchant v. Moore*, 44 N.E. 770 (N.Y. 1896); *In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, 238 F. Supp. 3d 799, 843 (S.D. Tex. 2017).

<sup>27</sup>*Owens v. Stifel Nicolaus & Co.*, 650 Fed. App'x 764 (11th Cir. 2016)(discussing salience of *Underberg v. Southern Alarm, Inc.*, 643 S.E. 2d 374, 375 (Ga. App. Ct. 2007).

<sup>28</sup>RESTATEMENT (THIRD) OF AGENCY § 7.03 (distinguishing between direct and vicarious liability).

<sup>29</sup>*See* Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301 (1998).

character of a lawyer-client relationship.<sup>30</sup> However, it would be mistaken to assume that a lawyer owes a prospective client no legal duties other than those derived from tort law. Lawyers owe prospective clients a duty not to use or disclose confidential information learned through consultation with the prospective client, subject to exceptions not germane to this Chapter. In possession of a prospective client's confidential information, a lawyer is subject to constraints in representing clients whose interests are materially adverse to the prospective client's.<sup>31</sup> Likewise, a lawyer owes duties to a prospective client concerning property in the lawyer's custody.<sup>32</sup> To the extent the lawyer furnishes legal services, the lawyer owes the prospective client a duty of reasonable care.<sup>33</sup> Contracts in which clients or prospective clients express advance consent to conflicts—with the lawyer's own interests or representation of other clients—that may later emerge in the relationship are effective only when the client is fully informed and the lawyer reasonably believes no client's interest will be adversely affected.<sup>34</sup>

<sup>30</sup>RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (3) and cmt. b (AM. LAW INST. 2000) (stating that “[a] lawyer is a fiduciary ....”).

<sup>31</sup>*Id.* § 15(1)(a) & (2).

<sup>32</sup>*Id.* § 15(1)(b).

<sup>33</sup>*Id.* § 15(1)(c).

<sup>34</sup>MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(AM. BAR ASS'N 1983). On the efficacy of general open-ended waivers, compare *Galdene Labs., L.P. v. Activis Mid Atl. LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013)(denying motion to disqualify counsel subject to unrelated conflict pertaining to current client; client gave informed consent to open-ended general waiver that would ordinarily be ineffective, but acted through general counsel who frequently retained

The same suite of duties applies even when no lawyer-client relationship eventuates. And why? Sharing confidential information is a frequent linchpin in seeking legal services, situating prospective clients much like clients. The vulnerability that follows for clients, once confidential information has been shared, seems essential to a relationship with a lawyer, even when the relationship is tentative or prospective or the client is sophisticated. And when a lawyer gives advice or otherwise furnishes legal services to a prospective client, the recipient is likely to rely, perhaps by failing to form a lawyer-client relationship either with the advice-giver or another lawyer.

As their clients' agents, lawyers are distinctive. They are officers of the court and members of a largely self-regulated profession as well as agents whose representative role comes packaged with other significant functions, most importantly furnishing advice to clients on a confidential basis. Their distinct duties—including those owed to prospective clients regardless of whether a lawyer-client relationship is formed—stem from the lawyer's status as a lawyer. Revisited in this light, brokers—the agents with which this section began—are disanalogous in significant ways. Any duty a broker owes a customer concerning investment advice is distinct outside counsel, including large law firms) with *Celgene Corp. v. KV Pharma. Co.*, 2008 WL 2937415 \*8 (D.N.J. 2008)(granting motion to disqualify when retention agreement included comparable waiver language; agreement did not manifest informed consent because it did not specify types of conflicts, such as concurrent representation of generic pharmaceutical companies in patent cases). *Galdene* and *Celgene* both shift the burden—ordinarily borne by the party moving to disqualify counsel—to the law firm resisting disqualification.

from the agency duties the broker owes in executing an order from the customer to buy or sell.<sup>35</sup> In contrast, the structure of a lawyer-client relationship, including one in formation, situates the client or prospective client in a position that entails sharing confidential information with the vulnerabilities that follow. Nonetheless, might a broker ever duties as a sort of “agent-in-waiting” before receiving an order for execution?

#### IV. The status of “agent-in-waiting”?

The imposition of duties (whether or not deemed fiduciary in character) that anticipate the formation of an agency relationship could be conceptualized in several ways, each with its distinct rationale. First, pre-agency duties may be grounded in the application of other bodies of law. These include tort law, which furnishes the basis for brokerage-firm liability to prospective clients in the “bad broker” cases discussed above. Second, pre-agency fiduciary duty may be grounded in a fact-specific, case-by-case determination of whether a particular relationship was characterized by trust invited by one party and justifiably reposed by the other. Lawyers’ duties to prospective clients, discussed above, operate categorically but the underlying justifications resemble those for the imposition of fact-specific fiduciary duties. Third, pre-agency fiduciary duties could follow from treating a relationship as an instance of a category in which all relationships are fiduciary ones, perhaps termed “agency-in-waiting.”<sup>36</sup> Grounding pre-agency duties in a distinct state that anticipates the formation of an agency relationship calls into question whether the duties arise when no agency relationship ensues. Perhaps only a limited suite of duties follows; recall that a lawyer owes duties to a prospective client but not the

<sup>35</sup>In re Enron, 238 F. Supp. 3d at 843.

<sup>36</sup>Thanks to Richard Brooks for urging me to develop the implications.

broader-reaching fiduciary duties owed to a client. Statutes and regulatory provisions may also be relevant to shape or dominate analysis and resolution. The sections that follow explore pre-agency duties for two significant groups: *de facto* and *de jure* corporate officers, and brokers.

A. Corporate officers, *de facto* and *de jure*

An actor who assumes to act as an agent in a formally defined category when requisite formalities have not been met—typified by a *de facto* corporate officer—owes fiduciary duties in the *de facto* phase, which may or may not precede a *de jure* phase. This is because the actor in question has assumed to act as an agent, in *de facto* officer cases with some appearance of rightful occupancy of the office, such as acquiescence by the corporation’s board of directors. Thus, the status of *de facto* officer isn’t an instance of acting as a poseur—purporting to be an agent when that’s not true at the time of holding out—or a fiduciary *de son tort*—unilaterally taking on a fiduciary status (or its appearance) without a regular appointment to it.<sup>37</sup> By definition, *de facto* officers do not act unilaterally in assuming a particular office. The consequences for the corporation are closely linked to apparent authority because it’s requisite that a *de facto* officer, in exercising the functions of an office, reasonably appear to hold the office.<sup>38</sup> To exercise the functions of an office in interactions with third parties as a corporation’s

<sup>37</sup>On poseurs, see Deborah A. DeMott, *The Poseur as Agent*, in AGENCY LAW IN COMMERCIAL PRACTICE 35-54 (Danny Busch et al. eds., 2016). On fiduciaries *de son tort*, see Andrew S. Gold, *The State as a Wrongful Fiduciary*, in FIDUCIARY GOVERNMENT 183, 190-93 (Evan J. Criddle et al. eds. 2018).

<sup>38</sup>See *Lowder v. All Star Mills, Inc.*, 330 S.E.2d 649, 655 (N.C. Ct. App. 1985)(individual found to have acted as an officer signed corporations’ income tax returns as corporate president

representative is to act as the corporation's agent. Like formal appointment or election to an office, whether an agent exercises an office's functions is readily determinable.

Returning to the potential status of "agent-in-waiting," consider the position of an individual whose announced appointment as a corporate officer will become effective as a future time, who, in the meantime, prepares to undertake the office's responsibilities. In *In re the Walt Disney Co. Derivative Litigation*, the court held that the corporation's new President did not owe fiduciary duties before assuming office, including duties concerning the terms of his employment agreement.<sup>39</sup> Not having purported to assume the duties of the presidency before his announced start date, the officer-in-waiting was not a *de facto* officer; his activities to prepare himself for the office did not amount to exercising its functions.<sup>40</sup> Additionally, the facts fall short of the bases on which courts impose fact-specific fiduciary duties. More generally, whether an actor has entered the realm of corporate officeholders and their fiduciary duties—even as a *de facto* officer—is relatively amenable to a bright-line or toggle-switch determination.<sup>41</sup>

and assistant treasurer, had input into corporations' formation and operation, and took over their management). On *de facto* officers in general, see RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. e.

<sup>39</sup>906 A.2d 27, 48-49 (Del. 2006). I testified as an expert witness on other issues in this litigation.

<sup>40</sup>*Id.* at 41 n. 14. Both determinations were made on the basis of a summary judgment record. See *In re the Walt Disney Co. Derivative Litig.*, 2004 WL 2050138 (Del. Ch. Sept. 10, 2004).

<sup>41</sup>Along these lines, the trial court observed, "[a] bright line rule whereby officers and

## B. Brokers

In contrast with corporate officeholders, the facts of the leading brokerage case, *Martin v. Heinold Commodities, Inc.*,<sup>42</sup> illustrate situations in which multiple bases for pre-agency fiduciary duties may be present. In *Martin*, the Illinois Supreme Court held that a commodities broker had a duty to explain the nature of its opaque fee and commission structures to prospective clients. The court stressed that “where the very creation of the agency relationship involves a special trust and confidence on the part of the principal in the subsequent fair dealing of the agent, the prospective agent may be under a fiduciary duty to disclose the terms of his employment as an agent.”<sup>43</sup> It’s not clear whether the imposition of the duty of disclosure applies at a categorical level and thus becomes applicable when the parties intend to create a relationship of a particular type, or whether the duty applies (and the prospective agent’s failure to make the requisite clarifying disclosure breaches the duty) only following a case-specific inquiry into the qualities of the relationship between a particular broker and its prospective principal. If the latter, a sophisticated or experienced investor could confront a higher barrier in establishing that the directors become fiduciaries only when they are officially installed, and receive the formal investiture of authority that accompanies such office or directorship, is a more reasonable and desirable rule” than imposing fiduciary duties at an earlier point, which could prove indeterminate in practice. 2004 WL 2050138 at \* 4. Likewise, a corporation’s directors and controlling shareholder are not as such agents of the corporation. *See Lyman Johnson*, this volume (conference draft p. 8, sentence beginning section B).

<sup>42</sup>643 N.E.2d 734 (Ill. 1995).

<sup>43</sup>*Id.* at 740.

broker owed a duty, on the assumption that such an investor, acting skeptically and at arms length, would inquire about fee and commission structures. Regardless of an investor's degree of sophistication, the broker possesses an informational advantage, here concerning the terms and operation of its fee and commission structure; a sophisticated investor might be expected to realize this fact, ask questions, and consider going elsewhere for brokerage services if unsatisfied by the broker's answers.

Like securities brokers, commodities brokers are agents who operate in a context shaped by regulation, which does not explicitly or comprehensively resolve all questions that may arise. General agency law could be salient to a practice of some brokers, anticipatory front-running. Regulation requires that commodities brokerage firms adopt internal prohibitions against front-running by individual brokers, that is, practices that prioritize trades in proprietary accounts or accounts in which a broker has an interest, ahead of executable customer orders in the same commodity. By front-running a customer's order an agent competes with the principal (the customer), contravening the agent's fiduciary duty of loyalty unless the customer consents.<sup>44</sup> Front-running can also injure the principal when a broker's front-running transaction is large enough to move the market price. If the broker profits through the front-running strategy, the broker also nets more from the transaction than the commission to which the customer agreed. In any event, by accepting or undertaking to execute an order to buy or sell on behalf of a customer, the broker has consented to and formed an agency relationship with the customer and thus owes fiduciary duties to the customer as its principal.

In contrast, anticipatory front-running could be prompted by a prospective customer's

<sup>44</sup>RESTATEMENT (THIRD) OF AGENCY § 8.05(2) cmt. c.

request for a quote from a commodities broker, not an executable order. Informational asymmetries are present in the relationship because the broker has access to real-time information about the relevant market that the customer lacks, including information about order flow. Commodities regulation itself imposes no explicit prohibition on “trading ahead” of prospective customer orders, as opposed to orders that are “executable.” However, commodities regulation in the United States now includes a prohibition on insider trading—narrower than the counterpart applicable to insider trading in securities—that proscribes the use of misappropriated information in breach of a pre-existing duty.<sup>45</sup> The reasoning in *Martin* could ground liability in a pre-existing duty, either because the circumstances surrounding a particular request for a quote led the customer to repose trust and confidence in the broker, or because circumstances or structures generally in commodities markets necessitate that prospective customers repose trust and confidence in brokers.

To be sure, anticipatory front-running is riskier for a broker than conventional forms of front-running because if the request for a quote is not followed by an order the broker may hold

<sup>45</sup>Commodities Exchange Act §§ 4b(a) and (c); 7 U.S.C. §§ 6b and (c). The Dodd-Frank Act amended the language of section 6 (c) in 2010 to grant the Commodities Futures Trading Commission (CFTC) authority to prohibit the use of manipulative or deceptive devices or contrivances in contravention of CFTC regulations. The amendment imposes no affirmative disclosure obligations except where necessary to prevent or correct a misleading statement. The CFTC brought and settled its first insider trading proceedings in 2015 and 2016, both against traders who front-ran their employers’ proprietary trading plans. In re Motazed, CFTC No. 16-02 (Dec. 2015) and In re Ruggles, CFTC No. 16-34 (Sept. 29, 2016).

an illiquid position. This reduces the likelihood that the broker will profit through front-running as well as the likelihood of injury, here to a prospective customer who may never place an order to be executed. If so, grounding “agent-in-waiting” liability in the prospective principal’s vulnerability to injury, does not seem compelling in this scenario, nor does a commodities broker as such, unlike a lawyer, occupy a status that engenders fiduciary obligations to prospective clients. In contrast, consider the vulnerabilities created by agreeing to co-own a business—which creates a general partnership, as discussed above—and the likelihood that the partners will share ideas well before they create a formal (and limited-liability) business firm. Sharing at “the dawn of the relationship,” in Christine Hurt’s terminology, is both crucial to future viability and a source of vulnerability for the partners, who risk betrayal by each other. Within this “danger zone,” the law categorically assigns the relationship among business co-owners to general partnership and its imposition of fiduciary duties.<sup>46</sup>

C. Implications of ubiquity of agency relationships

As one court recently noted, agency relationships are characterized by “mundane ubiquity,”<sup>47</sup> given their presence in a range of recurrent situations. Although agency relationships are governed by general doctrines—including those defining an agent’s fiduciary duties—it’s unsurprising that at their temporal edges the duties imposed on agents-in-waiting are not

<sup>46</sup> Hurt, *supra* note 6, at (ms.) 55. Likewise, the absence of a written agreement for M&A advisory services does not necessarily bar the conclusion that a bank that furnishes advice and other services owes a fiduciary duty to the party engaging it. *See* Andrew Tuch, in this volume (9/25 draft at 7, n. 31-33).

<sup>47</sup>*Great Minds*, 886 F.3d at 95.

uniform. Creating a lawyer-client relationship in itself likely creates vulnerabilities for the prospective client, given the need to share confidential information with the lawyer to form the relationship coupled with the likelihood that the prospective client will rely on any advice the lawyer gives. Thus, as a categorical matter lawyers owe duties to prospective clients, including constraints in the representation of other clients with materially adverse interests. Brokers, in contrast, are not categorically subject to fiduciary (or fiduciary-like) duties to prospective customers; and it's not evident why imposing such duties would be when a prospective customer never places an order. As *Martin* illustrates, a court may be persuaded that the specifics of a relationship broker's relationship to a customer warrant the imposition of fiduciary duties (in that case, a duty of disclosure), based either on the nature of the relationship and the vulnerability it creates for the client, or on informational advantages possessed by the broker and used to disadvantage the client. Separately, for some recurrent situations, articulating a bright-line rule is preferable to case-by-case inquiry into factual specifics. Thus, lawyers owe duties to prospective clients as a categorical matter; corporate officers-in-waiting are not subject to fiduciary duties unless or until they purport to perform the functions of the office. Up to then, the potential for abuse and opportunism by all officers-in-waiting isn't compelling enough to offset the benefits of a clear line of demarcation.<sup>48</sup>

#### V. Duties on the periphery of termination

Terminating an agency relationship does not end all duties that agent and principal owe to each other, most obviously duties imposed by an enforceable contract between them.

<sup>48</sup>For comparable reasoning as applied to determinations of fact-based fiduciary status, see Kelly, *supra* note 3, at 11-12.

Additionally, both principal and agent hold unilateral power to terminate the relationship. The fact that either or both contemplate ending the relationship does not eliminate their duties, although the agent's continuing duty of loyalty to the principal co-exists—if awkwardly—with any undisclosed plan to depart and preparations toward that end. Consider first ongoing duties that survive termination, then duties owed when either agent or principal, or both, contemplate exit.

A. Duties following termination

Distinct from duties imposed by contract, an agent's duty not to use or disclose the now-former principal's confidential information for the agent's own purposes or those of a third party survives termination of the agency relationship,<sup>49</sup> as does the agent's duty not to retain or use the principal's property without the principal's consent.<sup>50</sup> It is irrelevant whether the agent has memorized the information or retained a physical record of it.<sup>51</sup> Whether a former agent's disclosure of confidential information breaches the agent's duty to the principal depends on the agent's motivation or purpose in making disclosure. In *Dirks v. S.E.C.*, in which a former corporate officer told an investment analyst that the corporation was rife with fraud, the revelation did not breach the former officer's fiduciary duties. He sought to expose fraud, not to realize a monetary benefit or confer a gift on the analyst.<sup>52</sup>

<sup>49</sup>RESTATEMENT (THIRD) OF AGENCY § 8.05(2) & cmt. c.

<sup>50</sup> *Id.* § 8.05(1).

<sup>51</sup>*Id.* cmt. c; *accord*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995).

<sup>52</sup> 463 U.S. 646, 667 (1983). Thanks to Sung Hui Kim for highlighting this case.

Following the termination of an agency relationship, the now-former agent owes the principal a duty to cease acting as an agent or purporting to do so,<sup>53</sup> even when the principal's termination of the agent's authority is in breach of contract. Agents who do not follow what could be termed the principal's countermanding or final instruction act wrongfully toward the principal by persisting. But within agency's taxonomy of duties, the agent's refusal to comply—for example, by remaining in possession of property the agent manages on the principal's behalf—breaches not a fiduciary duty but a duty of performance.<sup>54</sup> This distinction carries implications for remedies against the now-former agent who, of course, is no longer an agent subject to the full suite of an agent's duties. In particular, an agent's breach of a duty of loyalty is a basis on which the principal may seek forfeiture of commissions or other compensation paid or payable to the agent during the period of disloyalty, for which the duration may be disputed.<sup>55</sup> Characterized as disobedience to an instruction from the principal, the agent's persistence would not be disloyal conduct that forfeits the agent's right to compensation for prior service.<sup>56</sup> Likely more significant to most former principals, a now-former agent lacks apparent authority to bind the principal to a third party who knows or has good reason to know that the agency relationship has ended.<sup>57</sup>

<sup>53</sup>*Id.* § 8.09, cmt. b.

<sup>54</sup>DeMott, *Fiduciary Character of Agency*, *supra* note 16 at 334; *Strategis Asset Valuation & Mgmt., Inc. v. Pacific Mut. Life Ins. Co.*, 805 F. Supp. 1544 (D. Colo. 1992).

<sup>55</sup>RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. (d)(2).

<sup>56</sup>*Strategis*, 805 F. Supp. at 1551-52.

<sup>57</sup>*Sullivan v. Pugh*, 814 S.E.2d 117, 120-121 (N.C. Ct. App. 2018)(purported transferee

Post-termination, a principal's duties to a former agent—beyond those created by contract—are fewer in number, just as they are throughout the relationship. This seeming imbalance reflects a basic consequence of agency itself: the relationship situates the agent (and only the agent) in a representative position to take action with legal consequences for the principal, and often in proximity to the principal's property.<sup>58</sup> Nonetheless, a principal may engage in conduct that, although not conventionally tortious, will foreseeably inflict loss on a now-former agent. In *Shen v. Leo A. Daly Co.*, the principal terminated the agent it had engaged as its general manager for Taiwan, which requires that the principal officially designate a “responsible person” to conduct business and affix that agent's signature-equivalent to tax returns.<sup>59</sup> Following the termination, the principal did not remove its designation of its now-former agent as its responsible person despite warnings from the agent that the failure might subject the agent to adverse legal consequences in the event of tax disputes between Taiwan and the principal. Following a final adverse tax determination, the principal refused to pay the amount claimed, prompting Taiwanese authorities to notify the former agent that he was forbidden to leave the country pending resolution of the country's tax dispute with the principal. The court held that the principal was subject to liability for loss suffered by its former agent, including attorneys' fees he incurred. Rejecting the former agent's argument that the principal's

of legal and equitable interests in claims or proceeds stemming from fire damage to transferor's property had good reason to know transferor's former president lacked authority to bind it).

<sup>58</sup>RESTATEMENT (THIRD) OF AGENCY, Ch. 8, Topic 2, Introductory Note.

<sup>59</sup>222 F.3d 472 (8th Cir. 2000)(applying Nebraska law).

conduct constituted false imprisonment,<sup>60</sup> the court held that the principal breached the duty of good faith and fair dealing it owed its former agent, which, in the court's analysis, was tortious.

Necessarily co-existing with the principal's ongoing power to terminate the relationship,<sup>61</sup> the scope of the duty of good faith and fair dealing is crimped as a consequence. Whether the duty is embraced and how it is formulated vary across jurisdictions. Framing the inquiry within contract law, a recent Australian case declined to imply a duty of mutual trust and confidence that would be breached when an employer undercut a soon-to-be-former employee's ability to utilize helpful mechanisms created by the employer. In *Commonwealth Bank v. Barker*, the bank decided to make the employee's position redundant and to terminate his employment in about four weeks. The bank also held out hope that the employee could be redeployed within its organization.<sup>62</sup> His manager sent the employee an email urging him to work with a career-support officer, who also emailed the employee, both using the employee's bank email address. However, the employee's access to his bank email account was terminated at the time of the redundancy notice; he alleged that, as a consequence, he did not become aware of a position description that may have fitted him. The court rejected the implication of a term of mutual trust and confidence, instead characterizing employment as a domain dominated by legislation. The court explicitly declined to follow authority from the United Kingdom, which held that former (and innocent) employees of a scandal-ridden bank stated legally viable claims in the bank's

<sup>60</sup>The court found that "the country of Taiwan is clearly too great an area within which to be falsely imprisoned." *Id.* at 478.

<sup>61</sup>RESTATEMENT (THIRD) OF AGENCY § 8.15 cmt. b.

<sup>62</sup>[2014] HCA 32. Thanks to Matthew Conaglen for alerting me to this case.

winding-up proceeding. The U.K. court held that the bank owed its employees an implied duty of trust and confidence that would be breached by mismanagement that leaves employees unemployable elsewhere due to the stigma created by their former employer.<sup>63</sup>

B. Preparing for termination

Agents and principals who plan to end an agency relationship do not owe each other a duty to disclose that fact, potentially giving each the advantage of an informational asymmetry in continued dealings with the other. Although (subject to exceptions not relevant here) an agent owes the principal a duty to disclose facts that are material to the agent's duties to the principal,<sup>64</sup> the duty does not require advance warning that the agent will renounce authority. Additionally, if the parties negotiate over the terms of their relationship—to continue it with modifications or terminate on mutually-agreed terms<sup>65</sup>—the principal and the agent likely negotiate to further their own interests as each then understands them.

This reality requires some tempering of the content or scope of the agent's overarching duty of loyalty to the principal, which is “to act loyally for the principal's benefit in all matters connected with the agency relationship.”<sup>66</sup> By participating in the negotiations, the principal has not consented to the agent's self-interested stance because the principal does not know all

<sup>63</sup>Malik v. Bank of Credit & Commerce Int'l S.A., [1998] A.C. 20 (H.L.). See RESTATEMENT (THIRD) OF AGENCY § 8.15, reporter's notes (citing *Malik*).

<sup>64</sup>RESTATEMENT (THIRD) OF AGENCY § 8.11

<sup>65</sup>*Id.* § 3.09.

<sup>66</sup>*Id.* § 8.01.

material facts, which include the agent’s undisclosed objectives and negotiating strategy.<sup>67</sup> More plausibly, the agent’s conduct in renegotiating the relationship’s terms falls outside its scope, as would the agent’s knowledge of the fact that the agent plans to renounce authority and thereby end the relationship. To be sure, the agent’s actions in negotiating are “connected with” the agency relationship in a causal or factual sense because the relationship still exists, but the agent’s actions are insufficiently within its scope to justify requiring that the agent renegotiate solely for the principal’s benefit. The principal, knowing the identity of the party with whom it’s negotiating, would not reasonably expect the agent to bargain toward achieving the principal’s benefit, as opposed to the agent’s own objectives. And just as the principal holds unilateral power to terminate the relationship, so does the agent. Accordingly, a principal may try to structure incentives to keep key agents on board and motivate them, especially once they become aware that the relationship will end.<sup>68</sup>

Likewise, an agent may make preparations to compete with the principal once the agency relationship ends. Agency law defines “preparations” to exclude conduct—albeit preparatory to

<sup>67</sup>C&E Servs., Inc. v. Ashland, 601 F. Supp. 2d 262, 270 (D.D.C. 2009).

<sup>68</sup>See, e.g., Act II Jewelry, LLC v. Wooten, 301 F. Supp. 3d 905 (N.D. Ill.

2018)(incentive bonus agreement with key manager adopted following firm’s announcement of wind-down of business division for which manager responsible). In *Act II*, after learning the plan, the manager incorporated a competing business prior to her termination date. The court found a genuine issue of material fact on whether the manager owed the LLC a fiduciary duty, stressing that under general agency law employees of Delaware LLCs owe fiduciary duties to their employers. *Id.* at 916-17.

competition—too proximately situated to the principal’s business operations and assets, including soliciting existing customers or employees of the principal to follow the agent.<sup>69</sup> Such conduct is analogous to an agent’s extraction of the principal’s property or confidential information for subsequent competitive use, which would breach the agent’s fiduciary duties.<sup>70</sup> Beyond instances of active solicitation, an agent—especially one positioned within a principal’s organization—may be better situated to design a competitive plan than are potential third-party competitors, who may lack established ties to the principal’s suppliers or customers, as well as ties to the principal’s personnel. Agents may also be able to time their departures to inflict maximum competitive damage on the principal. In extreme cases—such as calculated en masse departures at a sensitive time for the principal—courts may determine that the agents’ conduct went beyond mere “planning” to compete to the commencement of a competitive business while still engaged by the principal.<sup>71</sup>

The general rule permitting preparations to compete does not formally differentiate among employee-agents, whose roles range from providing non-managerial services to broad responsibilities as an entity’s executive officers. It’s hard to generalize from reported cases across jurisdictions. For example, one court categorically treated preparations to compete by corporate officers as breaches of fiduciary duty.<sup>72</sup> Some courts impose a heightened duty on officers, in particular a duty not to act in ways that impede the firm’s ability to continue in

<sup>69</sup>RESTATEMENT (THIRD) OF AGENCY § 8.04 cmts. b & c.

<sup>70</sup>Id. § 8.05.

<sup>71</sup>RESTATEMENT (THIRD) OF AGENCY § 8.04, cmt. c.

<sup>72</sup>Steelvest, Inc. v. Scansteel Serv. Ctr., 807 S.W.2d 476 (Ky. 1991).

business.<sup>73</sup> Officers who agree with each other to compete post-termination may thereby breach their fiduciary duties, especially when their agreement is colored by extreme or egregious conduct.<sup>74</sup> A fair generalization about many cases is that “actions of corporate executives are likely to receive particular scrutiny.”<sup>75</sup> And sometimes-subtle interactions between motive and conduct can situate post-termination disputes over pre-departure preparations beyond bright-line determinations, into the realm of fact-intensive inquiry.

As this Chapter illustrates, agents are heterogenous in the specifics of the duties they owe, including those connected to termination. Recall the discussion above of a lawyer’s duties in dealing with a prospective client. Although a lawyer may terminate the representation of a client, the lawyer’s owes the client a duty to take steps to the extent reasonably practicable to protect the client’s interests, including giving notice to the client of the termination or impending termination.<sup>76</sup> In contrast, agency law does not impose a general duty on either principals or agents to act in a harm-minimizing fashion, as opposed to the more minimal duties surveyed in this essay; the court’s justification for imposing liability on the principal in *Shen* is ingenious and

<sup>73</sup>*Veco Corp v. Babcock*, 611 N.E.2d 1054, 1059 (Ill. App. Ct. 1993).

<sup>74</sup>RESTATEMENT (THIRD) OF AGENCY § 8.04, cmt. c.

<sup>75</sup>RESTATEMENT OF EMPLOYMENT LAW § 8.04, rep. n. to cmt d.

<sup>76</sup>RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 8.04, cmt. c. *See* *Maples v. Thomas*, 565 U.S. 266 (2012)(lawyers for death-row inmate breached duties to client and terminated agency relationship by accepting employment that prevented ongoing service to client, without giving notice to client or court; unrepresented, client not bound by failure to file timely appeal).

unusual. And exiting from an agency relationship frees the agent to compete with the principal and take other actions adverse to the principal's interests. Lawyers, in contrast, owe duties to former clients that constrain their rights to undertake the representation of parties with materially adverse interests in the same or a related matter.<sup>77</sup> General agency law—the realm of corporate officers and brokers—defines duties and the conduct that breaches them in terms that accommodate a broader range of actors and activities than would be tolerable in the realm of lawyers' roles and duties.

## VI. Theoretical implications

These dimensions of agency doctrine have implications for scholarly accounts of fiduciary law more generally. When the assumed prototype for the general category of actors subject to fiduciary duties is a trustee and the prototypical fiduciary institution is a trust,<sup>78</sup> agents and agency relationships can appear to be discordant, non-conforming, or marginal instances. It's essential to an agency relationship that the principal have the right or power of control over the agent—and thus the power to furnish binding instructions on an interim basis—while the extent of a principal's control and how it is exercised can vary widely. An actor who is not subject to control of any sort exercised by a principal is not an agent, with the consequence that the parties' relationship is not one of common-law agency.<sup>79</sup> But the irreducible requisite of control for

<sup>77</sup>RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 132.

<sup>78</sup>*See, e.g.*, D. Gordon Smith, *Firms and Fiduciaries*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 293, 308 (Paul B. Miller & Andrew S. Gold eds. 2016)(characterizing the trust as “the quintessential fiduciary relationship”).

<sup>79</sup>*Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2103).

agency relationships mean they lack an essential property of fiduciary relationships specified by leading theories: possession by an actor of discretionary powers, or the exercise of discretionary power over a critical resource of the beneficiary.<sup>80</sup> To be sure, an agent has power to disregard the principal's instructions, but agency law does not entitle an agent to treat the bounds of actual authority, including the principal's interim instructions, as mere suggestions or precatory expressions that are not binding.

As this Chapter demonstrates, fiduciary duties within agency doctrine reflect signal characteristics of agency relationships not present in relationships governed by trust-law doctrine. A trustee's duties are tied to the trustee's exercise or non-exercise of powers as a trustee<sup>81</sup> and decisions about whether and how to exercise those powers,<sup>82</sup> which circumscribes their scope and duration, unlike the more fluid duties owed by agents, including former and prospective ones. The scope of a trustee's duty of loyalty focuses on the administration of the

<sup>80</sup>Julian Velasco, *Delimiting Fiduciary Status*, in RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold, eds. 2018); Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, U. TORONTO L.J. 285, 309-315 (2015). For accounts of essential properties, see Paul B. Miller, *The Idea of Status in Fiduciary Law*, in CONTRACT, STATUS, AND FIDUCIARY LAW 25, 48 (Andrew S. Gold & Paul B. Miller eds., 2016); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002).

<sup>81</sup>3 RESTATEMENT (THIRD) OF TRUSTS § 70 (AM. LAW INST. 2007)

<sup>82</sup>*Id.* § 86.

trust,<sup>83</sup> in contrast to the broader or less specified range of an agent's duty. Additionally, agency doctrine applies to ongoing relationships between two parties whose perspectives and preferences may shift over time. Thus it accommodates relationships in which parties may bargain with each other on an interim basis to adjust the terms of their relationship going forward, each always holding a unilateral power to exit. Relatedly, agency doctrine also accommodates the possibility that agents while still employed may take measures to prepare to compete with the principal. This is not the structure that underlies a prototypical donative trust, which is created by a manifestation of a settlor as a fiduciary relationship through which the trustee holds title to property and is subject to duties to deal with the property for the benefit of others.<sup>84</sup>

The duties that prospective agents may owe to principals also cast new light on a long-established dimension of contract law, which “accords parties the freedom to negotiate without risk of precontractual liability.”<sup>85</sup> The duty of fair dealing that's generally imposed on parties to an existing contract does not reach precontractual negotiations.<sup>86</sup> Despite cases and secondary

<sup>83</sup>*Id.* § 78.

<sup>84</sup>1 RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2003)(defining a trust as the “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”).

<sup>85</sup>E. ALLAN FARNSWORTH, CONTRACTS 189 (4<sup>th</sup> ed. 2004).

<sup>86</sup>*Id.*

authority recognizing a theory of liability grounded in one party's reasonable reliance engendered by negotiations toward a contract that is never concluded, only rarely do litigants in the United States seek relief on this basis. Parties engaged in negotiations toward a contract may be unaware that justifiable reliance can support liability; or perhaps, as Allan Farnworth suggests, parties are generally content with "the common law's aleatory view of negotiations," which might also reflect broader social disinterest in the outcome of negotiations.<sup>87</sup> Against this contract-law backdrop, the prospect that agents may owe duties beyond those imposed by tort law to prospective principals, or be subject to affirmative duties of disclosure in dealings with prospective principals, can appear discordant.<sup>88</sup>

However, both the *Martin* brokerage precedent and the duties that lawyers owe to prospective clients—instances discussed at length above—could be distinguished from negotiations toward a paradigmatic bilateral contract. First, consider the structures that particular relationships necessitate. Dealings undertaken in anticipation of an agency relationship often (and maybe even prototypically) involve informational asymmetries that reflect more than disparities in expertise. In *Martin*, as in the hypothetical instance of anticipatory front-running, the broker had access to material information that was legally unavailable to its prospective principal. Agents—like lawyers—whose functions require knowledge of their clients' or principals' confidential information typically deal with a party, a prospective client, who is made vulnerable by sharing information necessary to proceed toward an agency relationship. Separately, consider the nature of the prospective agent's activity. The scope of pre-agency

<sup>87</sup>*Id.* at 198-199.

<sup>88</sup>I owe this insight to Norio Higuchi.

duties could place them outside “negotiations” as a category of activity; the disclosure of fee and commission structures that *Martin* may require could precede negotiations, a distinct phase of activity. Additionally, by front-running on the basis of a client’s order or request for a quote, a broker is not negotiating with a client or prospective client, just exploiting an informational advantage. Finally, and much more broadly, negotiations toward an agency relationship could be treated as a basis for the imposition of fiduciary duties full stop (or categorically), but such breadth is inconsistent with much decisional law as well as with more tailored rationales that ground pre-agency duties in structures that entail vulnerability or induce reliance.

Duties owed at the temporal edges of agency relationships also have implications for general accounts of fiduciary duties, even apart from those premised on assuming a trust to be the prototype of a fiduciary relationship. Some accounts of the fiduciary duty of loyalty emphasize a cognitive dimension, that is, a focus on how the fiduciary deliberates and the connection between such deliberation and the fiduciary’s actions. In recent scholarship, Stephen Galoob and Ethan Leib demonstrate that a fiduciary’s cognition can bear on whether the fiduciary has satisfied duties of loyalty imposed by the law,<sup>89</sup> building on their earlier work identifying loyalty, deliberation, conscientiousness, and robustness as the cognitive dimensions of loyalty.<sup>90</sup> A cognitive account of fiduciary loyalty provides a different framework for resolving issues when an agent prepares to compete with the principal before the agency

<sup>89</sup>Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69 (2018).

<sup>90</sup>Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L. J. 1820 (2016).

relationship has come to an end, or even engages in a calculated assessment of whether to quit. For Galoob and Leib, the fiduciary duty of loyalty requires robust commitment; preparing to compete could betray the principal, or attempt betrayal, as a consequence of the agent's abandoned or weakened commitment to the principal.<sup>91</sup> To the extent agency law tolerates preparations to compete, and pre-preparation strategizing over exit, there's a limit to the fit between cognitivist accounts and the law.

Additionally, to encompass duties on the peripheries of agency relationships within a cognitivist account would require deepening the cognitivist account. If an agent plans (or hopes) to exit from the relationship and does not disclose that fact to the principal, is the non-disclosure an instance of disloyalty that makes forfeiture of compensation due the agent an available remedy to the principal? Alternatively, the structure of agency itself—a fiduciary relationship that empowers both parties to act unilaterally to end the relationship—may mean that conduct will often reflect a mix of motivations and that the retrospective lens of litigation will often require factually intensive scrutiny.

## VII. Conclusion

Agency relationships, so quotidian, can elude theoretical frameworks premised on other types of legal relationships. The reasons why prospective agents might owe fiduciary duties to principals, and the status of those duties when an agent plans to terminate an agency relationship, have broader implications for accounts of fiduciary obligation within business firms.

<sup>91</sup>Galoob & Leib, *supra* note \_\_\_, at 101. The authors acknowledge that agency law “suggests ... some room for permissible preparation....” *Id.* n. 111.

