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Allan W. Vestal

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THE DISCLOSURE OBLIGATIONS OF PARTNERS *INTER SE* UNDER THE REVISED UNIFORM PARTNERSHIP ACT OF 1994: IS THE CONTRACTARIAN REVOLUTION FAILING?

ALLAN W. VESTAL*

INTRODUCTION

Promulgation of the Revised Uniform Partnership Act of 1994¹ concludes the initial phase of a revision process that started in the mid-1980s amid great expectations in some quarters. The goal of some of the revision participants was to transform the organizing theory of partnership law from fiduciary obligation to contract—nothing less than an attempted revolution in partner-

* Associate Professor, Washington & Lee University School of Law. B.A., Yale University 1976; J.D., Yale University 1979. I gratefully acknowledge the assistance of the Frances Lewis Law Center, Washington & Lee University. I would like to thank Randy Bezanson, David Millon, Doug Rendleman, Barry Sullivan, and Brenda Lynch Vestal for their helpful comments on earlier drafts. I also would like to thank my research assistant, Barbara Jane League, for her valuable contributions.

1. The National Conference of Commissioners on Uniform State Laws (the Conference) designates the revised statute: "Uniform Partnership Act (1994)." U.P.A. § 1002 (1994). However, to avoid confusion with the original Uniform Partnership Act, text references are to the "Revised Uniform Partnership Act," or the "Revised Act." Footnote citations to the Revised Act are styled "U.P.A. (1994)." Text references to the original Uniform Partnership Act are to the "Uniform Partnership Act." Footnote citations to the original Uniform Partnership Act are styled "U.P.A. (1969)."

ship law.

At issue have been two competing views of the core rights and obligations of partners within the partnership relation. The first vision is best described as fiduciary in nature,² the second as contractarian.³ Proponents of both visions use the rhetoric of fiduciary duty, but with quite different meanings.⁴

In the fiduciary world view, the core rights and obligations of partners are in critical aspects status based, unamendable, and expansively construed.⁵ The rights and obligations are status based because they inhere in the concept of partnership and are unamendable because they are definitional.⁶ The rights and obligations of partners are construed expansively because they are the enabling mechanism for broad judicial supervision of partnership affairs.⁷

Not so in the contractarian vision. In the contractarian worldview, the core rights and obligations of partners are contract based, fully amendable, and narrowly construed.⁸ In this view, fiduciary obligations are mere gap fillers, dependent on the express and implied terms of the specific contract at issue.⁹ As

2. See Claire M. Dickerson, *Is It Appropriate To Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111 (1993); Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993), reprinted in 36 CORP. PRAC. COMMENTATOR 923 (1995); Letter from Melvin A. Eisenberg to the Commissioners on Uniform State Laws (July 17, 1992) (on file with the author) [hereinafter Eisenberg, July 17, 1992 Letter]; Letter from Melvin A. Eisenberg to the Commissioners on Uniform State Laws (July 27, 1992) (on file with the author) [hereinafter Eisenberg, July 27, 1992, Letter].

3. See Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45 (1993) [hereinafter Ribstein, *Prime Time*]; Larry E. Ribstein, *A Mid-Term Assessment of the Project To Revise the Uniform Partnership Act*, 46 BUS. LAW. 111 (1990) [hereinafter Ribstein, *Mid-Term*]; Larry E. Ribstein, *An Analysis of Georgia's New Partnership Law*, 36 MERCER L. REV. 443 (1985); Vestal, *supra* note 2, at part II.

4. This difference in usage is not confined to the partnership debate. See *infra* note 311 and accompanying text.

5. See Vestal, *supra* note 2, at 524-30.

6. *Id.*

7. *Id.*

8. Professor Terry O'Neill traces the parallel evolution of corporation law. Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646, 654-57 (1992).

9. Ribstein, *Prime Time*, *supra* note 3, at 52.

gap fillers, they are merely defaults and are fully amendable by the parties.¹⁰ If the partners do not alter the statutory defaults, then the court must determine how the parties would have contracted on the term at issue. Thus, the court is not reviewing partner conduct against a generalized standard of conduct; it is attempting to determine how the parties would have resolved the situation had they addressed it *ex ante*.¹¹

The contractarians had substantial influence in the revision process.¹² Successive drafts showed an infusion of contractarian concepts and language.¹³ As general propositions, the Revised

Fiduciary duty is a type of contractual term courts supply because the parties themselves would have contracted for the duties if it were not so costly to contract in detail. Fiduciary duties do not differ fundamentally from other types of terms the courts supply in interpreting contracts. Because fiduciary duties are contractual "gap-fillers," the precise nature of the duties that exist in any particular contractual relationship depends on the express and implied terms of the relevant contract.

Id.

10. Dickerson, *supra* note 2, at 111-13; O'Neill, *supra* note 8, at 656-57. Professor O'Neill correctly observes that, "[d]espite its seeming neutrality as to content . . . recharacterizing fiduciary rules as default rules fundamentally alters the source of . . . obligations, and thus requires a radically different analysis of them." *Id.* at 657.

11. Ribstein, *Prime Time*, *supra* note 3, at 52.

12. Dean Donald J. Weidner, the Reporter for the Revised Act, cast the distinction between "libertarian, free-market oriented" policy makers who "suggest that all the rules governing the relations among partners should be merely default rules," and "parentalistic" policy makers who "would be more inclined to support mandatory fiduciary duties to protect minority partners." Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427, 454 (1991). Dean Weidner acknowledged "the basic libertarian policy perspective of the Drafting Committee" which

wanted to make clear that all but a very few of the rules governing the relations among partners are merely *default* rules. It was only in rare situations that the Committee felt that the rules should be *mandatory*. Mandatory rules governing the relations among partners are essentially parentalistic, and the Committee felt that, with only very limited exception, adults in nonconsumer transactions should be held to their agreements.

Id.

13. The Uniform Partnership Act revision effort has produced multiple drafts. First came the listing of objectives, not really a draft as such, of an ABA committee. U.P.A. Revision Subcomm. of the Comm. on Partnerships and Unincorporated Bus. Orgs., Sec. of Corp. Banking & Bus. Law, A.B.A., *Should the Uniform Partnership Act be Revised?*, 43 BUS. LAW. 121 (1987) [hereinafter ABA Report].

The Drafting Committee to Revise the Uniform Partnership Act of the National

Act recognizes the primacy of the partnership agreement over the statute¹⁴ and the full amenability of the statutory provisions.¹⁵

Conference of Commissioners on Uniform State Laws generated at least fourteen working drafts leading to the first promulgation of the Revised Act in 1992. U.P.A. (Jan. 9, 1989, Draft); U.P.A. (Feb. 17, 1989, Draft); U.P.A. (July 28 - Aug. 4, 1989, Meeting Draft); U.P.A. (Dec. 3, 1989, Draft); U.P.A. (Feb. 14, 1990, Draft); U.P.A. (Apr. 16, 1990, Draft); U.P.A. (July 13-20, 1990, Meeting Draft); U.P.A. (Dec. 6, 1990, Draft); U.P.A. (Jan. 19, 1991, Draft); U.P.A. (Mar. 11, 1991, Draft); U.P.A. (Aug. 2-9, 1991, Meeting Draft); U.P.A. (Dec. 13, 1991, Draft); U.P.A. (June 1, 1992, Draft); U.P.A. (July 30 - Aug. 6, 1992, Meeting Draft).

The 1992 annual meeting of the Conference considered the July, 1992 draft and several amendments. REVISIONS TO U.P.A. (July 30, 1992) [hereinafter R.U.P.A. ANNUAL MEETING JULY 30, 1992, REVISIONS]; AMENDMENTS TO U.P.A. (Aug. 2, 1992) [hereinafter R.U.P.A. ANNUAL MEETING AUGUST 2, 1992, REVISIONS]; AMENDMENTS TO U.P.A. (Aug. 3, 1992) [hereinafter R.U.P.A. ANNUAL MEETING AUG. 3, 1992, REVISIONS].

The 1992 annual meeting of the Conference passed the Revised Act by a unanimous vote of the state delegations. U.P.A. (1992) (Aug. 1992, Adoption) [hereinafter R.U.P.A. 1992 ADOPTED TEXT]. Pursuant to Conference policy, the adopted text was then reviewed and modified in non-substantive detail to produce a final text. R.U.P.A. (1992).

Further revisions were proposed on the basis of continuing consultations between the Conference's Drafting Committee to Revise the Uniform Partnership Act and various ABA committees. See SUBCOMMITTEE ON RUPA, OF THE COMM. ON PARTNERSHIPS AND UNINCORPORATED BUS. ORGS., 1992 ABA SEC. BUS. L., REPORT (on file with the author) [hereinafter ABA 1992 SUBCOMMITTEE REPORT]; R.U.P.A. (Apr. 14, 1993, Draft). The Conference reconsidered parts of the Revised Act at its 1993 annual meeting and passed a series of amendments. AMENDMENTS TO U.P.A. (July 30 - Aug. 6, 1993) [hereinafter R.U.P.A. 1993 ANNUAL MEETING REVISIONS]. This meeting generated another draft. R.U.P.A. (1992) (July 2, 1993, Draft). The Conference then issued an amended text. R.U.P.A. (Aug. 17, 1993, Adoption) [hereinafter R.U.P.A. 1993 ADOPTED TEXT]. Once again the text was subjected to a non-substantive style review, and a final version was issued. U.P.A. (1993).

Further revisions were again proposed through continuing consultations between the Conference's Drafting Committee to Revise the Uniform Partnership Act and various ABA committees. See SUBCOMMITTEE ON RUPA, ABA SEC. BUS. L., SUPPLEMENTAL REPORT (Oct. 1993) (on file with the author) (recommending against enactment of the Revised Act in its then-existing form) [hereinafter ABA 1993 SUBCOMMITTEE REPORT]. Further drafts were generated. U.P.A. (Dec. 7, 1993, Draft); U.P.A. (Jan. 18, 1994, Draft); U.P.A. (Feb. 5, 1994, Draft); U.P.A. (June 1, 1994, Draft). The June, 1994, draft was approved by the Conference at its annual meeting in August, 1994. U.P.A. (1994). Also in August, 1994, the House of Delegates of the ABA approved the Revised Act.

14. U.P.A. § 103(a) (1994) ("Except as otherwise provided in subsection (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.").

15. *Id.* § 103(a)-(b) (providing that statutory provisions are fully amendable except

Contractarian influence also is found within the fiduciary duty provisions. The Revised Act's fiduciary duties are stated narrowly and exclusively.¹⁶ And, although to some analysts a cursory review of the fiduciary duty provisions of the Revised Act "reflects a thoroughly anti-contractarian tone,"¹⁷ the provisions yield an essentially contractarian result.¹⁸ The obligation of good faith and fair dealing¹⁹ conforms to contractarian theory by being cast as a non-fiduciary obligation²⁰ and by being broadly modifiable by agreement of the parties.²¹ The Revised Act's approval of the

as restricted for provisions set forth in § 103(b)).

16. *Id.* § 404(a) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).").

17. Dickerson, *supra* note 2, at 145.

18. *Id.* at 145-47. Professor Dickerson's argument is that the "escape routes" from the duty of loyalty, the § 404(e) approval of self-interest and the § 103(b)(3) authorization of categorical exceptions, permit "the parties to enter into a valid, enforceable agreement that would remove, prospectively, virtually any duty of loyalty." *Id.* at 145-46. Such a result, she suggests, offers little more protection than a provision allowing elimination of a statutory default duty of loyalty. *Id.* at 147.

19. U.P.A. § 404(d) (1994) (establishment of non-fiduciary obligation of "good faith and fair dealing").

20. Dickerson, *supra* note 2, at 133.

21. The non-fiduciary obligation of good faith and fair dealing may not be eliminated by the agreement of the partners, "but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable." U.P.A. § 103(b)(5) (1994).

Professor Dickerson correctly looks to the substance of the treatment and not to the formal protection against elimination. Dickerson, *supra* note 2, at 143-44. "It appears that, absent a showing that the agreement is 'manifestly unreasonable,' the parties could stipulate that any party, vis-a-vis the other partners and the partnership, can act according to a standard as low as mere 'honesty in fact.' Such a result is contractarian." *Id.* at 144 (citations omitted). Professor Dickerson does note the § 103(b)(5) restrictions on amendments of the obligation of good faith and fair dealing, correctly observing that "while this is anti-contractarian in form, it is not so in substance." *Id.* at 144-45; see Vestal, *supra* note 2, at 556-59. There is no consensus on how narrowly the courts will limit the ability of the parties to restrict the definition of good faith and fair dealing. I tend to believe the courts will allow wide latitude for agreements limiting the fiduciary duties and the non-fiduciary obligation of good faith and fair dealing. *Id.* at 559-60. The drafters effectively conceded the point in the floor debates. PROCEEDINGS OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM PARTNERSHIP ACT, PROCEEDINGS OF THE COMM. OF THE WHOLE, 492-501 (July 31 - Aug. 6, 1992) [hereinafter 1992 NATIONAL CONFERENCE PROCEEDINGS]; see Robert M. Phillips, Comment, *Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 1179, 1181-82 (1993). ("[T]he obligation of good faith and fair dealing is expressly made non-waivable—the

pursuit of self-interest in the partnership setting is antithetical to a fiduciary analysis²² but is compatible with a contractarian-based approach.²³ Professor Dickerson's overall assessment is reasonable:

It is . . . difficult to escape the conclusion that [the Revised Uniform Partnership Act's] provisions concerning fiduciary duties and the related obligation of good faith, while not exclusively contractarian, represent a strong shift in that direction as compared to the fiduciary duties currently applicable to partnerships under [the Uniform Partnership Act].²⁴

Despite the thematic acceptance of the contractarian view, the details of implementation abandon the contractarian approach in important ways. In the end, the contractarian failure is perhaps most keenly felt in the Revised Act's provisions dealing with the disclosure obligations of partners *inter se*. Here, in the details of the partners' statutory obligations to disclose information to other partners or to the partnership, the contractarian revolution stumbles to a halt. The Revised Act includes an expanded and broadly defined right of access to partnership books and re-

obligation is mandatory.").

It is unclear what the term "standards" means in this context [which is the authority now found in U.P.A. § 103(b)(5) (1994), to "determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable"]. Does this language permit private definitions of good faith that will be absolutely respected by courts? Probably not. The inclusion of a "manifestly unreasonable" limitation effectively narrows the latitude to negotiate particular standards of good faith by subjecting all such privately negotiated definitions to external, objective review.

Id. at 1182 n.16.

22. Vestal, *supra* note 2, at 553-55.

23. Dickerson, *supra* note 2, at 144. Professor Dickerson describes the provision, which is § 404(e) in the Revised Act, as "neither truly contractarian nor truly anti-contractarian" but believes "it leans towards the former." *Id.*

24. *Id.* at 149. The reporter for the Revised Act has described the development of the fiduciary duty sections as "a battleground between the libertarians and the parentalists," the outcome of which was that "the libertarians achieved a victory to the extent that [the Revised Act] . . . gives statutory legitimacy to the pursuit of individual self-interest." Donald J. Weidner, *The Revised Uniform Partnership Act Midstream: Major Policy Decisions*, 21 U. TOL. L. REV. 825, 857-58 (1990); see also Vestal, *supra* note 2, at 535-36.

cords.²⁵ This right is protected against unreasonable restriction,²⁶ a protection deemed "senseless" by one contractarian critic.²⁷ It provides for a broad, non-demand-driven disclosure obligation.²⁸ The proposed regime contains frontal restrictions on partner agreements that would modify key statutory provisions²⁹ and further contains implied restrictions on partner agreements that would weaken the statutory remedies for violations of core statutory duties.³⁰ By deferring to non-partnership-specific law on some partnership-related claims, the Revised Act opens the door for the resurrection of fiduciary-based analysis with respect to certain claims historically within the range of partnership law.³¹ The Revised Act leaves open an argument that the statutory provisions do not displace certain common-law disclosure obligations of partners³²—obligations historically not subject to broad modifications by the parties.³³ Finally, ambiguities in the statutory language allow arguments that certain common-law disclosure obligations not frontally included in the revision are included by implication.³⁴ Each of these points represents a setback for the contractarian position.

Thus, with passage of the Uniform Partnership Act of 1994, the revision effort has come to an uncertain conclusion. The Revised Act does not return to a truly fiduciary view of the partnership relation; thematically, it remains largely contractarian. But it does not clearly articulate and completely effectuate the contractarian vision. The Revised Act is, as to the operational details, internally contradictory and confused. It has been denounced by some of the most vocal advocates of partnership contractarianism,³⁵ and its fiduciary sections are the subject of

25. U.P.A. § 403(b) (1994); see discussion *infra* part II.A.

26. *Id.* § 103(b)(2) ("The partnership agreement may not . . . unreasonably restrict the right of access to books and records . . .").

27. Professor Ribstein argues that the section "senselessly invalidates" otherwise reasonable agreements. Ribstein, *Prime Time*, *supra* note 3, at 51-52.

28. U.P.A. § 403(c)(1); see discussion *infra* part II.B.

29. U.P.A. § 103(b).

30. *Id.* §§ 103 cmt. 1, 405 cmt. 3; see discussion *infra* part II.F.

31. See discussion *infra* part II.G.3.

32. See discussion *infra* part III.A.

33. Vestal, *supra* note 2, at 556-63.

34. See discussion *infra* part III.B.

35. Ribstein, *Prime Time*, *supra* note 3, at 45 (concluding that the 1993 version of

criticism on both the right and left.³⁶

The first phase of the contractarian revolution in partnership law has ended, apparently in failure. Where do we go from here? To simply abandon the Revised Act would be unwise. Many excellent changes are included in the revision—changes that are not the product of contractarian fiduciary duty analysis. Too much valuable work is embodied in the Revised Act for the National Conference of Commissioners on Uniform State Laws to start from a blank slate with another revision of the Uniform Partnership Act. Moreover, both the Conference and the American Bar Association have approved the Revised Act, and states have begun to adopt it, although in non-uniform versions.³⁷

the Revised Act should not be adopted); ABA 1992 SUBCOMMITTEE REPORT, *supra* note 13, at 1 (recommending that the 1992 version of the Revised Act should not be adopted); ABA 1993 SUBCOMMITTEE REPORT, *supra* note 13, at 1 (recommending that the 1993 version of the Revised Act should not be adopted). Some of the ABA subcommittee's criticisms had an underlying contractarian component; in a number of cases these criticisms have not been met in the final version of the Revised Act. For example, in the 1992 reaction, the ABA subcommittee listed problems with § 404, including the fiduciary duty formulation and the concept of an obligation of good faith and fair dealing as a matter "of such importance that, without correction they would stand as a barrier to achieving the level of support necessary for the Subcommittee to recommend RUPA for adoption in any jurisdiction." ABA 1992 SUBCOMMITTEE REPORT, *supra* note 13, at 3-4. The Subcommittee also objected to many of the inclusions in § 103. *Id.* at 2. The 1993 critique lists the standards of partnership conduct and the inability to vary such standards by agreement of the partners as a "principal concern" of the committee. ABA 1993 SUBCOMMITTEE REPORT, *supra* note 13, at 1, 4-5, A-3 to A-4. The ABA subcommittee was highly critical of changes made by the full Conference at its 1992 meeting, noting that "[§ 404] was radically changed in response to an emotional letter delivered to the floor of the NCCUSL meeting in August [1992]." ABA 1992 SUBCOMMITTEE REPORT, *supra* note 13, at 4. Presumably the reference is to the two letters from Professor Eisenberg, which are, correctly in my opinion, highly critical of the contractarian influence on the Revised Act. See Eisenberg, July 17, 1992, Letter, *supra* note 2; Eisenberg, July 27, 1992, Letter, *supra* note 2.

36. See Dickerson, *supra* note 2, at 140-45; Ribstein, *Prime Time*, *supra* note 3, at 52-61; Vestal, *supra* note 2, at 535-37.

37. At the time this Article was written, three states had passed some form of the Revised Act. Montana and Wyoming have passed the 1992 version without substantial amendment. Montana Uniform Partnership Act, MONT. CODE ANN. tit. 35, ch. 10 (1993); Wyoming Uniform Partnership Act, 1993 Wyo. S. No. 126, 52d Sess. Texas has passed a version with many non-standard features. Texas Revised Partnership Act, 1993 Tex. Sess. Law Serv. 917 (Vernon). Other states have various versions of the Revised Act under consideration. California, Illinois, Minnesota, New Mexico and Virginia have proposed legislation which would adopt the Revised Act without sub-

There are three needs, at least in the short term. The first is to identify the contractarian errors in the proposed regime. The second is to develop a set of amendments to reverse the worst manifestations of contractarian error. The third is to suggest ways in which the contractarian error can be challenged interpretively in jurisdictions where the Revised Act is adopted without appropriate amendment.

In the longer term, we should consider another general revision of partnership law. Such an effort should borrow heavily from the non-contractarian-based changes suggested in the current Revised Act. The dual justifications for such a revision effort would be to return partnership law to a fiduciary foundation and to re-introduce uniformity into partnership law.

This Article looks primarily to the short-term agenda, specifically as it relates to the disclosure obligations of partners.³⁸ Part

stantial amendment. See Cal. A.B. 2612, 1993-94 Reg. Sess. (1993); Ill. S. 455, 88th Gen. Ass., Reg. Sess. (1993); Ill. S. 772, 88th Gen. Ass., Reg. Sess. (1993); Minn. H. 1795, 78th Leg. Sess., Reg. Sess. (1993); Minn. S. 1646, 78th Leg. Sess., Reg. Sess. (1993); N.M. H. 65, 41st Leg., 2d Reg. Sess. (1994); Va. H. 1048, 1994-95 Reg. Sess. (1994). However, all of these bills have died in committee or have been held over, perhaps as a result of the ongoing revisions by the Conference. Telephone Interview with Office of Chief Clerk of Assembly, Cal. Leg. (Aug. 11, 1994); Telephone Interview with Legislative Information System, Ill. Gen. Ass. (Aug. 11, 1994); Telephone Interview with House Index, Minn. (Aug. 11, 1994); Telephone Interview with Senate Information Office, Minn. Leg. (Aug. 11, 1994); Telephone Interview with Legislative Council Service, N.M. Leg. (Aug. 12, 1994); Telephone Interview with Legislative Information Office, Va. Gen. Ass. (Aug. 11, 1994). The Nebraska State Legislature passed a resolution to study whether it should adopt the Revised Act. Neb. Res. 360, 93d Leg., 2d Sess. (1994).

38. I have outlined such a program with respect to the Revised Act's general fiduciary duty provisions, Vestal, *supra* note 2, suggested changes of the Revised Act's choice of law provisions, Allan W. Vestal, *Choice of Law and the Fiduciary Duties of Partners Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219 (1994) [hereinafter Vestal, *Choice of Law*], argued the Revised Act ought not be applied to existing partnerships, Allan W. Vestal, *Should the Uniform Partnership Act of 1994 Really Be Retroactive?*, 50 BUS. LAW. 267 (1994), explored the confusion inherent in Revised Act § 103 and the prospects for compromise of the fiduciary-contractarian debate, Allan W. Vestal, *Advancing the Search for Compromise: A Response to Professor Hynes*, 58 LAW & CONTEMP. PROBS. (forthcoming 1995) [hereinafter Vestal, *Compromise*], traced the impact of the Revised Act on limited partnership law, Allan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. (forthcoming 1995), and critiqued the development of the disclosure provisions through the Summer, 1990, meeting of the Conference, Allan W. Vestal, "Ask Me No Questions and I'll Tell You No Lies": *Statutory and Common-*

I briefly describes the existing partnership disclosure regime provided by the common law and the Uniform Partnership Act. Part II describes and critiques the disclosure structure contained in the Revised Act and outlines a series of amendments to correct errors in the proposed regime. Part III presents several analyses, which could be used in jurisdictions that do not modify the Revised Act disclosure provisions, to mitigate the damage caused by the provisions and further erode the contractarian aspect of the Revised Act disclosure regime.

The failure of the contractarian revolution in partnership law—if that is indeed what we are seeing—is another indication of more general dissatisfaction with contractarian theory when the theory is applied to concrete legal problems. The partnership disclosure regime offers another example where the simplification offered by contractarian analysis leads to unacceptable results when the theory is translated to specific legal rules and decisions. When confronted with the statutory provisions that necessarily flow from contractarian theory, the drafters of the Revised Uniform Partnership Act balked at the results and compromised the theory. There is a valuable lesson from that process for the larger debate.

I. DISCLOSURE OBLIGATIONS UNDER THE UNIFORM PARTNERSHIP ACT AND THE COMMON LAW

Under the existing regime, intra-partnership disclosure requirements arise under both the statutory and the common law. The common law requires disclosure by partners *inter se* in two circumstances: the first involving transactions between a partner and the partnership, and the second involving the purchase by one partner of another's interest.

The classification for transactions with the partnership includes situations where one partner usurps a partnership opportunity,³⁹ where one partner purchases an asset required for partnership business activities without disclosure,⁴⁰ and where one

Law Disclosure Requirements Within High-Tech Joint Ventures, 65 TUL. L. REV. 705 (1991) [hereinafter Vestal, *Disclosure*].

39. See *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. App. Div. 1928).

40. *Bakalis v. Bressler*, 115 N.E.2d 323 (Ill. 1953).

partner mischaracterizes partnership income as non-partnership income.⁴¹ Another example is where a partner sells an asset to the partnership, or buys an asset from the partnership, without disclosing information relevant to the valuation of the asset that is within the partner's knowledge but unknown to the partnership.⁴² The second category of common-law disclosure involves the purchase and sale of partnership interests *inter se*. In such situations, partners must disclose information that is unavailable to the other party to the transaction and bears on the value of the partnership interest being sold.⁴³

41. See *Peskin v. Deutsch*, 479 N.E.2d 1034, 1038 (Ill. App. 1985).

42. Vestal, *Disclosure*, *supra* note 38, at 730. I have argued that one leading formulation of this category is too narrow. *Id.* at 729-30. In their treatise, Professors Reuschlein and Gregory narrowly define the transactions with the partnership common-law disclosure situation to "prepartnership transactions":

One class of cases emphasizing this duty to disclose are those involving prepartnership transactions, such as those involving a transfer to the partnership of property previously owned or recently acquired by one of the parties to the agreement of partnership. In these cases the interests of a partner in such property or the cost at which it was obtained by a partner are material facts which it is the partner's duty to disclose.

HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* § 189 (1979) (citations omitted). I believe the Reuschlein and Gregory categorization should be expanded to include all transactions between the partnership and a partner that take place during the formation, term, or dissolution and winding up of the partnership. Vestal, *Disclosure*, *supra* note 38, at 730.

Professor Ribstein evidently agrees with the result, although he gets there in a rather circuitous manner. 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* 6:60-62 (1988). He first notes the UPA § 20 demand-driven disclosure obligation. *Id.* at 6:60. He then reads the demand component out of the statutory provision:

[T]he courts have held that, at least in some situations, the duty is breached by a failure to make affirmative disclosure even in the absence of an explicit demand. In general, no demand should be required to trigger an affirmative disclosure duty if the circumstances indicate that the party entitled to disclosure is relying on the other party to provide it. . . . The duty arises during the partnership's operations. . . . The duty also applies to transactions connected with formation and liquidation of the partnership or partnership interest.

Id. at 6:61-62. The result is the same—a non-demand-driven disclosure obligation as to transactions with the partnership during the formation, operation, and dissolution and winding up of the partnership.

43. Professors Reuschlein and Gregory summarize the obligation as: "Both selling and purchasing partner are duty bound to reveal such facts as touch the value of the property which are not available to the other partner." REUSCHLEIN & GREGORY, *supra* note 42, § 189, at 280 (citing *Johnson v. Buck*, 540 S.W.2d 393 (Tex. Civ. App.

The Uniform Partnership Act also requires disclosures by partners *inter se*. Statutory disclosure obligations arise in five situations, either affirmatively or by implication. There are statutory rights to information regarding the routine operations of the partnership,⁴⁴ to information contained in the partnership's

1976)). Professors Bromberg and Ribstein find a "duty to render complete information" which arises "in connection with interpartner transfers of partnership interests." BROMBERG & RIBSTEIN, *supra* note 42, at 6:60-61. They appear to find the obligation, however, by reading the demand component out of U.P.A. § 20, not by acknowledging the continuation of the common-law rule parallel with the statutory provision. *Id.* The cases they cite do not support this reading. Five of the cases pre-date the Uniform Partnership Act and necessarily rely on the common law. *See* Brooks v. Martin, 69 U.S. 70, 84 (1863); Caldwell v. Davis, 15 P. 696 (Colo. 1887); Gilbert & O'Callaghan v. Anderson, 66 A. 926 (N.J. 1907); Kelly v. Delaney, 121 N.Y.S. 241 (App. Div. 1910); Wright v. Duke, 36 N.Y.S. 853 (App. Div. 1895). Eleven of the cases decided after promulgation of the U.P.A. make no mention of the U.P.A. and are couched in terms of fiduciary duty. *See* Witter v. Torbett, 604 F. Supp. 298, 306 (W.D. Va. 1984) (citing *Meinhard* v. Salmon, 164 N.E. 545 (N.Y. App. Div. 1928)); Reed v. Robilio, 273 F. Supp. 954, 960-61 (W.D. Tenn. 1967) ("fiduciary duty"), *aff'd*, 400 F.2d 730 (6th Cir. 1968); Ohaco Sheep Co. v. Heirs of Ohaco, 713 P.2d 343, 346 (Ariz. App. 1986) ("utmost good faith"); W.A. McMichael Constr. Co. v. D&W Properties, Inc., 356 So. 2d 1115, 1122 (La. App.) ("fiduciary duty"), *writ denied*, 359 So. 2d 198 (La. 1978); Hagen v. Dundore, 50 A.2d 570, 575 (Md. 1947) ("confidential and fiduciary relation"); Poss v. Gottlieb, 193 N.Y.S. 418, 420-21 (App. Term 1922) ("relationship . . . of trust and confidence"); Auld v. Estridge, 382 N.Y.S.2d 897, 898 (Spec. Term 1976) (citing *Meinhard* and applying a "fiduciary relationship" standard); Guggenheim v. Guggenheim, 159 N.Y.S. 333, 339 (Spec. Term 1916) ("rule of positive law"); *Buck*, 540 S.W.2d at 399 ("confidential agent"); Inman v. Parr, 311 S.W.2d 658, 702 (Tex. Civ. App. 1958) ("highest duty of honesty and fair dealing"); Bovy v. Graham, Cohen & Wampold, 564 P.2d 1175, 1177 (Wash. App. 1977) ("fiduciary relationship"). Only one of the cited cases refers to the Uniform Partnership Act, noting in passing, in a discussion that includes authorities going back as far as the Roman Republic, that the U.P.A. "recognizes" the pre-existing good faith requirement, although not basing the decision on the Uniform Partnership Act. Alexander v. Sims, 249 S.W.2d 832, 836 (Ark. 1952). Bromberg and Ribstein also cite a law review commentary, Leona Beane, *The Fiduciary Relationship of a Partner*, 5 J. CORP. LAW. 483 (1980). I have argued that this commentary is not persuasive as to a merger of the common-law and statutory obligations. Vestal, *Disclosure*, *supra* note 38, at 735-39.

44. The Uniform Partnership Act does not contain an affirmative provision requiring routine disclosures to partners of information necessary for their participation in the management of the enterprise. However, Professor Melvin Eisenberg argues convincingly that such an obligation is implied in § 18 of the U.P.A. MELVIN EISENBERG, AN INTRODUCTION TO AGENCY AND PARTNERSHIP 42 (1987). Section 18 provides that, absent the contrary agreement of the partners, "[a]ll partners have equal rights in the management and conduct of the partnership business." U.P.A. § 18(e) (1969). From this provision, Professor Eisenberg argues that "[t]he effect of Section 18(e) 'is

books,⁴⁵ and to information required for a judicial accounting.⁴⁶ There are statutory obligations to disclose partnership-related information in response to an inquiry from another partner⁴⁷ and information relating to diversions of partnership profits and assets.⁴⁸

The common-law and statutory disclosure obligations of partners *inter se* co-exist under the present regime. The Uniform Partnership Act did not automatically displace the common law of partnerships. Indeed, the statute specifically provides that the law of agency shall continue to apply under the Uniform Partnership Act,⁴⁹ and that "[i]n any case not provided for in this act the rules of law and equity . . . shall govern."⁵⁰ Analysis of cases decided after adoption of the Uniform Partnership Act confirms that the disclosure provisions of the statute did not displace the common-law disclosure requirements, and that the two disclosure regimes continue to exist in parallel.⁵¹

to require that, absent contrary agreement, every partner is to be provided on an ongoing basis with information concerning the partnership business, and be consulted in partnership decisions." EISENBERG, *supra*, at 42. Professor Eisenberg's analysis was noted by the Revised Act drafters. See U.P.A. § 20 cmt. (July 28 - Aug. 4, 1989, Meeting Draft).

45. The Uniform Partnership Act provides that "[t]he partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them." U.P.A. § 19 (1969).

46. "Any partner shall have the right to a formal account as to partnership affairs" if the partner is wrongfully excluded from the partnership business, if an agreement of the partners so provides, if a situation otherwise covered under the § 21 accounting obligation requires, or "[w]henever other circumstances render it just and reasonable." *Id.* § 22.

47. "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." *Id.* § 20.

48. "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property." *Id.* § 21(1).

49. *Id.* § 4(3).

50. *Id.* § 5.

51. Vestal, *Disclosure*, *supra* note 38, at 735-39. Professor Ribstein puts another spin on the cases: "The prior case law overlooked the UPA [§ 20] demand requirement and compelled disclosure in other appropriate circumstances." Ribstein, *Prime Time*, *supra* note 3, at 51 (citations omitted).

II. DISCLOSURE OBLIGATIONS UNDER THE REVISED ACT: CRITIQUE AND PROPOSED AMENDMENTS

The Revised Act continues the basic elements of the disclosure regime under the Uniform Partnership Act. The familiar tools of the right to inspect partnership books, the demand-driven duty to disclose, the duty to account as a fiduciary for diverted benefits, and the right to a formal accounting are all present, albeit with some substantial modifications. In addition, the Revised Act codifies a non-demand-driven disclosure requirement. While the basic regime is familiar, and many of the changes are justified, a number of significant problems remain that should be the subject of further amendments of the Revised Act.

A. The Revised Act Section 403(a) and (b) Examination of Books and Records Disclosure Mechanism Requires Further Development

The Revised Act contains a guarantee of partner access to partnership books and records.⁵² This language is designed to expand the rights of partners over their rights under the Uniform Partnership Act.⁵³ Several problems remain.

The Uniform Partnership Act is ambiguous on whether the partnership is required to keep any books.⁵⁴ An early draft of

52. U.P.A. § 403(b) (1994).

(b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.

Id.

53. Compare U.P.A. § 19 (1969) ("The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.") with U.P.A. § 403(b) (1994).

54. U.P.A. § 19 (1969); see *supra* note 53 (quoting U.P.A. § 19). Confusion on this score arises under the Uniform Partnership Act from the question of whether the clause "subject to any agreement between the partners" modifies the basic obligation to keep partnership books or merely modifies the location at which the books must be kept. The latter seems the better reading. Vestal, *Disclosure*, *supra* note 35, at 721. The official commentary to the Revised Act is uncertain on this point. After an-

the Revised Act added a provision that "[e]ach partnership shall keep complete and correct books and records of account."⁵⁵ The drafters apparently split, however, on whether requiring that books be kept is appropriate,⁵⁶ and later drafts deleted the provision.⁵⁷ The Revised Act eliminates the ambiguity by clearly indicating that there is *no* requirement under the Revised Act for the partnership to keep any books or records.⁵⁸ Having eliminated the requirement that books be kept, however, the official commentary includes a curious directive as to the minimum books and records that a partnership should maintain.⁵⁹

nouncing that Revised Act § 403(a) "continues the UPA Section 19 rule, modified to include partnership records other than its 'books,'" the official commentary is unclear as to whether the existing provision requires that books be kept. U.P.A. § 403 cmt. 1 (1994). "Any requirement in UPA Section 19 that the partnership keep books is oblique at best, since it states merely where the books shall be kept, not that they shall be kept." *Id.* The "oblique" characterization is from the Crane and Bromberg treatise, although the treatise authors give a rather more positive read to Uniform Partnership Act § 19, noting that the section is "rather oblique, since the statement is primarily *where* they shall be kept, and only secondarily *that* they shall be kept." ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 66, at 383 n.13 (1968).

55. U.P.A. § 19 (Jan. 9, 1989, Draft).

56. Vestal, *Disclosure*, *supra* note 35, at 744-45. The discussion apparently turned in part on the question of liability to third parties: "The Committee did not want to create new liability to third parties by stating a duty to keep partnership books," although some "[m]embers of a subcommittee were uncomfortable with the suggestion that RUPA says you don't have to keep books and records." U.P.A. § 20 cmt. (July 13-20, 1990, Meeting Draft).

57. The February, 1990, draft incorporated language that removed the concept of required books and records from the statutory language. U.P.A. § 20(a) (Feb. 17, 1990, Draft) ("The partnership books and records, if any, shall be kept at the principal place of business of the partnership.").

58. U.P.A. § 403(a) (1994) ("A partnership shall keep its books and records, *if any*, at its chief executive office.") (emphasis added). The default location of the records has also changed from "the principal place of business of the partnership" under the Uniform Partnership Act, U.P.A. § 19 (1969), to the partnership's "chief executive office" under the Revised Act, U.P.A. § 403(a) (1994). The chief executive office concept has been criticized in the context of the Revised Act choice of law rule, U.P.A. § 106 (1994), as being of doubtful operational utility, Vestal, *Choice of Law*, *supra* note 35, at 230-43. Those criticisms would apply in this context as well.

59. U.P.A. § 403 cmt. 1 (1994).

In general, a partnership should, at a minimum, keep those books and records necessary to enable the partners to determine their share of the profits and losses, as well as their rights on withdrawal. An action for an accounting provides an adequate remedy in the event adequate records are not kept. The partnership must also maintain any books and records

Previously, I criticized the Uniform Partnership Act for not defining the class of "books" to which the partners were guaranteed access.⁶⁰ Several definitions have been suggested.⁶¹ Both the ABA advisory committee and the Conference drafters wanted to expand the universe to which access is provided,⁶² but neither wanted to have a listing of what constitutes books and records.⁶³ Thus the Revised Act continues the practice of not defining the universe for access.⁶⁴ The minimal guidance provided comes from the substitution of the term "books and records" in the Revised Act for the term "books" in the existing law⁶⁵ and from the commentary.⁶⁶

The Uniform Partnership Act is unclear as to whether the parties could *ex ante* restrict access to partnership books and records. Whereas the statute clearly provides that "every partner shall at all times have access to and may inspect and copy any

required by state or federal taxing or other governmental authorities.

Id.

60. Vestal, *Disclosure*, *supra* note 38, at 743-44.

61. One treatise focuses on the partnership books as tax records. BROMBERG, *supra* note 54, § 66, at 383. The ABA advisory committee read § 19 somewhat more broadly, synonymous with "financial records." ABA Report, *supra* note 13, at 149. The Conference drafters apparently adopted this reading. See U.P.A. § 403 cmt. 1 (1994) ("[Section 403(a)] continues the UPA Section 19 rule, modified to include partnership records other than its 'books,' i.e., financial records.").

62. ABA Report, *supra* note 13, at 149 (stating that "this section should be expanded to cover other records as well [as financial records]"); U.P.A. § 403 cmt. 1 (1994).

63. ABA Report, *supra* note 13, at 149; U.P.A. § 403 cmt. 1 (1994).

64. U.P.A. § 101 (1994) (containing no general definition of books and records); *id.* § 403 (containing no Article 4 definition of books and records).

65. Compare U.P.A. § 19 (1969) ("books") with U.P.A. § 403 (1994) ("books and records").

66. U.P.A. § 403 cmt. 1 (1994). The commentary is somewhat unclear on this point. Revised Act § 403(a) "continues the UPA Section 19 rule, modified to include partnership records other than its 'books,' i.e., financial records." *Id.* No guidance is provided as to whether the phrase "i.e., financial records" clarifies "partnership records" or "books." If the former, the commentary might signal a move from the old regime, which included books but not financial records, to the new one, which includes books and financial records but not more. If the latter, the commentary might signal a move from the old regime, which included both books and financial records, to the new regime, which includes other, non-financial records. The latter reading is in accord with the interpretation of the term "partnership books" and the recommendation for change in the original ABA commentary. See ABA Report, *supra* note 13, at 149.

[partnership books],”⁶⁷ it is not clear whether the partners may waive by agreement the protections afforded by the statutory section.⁶⁸ The Revised Act answers this question—at least in part. The partners may not agree to “unreasonably restrict the right of access to books and records under Section 403(b).”⁶⁹ This limitation is a significant deviation from the contractarian approach.⁷⁰ The Revised Act does not define a core of partnership information as to which restrictions on partner access would be prohibited although the commentary indicates that an undefined core of information exists as to which restrictions on access are *per se* unreasonable.⁷¹ Nor is the existing statute clear that a partner can be required to demonstrate a proper purpose before gaining access to partnership books.⁷² The Revised Act continues

67. U.P.A. § 19 (1969).

68. Vestal, *Disclosure*, *supra* note 38, at 743-46. If all of § 19 is subject to modification by agreement of the partners, then the clause “subject to any agreement between the partners,” which modifies the default provision specifying the location at which partnership books are to be kept, is surplusage. If the clause is not surplusage, then the fact that there is no parallel clause in the inspection provision could be taken to indicate that the inspection clause is not subject to modification by the partners. *But see* *People v. Phillips*, 137 N.Y.S.2d 697, 699 (Sup. Ct. 1955) (“Each partner has equal rights to the partnership books unless there is a contrary agreement.”).

69. U.P.A. § 103(b)(2) (1994). One restriction from the existing provision is included in the Revised Act default provision. Under the existing statute, access is provided “at all times,” but under the Revised Act, access is provided only “during ordinary business hours.” *Compare* U.P.A. § 19 (1969) *with* U.P.A. § 403(b) (1994). The difference could be significant where one partner charges another with improper access to partnership records. Vestal, *Disclosure*, *supra* note 38, at 722-23 (discussing DuPont-HEM dispute over Ampligen records).

70. Professor Ribstein’s commentary is that “RUPA . . . senselessly invalidates agreements that ‘unreasonably restrict the right of access to books and records.’” Ribstein, *Prime Time*, *supra* note 3, at 51.

71. U.P.A. § 403 cmt. 2 (1994).

Under Section 103(b)(2), a partner’s right of access to partnership books and records may not be unreasonably restricted by the partnership agreement. Thus, *to preserve a partner’s core information rights despite unequal bargaining power*, an agreement limiting a partner’s right to inspect and copy partnership books and records is subject to judicial review. Nevertheless, reasonable restrictions on access to partnership books and records by agreement are authorized. For example, a provision in a partnership agreement denying partners access to the compensation of other partners should be upheld, absent any abuse such as fraud or duress.

Id. (emphasis added).

72. Vestal, *Disclosure*, *supra* note 38, at 724. At common law there was a proper

the practice of not requiring a partner to demonstrate a proper purpose prior to accessing partnership books and records.⁷³

Is the Revised Act treatment of partnership books and records a success? The section would benefit from a definition of "partnership books and records," a requirement that the partnership maintain a core of information, and tighter restriction of modifications of the statutory provisions. The definition should differentiate between the core partnership information required to be retained and non-core information which, although not required to be maintained, is maintained in fact. The partnership should be required to maintain the core information, denominated the "required partnership books and records," but not the non-core information, denominated the "optional partnership books and records." The partners should be free to limit access to non-core information by modifying the statutory default but should be precluded from modifying either the definition of core information or the right of access to such information. These changes would be straightforward.⁷⁴

purpose test for access to partnership books. BROMBERG, *supra* note 54, § 66, at 385 n.31. But such a requirement is not provided in the statutory language of the Uniform Partnership Act. See U.P.A. § 19 (1969). This standard contrasts with some other business organization statutes. See, e.g., REV. MODEL BUS. CORP. ACT § 16.02(b)-(c) (1989) (requiring good faith and proper purpose to examine certain non-core records); DEL. GEN. CORP. LAW § 220(b) (requiring and defining a proper purpose for examination of corporate books and records); UNIF. LIMITED PARTNERSHIP ACT § 305 (1985) (requiring a just and reasonable qualification for non-core information).

73. Compare U.P.A. § 403 cmt. 2 (1994) with U.P.A. § 19 (1969). However, the partnership is not powerless to prevent the improper use of the information so obtained. See U.P.A. § 403 cmt. 2 (1994).

[The] right to inspect and copy the partnership's books and records is not conditioned on the partner's purpose or motive. . . . A partner's unlimited personal liability justifies an unqualified right of access to the partnership books and records. An abuse of the right to inspect and copy might constitute a violation of the obligation of good faith and fair dealing for which the other partners would have a remedy.

Id. (citing §§ 404(d), 405). This provision is consistent with the practice under the existing law. See BROMBERG, *supra* note 54, § 66, at 385 n.31. "[The inspecting] partner's rights are not absolute. He may be restrained from using the information gathered from inspection for other than partnership purposes." *Id.* (quoting *Sanderson v. Cooke*, 175 N.E. 518 (N.Y. 1931)).

74. A good starting point for developing the required definition would be to differentiate between partnership books and records that are required for the partner-

B. The Revised Act Section 403(c)(1) Non-demand-Driven Disclosure Requirement Is Appropriate and Should Be Made Unamendable

Unlike the Uniform Partnership Act, the Revised Act contains an affirmative disclosure mechanism for information required for the partnership to function:

(c) Each partner and the partnership shall furnish to a partner, and the legal representative of a deceased partner or partner under legal disability:

(1) without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the

ship to prepare tax returns and financial statements and those other books and records which, although not required, are in fact kept. Such a definition, which would be added to the general definitions in Revised Act § 101, might read:

"[P]artnership books and records" means (a) the media containing any information required by applicable statutes, rules, regulations, GAAP, or the partnership agreement, or required for the preparation of the partnership's tax returns or financial statements, including all information on any supporting or explanatory schedules and notes, and all information required to support, clarify or call into question such tax returns and financial statements (the "required partnership books and records"), together with (b) the media containing any information maintained in fact within the partnership's control in addition to that set forth under (a) (the "optional partnership books and records"); subject in either case to destruction pursuant to a commercially reasonable document/information destruction policy of general application.

Vestal, *Disclosure*, *supra* note 35, at 760-61.

The requirement that the core information be maintained would occur at Revised Act § 403(a). The former would read:

(a) A partnership shall maintain true and accurate required partnership books and records, and keep both its required and optional partnership books and records, if any, at its chief executive office.

The final step is to preclude modifications of the definition and the requirement that core information be maintained. This would occur at § 103(b)(2):

(b) A partnership agreement may not:

(2) vary the definition of required partnership books and records under Section 101, restrict the right of access to required partnership books and records under Section 403(b), or unreasonably restrict the right of access to optional partnership books and records under Section 403(b);

partnership agreement or this [Act]⁷⁵

This provision, which was a late addition to the Revised Act,⁷⁶ approximates the disclosure obligation derived from Uniform Partnership Act section 18(e) by Professor Eisenberg,⁷⁷ although the drafters are clear that the statutory provision does not displace the disclosure obligation implied in the partnership management provision.⁷⁸

The broad, non-demand-driven disclosure obligation in Revised Act section 403(c)(1) is a deviation from contractarian theory.⁷⁹

75. U.P.A. § 403(c)(1) (1994).

76. The non-demand-driven disclosure obligation was not incorporated into the Revised Act until the draft of December 1993. Compare U.P.A. § 403(c) (1993) (no non-demand-driven disclosure mechanism) with U.P.A. § 403(c) (Dec. 7, 1993, Draft) ("Each partner and the partnership shall furnish to a partner . . . information concerning the partnership to the extent reasonably demanded and, without demand, to the extent just and reasonable."). In the following draft, and in the Revised Act as passed by the Conference, the demand- and non-demand-driven provisions were bifurcated. See U.P.A. § 403(c)(1)-(2) (Jan. 18, 1994, Draft); U.P.A. § 403(c)(1)-(2) (1994).

77. EISENBERG, *supra* note 44, at 42 (1987); Vestal, *Disclosure, supra* note 38, at 717. The drafters embraced Professor Eisenberg's interpretation that "[t]he effect of Section 18(e) 'is to require that, absent contrary agreement, every partner be provided on an ongoing basis with information concerning the partnership business, and be consulted in partnership decisions.'" U.P.A. § 20 cmt. (Jan. 9, 1989, Draft).

[Revised Act Section 401(f)] is based on UPA Section 18(e), which has been interpreted broadly to mean that, absent contrary agreement, each partner has a continuing right to participate in the management of the partnership and to be informed about the partnership business even if his assent to partnership business decisions is not required.

U.P.A. § 401 cmt. 7 (1994); see also *id.* § 403 cmt. 3.

[Revised Act Section 403(c) paragraph (1)] is new and imposes an affirmative disclosure obligation on the partnership and partners. There is no express UPA provision imposing an affirmative obligation to disclose any information other than the partnership books. Under some circumstances, however, an affirmative disclosure duty has been inferred from other sections of the Act, as well as from the fiduciary duty of good faith. Under UPA Section 18(e), for example, all partners enjoy an equal right in the management and conduct of the partnership business, absent contrary agreement. *That right has been construed to require that every partner be provided with ongoing information concerning the partnership business.*

Id. (emphasis added).

78. U.P.A. § 403 cmt. 3 (1994). "Subsection [403](c) is a significant revision of UPA Section 20 and provides a more comprehensive, *although not exclusive*, statement of partners' rights and duties with respect to partnership information other than books and records." *Id.* (emphasis added).

79. Ribstein, *Prime Time, supra* note 3, at 51 n.42. Discussing an earlier draft, in

To make the departure complete, the provision should be made unamendable, a regrettable oversight in the Conference's proposed statutory scheme.⁸⁰

which the commentary supported a non-demand-driven disclosure obligation as implied in the statutory provisions governing participation in the management of the business and requiring good faith, but in which such an obligation was not included in the statutory provisions, Professor Ribstein stated: "It is far from clear that disclosure duties necessarily should be implied from these provisions" *Id.*

80. Vestal, *Disclosure*, *supra* note 38, at 759-60. The statutory language follows the substance of the 1991 proposal:

All partners shall have equal rights in the management and conduct of the partnership business, which rights shall entitle each partner to such information from the partnership concerning the partnership business as is reasonably required for the exercise of such rights, without any demand by such partner.

Id. The 1991 proposal, however, called for "the insertion of a . . . clause . . . stating that a partner's right to information concerning business matters as to which the partner has a management and conduct right . . . may not be varied by agreement." *Id.* at 760. This oversight is corrected easily with an addition to Revised Act § 103(b) that the partnership agreement may not "vary the right of a partner to information concerning the partnership's business and affairs under Section 403(c)(1)." The section should be limited to Revised Act § 403(c)(1), and not include the demand-driven disclosure provision of § 403(c)(2), because the parties should be allowed some latitude to vary the availability of partnership information not required for the proper exercise of the partner's rights and duties.

Interestingly, although neither the non-demand-driven disclosure obligation nor the demand-driven disclosure obligation under Revised Act § 403(c)(1) is included in the restriction list, the access to books and records provision under Revised Act § 403(b) is included. U.P.A. § 103(b)(2) (1994) (agreement may not "unreasonably restrict the right of access to books and records under Section 403(b)"). The commentary notes the different treatment but does not indicate the rationale behind the policy decision. *See id.* § 103 cmt. 3. Professor Ribstein notes the difference in treatment between the general disclosure obligation and the right of access to books and records: "Strangely enough, RUPA does not prevent waiver of the far more basic general disclosure provided for under RUPA § 403." Ribstein, *Prime Time*, *supra* note 3, at 51 n.43.

C. The Revised Act Section 403(c)(2) Requirement for Disclosure upon Demand Should Be Expanded and Procedurally Tightened

Like the Uniform Partnership Act,⁸¹ the Revised Act contains a demand-driven disclosure mechanism:

(c) Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:

....

(2) on demand, any . . . information [other than information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act], which is required to be furnished without demand under § 403(c)(1)] concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.⁸²

The language of the Revised Act effects a narrowing of the range of information required to be supplied in two ways. First, from the formulation "all things affecting the partnership" under the Uniform Partnership Act, the Revised Act retreats to the formulation "information concerning the partnership's business and affairs"⁸³ Second, the Revised Act contains an exception to the disclosure requirement where the demand or the information sought "is unreasonable or otherwise improper under the circum-

81. U.P.A. § 20 (1969) ("Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.").

82. U.P.A. § 403(c)(2) (1994).

83. The development of this language through the drafts of the revision illustrates a steady narrowing of the language. Vestal, *Disclosure*, *supra* note 38, at 755. Compare U.P.A. § 20 (1969) ("true and full information of all things affecting the partnership") with U.P.A. § 20(c) (Feb. 14, 1990, Draft) ("true and full information concerning the partnership"); U.P.A. § 403(c) (Aug. 2-9, 1991, Meeting Draft) ("complete and accurate information concerning the partnership"); U.P.A. § 403(c) (Dec. 7, 1993, Draft) ("information concerning the partnership"); U.P.A. § 403(c) (Jan. 18, 1994, Draft) ("information concerning the partnership's business and affairs"); U.P.A. § 403(c) (1994) ("information concerning the partnership's business and affairs").

stances."⁸⁴ Other differences are of limited significance.⁸⁵

Three modifications of the Revised Act provisions would be appropriate. The first would expand the universe of information required to be provided on demand by returning the formulation from the proposed "information concerning the partnership's business and affairs"⁸⁶ to the existing language, "information of all things affecting the partnership."⁸⁷ The second would clarify the procedures to be followed when a partner or the partnership refuses to make disclosure based on an assertion that the demand "is unreasonable or otherwise improper under the circumstances,"⁸⁸ and make it clear that the burden of persuasion rests on the party refusing to make disclosure and not on the party demanding disclosure.⁸⁹ The third would restrict amendments of

84. U.P.A. § 403(c)(2) (1994). The Uniform Partnership Act does not contain such a qualifier in the statutory language. *See* U.P.A. § 20 (1969). The first draft of the Revised Act qualified the right to information, allowing the right "to the extent just and reasonable." U.P.A. § 20(b) (Jan. 9, 1989, Draft). This formulation continued to the December, 1993, draft when the drafters combined the right to information on demand and the right to information without demand. *See* U.P.A. § 403(c) (Dec. 7, 1993, Draft) ("Each partner and the partnership shall furnish to a partner, . . . information concerning the partnership to the extent reasonably demanded, and, without demand, to the extent just and reasonable."). The subsequent draft bifurcated the provision, leaving the demand-driven component in its final form. *See* U.P.A. § 403(c)(2) (Jan. 18, 1994, Draft); U.P.A. § 403(c) (1994) ("Each partner and the partnership shall furnish to a partner . . . (2) on demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.").

85. The revision includes another change. The Revised Act does not change the universe of recipients: partners and the legal representatives of deceased partners and partners under legal disability. The Revised Act does, however, change the universe of people required to supply the information, broadening the obligation from "partners" under the Uniform Partnership Act to "each partner and the partnership" under the Revised Act. *Compare* U.P.A. § 20 (1969) *with* U.P.A. § 403(c) (1994). This change is consistent with the move toward entity theory. *See* U.P.A. § 201 (1994) ("A partnership is an entity . . ."); Weidner, *supra* note 12, at 428-30.

86. U.P.A. § 403(c)(2) (1994).

87. U.P.A. § 20 (1969).

88. U.P.A. § 403(c)(2) (1994).

89. Revised Act § 403(c)(2) would be modified as follows:

(c) Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:

(2) on demand, any other information of any things affecting the

the demand-driven disclosure obligation, holding the partners to a reasonableness standard parallel to that applicable to books and records.⁹⁰

D. The Revised Act Section 404(b)(1) Statutory Accounting for Profits Disclosure Mechanism Should Be Returned to the Existing Temporal Scope and the Mechanism for Less-Than-Unanimous Contemporaneous Consent Should Be Eliminated

The Revised Act contains a duty to account for profits and benefits diverted from the partnership.⁹¹ Because the obligation to account is temporally diminished and substantively weakened, this duty compares unfavorably to the accounting obligation in the Uniform Partnership Act.⁹²

Under existing law, a partner is obligated to account for profits made and benefits received without the consent of the partnership during the formation, conduct, and liquidation of the partnership.⁹³ In the Revised Act, the duty to account is specifically

partnership, concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances. Any partner, or the partnership, refusing to furnish information demanded shall promptly notify the demanding partner (or the legal representative of a deceased partner or partner under legal disability making such demand) of such refusal and shall bear the burden of persuasion in any action to compel compliance with the demand.

90. U.P.A. § 103(b)(2) (1994). The partnership agreement may not "unreasonably restrict the right of access to books and records under Section 403(b) . . ." *Id.* The parallel change for the demand-driven disclosure obligation would be to add another subsection to § 103(b), providing that the partnership agreement may not "unreasonably restrict the right to information under Section 403(c)(2)"

91. *Id.* § 404(b)(1).

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity

Id.

92. Compare U.P.A. § 21 (1969) with U.P.A. § 404(b)(1) (1994).

93. U.P.A. § 21(1) (1969).

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the

limited to "the conduct and winding up of the partnership business."⁹⁴ The diminution in coverage was a result of the drafters' general decision that it is "inappropriate" to extend fiduciary protections to the pre-formation, negotiation period.⁹⁵

UPA Section 21(1) imposes the duty on partners to account for profits and benefits in all transactions connected with "the formation, conduct, or liquidation of the partnership." Reference to the "formation" of the partnership has been eliminated by RUPA because of concern that the duty of loyalty could be inappropriately extended to the pre-formation period when the parties are really negotiating at arm's length.⁹⁶

For authority the drafters direct readers to compare *Herring v. Offutt*⁹⁷ with *Phoenix Mutual Life Insurance Co. v. Shady Grove Plaza Limited Partnership*.⁹⁸ The comparison is not illuminating because *Herring* misapplies the existing rule and *Phoenix Mutual* is inapposite. *Herring* involved the sale of a partnership interest by two partners to a third non-partner, in connection with which the sellers misrepresented their cost.⁹⁹ Years later, the buyer found out about the secret profit and sued the sellers for fraud.¹⁰⁰ Following the obligatory quotation from Cardozo's

other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

Id.

94. U.P.A. § 404(b)(1) (1994). The accounting obligation also applies to profits and benefits "derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity." *Id.* Although this clause is not formally subject to the time limitation "in the conduct and winding up of the partnership business," *id.*, presumably the end result is the same because there can be no "partnership property" during the pre-formation phase.

95. *Id.* § 404 cmt. 2.

96. *Id.*

97. 295 A.2d 876 (Md. 1972).

98. 734 F. Supp. 1181 (D. Md. 1990), *aff'd*, 937 F.2d 603 (4th Cir. 1991).

99. In *Herring*, a joint venturer, Dewees, with his business associate Herring, located a third party, Offutt to buy the joint venture interest of a deceased joint venturer, Duley. *Herring*, 295 A.2d at 878. Offutt was told that a 24.5% interest in the venture could be purchased for \$25,000. *Id.* In fact, Duley's estate had a 25% interest which Dewees and Herring purchased for \$14,000. Having bought a 25% interest for \$14,000, Dewees and Herring sold Offutt 10% for \$10,000. *Id.*

100. *Id.*

opinion in *Meinhard v. Salmon*,¹⁰¹ the court cited section 21 of the Maryland enactment of the Uniform Partnership Act for the proposition that "the principle of utmost good faith covers not only dealings and transactions occurring during the partnership but also those taking place during the negotiations leading to the formation of the partnership."¹⁰² The sellers had to account to the buyer for the profit made on the resale.¹⁰³ The court in *Herring* may have reached the right result using the wrong rule. It appears the sellers would have liability in fraud based on their affirmative misstatement of material fact. But U.P.A. section 21 is inapplicable because it requires an accounting to the partnership, not to another partner as is the relief ordered in *Herring*.¹⁰⁴ Neither is *Phoenix Mutual* on point. It involved the failed negotiations of a real estate developer, Shady Grove, and a potential, equity-participant, life insurance company, Phoenix Mutual, to set up a joint venture.¹⁰⁵ After Shady Grove's primary claims were disposed of,¹⁰⁶ in the "Other Claims" section, the court rejected in a cursory fashion Shady Grove's claim that Phoenix Mutual breached a fiduciary duty based on an unspecified "special relationship" between the parties:

The claim . . . must fail because no fiduciary duty was owed by defendants to plaintiff. Plaintiff contends that a "special rela-

101. 164 N.E. 545 (N.Y. App. Div. 1928). The Maryland appellate court correctly found that the joint venture was the equivalent of a partnership for purposes of its analysis. *Herring*, 295 A.2d at 878.

102. *Herring*, 295 A.2d at 879 (quoting *Allen v. Steinberg*, 223 A.2d 240, 246 (Md. 1965)).

103. *Id.*

104. Nor was this transaction one involving the "formation" of the partnership. The partnership was pre-existing; at issue in *Herring* was the admission of a new partner under U.P.A. § 18(g). Nor is the common-law disclosure obligation effective in this case. While the common law does require partners to make full disclosure when they buy and sell partnership interests, that obligation operates only with respect to transactions between existing partners. It does not require disclosure to non-partners who are buying a partnership interest of an existing partner. *Vestal, Disclosure, supra* note 38, at 730-31.

105. *Phoenix Mutual*, 734 F. Supp. 1183-84.

106. Shady Grove asserted "a veritable laundry list of legal theories." *Id.* at 1186. Its primary theory, unsuccessful on the facts, was that a binding joint venture agreement was reached. *Id.* part IV. Its secondary theory, also unsuccessful on the facts, was that Phoenix Mutual breached a duty to negotiate in good faith. *Id.* part V.

tionship" existed between the parties giving rise to creation of a fiduciary duty. This contention is specious. A fiduciary relationship hardly arises when commercial parties engage in contract negotiations. No trustee-beneficiary relationship arose here, nor do the facts indicate that any other sort of special relationship existed between these two negotiating parties.¹⁰⁷

Why did the court in *Phoenix Mutual*, which appears to be applying Maryland law, ignore the special, fiduciary relationship created under Uniform Partnership Act section 21 and earlier cited (albeit wrongly) in *Herring*, a Maryland case? The answer is simple: *Phoenix Mutual* did not involve a diversion of a partnership asset or opportunity. It involved negotiations that reached an impasse. As such, it is questionable authority in a discussion of whether it is appropriate to restrict temporally the obligation to account for profits and opportunities diverted in the formation stage. Because neither *Herring* nor *Phoenix Mutual* involve a situation as to which U.P.A. section 21 applies, they are hardly compelling support for the proposition that it would be "inappropriate" to continue application of the statutory duty to account in the pre-formation period.

Another change relates to the role of consent. The existing act specifically obliges a partner to account for benefits and profits derived "without the consent of the other partners."¹⁰⁸ The case law is clear that the Uniform Partnership Act requires the consent of *all* the partners before a partner can take actions that would otherwise justify an accounting.¹⁰⁹ Up until the final drafts, the Revised Act also included the consent qualification, but the drafters deleted the qualification in the final drafts,¹¹⁰ and it is absent from the Revised Act.¹¹¹ Had the drafters merely deleted the consent requirement, the partners presumably

107. *Id.* at 1191-92.

108. U.P.A. § 21(1) (1969).

109. See *Phillips v. Kula* 200, Wick Realty, Inc., 629 P.2d 119, 123 (Haw. Ct. App. 1981).

110. Compare U.P.A. § 21 (1969) (including consent provision) and U.P.A. § 404(b)(1) (1993) (including consent provision) with U.P.A. § 404(b)(1) (June 1, 1994, Draft) (deleting consent provision) and U.P.A. § 404(b)(1) (1994) (deleting consent provision).

111. U.P.A. § 404(b)(1) (1994).

would have been free to proceed under the section that allows the partners by unanimous agreement to "identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable"¹¹² The drafters went further, however, and the consent feature reappears in another location with a critical substantive difference:

(b) The partnership agreement may not:

. . . .

(3) eliminate the duty of loyalty under Section 404(b) or 603(b)(3), but:

. . . .

(ii) all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty¹¹³

The Revised Act allows parties to breach the fiduciary duty of good faith requirement to account on the agreement of less than all of the partners, albeit with the *ex ante* agreement of all the partners.¹¹⁴ And the final jiggling of the Revised Act provisions removes even the protection of the "manifestly unreasonable" test in cases where the partners agree to a non-categorical violation of the duty of loyalty.¹¹⁵ This revision is yet another inap-

112. *Id.* § 103(b)(3)(i) ("[T]he partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable").

113. *Id.* § 103(b).

114. It must be specified in the partnership agreement if actions that would otherwise breach the duty of loyalty may be authorized on the agreement of fewer than all the partners. *Id.* § 103(b)(3)(ii). If the provision is in the partnership agreement at organization, each partner in theory agrees (although it is far from clear that such a provision would be an effective notice of the mischief that could be in the offing). If the provision is added at a later date through an amendment of the partnership agreement, the acquiescence of all the partners would be required. *Id.* § 401(j) ("An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all the partners.").

115. Compare *id.* § 103(b)(3)(ii) (not containing manifestly unreasonable qualification if prior authorization or ratification) with U.P.A. § 103(b)(3) (Jan. 18, 1994, Draft) (containing manifestly unreasonable qualification for all agreements regarding duty of loyalty violations).

propriate diminution of the fiduciary protections afforded partners under the Revised Act.

The section 404(b)(1) statutory accounting for profits disclosure mechanism should be modified to include pre-formation conduct and to eliminate the mechanism for less-than-unanimous, contemporaneous consent of breaches of fiduciary duties.¹¹⁶

E. The Revised Act Section 405(b) Formal Accounting Disclosure Mechanism Appropriately Modifies the Uniform Partnership Act Provisions and Requires No Further Modifications

The Revised Act contains a right to a formal accounting that differs in structure from the right to a formal accounting included in the Uniform Partnership Act.¹¹⁷ The Revised Act increases

116. The changes are straightforward. First, § 103(b)(3)(ii) should be deleted, and § 103(b)(3)(i) should be integrated into the introductory language of § 103(b)(3). Second, § 404(b)(1) should be revised to include pre-formation conduct. This revision would raise a problem because the language of U.P.A. § 21 does not provide for all of the possible situations evidently meant to be covered. For example, a § 21 claim may arise in a case where the partnership is not ultimately formed, but § 21 provides for an accounting "to the partnership." See U.P.A. § 21 (1969). On the theory that U.P.A. § 21 has worked despite this technical defect, Revised Act § 404(b)(1) could be slightly modified, as follows:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the ~~formation~~ conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity

If a more technically correct revision is desired, Revised Act § 404(b)(1) could be modified more comprehensively, as follows:

(1) to account to the partnership, ~~or in the case of formation-based claims, the other partners or prospective partners,~~ and hold as trustee for it, ~~or them,~~ any property, profit, or benefit derived by the partner in the ~~formation~~ conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership, ~~or a prospective partnership,~~ opportunity

117. U.P.A. § 405(b) (1994).

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

- (1) enforce the partner's rights under the partnership agreement;
- (2) enforce the partner's rights under this [Act] . . .
- (3) enforce the rights and otherwise protect the interests of the

the availability of the formal accounting mechanism as part of a general relaxation of impediments to partner litigation against the partnership prior to dissolution and winding up.¹¹⁸ The present statute allows an accounting without dissolution in three specific circumstances: if a partner "is wrongfully excluded from the partnership business or possession of its property by his co-partners,"¹¹⁹ if an agreement of the partners so provides,¹²⁰ and if triggered by a section 21 obligation.¹²¹ The Revised Act deals with the right to an accounting as part of the legal and equitable remedies potentially available to a partner, not as a separate mechanism.¹²² Within that framework, the Revised Act allows for an accounting in each of the three specific situations contemplated by the existing statute. The existing statute provides for an accounting where one partner "is wrongfully excluded from the partnership business or possession of its property by his co-partners."¹²³ The Revised Act expands this provision to make the accounting remedy available to enforce any partner rights under the partnership agreement and the Revised Act, not just the right of participation.¹²⁴ The existing statute provides for an accounting if an agreement of the partners so pro-

partner, including rights and interests arising independently of the partnership relationship.

Id.

118. Compare U.P.A. § 22 (1969) with U.P.A. § 405(b) (1994).

Section 405(b) goes far beyond the UPA [§ 22] rule. It provides that, during the term of the partnership, partners may maintain a variety of legal or equitable actions, including an action for an accounting, as well as a final action for an accounting upon dissolution and winding up. It reflects a new policy choice that partners should have access to the courts during the term of the partnership to resolve claims against the partnership and the other partners, leaving broad judicial discretion to fashion appropriate remedies.

Id. § 405 cmt. 2.

119. U.P.A. § 22(a) (1969).

120. *Id.* § 22(b).

121. *Id.* § 22(c).

122. U.P.A. § 405(b) (1994). "A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business" *Id.*

123. U.P.A. § 22(a) (1969).

124. U.P.A. § 405(b)(1)-(2) (1994).

vides¹²⁵—a point presumably subsumed in the combination of the Revised Act sections allowing an accounting to “enforce a right under the partnership agreement,”¹²⁶ and the expansive definition of “partnership agreement” as “the agreement, whether written, oral, or implied, among the partners concerning the partnership”¹²⁷ The final specific situation allowing an accounting under the existing regime is “[a]s provided by section 21.”¹²⁸ Aside from the question of whether, strictly speaking, “a formal account” within the meaning of section 22 ever is “provided” by the partner’s obligation to account under section 21, a fair reading of the existing statute is that partners have a section 22(c) right to a formal accounting to determine whether a copartner has breached such partner’s section 21 obligation to account. This result is achieved in the Revised Act (although in somewhat reduced power given the temporal restriction of the underlying obligation to account)¹²⁹ through the combination of the fiduciary duty of loyalty obligation to account¹³⁰ and the specific authorization for an accounting to enforce the other partners’ rights under that section.¹³¹

The Revised Act contains no directly parallel provision to the final authorization contained in the existing regime, which provides for an accounting “[w]henver other circumstances render it just and reasonable.”¹³² Surely, however, the combination of the authorizations for formal accountings to protect rights under the agreements of the parties and the Revised Act—together with the ability to have an accounting to “enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relation-

125. U.P.A. § 22(b) (1969).

126. U.P.A. § 405(b)(1) (1994).

127. *Id.* § 101(5).

128. U.P.A. § 22(c) (1969).

129. Compare *id.* § 21 (obligation during formation, conduct, and liquidation of partnership) with U.P.A. § 404(b)(1) (1994) (obligation during conduct and winding up of partnership).

130. U.P.A. § 404(b)(1) (1994).

131. *Id.* § 405(b)(2)(i) (authorizing an accounting to “enforce the partner’s rights under . . . [§] 404”).

132. U.P.A. § 22(d) (1969).

ship"¹³³—achieves the same result. Clearly, the drafters intended this outcome.¹³⁴

The statutory provisions dealing with the right to a formal accounting are appropriate, and the structural change is helpful. No special modifications of this section are required although the modifications proposed in the following section apply to the formal accounting mechanism as one of the section 405 remedies.

F. The Relationship Between the Statutory Disclosure Obligations and the Revised Act Section 405 Remedies and Liabilities Should Be Clarified; Preferably the Remedies and Liabilities Provisions Should Be Made Unamendable

A major unresolved problem with the disclosure scheme of the Revised Act is the remedies for non-compliance with the disclosure obligations. Specifically, how do the rights under sections 403 and 404 fit with the remedies and liabilities under section 405? Can even the minimal protections of the Revised Act be circumvented by eliminating or impairing the remedies available to vindicate the aggrieved partners' rights?

The analysis requires two steps, both of which turn on the ability to amend the various sections. The first step involves the substantive disclosure obligations. As it stands, the duty to make available partnership books and records,¹³⁵ the fiduciary duty to account,¹³⁶ and the non-fiduciary obligation of good faith and fair dealing¹³⁷ are subject to some restrictions on amendment.¹³⁸ The demand-driven¹³⁹ and non-demand-driven¹⁴⁰ disclosure requirements are not subject to any restrictions on amendment.¹⁴¹ Each of these provisions should be

133. U.P.A. § 405(b)(3) (1994).

134. *Id.* § 405 cmt. 2; see *supra* note 118.

135. U.P.A. § 403(b).

136. *Id.* § 404(b)(1).

137. *Id.* § 404(d).

138. See, e.g., *id.* § 103(b)(2) (as to the right of access to books and records under § 403(b)); *id.* § 103(b)(3) (as to the fiduciary duty of loyalty); *id.* § 103(b)(5) (as to the non-fiduciary obligation of good faith and fair dealing).

139. *Id.* § 403(c)(2).

140. *Id.* § 403(c)(1).

141. Neither disclosure obligation appears in the section 103(b) listing of sections as to which amendments are restricted. See *id.* § 103(b).

tightened to restrict the ability of the parties to diminish the protections,¹⁴² but the protections would not be safe even if all the appropriate modifications of the substantive disclosure obligations were made because of the second step, involving the liabilities and remedies associated with the substantive disclosure obligations. Again, the key is the ability to amend the statutory sections at issue. The relevant liabilities and remedies are found in Revised Act section 405.¹⁴³ The liabilities and remedies under section 405, however, are not on the list of sections as to which the ability of the parties to amend the statutory defaults is restricted,¹⁴⁴ and the parties appear to be fully able to modify the liabilities and remedies, including the formal accounting mechanism.¹⁴⁵

This appearance is incorrect, however, and forms a significant trap for the unwary. The intention of the drafters, notwithstanding the seemingly clear language of section 103(a), is that the provisions of any partnership agreement govern over the statutory provisions except where section 103(b) otherwise provides, *and except where the liabilities and remedies of section 405 are involved*.¹⁴⁶ The statute itself gives no indication that the list of sections as to which modifications are limited is anything but exclusive. The drafters recognized this problem, but they were unable to solve it in the statute.¹⁴⁷ If the Conference is serious

142. See *supra* part II.A (duty to make available partnership books and records); *supra* part II.B (non-demand-driven disclosure); *supra* part II.C (demand-driven disclosure); *supra* part II.D (duty to account); see also Vestal, *supra* note 2, at 575 n.235 (arguing that obligation of good faith and fair dealing should be included within fiduciary duty of loyalty).

143. U.P.A. § 405 (1994).

144. *Id.* § 103(b).

145. *Id.* § 103(a).

Except as otherwise provided in subsection (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

Id.

146. See *id.* §§ 103 cmt. 1, 405 cmt. 3.

147. 1992 NATIONAL CONFERENCE PROCEEDINGS, *supra* note 21, at 188. One of the reporters for the Revised Act observed to the Conference:

We have looked at that and have tried to figure out how we could go about stating some sort of floor on remedy, and we haven't been able to

that the section 405 remedies and liabilities are not to be fully in play—and certainly that is the correct position, albeit not one in accord with contractarian theory¹⁴⁸—at the very least some indication should be included in the statute itself, and not merely in the comments,¹⁴⁹ that the power of the partners to modify the liabilities and remedies of section 405 is limited.¹⁵⁰

If partners cannot circumvent the restrictions on modification of the section 403 and 404 rights by eliminating the liabilities and remedies provisions of section 405, then another basic problem arises: What are the limits of the power to amend the liabilities and remedies provisions of section 405? It is important at this point to remember that the section 103(b) restrictions on the power to modify specified statutory provisions are not uniform.¹⁵¹ Although provisions not listed in section 103(b) are fully amendable (albeit with the “implicit listing” of section 405),

find a way. We decided to leave it to comment to say something that would reflect the policy you've just stated.

Id.

148. Ribstein, *Prime Time*, *supra* note 3, at 62 n.125. Professor Ribstein notes the apparent inconsistency in declaring the § 405 remedies of limited amenability while not including them in the § 103(b) listing. He also argues that, “[c]ontrary to the implication of the Comment 3 to § 405, it does not follow from the fact that a duty is mandatory that all aspects of the remedy also are mandatory.” *Id.* His solution is simple: “the statute should make clear that partners can contract to limit remedies.” *Id.* at 62.

149. The use of the commentary in this manner is troublesome. It almost certainly fails to provide adequate notice to the bench and bar, in part because the Conference’s official commentary is rarely adopted by enacting legislatures. Vestal, *Choice of Law*, *supra* note 38, at 245 nn.110-11, 246 n.112 (discussing treatment of commentary to the Revised Uniform Limited Partnership Act by enacting states). Additionally, the use of the commentary in this way appears to violate the Conference’s own guidelines. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1991-92 REFERENCE BOOK, DRAFTING RULES FOR UNIFORM OR MODEL ACTS 81 (1991) (“Comments should not be used as a substitute for or to modify any substantive provision in an Act.”).

150. Such a change would be easily accomplished by adding a new paragraph to subsection 103(b), making reference to § 405, although the exact language of the new paragraph would depend upon the content of the restriction, discussed in *infra* part II.G. The suggestion, to add a statutory reference to the restrictions on modification of the liabilities and remedies under § 405, was made during the 1992 floor debate. 1992 NATIONAL CONFERENCE PROCEEDINGS, *supra* note 21, at 188-89. Note that such a change would not protect the non-demand-driven disclosure obligation because it is codified at § 403, not § 405.

151. Vestal, *Compromise*, *supra* note 38, part II.

the obverse (that provisions listed in section 103(b) are flatly unamendable) is not true. Section 103(b) differentiates between statutory provisions that (1) cannot be varied,¹⁵² (2) cannot be unreasonably restricted,¹⁵³ (3) cannot be unreasonably reduced,¹⁵⁴ (4) cannot be eliminated,¹⁵⁵ and (5) cannot be restricted.¹⁵⁶ How should modifications of the section 405 provisions be restricted to follow appropriately the different treatments of the amenability of section 403 and 404 rights?

The commentary is ambiguous on this point. The commentary to section 405 states: "Generally, partners may limit or contract away their Section 405 remedies. They may not, however, eliminate entirely the remedies for breach of those duties which are mandatory under Section 103(b)."¹⁵⁷ This implicit restriction of the modification right is restated, with an important difference, in the commentary to section 103:

The general rule under Section 103(a) is that relations among the partners and between the partners and the partnership are governed by the partnership agreement. *See* Section 101 (5). To the extent that the partners fail to agree upon a contrary rule, RUPA provides the default rule. Only the rights and duties listed in Section 103(b), and implicitly the corresponding liabilities and remedies under Section 405, *are mandatory and cannot be waived or varied by agreement beyond what is authorized*. Those are the only exceptions to the general principle that the provisions of RUPA with respect to the rights of the partners *inter se* are merely default rules, subject to modification by the partners.¹⁵⁸

The difference between the first formulation, that the remedy may not be eliminated, and the second, that the remedy may not be varied beyond what is authorized, is significant.

152. U.P.A. § 103(b)(1), (6), (7), (8) (1994).

153. *Id.* § 103(b)(2) ("A partnership agreement may not . . . unreasonably restrict the right of access to books and records under Section 403(b) . . .").

154. *Id.* § 103(b)(4) ("A partnership agreement may not . . . unreasonably reduce the duty of care under Section 404(c) or 603(b)(3) . . .").

155. *Id.* §§ 103(b)(3), (5).

156. *Id.* § 103(b)(9) ("A partnership agreement may not . . . restrict rights of third parties under this [Act].").

157. *Id.* § 405 cmt. 3.

158. *Id.* § 103 cmt. 1 (emphasis added).

The challenge, then, is how to tie the permissible range of modifications of the liabilities and remedies provisions to the different permissible ranges of modifications of the duties provisions.¹⁵⁹ There are several possibilities. The grossest treatment would be to adopt the suggestion in the commentary to section 405 and to establish a "lowest common denominator" rule.¹⁶⁰ Under this approach, the statute merely would guarantee against the complete elimination of all liabilities and all remedies where the partner's claim is based on a substantive right, the modification of which is restricted under section 103.¹⁶¹ This treatment would, under the structure of section 103, provide wholly inadequate protection for partners.¹⁶²

A somewhat more targeted approach would be to adopt the suggestion in the commentary to section 103 and establish an "authorized variation" rule.¹⁶³ Under this approach, the statute would limit contractual modifications of liabilities and remedies

159. One of the reporters for the Revised Act recognized this problem in the floor discussion on point:

Mr. Donald J. Weidner (Reporter): . . . I think what you're talking about is whether we should include in Section 103 some sort of qualification to both 405 and 406. . . . The problem you get into in drafting is that in 103 there is fairly carefully chosen language with respect to the various rights—that is to say, in some cases, we may not vary a right; in other cases, you may not eliminate the right. And in some of the sections we have qualified further. We have said you may not eliminate the right, but you may do something—you may hobble it [a] little bit.

1992 NATIONAL CONFERENCE PROCEEDINGS, *supra* note 21, at 187-88.

160. U.P.A. § 405 cmt. 3 (1994). "Generally, partners may limit or contract away their Section 405 remedies. They may not, however, eliminate entirely the remedies for breach of those duties which are mandatory under Section 103(b)." *Id.*

161. The language to implement this approach would be a straightforward addition to § 103:

(b) A partnership agreement may not:

(10) eliminate the liabilities and remedies under Section 405.

162. Such a treatment would, however, be consistent with the weak treatment of essential fiduciary duties under the Revised Act. Vestal, *supra* note 2, at 556-59. The weakest limitation on modification, the prohibition on elimination, applies to both the fiduciary duty of loyalty, U.P.A. § 103(b)(3) (1994), and the non-fiduciary obligation of good faith and fair dealing, *id.* § 103(b)(5).

163. *Id.* § 103 cmt. 1 ("[The] liabilities and remedies under Section 405 [corresponding to rights and duties listed in section 103(b)] . . . are mandatory and cannot be waived or varied by agreement beyond what is authorized.").

to the same authorized variations of the statutory defaults as are available for the underlying substantive rights.¹⁶⁴

Both the lowest common denominator and authorized variation approaches have serious deficiencies. By tying the ability to restrict remedies and liabilities to the ability to modify substantive rights, both approaches allow unlimited weakening of remedies and liabilities as related to sections not listed in section 103(b). Consider the situation where a partner is in fact excluded from participation in the management of the partnership, notwithstanding that the partnership agreement does not vary the statutory default that "[e]ach partner has equal rights in the management and conduct of the partnership business."¹⁶⁵ The participation section is not listed in section 103(b) as a section as to which the partners' ability to modify the statutory default is limited. The partners could have agreed to exclude one of their number from participation, although in the example they did not do so. Both the lowest common denominator and authorized variation approaches suggest that because the partnership agreement could have contained a complete exclusion on participation, it also could include a complete exclusion of liability and remedies.¹⁶⁶ Of course, a fully knowledgeable partner would never agree to such a provision, but the world is full of people who read the "important" substantive provisions, if they read the agreement at all, and never get to the "boilerplate" remedies sections of the agreement. The contractarians label concern for such individuals "parentalistic."¹⁶⁷

The authorized variation approach introduces a new dimension

164. The language to implement this approach would be a different addition to § 103(b):

(b) A partnership agreement may not:

. . . .
 (10) vary the liabilities and remedies under Section 405 to a greater extent than variations are allowed under Section 103(a) and (b) in the substantive rights giving rise to the partner claims at issue.

165. U.P.A. § 401(f) (1994).

166. See *id.* § 103 cmt. 1 ("Only the rights and duties listed in Section 103(b), and implicitly the corresponding liabilities and remedies under Section 405, are mandatory and cannot be waived or varied by agreement beyond what is authorized."); *id.* § 405 cmt. 3 ("[Partners] may not . . . eliminate entirely the remedies for breach of those duties which are mandatory under Section 103(b).").

167. Weidner, *supra* note 12, at 454.

of complexity by tying restrictions on modifications of liabilities and remedies to the various levels of restriction already included in section 103(b) for the underlying rights and duties provisions. Of course, there is no problem as to those provisions that cannot be varied¹⁶⁸ because the remedies also would be beyond modification. Using the same method, the partnership agreement could not "unreasonably restrict" remedies for partners denied access to books and records¹⁶⁹ or "unreasonably reduce" remedies for partners having claims based on the fiduciary duty of care.¹⁷⁰ These formulations may be reasonable, requiring the courts to make case-by-case determinations as to what is reasonable. But it seems no protection at all to say that as to breaches of the fiduciary duty of loyalty and the non-fiduciary obligation of good faith and fair dealing, the partnership agreement is limited only to the extent that it may not wholly eliminate the remedies provided in section 405.¹⁷¹ To complicate matters further, the court would need to consider the impact in the remedy calculation of the language that "the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable,"¹⁷² and that "the partnership agreement may prescribe the standards by which the performance of the obligation [of good faith and fair dealing] is to be measured, if the standards are not manifestly unreasonable."¹⁷³ These passages may impose a "manifestly unreasonable" test on the restriction of liabilities and remedies—another indication of the problems caused by the basic formulation of fiduciary duties under the Revised Act.¹⁷⁴

Both approaches run into difficulty when faced with multiple claims arising from the same factual situation. Consider our last illustration—a partner improperly excluded from partnership

168. U.P.A. § 103(b)(1), (6), (7), (8) (1994).

169. *Id.* § 103(b)(2).

170. *Id.* § 103(b)(4).

171. *Id.* §§ 103(b)(3), (5).

172. *Id.* § 103(b)(3)(i).

173. *Id.* § 103(b)(5).

174. The final part of the analysis is moot because § 103(b) provides that "[a] partnership agreement may not . . . restrict rights of third parties under this [Act]," *id.* § 103(b)(9), but § 405 does not create any remedies for non-partners, *id.* § 405.

operations. In addition to being excluded from the partnership business, such a partner typically may be denied access to the books, and the co-partners may pilfer partnership profits. If the partnership agreement limits remedies to the extent possible under the commentary, what result? Under either approach, the partnership agreement could eliminate any remedy for the exclusion from participation. Under the lowest common denominator approach, the partnership agreement could modify the remedies and liabilities for the denial of access to the books and records, and for the breach of the fiduciary duty of loyalty in the failure to account for the diverted profits, but it would be prevented from eliminating such provisions. Under the authorized variation approach, the partnership agreement could not "unreasonably restrict" the remedy for a denial of access to the books and records, or "eliminate" the remedy for the breach of the fiduciary duty of loyalty in the failure to account for the diverted profits. Under either approach, courts could have to consider separate limitations on remedies for each claim—a cumbersome approach.

Better than the lowest common denominator or authorized variation approaches, although conceptually complicated, would be an approach that tied variations in the liabilities and remedies under section 405 to changes actually made from the statutory defaults with respect to the underlying rights and powers giving rise to the claims. This approach would solve the problem of how to treat sections that are fully amendable under section 103(a), such as the right of participation, but are not modified, or are modified in insubstantial ways, in the specific case at issue.¹⁷⁵ This approach would not eliminate the challenge in dealing with multiple claims, and it would exponentially complicate the challenge of linking changes in the underlying rights and powers and

175. The language to implement this approach would be a different addition to § 103(b):

(b) A partnership agreement may not:

....
(10) vary the liabilities and remedies under Section 405 to a greater extent than variations are in fact made under Section 103(a) and (b) in the substantive rights in that partnership agreement giving rise to the partner claims at issue.

changes in the corresponding liabilities and remedies by requiring the courts to define equivalents, not for the five levels of permissible statutory variation¹⁷⁶ but for the infinite number of possible contractual variations.

The best approach would be simply to add the liabilities and remedies section to the list of provisions made unamendable,¹⁷⁷ thus equalizing the treatment of liabilities and remedies for sections listed and not listed in section 103(a) and leaving section 405 intact. At the same time, such an approach would permit the partners to liquidate damages and otherwise limit remedies subject to other law, while allowing courts the benefit of existing caselaw on point.¹⁷⁸

G. The Revised Act Abandonment of Classes of Partnership-Related Claims Historically Within the Operation of Partnership Law Should Be Reversed

The Revised Act bifurcates the world historically within the scope of common law and statutory partnership law. Some part-

176. U.P.A. § 103(b) (1994). This provision differentiates between sections that cannot be varied, *id.* § 103(b)(1), (6), (7), (8), cannot be unreasonably restricted, *id.* § 103(b)(2), cannot be unreasonably reduced, *id.* § 103(b)(4), cannot be eliminated, *id.* § 103(b)(3), (5), and cannot be restricted, *id.* § 103(b)(9).

177. The language to implement this approach would be the simplest addition to § 103:

(b) A partnership agreement may not:

(10) vary the liabilities and remedies under Section 405.

178. This is apparently the result the drafters desired:

Commissioner Miller: . . . the way I read 405, and I think 406, and their comments, is that we may in fact be able to back door, since 405 and 406 are waivable by agreement, whatever we seek to achieve in 404. . . .

Mr. Donald J. Weidner (Reporter): We discussed this issue, and I think what you're talking about is whether we should include in Section 103 some sort of qualification to both 405 and 406. And the committee view on it was that whenever there is a mandatory right in the act, that the remedies appropriate under 406 to pursue that right would be available and not waivable, you couldn't eliminate through the back door the right by eliminating all the remedies. And the understanding was that, for example, if you had a liquidated damages clause for breach of a partnership agreement that gave you a dollar settlement, that would be unenforceable by the general law of penalty.

1992 NATIONAL CONFERENCE PROCEEDINGS, *supra* note 21, at 187-88.

nership-related claims continue to be deemed partnership situations and will continue to be handled by partnership law. Other partnership-related claims are deemed "arms length" transactions and will be handled by non-partnership law. Thus the Revised Act removes the conduct of the parties in the pre-formation stage,¹⁷⁹ the conduct of partners transacting business with the partnership,¹⁸⁰ and the conduct of partners selling interests in the partnership among themselves¹⁸¹ from the partnership-law regime and treats them as arms-length interchanges no longer subject to partnership-specific law.

1. The Issue of Whether To Reduce the Protections for Aggrieved Partners Was Not Debated Adequately or Resolved Properly

This change results in a clear diminution of protection for aggrieved parties from that available under the existing regime.¹⁸² Whether this diminution is appropriate is debatable.¹⁸³ A fair reading of the official commentary and the Conference deliberations suggests that the amount of the decrease in protection was not always clearly understood. For example, when dealing with the exclusion of the pre-formation period from the operation of the Revised Act, the commentary notes the exclusion but does not flag the diminution in protection:

Reference to the "formation" of the partnership has been

179. The Revised Act's non-fiduciary obligation of good faith and fair dealing operates only as to the discharge of duties under the Revised Act or the partnership agreement, and the exercise of rights. U.P.A. § 404(d) (1994). The predicate duty to account, as part of the fiduciary duty of loyalty, is inapplicable to the formation period. *Id.* § 404(b)(1).

180. *Id.* § 404(f).

181. These transactions are excluded because they are not within the artificial formulation of partnership fiduciary duties contained in § 404(a) and (b) of the Revised Act.

182. Vestal, *supra* note 2, at 546-49.

183. I do not believe it is appropriate to exclude pre-formation conduct from the oversight of the act. *See id.* at 555-56. This pre-formation disclosure obligation has been identified as a notable departure of partnership law from ordinary contract law, one which properly could be classified as mandatory. Deborah A. DeMott, *Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty To Be Loyal*, 30 OSGOOD HALL L.J. 471, 475, 485-86 (1992).

eliminated by RUPA because of concern that the duty of loyalty could be inappropriately extended to the pre-formation period when the parties are really negotiating at arm's length. . . . Once a partnership is agreed to, each partner becomes a fiduciary in the "conduct" of the business. Pre-formation negotiations are, of course, subject to the general contract obligation to deal honestly and without fraud.¹⁸⁴

The commentary does not make clear that the quantum of protection available to parties in the pre-partnership phase is significantly less than that available after partnership formation. An example of the diminution of protection found in the Revised Act comes in the treatment of good faith and fair dealing where a partner transacts business with the partnership. Under the existing regime, the common-law disclosure obligation of partners is effective during the period the transaction is negotiated.¹⁸⁵ Under the Revised Act, however, "the rights and obligations of the partner [transacting business with the partnership] are the same as those of a person who is not a partner, subject to other applicable law."¹⁸⁶ But "other applicable law" provides diminished protection: Neither the Uniform Commercial Code good faith requirement¹⁸⁷ nor the Restatement duty of good faith and fair dealing¹⁸⁸ is effective during the period of negotiation. Presum-

184. U.P.A. § 404 cmt. 2 (1994).

185. Vestal, *supra* note 2, at 555; Vestal, *Disclosure*, *supra* note 38, at 732.

186. U.P.A. § 404(f) (1994).

187. The Uniform Commercial Code good faith obligation, by its terms, does not apply during the negotiation of a contract otherwise covered by the Code. *See, e.g.*, *Whorley v. First Westside Bank*, 485 N.W.2d 578, 583 (Neb. 1992) (no U.C.C. good faith claim where contractual relationship not established). But one could argue that application of a subjective good faith standard in the context of a partnership relationship would create an *ongoing* obligation to disclose prior to the performance of the contract such that performance of the contract by the knowledgeable partner would be a violation of the U.C.C. § 1-203 good faith in performance requirement. One could also construct a case where a partner would acquire knowledge after the contract had been entered into, but in advance of performance, thus triggering a U.C.C. § 1-203 obligation to disclose.

188. Like U.C.C. § 1-203, Restatement § 205 does not, by its terms, apply to the negotiation phase of a contractual relationship. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1979). One might argue, however, that the good faith and fair dealing obligation set forth in the Restatement applies to the knowledgeable partner not by virtue of the contract for the purchase and sale of the specific asset which is being negotiated, but rather by virtue of the partnership agreement, which is after

ably the Revised Act's drafters would not see this gap in coverage as a problem; this contraction of protection for partners is consistent with the temporally narrow coverage of the Revised Act's non-fiduciary obligation of good faith and fair dealing¹⁸⁹ and with the general contraction of intra-partnership fiduciary protections under the Revised Act.¹⁹⁰ To the extent the commentary and discussions surrounding adoption finesse this point, the issue has not been debated adequately.

Some indication of the inadequate nature of the consideration given the shift to reliance on non-partnership-specific law is found in an exchange between one of the ABA advocates and a commissioner at the 1992 annual meeting:

Mr. Ed. Merrill (ABA): [I]t was generally felt that pre-formation of the partnership, that the parties should be treated as dealing with arm's lengths and that other law, such as fraud in the inducement and other contract related principles, would cover the period where a person is induced into the partnership on the basis of fraud.

Commissioner Stern: Well, yes. But for fraud to operate, there has to be some information given.

Mr. Merrill: Concealment—intentional concealment to induce conduct I think is actionable fraud.

Commissioner Stern: Okay.¹⁹¹

The exchange misses an important distinction. Intentional concealment and non-disclosure are not the same thing. Simply stated, concealment, without more, is the equivalent of assertion;

all a contract between the partners. Such an argument should fail for two reasons. First, a contract to purchase an asset from the partnership is not made in performance or enforcement of the partnership agreement, and thus the Restatement obligation is irrelevant. Second, the Revised Act clearly intended to exclude the partnership-status-based statutory good faith and fair dealing obligation in the situation where a partner is transacting business with the partnership. See U.P.A. § 404(f) (1994) ("[T]he rights and obligations of the partner [who transacts business with the partnership] are the same as those of a person who is not a partner, subject to other applicable law."). It would seem inappropriate to impose a common-law obligation of good faith and fair dealing on the knowledgeable partner on the basis of the contract of partnership.

189. U.P.A. § 404(d) (1994).

190. Vestal, *supra* note 2, at 534, 555-56.

191. 1992 NATIONAL CONFERENCE PROCEEDINGS, *supra* note 21, at 137-38.

non-disclosure, without more, is not.¹⁹² Under the current regime *non-disclosure* is actionable; the aggrieved party need not show intentional concealment. The drafters' reliance on fraud is misplaced further because, although non-disclosure short of intentional concealment can support a claim for relief, such a remedy is not the equivalent of the protections provided partners under the existing regime. Non-disclosure of a material fact is equivalent to assertion only in certain well-defined cases.¹⁹³ Non-disclosure of a material fact can be equivalent to assertion even for individuals not in a relation of trust and confidence, but the standard typically applicable in the negotiation context both creates substantial proof problems and gives the aggrieved partner materially diminished protection.¹⁹⁴ This reduction in an

192. Compare RESTATEMENT (SECOND) OF CONTRACTS § 160 (1979) ("Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist.") with *id.* § 161 ("A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only: . . ."). Compare RESTATEMENT (SECOND) OF TORTS § 550 (1976) ("One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.") with *id.* § 551 ("One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, *if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.*") (emphasis added).

193. RESTATEMENT (SECOND) OF CONTRACTS § 161 (1979); RESTATEMENT (SECOND) OF TORTS § 551 (1976). Prospective partners have a status-based obligation to disclose under the present regime. Vestal, *Disclosure*, *supra* note 38, at 727-35; see RESTATEMENT (SECOND) OF CONTRACTS § 161(d) (1979) ("A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only: . . . (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them."). The co-agency partnership relationship, as historically defined, and the relationship of joint adventurers, are such relations of trust and confidence. *Id.* at § 161 cmt. f; RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976) ("One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them . . .") The partnership relationship is such a relation of trust and confidence. See *id.* at § 551 cmt. f.

194. RESTATEMENT (SECOND) OF CONTRACTS § 161(b) (1979).

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only: . . . (b)

aggrieved partner's access to a potential remedy is precisely the shift, from status as partner to status as third party, the Revised Act's drafters propose.¹⁹⁵ Having made the change, and having specifically argued against status-based, fiduciary duties, the proponents of the Revised Act should articulate clearly that protections equivalent to those based on partnership status will not be available to aggrieved partners under the proposed regime.

2. The Revised Act's Reliance on Non-Partnership Law Is Misplaced

Beyond the question of whether the policy issue of the diminution in protection has been debated adequately and resolved properly, the new regime fails to address questions of how, and how well, the "other applicable law" of "arms length" transactions will be applied in the context of situations heretofore handled under partnership-specific law. The Revised Act's abandonment of jurisdiction over significant partnership-related situations might be justified if the other applicable law constitutes a well-defined body of law that can be applied without significant modification. But the body of law to which recourse is being made fails on both counts; it is neither well-defined nor capable of being applied intact.

Consider the three situations the Revised Act removes from operation of the partnership-law-based disclosure obligation: pre-

where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

Id.; see RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1976).

One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Id.

195. U.P.A. § 404(f) (1994) ("A partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.").

formation negotiations, negotiations for business transactions between a partner and the partnership, and sales of partnership interests among partners. Of course, some elements of the general regime are relatively settled. Fraud remedies may be available in cases involving affirmative misstatement or active concealment of material fact. But fraud remedies are not available in the hard—and one must assume much more common—case of simple non-disclosure. In the general regime there are remedies for violation of the obligation of good faith and fair dealing, but such remedies are available only as to the performance, not the negotiation, of contracts. In general, there is no obligation to disclose in arms length negotiations between non-fiduciary parties.¹⁹⁶ However, the nature and extent of the exceptions to that general rule are the subject of ongoing debate. The information disclosure duties that are owed in “arms length” business transactions is far from settled.¹⁹⁷

One vehicle for the continuing debate is the unilateral mistake doctrine—the applicable rule where one party, but not the other, possesses information relevant to the transaction. Plausible mistake scenarios could arise for each of the three areas that the Revised Act excludes from the operation of partnership-specific law. Smith is negotiating with Jones to form a small business; it is agreed that Smith will contribute a truck she owns and Jones will contribute cash. Jones proposes valuing the truck at the wholesale bluebook value for a truck of that year, model, and mileage. Smith agrees to the valuation without disclosing that the truck has a cracked cylinder head, uses oil at a prodigious rate, and needs extensive engine repairs. Smith does not make any affirmative statements about the condition of the truck; neither does she actively conceal the problems. Change the facts slightly, so that Smith is selling the truck to the partnership after formation or selling her partnership interest to Jones where the ailing

196. Deborah A. DeMott, *Do You Have the Right to Remain Silent?: Duties of Disclosure in Business Transactions*, 19 DEL. J. CORP. L. 65, 65 (1994) (“To a considerable extent, parties who deal at arm’s length are free to take a sporting view of their relationship with each other.”). Professor DeMott correctly notes that parties who contemplate forming a partnership are treated as fiduciaries under the existing regime. *Id.*

197. *Id.*

truck is a partnership asset, and the three excluded situations are covered. Does Smith have an obligation to disclose?

Under the existing partnership-law-based regime the answer is clear: In all three permutations, the knowledgeable partner, Smith in our example, has an obligation to disclose.¹⁹⁸ Under the proposed non-partnership-law-based regime the answer is not at all clear.

Dean Anthony Kronman differentiates between situations where non-disclosure is allowed and where disclosure is required on the basis of the cost of acquisition of the information at issue.¹⁹⁹ The "social interest in efficiency" is served, he suggests, when parties are not required to disclose "socially useful information" that is developed at a cost to the possessor because by requiring disclosure the law discourages the production of such information.²⁰⁰ When such information is produced without effort, Dean Kronman observes, a disclosure requirement can be socially efficient because it will not discourage the production of socially useful information.²⁰¹

198. Vestal, *Disclosure*, *supra* note 38, at 727-35.

199. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9 (1978).

200. *Id.* ("Where non-disclosure is permitted . . . the knowledge involved is typically the product of a costly search."). "[A]llocative efficiency is best served by permitting one who possesses deliberately acquired information to enter and enforce favorable bargains without disclosing what he knows." *Id.* at 17. "In the cases permitting non-disclosure, [an allocation of the risk of unilateral mistake to the party with knowledge] would . . . eliminate the private incentive for producing such information and would therefore work to the disadvantage of society as a whole." *Id.* at 33.

201. *Id.* at 9 ("[I]n the cases requiring disclosure . . . the knowledgeable party's special information is typically not the fruit of a deliberate search."). Dean Kronman's conception of when information is deliberately acquired is somewhat broad.

[T]he term "deliberately acquired information" means information whose acquisition entails costs which would not have been incurred but for the likelihood, however great, that the information in question would actually be produced. These costs may include, of course, not only direct search costs (the cost of examining the corporation's annual statement) but the costs of developing an initial expertise as well (for example, the cost of attending business school). If the costs incurred in acquiring the information . . . would have been incurred in any case—that is, whether or not the information was forthcoming—the information may be said to have been casually acquired. The distinction between deliberately and casually acquired information is a shorthand way of expressing this economic dif-

Professor Saul Levmore also approaches the situation through an analysis of the cost of disclosure to knowledgeable parties and to society.²⁰² Specifically, he finds situations in which a requirement of disclosure will encourage free riders and discourage the socially beneficial search for knowledge.²⁰³ Although Professor Levmore allows that "[m]odern cases . . . can be read as signaling a trend toward increased disclosure requirements,"²⁰⁴ he suggests consideration of policy alternatives intended to achieve "fairness"²⁰⁵ while encouraging economically efficient behavior.²⁰⁶ Professor Levmore identifies economic costs associated with disclosure. To illustrate, he differentiates between two situations. In the first, a homeowner knows that the house being sold is infested with termites. The law should require the seller to

ference. Although in reality it may be difficult to determine whether any particular item of information has been acquired in one way or the other, the distinction between these two types of information has . . . considerable analytical usefulness.

Id. at 13. In Dean Kronman's analysis, parties can be forced to disclose information that is not the product of a deliberate search because the disclosure will not discourage the future production of socially useful information:

The unilateral mistake cases are indistinguishable, in principle, from the other contract cases . . . which impose a duty to disclose. These cases are distinguished as a group by the fact that in each of them the social interest in efficiency is best served by allocating the risk of unilateral mistake to the party with knowledge (since this is unlikely to discourage him from investing in the production of socially useful information).

Id. at 33.

202. Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117 (1982).

203. *Id.* at 132-33. Professor Levmore uses as an example a situation in which a mineral company is buying land from a farmer. If the corporation discloses its information about the presence of valuable minerals on the site it will be forced to pay a premium or refrain from looking for minerals. Either the shareholders of the corporation are harmed or society is harmed by a decrease in an activity seen as socially useful. *Id.*

204. *Id.* at 134.

205. *Id.* at 122. In the context of insider trading in securities, the primary focus of his analysis, Professor Levmore defines fairness as "achieved when insiders and outsiders are in equal positions. That is, a system is fair if we would not expect one group to envy the position of the other." *Id.* In the context of partnership-related transactions, parallel fairness would presumably be achieved if the disclosure rules did not give any identifiable class of parties—buyers or sellers; contributors of capital, labor, or goods; transferees or transferors of partnership interests—a consistent advantage.

206. *Id.* at 132-33.

disclose the termite problem because allowing non-disclosure is wasteful to society in that potential buyers will incur duplicate inspection costs and unwary buyers will allow termite damage to continue.²⁰⁷ The second situation involves a mineral company buying farmland that its research and exploration efforts have identified as having mineral potential. Here, Professor Levmore observes, the efficiency analysis leads to a different result. The farmer-seller is unlikely to explore for minerals, a socially beneficial activity. The corporation will not explore if it must disclose. Thus, a rule allowing non-disclosure by the knowledgeable buyer is justified.²⁰⁸

One of the alternatives Professor Levmore identifies, which he christens "optimal dishonesty," would further complicate the analysis.²⁰⁹ Under the Levmore optimal dishonesty rule, parties to commercial transactions would be allowed to withhold relevant information, and even make affirmative misstatements of material facts ("dishonest disclosure" in the Levmore scheme) "in cases in which the misinformation would only cause the misinformed party to behave as he would have without the information, and in which it would be unfair—because of the cost and risk of extortion—to require disclosure of the informed party."²¹⁰

In contrast, Professor Deborah DeMott argues convincingly that the commercial transaction disclosure cases cannot be rationalized by a single unifying theme or general doctrine, and that it is error to attempt to do so.²¹¹ Professor DeMott isolates non-economic factors that have some explanatory power, such as the different obligations of sellers and buyers,²¹² and differences in reactions to different types of loss.²¹³ Rather than use any

207. *Id.* at 135.

208. *Id.*

209. *Id.* at 140. Professor Levmore's tentative conclusion is that more consideration should be given to "always-disclose" or "disclose-or-suspend" options in tandem with a right of "private eminent domain" in the knowledgeable party. *Id.* at 159.

210. *Id.* at 140.

211. DeMott, *supra* note 196, at 66-67.

212. *Id.* at 76, 89-91 (noting differing obligations of buyers and sellers).

213. *Id.* at 90. Professor DeMott suggests the existence of "a generally-shared aversion to a particular type of loss: the discovery, after the deal is closed, that we have bought a house infested with termites or a car lacking an engine. This type of loss, in turn, may be perceived as less palatable than a lost opportunity for gain or

"sharp-edged doctrine and theory," she favors "[l]ooser-fitting doctrine, which facilitates judicial sensitivity to context, to the flavor of the transaction and the parties' relationship"²¹⁴

How does this continuing debate relate to our partnership hypothetical in which the knowledgeable Smith is about to dump a bad pickup truck on the partnership? Is the situation closer to termites in the basement or gold in the north forty? The distinction, it turns out, may be quite narrow. Dean Kronman and Professor Levmore would presumably wish to know how Smith acquired the knowledge of the truck's condition. Did Smith pay for expensive diagnostic tests? If what is at issue is wealth redistribution, Professor Levmore would not require disclosure and would leave the parties to their (asymmetrically informed) bargain; if non-disclosure will impose a social cost, then disclosure may be justified.²¹⁵ Is the cracked head wealth redistribution or a social cost? We need to look at both "the need to encourage the production of information" and "the societal loss that would result from withholding information," although the societal loss may be of diminished importance because the additional information may be generated without significant additional cost.²¹⁶ Significant factors may be whether the problem will worsen or the uninformed party will wastefully expend money in the absence of disclosure.²¹⁷ Is the cracked head getting worse? If so, perhaps it is a social cost favoring disclosure. Is the cracked head, and the consequent use of oil, causing collateral damage to the vehicle? Better still. Does Smith know of the cracked head on the basis of an expensive diagnostic test? Then perhaps disclosure is not appropriate, because we want the Smiths of the world to find out why their trucks are misfiring. But if the test is inexpensive,

profit." *Id.*

214. *Id.* at 102.

215. Levmore, *supra* note 202, at 136-37 n.62.

216. *Id.* at 136 & n.61. "The societal loss that results from the extra inspection that might be required is less important because latent defects are often discoverable after living in a home for a time, with no extra inspection." *Id.* at 136 n.61. This is also true with respect to motor vehicles. David C. Bayne, *Replacement vs. Repair: A Consumer's Brief Challenges General Motors*, 24 SYRACUSE L. REV. 639, 644-45 (1973) (discussing inadequate automobile rear axle lubrication discoverable without inspection—through catastrophic failure of drivetrain).

217. Levmore, *supra* note 202, at 136 n.62, 137.

then the social cost is diminished, and disclosure is not as critical. Furthermore, under the proper circumstances, Professor Levmore's optimal dishonesty rule would not require Smith to disclose the cracked head, as she would be required to do under the current partnership-law-based regime; it not only would allow Smith to not disclose the problem, it would allow Smith to affirmatively misstate the truth.

Professor DeMott, in contrast, would have the court eschew tight doctrine and theory and allow the judge to be sensitive to the context, character, and flavor of the transaction.²¹⁸ It is far beyond the scope of this discussion to suggest who is right in the debate, much less who, if anyone, shall prevail. For our purposes, it is quite sufficient to note the existence of this unresolved question and to suggest that the Revised Act, by removing partnership-related cases from the certain operation of the existing law and casting them into the uncertainty of the general legal debate, imposes a substantial cost upon society.²¹⁹

3. The "Other Applicable Law" Does Not Provide Adequate Guidance

The other facet of the questions how, and how well, the "other applicable law" of "arms length" transactions will be applied in the context of situations heretofore handled under partnership-specific law is whether courts can apply the other applicable law without significant modification. The Revised Act fails on this count as well because the body of law to which recourse is made is not capable of being applied intact.

The intent of the drafters is clear—as to those transactions

218. DeMott, *supra* note 196, at 102.

219. The existing regime, under which partnership-related cases are handled under partnership law, is not incompatible with either side of this debate. Dean Kronman notes that where there is a confidential or fiduciary relationship between the parties to a commercial contract "courts are more likely to require disclosure than they would otherwise be." Kronman, *supra* note 199, at 18 n.49. He observes that this requirement "makes sense from an economic point of view: a fiduciary relation can be viewed as a deliberate form of risk sharing (the beneficiary in effect purchases the other party's information)." *Id.* at 19 n.49. The existing regime is also compatible with Professor DeMott's analysis; if the Revised Act placed these cases within the general rule, the courts could craft an exception for partnership-related cases based on the parties relationship as partners. See DeMott, *supra* note 196, at 102.

that are excluded from coverage under the partnership law, the partners are to be treated as if the partnership did not exist. An example of this method, and the problems it causes, is the treatment accorded partners transacting business with the partnership. Under the existing regime, the partner is bound to make full disclosure.²²⁰ Under the Revised Act, "the rights and obligations of the partner [transacting business with the partnership] are the same as those of a person who is not a partner, subject to other applicable law."²²¹ The problem with the Revised Act approach, however, is that the outside sources of law are contextual, and the identity of the partner as a partner is a critical part of that context.

For example, the basic Uniform Commercial Code good faith requirement²²² is a subjective and not an objective standard.²²³ In a sale transaction otherwise covered by the Uniform Commercial Code, Revised Uniform Partnership Act section 404(f) could be interpreted two very different ways. The Revised Act provision could hold the knowledgeable partner to the subjective good faith standard of the Uniform Commercial Code—a standard that requires consideration of his or her status as partner. In the alternative, the Revised Act could be read to alter fundamentally the Uniform Commercial Code good faith requirement by abandoning the well-established subjective good faith standard and substituting in its place a wholly idiosyncratic "reasonable (non-partner) person standard." The first reading is more plausible because the statutory language gives no indication of such a radical change in existing law. The official commentary is

220. Vestal, *Disclosure*, *supra* note 38, at 729-30.

221. U.P.A. § 404(f) (1994).

222. U.C.C. § 1-203 (1978) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). The general U.C.C. definition of good faith, "honesty in fact in the conduct or transaction concerned," *id.* § 1-201(19), would apply in situations covered by the Uniform Commercial Code, *id.* § 1-203. The Article 2 definition of good faith for a merchant, "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," *id.* § 2-103(1)(b), would apply only if the partner as to whom a disclosure obligation is asserted is a merchant, *id.* § 2-104(1).

223. See *Farmers Coop. Elevator, Inc. v. State Bank*, 236 N.W.2d 674, 678 (Iowa 1975) (citing cases establishing subjective standard). "Decisions construing § 1201(19) of the Code overwhelmingly agree that the test of good faith under that section is a wholly subjective one of honesty." *Id.*

ambiguous.²²⁴

The general contractual duty of good faith and fair dealing is similarly contextual.²²⁵ In the Restatement (Second) model, "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."²²⁶ Revised Act section 404(f) either must allow the courts to consider the parties' partnership status or require the courts to abandon actual context and substitute some artificial, non-partnership-related expectations for the other partner's actual, historical expectations. The same dilemma, whether to allow consideration of the partnership context notwithstanding the language of the Revised Act or to force the courts to create a non-partnership-regarding artificial context, arises in the application of the general rules of unconscionability²²⁷ and mistake.²²⁸

224. U.P.A. § 404 cmt. 6 (1994).

Subsection (f) authorizes partners to lend money to and transact other business with the partnership and, in so doing, to enjoy the same rights and obligations as a non-partner. . . . The rights and obligations of a partner doing business with the partnership as an outsider are expressly made subject to the usual laws governing those transactions. . . . The reference to "other applicable law" makes clear that subsection (f) is not intended to displace those laws, and thus they are preserved under Section 104(a).

Id.

225. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979) (citing U.C.C. § 1-201(19) definition of good faith).

226. *Id.*

227. *See id.* § 208 cmt. a ("The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect.").

228. The Restatement permits relief on the basis of unilateral mistake when "the effect of the mistake is such that enforcement of the contract would be unconscionable." *Id.* § 153(a). Although not technically falling within the operation of § 208 (because the unconscionability is not present when the contract is made) the official commentary to § 153 cross-references the § 208 standards. *Id.* § 153 cmt. c. Even absent a finding of unconscionability, relief for unilateral mistake may be available where "the other party had reason to know of the mistake," *id.* § 153(b), but in fact does not know of the mistake, *id.* § 153 cmt. e, and in the case where the other party knows of the mistake but does not disclose it, *id.* § 161. The inquiry under § 161 can depend on the partnership context in two distinct ways. Disclosure can be required when the knowledgeable party

knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good

The new regime inappropriately abandons the existing clear, easily applied rules and casts partners into an unsettled area of the law. Moreover, the rules to which the Revised Act could force recourse simply cannot be applied in a "partnership-blind" manner without either making significant modifications to the rules or forcing the courts to decide cases based on "facts" conjured out of the air. The solution to this problem is conceptually simple; we should reverse the Revised Act's policy of abandoning classes of partnership-related claims historically considered within partnership law. The implementation is equally straightforward.²²⁹

III. DISCLOSURE OBLIGATIONS UNDER THE REVISED ACT: INTERPRETIVE CHALLENGES

What of jurisdictions that adopt the Revised Partnership Act without the amendments required to correct contractarian error? What of states that enact some, but not all, of the appropriate amendments? Two types of interpretive challenges to the Revised Act could be used to challenge the proposed disclosure regime and return it closer to a fiduciary foundation. The first challenge is that the Revised Act does not displace completely the common-law disclosure regime and that significant common-law disclosure

faith and in accordance with reasonable standards of fair dealing.

Id. § 161(b). The obligation to disclose under this subsection depends on the situation. *Id.* § 161 cmt. d. Disclosure also can be required "where the other person is entitled to know the fact because of a relation of trust and confidence between them." *Id.* § 161(d).

229. Vestal, *supra* note 2, at 575 n.235. As to jurisdiction over the pre-formation period, the statutory duty of loyalty in § 404(b) should be changed to include the pre-formation period in the duty to account (§ 404(b)(1)) and the adverse interest prohibition (§ 404(b)(2)). As to jurisdiction over partners conducting business with the partnership, the statutory self-interest allowance (§ 404(e)) and the special rule for transactions with the partnership (§ 404(f)) should be deleted, and a specific disclosure obligation should be inserted requiring disclosure of "information regarding commercial transactions between the disclosing partner and the partnership, other than transactions that are both incidental to the business of the partnership and are on terms and conditions generally available in a recognized market." *Id.* at 576 n.235. As to partners selling partnership interests among themselves, a specific disclosure obligation should be inserted requiring disclosure of "information regarding the value of any partnership interest transferred between the disclosing partner and either another partner or the partnership." *Id.*

elements remain in place. The second challenge is that, properly construed, the Revised Act provisions duplicate certain of the common-law disclosure provisions beyond those detailed in the statute.

A. The Revised Act Does Not Completely Displace the Common Law as to the Disclosure Obligations of Partners Inter Se

Like the Uniform Partnership Act, the Revised Act does not call for the wholesale displacement of the common law of partnerships. Rather, it provides that "[u]nless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]."²³⁰ The Revised Act drafters clearly understood how to attempt displacement; for example, the drafters clearly intended for the Revised Act to displace the general common law of fiduciary obligation within the partnership sphere, at least as they construed fiduciary obligation.²³¹ The drafters did not, however, evidence such an intent to displace the common law with respect to the disclosure obligations of partners.²³² No language in the statutory provisions that set forth the statutory disclosure obligations even hints that the drafters intended to work a displacement of the common-law

230. U.P.A. § 104(a) (1994).

231. Vestal, *supra* note 2, at 532. The Revised Act provides that "[t]he only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections [404](b) and (c)." U.P.A. § 404(a) (1994). Dean Donald J. Weidner, the Reporter for the Revised Act, notes that § 404 "purports to be an exclusive statement of fiduciary duties," Weidner, *supra* note 24, at 857, and that the fiduciary duty section "is couched in terms of an integrated and exclusive statement of the fiduciary duties of partners," Weidner, *supra* note 12, at 457.

232. The duty to account for the unapproved use of partnership property is included within the fiduciary duty of loyalty and presumably would be within the scope of displacement. See U.P.A. § 404(b)(1) (1994). A much closer call is involved in the common-law obligation to disclose information in transactions with the partnership. Arguably, such transactions come within the scope of the Revised Act: "A partner may . . . transact . . . business with the partnership, and as to each . . . transaction, the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law." *Id.* § 404(f). The argument is undercut by the contrast with the displacement language of § 404(a) and § 404(b) and by the "subject to other applicable law" qualifier. The argument is even weaker as to pre-formation conduct because such conduct is specifically excluded from coverage under the fiduciary duty of loyalty as formulated in the Revised Act.

disclosure obligations.²³³

Arguably, however, the disclosure obligations of partners should be included in the general displacement of fiduciary obligations. The argument is unpersuasive. It is true that, historically, the common-law disclosure obligations of partners *inter se* have been couched in the language of fiduciary duty.²³⁴ But the Revised Act abandons the customary definition of the term "fiduciary"²³⁵ and specifically defines the scope of the duties labeled "fiduciary."²³⁶ The primary historical disclosure obligations of the partners *inter se* are not on the list.²³⁷ The statutory disclosure obligations of partners *inter se* under the Revised Act are treated as non-fiduciary obligations.²³⁸ Given that treatment,

233. Compare *id.* § 404(a) ("The only fiduciary duties a partner owes . . .") and *id.* § 404(b) ("A partner's duty of loyalty . . . is limited to the following . . .") with *id.* § 403(b) ("A partnership shall provide . . . access to its books and records.") and *id.* § 403(c) ("Each partner and the partnership shall furnish . . .") and *id.* § 405(b) ("A partner may maintain an action . . . with . . . an accounting . . .").

234. See Vestal, *Disclosure*, *supra* note 38, at 727-28.

235. Vestal, *supra* note 2, part II.A. This use of the term "fiduciary" to describe obligations not within the customary definition of the concept is not limited to the partnership context. See Lawrence E. Mitchell, *The Cult of Efficiency*, 71 TEX. L. REV. 217, 221-22, 235-38 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991)) (criticizing authors for labelling as "fiduciary" corporate obligations not within the customary definition of the term).

236. U.P.A. § 404(a) (1994) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).").

237. The duty of loyalty in the Revised Act is limited to three components, only one of which touches on a historically recognized disclosure obligation of partners *inter se*. *Id.* § 404(b). Revised Act § 404(b)(1) defines the accounting obligation formerly found at § 21 of the Uniform Partnership Act, which has a disclosure component. The remaining two components of the statutory duty of loyalty under the Revised Act are unrelated to the disclosure obligations of partners *inter se*. Section 404(b)(2) requires partners "to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership." *Id.* § 404(b)(2). Section 404(b)(3) requires partners "to refrain from competing with the partnership in the conduct of the partnership business before dissolution of the partnership." *Id.* § 404(b)(3).

The duty of care—the other half of the fiduciary duty combination under the Revised Act—also does not incorporate the historically recognized disclosure obligations of partners *inter se*. *Id.* § 404(c) ("A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.").

238. *Id.* § 403(b) (access to partnership books and records); *id.* § 403(c)(1) (non-

and the general hostility to displacement under the Revised Act, the statute has not met the "displaced by particular provisions" test.²³⁹

The commentary supports the non-displacement interpretation: "Subsection [403](c) is a significant revision of UPA Section 20 and provides a more comprehensive, *although not exclusive*, statement of partners' rights and duties with respect to partnership information other than books and records."²⁴⁰ The history of the Uniform Partnership Act also supports non-displacement. Under the existing regime, the statutory and common-law disclosure obligations coexist.²⁴¹ One should not presume that the drafters of the Revised Act have reversed this historical pattern without some clear indication in the statute of that intention.

B. The Revised Act Duplicates Certain Common-Law Disclosure Obligations Beyond Those Detailed in the Statute

What if the courts reject the non-displacement argument and determine that the Revised Act does displace the common-law disclosure obligations of partners *inter se*? Could the same disclosure obligations be fashioned out of the four corners of the statute? Perhaps in some cases, although the end result is substantially less desirable than would be achieved by a finding of non-displacement. One substantial barrier to duplication of the common-law obligations is the structure of the Revised Act on point. Competing concepts represented in the statute lead to different results, with no mechanism for reconciliation in the statute itself. Another substantial barrier to duplication is the temporal inadequacy of the statutory provisions.

1. Partner Transactions with the Partnership

The first common-law disclosure obligation of partners concerns transactions between a partner and the partnership.²⁴² In

demand-driven disclosure obligation); *id.* § 403(c)(2) (demand-driven disclosure obligation); *id.* § 405(b) (right to judicial accounting).

239. *Id.* § 104(a).

240. *Id.* § 403 cmt. 3.

241. Vestal, *Disclosure*, *supra* note 38, at 732.

242. I believe the Reuschlein and Gregory categorization "should be expanded to

such situations, the common law requires partners to disclose facts material to the transaction but unavailable to the partnership. The obligation arises in the pre-partnership phase and extends through dissolution.²⁴³

There are four paths by which the common-law disclosure obligation for transactions with the partnership might be found in the statute: the fiduciary duty to account for profits and benefits diverted from the partnership,²⁴⁴ the fiduciary duty to refrain from acting in a manner adverse to the partnership,²⁴⁵ the non-demand-driven disclosure requirement,²⁴⁶ and the non-fiduciary obligation of good faith and fair dealing.²⁴⁷

Consider, for example, when a partner buys a parcel of land from the partnership for its fair market value as pasture, and the

include all transactions between the partnership and a partner that take place during the formation, term, or dissolution and winding up of the partnership." *Id.* at 730.

243. *Id.* at 729-30.

244. U.P.A. § 404(b)(1) (1994).

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity

Id.

245. *Id.* § 404(b)(2).

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

. . . .

(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership

Id.

246. *Id.* § 403(c)(1).

(c) Each partner and the partnership shall furnish to a partner, and the legal representative of a deceased partner or partner under legal disability:

(1) without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act]

Id.

247. *Id.* § 404(d) ("A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.").

purchasing partner alone knows that the land contains gold worth far in excess of the price paid the partnership. This transaction is a classic breach of the common-law obligation to make disclosure. Does the statutory scheme duplicate the common-law result? On cursory review, the Revised Act looks promising. The partner would seem to have an obligation to disclose the presence of the gold, and, failing disclosure, would have an obligation within the fiduciary duty of loyalty to the partnership to account for the profit or benefit derived from the misappropriation of the partnership opportunity.²⁴⁸ The partner also would seem to violate the statutory fiduciary duty of loyalty to the partnership by breaking the directive that partners not deal with the partnership as an adverse party.²⁴⁹ The partner appears to have an obligation to disclose under the statutory non-demand-driven disclosure obligation.²⁵⁰ Consequently, the non-disclosing partner probably also would run afoul of the statutory, but non-fiduciary, obligation of good faith and fair dealing.²⁵¹ On closer review, however, the results are not so clear-cut.

Reliance on the fiduciary-duty-of-loyalty-based paths is precarious for two reasons. First, the same section that defines the fiduciary duties of partners contains the language: "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."²⁵² The history of this debased formulation is interesting.²⁵³ The drafters started from the proposition that "[a] partner must act solely on behalf of the partnership in all matters connected with that partner's position as partner"²⁵⁴—a reasonable restatement of the common law on point but one that "was rejected as unnecessarily restrictive for partnership purposes."²⁵⁵ At the end of the drafting process, the statute declares that not only is the pursuit of self-interest not a

248. *Id.* § 404(b)(1).

249. *Id.* § 404(b)(2).

250. *Id.* § 403(c)(1).

251. *Id.* § 404(d).

252. *Id.* § 404(e).

253. Vestal, *supra* note 2, at 553-55.

254. U.P.A. § 20Y(a) (Jan. 9, 1989, Draft).

255. U.P.A. § 404 cmt. (July 30 - Aug. 6, 1992, Meeting Draft).

violation of the Revised Act, but it *cannot* be made a violation of the partnership agreement—a rather curious position for a contractarian to adopt.²⁵⁶ The commentary to the self-interest insulation language is significantly less sweeping than is the statutory language,²⁵⁷ but the section presents an obstacle to the use of either fiduciary duty of loyalty prong to recreate the common-law disclosure obligation relating to transactions with the partnership.

The fiduciary-duty-of-loyalty-based paths are precarious for a second reason. The same section that defines the fiduciary duties of partners contains language addressing the situation in which partners do business with the partnership: "A partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law."²⁵⁸ Although the commentary suggests a narrower purpose,²⁵⁹ the language of the provision is not narrow and presents a substantial barrier to using either fiduciary duty of loyalty prong for the recreation of the common-law disclosure obligation relating to transactions with the partnership.

The result is outrageous if the partner in our illustration has no fiduciary obligation to tell the partnership about the gold on its property, but that result is possible under the existing, am-

256. Vestal, *supra* note 2, at 554.

257. U.P.A. § 404 cmt. 5 (1994). The commentary to § 404(e) reads in its entirety:

5. Subsection (e) is new and deals expressly with a very basic issue on which the UPA is silent. A partner as such is not a trustee and is not held to the same standards as a trustee. Subsection (e) makes clear that a partner's conduct is not deemed to be improper merely because it serves the partner's own individual interest.

That admonition has particular application to the duty of loyalty and the obligation of good faith and fair dealing. It underscores the partner's rights as an owner and principal in the enterprise, which must always be balanced against his duties and obligations as an agent and fiduciary. For example, a partner who, with consent, owns a shopping center may, under subsection (e), legitimately vote against a proposal by the partnership to open a competing shopping center.

Id.

258. *Id.* § 404(f).

259. *Id.* § 404 cmt. 6 (casting rationale in terms of partner purchase of partnership assets at foreclosure and tax sales).

biguous language. That such a result is a possibility merely emphasizes the inadequacy of the Revised Act's fiduciary duty provisions.²⁶⁰

If not the fiduciary duty of loyalty, what of the statutory, non-demand-driven disclosure requirement?²⁶¹ The argument in support of statutorily mandated disclosure is that knowledge of the gold on the partnership property was "information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act]."²⁶² So it is, as to the non-purchasing partner who has a right to participate in the partnership business²⁶³ and an obligation to use partnership property only for partnership purposes.²⁶⁴ Because the non-demand-driven disclosure obligation is an obligation of both the partnership and "each partner,"²⁶⁵ the purchasing partner has an obligation to disclose the presence of the gold on the property. The Revised Act eliminates possible doubt as to interpretation of the disclosure requirement through its obligation of good faith and fair dealing, which is, by its terms, applicable.²⁶⁶

Does the non-demand-driven statutory disclosure obligation perfectly recreate the first common-law disclosure obligation?

260. Professor Dickerson treats the language of § 404(e) as shifting the burden of proof from the partner to the partnership in cases where the partner has advanced personal interest over the collective interest. Dickerson, *supra* note 2, at 144. Professor Ribstein agrees that the language is confusing and leads to erroneous implications. Ribstein, *Prime Time*, *supra* note 3, at 54-55.

261. See U.P.A. § 403(c)(1) (1994).

262. *Id.*

263. *Id.* § 401(f) ("Each partner has equal rights in the management and conduct of the partnership business."). The partners may fully modify this right by agreement. See *id.* § 103(a).

264. See *id.* § 401(g) ("A partner may use or possess partnership property only on behalf of the partnership."). The partners may fully modify this right by agreement. See *id.* § 103(a).

265. *Id.* § 403(c) ("Each partner and the partnership shall furnish to a partner . . .").

266. *Id.* § 404(d) ("A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing."). Note that the obligation of good faith and fair dealing is one of the statutory sections as to which the Revised Act restricts the right of the partners to modify the statutory language. See *id.* § 103(b)(5).

Regrettably, it does not completely do so because of the temporal limitation of the statutory obligation. The common-law obligation with respect to partnership transactions extended from the pre-formation period through dissolution.²⁶⁷ The non-demand-driven statutory obligation is not affirmatively limited in temporal application, as is the fiduciary duty of loyalty for example,²⁶⁸ but the language of the statute supports an interpretation excluding the statutory requirement from the pre-formation stage.²⁶⁹ This discrepancy is significant and makes the statutorily-based obligation an imperfect replica of the common law.

The last path is the non-fiduciary obligation of good faith and fair dealing.²⁷⁰ A partner must discharge duties to the partnership consistent with the obligation of good faith and fair dealing, and each partner has an obligation to use partnership property only on behalf of the partnership.²⁷¹ The Revised Act, however, does not resolve the conflict with the statutory provision which states that "the rights and obligations of the partner [who transacts business with the partnership] are the same as those of a person who is not a partner, subject to other applicable law."²⁷² If the specific trumps the general, the knowledgeable partner is required only to meet the non-Revised-Act standards applicable to a non-partner party to the transaction, such as the Uniform Commercial Code standard of good faith,²⁷³ the general contractual duty of good faith and fair dealing,²⁷⁴ and the general contractual remedies for mistake or unconscionability.²⁷⁵ As noted,

267. See Vestal, *Disclosure*, *supra* note 38, at 729-30.

268. See U.P.A. § 404(b)(1) (1994) (accounting obligation "in the conduct and winding up of the partnership business"); *id.* § 404(b)(2) (adverse actions obligation "in the conduct or winding up of the partnership business").

269. *Id.* § 403(c). The section speaks in terms of "partners" and the "partnership" and focuses on "information concerning the partnership's business and affairs." *Id.*

270. *Id.* § 404(d) ("A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.").

271. *Id.* § 401(g).

272. *Id.* § 404(f).

273. U.C.C. § 1-203 (1978); see *supra* note 222.

274. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

275. See *id.* § 208. The official commentary to the Restatement treatment of unconscionability notes that "gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable." *Id.* § 208 cmt. c. A

reliance on these legal doctrines is unsatisfactory.

2. *Partner Transactions Inter Se*

The second common-law disclosure obligation of partners concerns the purchase by one partner of another's interest.²⁷⁶ In such situations, partners are required to disclose information unavailable to the other party to the transaction and which bears on the value of the partnership interest being sold.²⁷⁷

In this case, the fiduciary duty to refrain from acting in a manner adverse to the partnership²⁷⁸ cannot be used to replicate the common-law disclosure requirement. Although a partner owes the fiduciary duty of loyalty, of which the prohibition on adversarial conduct is a part,²⁷⁹ to both the partnership and the other partners,²⁸⁰ the duty to refrain from adversarial actions is defined in terms of harm to the partnership, not harm to the other partners individually.²⁸¹

The fiduciary duty to account for profits and benefits diverted from the partnership²⁸² offers an interesting, but ultimately flawed, possibility for replicating the common-law disclosure obligation of partners transferring partnership interests *inter se*. The possibility arises from the wording of the accounting

gross disparity in values exchanged "may also corroborate indications of defects in the bargaining process." *Id.* A "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception" *Id.* § 208 cmt. d. Factors supporting a finding of unconscionability include "knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; [and] knowledge of the stronger party that the weaker party is unable reasonably to protect his [or her] interests by reason of . . . ignorance." *Id.*

276. See Vestal, *Disclosure*, *supra* note 38, at 727-35.

277. Professors Reuschlein and Gregory summarize the obligation as: "Both selling and purchasing partner are duty bound to reveal such facts as touch the value of the property which are not available to the other partner." REUSCHLEIN & GREGORY, *supra* note 42, § 189, at 280 (citing *Johnson v. Buck*, 540 S.W.2d 393 (Tex. Civ. App. 1976)).

278. U.P.A. § 404(b)(2) (1994).

279. *Id.*

280. *Id.* §§ 404(a), (b).

281. *Id.* § 404(b)(2). The duty is "to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership." *Id.* (emphasis added).

282. *Id.* § 404(b)(1).

section:

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity²⁸³

The duty to account for "benefit derived by the partner . . . from a use by the partner of partnership property,"²⁸⁴ precisely describes the situation if the undisclosed information is partnership property. Because the clause does not require harm to the partnership, but merely benefit to the partner,²⁸⁵ it could apply in situations where it is another partner, and not the partnership, who suffers injury. This reading is in harmony with the Revised Act's provision that partnership property is only to be used for partnership purposes.²⁸⁶

If the non-disclosure of partnership information material to the sale price of a partnership interest transferred *inter se* violates the fiduciary duty to account, then it is a straightforward matter to find a duty to disclose under both the non-demand-driven disclosure requirement²⁸⁷ and the disclosure component of the non-fiduciary obligation of good faith and fair dealing.²⁸⁸ The potential flaw in the argument comes from the operation of the accounting obligation. By the terms of the statute, the obligation is "to account to the partnership and hold as trustee for it any . . . benefit . . . derived from a use by the partner of partner-

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* § 401(g) ("A partner may use or possess partnership property only on behalf of the partnership.").

287. *Id.* § 403(c)(1). The partner in possession of the information would be obligated to furnish to all the other partners, including the other party to the transfer, "without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act]." *Id.* In this case the information would be necessary for the other partners to advance their right to an accounting.

288. *Id.* § 404(d); *id.* § 404 cmt. 4.

ship property."²⁸⁹ But in this case, where one partner has withheld information from another partner material to a transfer of a partnership interest *inter se*, the recovery should go to the other partner, not to the partnership. Unless one can make an argument that the partnership receives the recovery in trust for the partner, which is difficult to do given the statutory treatment of partnership property,²⁹⁰ the misdirection of the remedy may cast doubt on the underlying theory.²⁹¹

If the fiduciary duty to account for profits and benefits diverted from the use of partnership property does not apply,²⁹² it may still be possible to recreate the common-law disclosure obligation using either the non-demand-driven disclosure requirement²⁹³ or the disclosure component of the non-fiduciary

289. *Id.* § 404(b)(1).

290. *Id.* §§ 203, 204. Section 203 provides that "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually." *Id.* § 203. The commentary notes the "acquired by" language is given content in § 204. *Id.* § 203 cmt. Section 204 provides flatly that "[p]roperty is partnership property if acquired in the name of: (1) the partnership . . .," *id.* § 204(a), and that "[p]roperty is acquired in the name of the partnership by a transfer to: (1) the partnership in its name . . .," *id.* § 204(b). Notwithstanding the statutory language, the commentary indicates some room for an argument that a recovery, even in the name of the partnership, might be deemed the property of the partner who was a party to the transfer with the non-disclosing partner. *See id.* § 204 cmt. 3 ("Ultimately, it is the intention of the partners that controls whether property belongs to the partnership or to one or more of the partners in their individual capacities, at least as among the partners themselves.").

291. At least one commentary supports the analysis. *See, e.g.,* BROMBERG & RIBSTEIN, *supra* note 42, at 6:61-62. Professors Bromberg and Ribstein believe that the obligation to account supports the obligation to disclose transfers of partnership interests between partners:

The duty [to render complete information] arises during the partnership's operations and in connection with interpartner transfers of partnership interests. . . . U.P.A. § 21 confirms this broad approach by providing for a fiduciary duty to account for benefits derived from "any transaction connected with the formation, conduct, or liquidation of the partnership."

Id. (quoting U.P.A. § 21(1) (1969)). Presumably, if the statutory accounting obligation confirms the obligation to disclose in the present regime, an identical statutory accounting obligation would support an identical common-law disclosure obligation in the proposed regime.

292. *See* U.P.A. § 404(b)(1) (1994).

293. *Id.* § 403(c)(1). The partner in possession of the information would be obligated to furnish to all the other partners, including the other party to the transfer, "without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the

obligation of good faith and fair dealing.²⁹⁴

The non-demand-driven disclosure requirement would apply if the material information constituted "information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act]."²⁹⁵ A court might give the language such a construction if it liberally reads the modifier "proper."²⁹⁶ Again, possible doubt as to interpretation of the disclosure requirement should be resolved in favor of disclosure by reference to the obligation of good faith and fair dealing which is, by its terms, applicable.²⁹⁷

The non-fiduciary obligation of good faith and fair dealing, standing alone, presents a somewhat more favorable prospect.²⁹⁸ The argument would be that the transfer of the selling partner's interest to an existing partner is an "exercise of rights" under both the Revised Act and the partnership agreement; therefore, the selling partner is bound to meet the good faith and fair dealing standard, and the standard requires disclosure.

That such a transfer is an "exercise of rights" under the Revised Act is an argument well-taken. If a partnership is operating under the statutory defaults, "[e]ach partner has equal rights in the management and conduct of the partnership business."²⁹⁹ Because a partner who purchases another partner's interest would receive no added voice in the management of the partnership, the purchasing partner might be content to receive only an assignment of the selling partner's right to receive distributions.³⁰⁰ Under the Revised Act, as under the Uniform Partner-

partnership agreement or this [Act]." *Id.* In this case the information would be necessary for the other partners to advance their right to an accounting.

294. *Id.* § 404(d) & cmt. 4.

295. *Id.* § 403(c)(1).

296. A liberal reading is not a strained one. The definitions of "proper" include "sanctioned as according with equity, justice, ethics, or rationale," and "socially appropriate: according with established traditions and feelings of rightness and appropriateness." WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1817 (1986).

297. U.P.A. § 404(d) (1994) ("A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.").

298. *See id.*

299. *Id.* § 401(f). This language tracks that of the parallel Uniform Partnership Act provision. *See* U.P.A. § 18(e) (1969).

300. Indeed, if the purchasing partner trusted the selling partner (or the selling

ship Act, a partner has no right to transfer the entire partnership interest and, by the transfer, constitute the transferee a partner,³⁰¹ but a partner can assign the right to receive distributions without the consent of the other partners.³⁰² Surely this exercise of rights under the Revised Act suffices to bring the transfer within the scope of the obligation of good faith and fair dealing.³⁰³

On the other hand, the partners could vary the statutory defaults and provide for non-per-capita participation in management, so that a transferee will wish to have a full partnership interest, and not merely the right to distributions. The partners then could provide a mechanism in the partnership agreement for the transfer of a partnership interest (if only to existing partners) without the consent of the other partners. Actions taken as a matter of right pursuant to such an amendment of the statutory defaults also would trigger the good faith and fair dealing re-

partner could be properly induced) to share the purchasing partner's interpretation of the partners' fiduciary duties and business judgment, the purchasing partner might prefer to have the selling partner remain a partner for voting purposes.

301. U.P.A. § 401(i) (1994) ("A person may become a partner only with the consent of all of the partners."); U.P.A. § 18(g) (1969) ("No person can become a member of a partnership without the consent of all the partners.").

302. U.P.A. §§ 502, 503 (1994); U.P.A. §§ 26, 27 (1969). The Uniform Partnership Act speaks in terms of a partner's "share of the profits and surplus," *id.* § 26, whereas the Revised Act speaks in terms of a "partner's right to receive distributions," U.P.A. § 502 (1994), but no substantive change is apparently intended, *see id.* § 502 cmt.

303. Such a distinction also might help to differentiate the situation covered by the common-law disclosure obligation, a transfer *inter se*, from the pattern not covered by the common law, a transfer from a partner to a non-partner. However, nothing in the analysis prevents the conclusion that the drafters have inadvertently expanded upon the common-law disclosure obligation by making it applicable to transfers of partnership interests to non-partners. The "discharge duties" provision is limited on its face to duties to the partnership or other partners, whereas the "exercise rights" language is not so limited. Compare the first clause of § 404(d), "[a] partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement . . . consistently with the obligation of good faith and fair dealing," U.P.A. § 404(d) (1994), with the section's second clause, "[a] partner shall . . . exercise any rights consistently with the obligation of good faith and fair dealing," *id.* Several interpretations of the second clause are possible. For example, the clause could be read as either "[a] partner shall . . . exercise any rights [under this Act or under the partnership agreement] consistently with the obligation of good faith and fair dealing," or "[a] partner shall . . . exercise any rights [relating to the partnership or the other partners under this Act or under the partnership agreement] consistently with the obligation of good faith and fair dealing."

quirement, as the "exercise of rights" under the partnership agreement.³⁰⁴

The hardest case would be where the statutory default on participation in management was changed, but the statutory default on the consent of the other partners was not. Even in this case, the stronger argument is that the transfer of the full partnership interest was an "exercise of rights" under the partnership agreement, even if qualified by the approval requirement.

If the obligation of good faith and fair dealing applies to transfers of partnership interests *inter se*, do good faith and fair dealing require disclosures equivalent to those required under the common law? The obligation of good faith and fair dealing is not defined in the Revised Act.³⁰⁵ Nor is the meaning of the language fixed; the drafters intended the meaning to be developed by courts over time.³⁰⁶ The drafters specifically note, however, that the obligation of good faith and fair dealing may impose disclosure requirements beyond those expressly provided in the Revised Act.³⁰⁷ It is entirely reasonable to believe that the courts, when faced with giving content to an obligation of good faith and fair dealing which is designed to include a disclosure component, will look for guidance to the pre-Revised-Act common law for guidance. In doing so, the courts may be persuaded to adopt the existing common-law disclosure requirement for transactions between the partnership and the partners.

304. *Id.*

305. *Id.*

306. *Id.* § 404 cmt. 4.

The meaning of "good faith and fair dealing" is not firmly fixed under present law. "Good faith" clearly suggests a subjective element, while "fair dealing" implies an objective component. It was decided to leave the term undefined in the Act and allow the courts to develop its meaning based on the experience of real cases.

Id. "Good faith and fair dealing" under the Revised Act is not the same as "good faith" under the Uniform Commercial Code. The drafters rejected both the general U.C.C. definition, "honesty in fact in the conduct or transaction concerned," U.C.C. § 1-201(19) (1990), and the Article 2 definition of good faith for a merchant, "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," *id.* § 2-103(1)(b), as "too narrow." See U.P.A. § 404 cmt. 4 (1994).

307. U.P.A. § 404 cmt. 4 (1994) ("In some situations the obligation of good faith includes a disclosure component. Depending on the circumstances, a partner may have an affirmative disclosure obligation that supplements the Section 403 duty to render information.").

IV. CONCLUSION

The substantive errors and ambiguities in the Revised Uniform Partnership Act disclosure provisions are serious and promise confusion for bench, bar, and clients. These errors require enacting states to modify the uniform provisions, and their presence suggests that, in the long term, the Conference should withdraw and rework the revision.

But the substantive errors and ambiguities of the Revised Act compel us to withdraw and rework the Revised Act for a more basic reason. In the disclosure provisions, we confront clearly the stark implications of the contractarian premise, and we see how dramatically contractarianism diverges from our long-established, reasonable expectations in partnership matters. The drafters were rightly uncomfortable with a regime of partnership law that allows partners to bargain away their rights to all disclosures—their access to all information. The drafters thus sought to preserve as inviolate a core of information, a foundation of rights and remedies.³⁰⁸ They left open challenges based on non-displacement of the common law and contradictions internal to the Revised Act. In the end, and to their credit, the drafters seemingly have concluded that strict contractarianism is elegant theory but bad law.

This disillusionment with the hard edge of contractarianism is not confined to the disclosure obligations of partners, or even to partnership law in general. In many areas of the law, scholarship is emerging that convincingly questions the value of the contractarian premise, scholarship that suggests the value of fiduciary-based analysis in its many and rich variations. Valuable work has identified the nature and purpose of fiduciary obligation.³⁰⁹ We have been reminded forcefully that the language in

308. See *id.* § 103(b) (listing non-waivable provisions).

309. See, e.g., Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879; DeMott, *supra* note 183 (exploring legal taxonomy of fiduciary obligation). Professor DeMott links her general observations to the partnership context, at one point suggesting that the partnership rules requiring disclosure in the pre-formation stage are more appropriately conceptualized as mandatory rules rather than default rules. *Id.* at 485-86. It is ironic, given Professor DeMott's perceptive comment, that a pre-formation disclosure obligation is *neither* a mandatory nor a default fiduciary rule under the Revised Uniform Partnership Act. See U.P.A. §

which we couch our discussions of fiduciary duty is terribly important³¹⁰ and that some law-and-economics scholars have used the term "fiduciary" to describe concepts that are not at all fiduciary within the historically-accepted meaning of the term.³¹¹ Other scholars view fiduciary obligation as a point of connection between the static jurisprudence of the formal economy and the dynamic jurisprudence of the informal economy, a trace indicator that "records an absence of normative, material suspension of the norms of static jurisprudence."³¹²

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404(b) (1994).

310. See Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 954, 962-83 (1993) ("The language we use to talk about fiduciary duty is important if the word 'fiduciary' is to retain its educational power.").

311. Mitchell, *supra* note 235, at 220-22, 235-38. Professor Mitchell argues that the duty described by Judge Easterbrook and Professor Fischel as "fiduciary" "is unlike any customary legal formulation of fiduciary duty." *Id.* at 221. Judge Easterbrook and Professor Fischel substitute a hypothetical bilateral bargain for customary formulations of fiduciary duty: "Socially optimal fiduciary rules approximate the bargain that investors and managers would have reached if they could have bargained (and enforced their agreements) at no cost." *Id.* at 235 (quoting EASTERBROOK & FISCHEL, *supra* note 235, at 92). Such a formulation, as Professor Mitchell observes, changes essential elements of the traditional fiduciary formulation, such as the identity of the beneficiary, the absence of arms-length bargaining, and the unidirectional flow of benefits. See *id.* at 236-37. I have made a parallel point with respect to the Revised Uniform Partnership Act, arguing that contractarian advocates misconstrue the nature of the fiduciary obligation and label certain obligations as fiduciary although they do not fit within the customary formulation of fiduciary duty. Vestal, *supra* note 2, at 537-45.

312. Arthur J. Jacobson, *The Other Path of the Law*, 103 YALE L.J. 2213, 2235 (1994). Professor Jacobson identifies fiduciary obligation as one of "two exemplary doctrines . . . that engrave a trace of dynamic jurisprudence in the formal jurisprudence." *Id.* at 2234. Professor Jacobson cites the Revised Uniform Partnership Act as an example of a misformulation which loses the dynamic essence of fiduciary obligation:

[B]ecause they are etched in the legal system established by static jurisprudence, fiduciary norms take the form of generally applicable, forward-looking norms. . . . On the surface, fiduciary law looks as if it can be colonized by static jurisprudence, like common law. Yet rules of thumb are only presumptive—starting-points for analysis. Fiduciary law reserves a right to scrutinize every aspect of a transaction, possibly ousting rules of thumb. It asserts a limitless, general supervisory power.

Because fiduciary norms take the form of generally applicable, forward-looking norms, lawyers can easily forget or reject their inherent supervisory power. Thus, law and economics scholars have urged the for-

On the corporate side, fiduciary-related scholarship has developed in interesting directions. Commentators have identified the fiduciary nature of relations within the enterprise as a key element in the creation of the trust that makes the corporate form possible.³¹³ Some have proposed fiduciary-based rules to reverse the excessive contractarian erosion in both the duty of care³¹⁴ and the duty of loyalty.³¹⁵ Scholars have advocated a return to fiduciary duty with respect to close corporations³¹⁶ and the rela-

mulation, in advance, of crisp, precise fiduciary rules that parties can opt out of by contract. Their vision of fiduciary obligation utterly suppresses its supervisory power, shifting it from trace to static jurisprudence. The drafters of the new Revised Uniform Partnership Act have thoroughly implemented the contract model of fiduciary obligation by confining it to a list of precise obligations that fiduciaries can alter by contract. The old Uniform Partnership Act assumed the existence of a supervisory power, without even expressing it in the form of a static norm.

Id. at 2235 (citations omitted).

313. See Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425, 434-36 (1993). Professor Mitchell evaluates the fairness test and finds it an inadequate substitute for a fiduciary duty standard. *Id.* at 475 ("The fairness test . . . not only misses the point of fiduciary duty but also is inherently flawed.").

314. See Nat Stern, *Circumventing Lax Fiduciary Standards: The Possibility of Shareholder Multistate Class Actions for Directors' Breach of the Duty of Due Care*, 72 NEB. L. REV. 1, 3-11 (1993) (proposing enactment of state "fiduciary outreach statutes" to protect domestic shareholders of foreign corporations).

315. See Norwood P. Beveridge, Jr., *The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction*, 41 DEPAUL L. REV. 655 (1992) (supporting fiduciary duty of loyalty analysis not mechanical rules for evaluating self-interested director transactions).

316. See Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1729-30 (1990). An interesting counterpoint is suggested by Professor O'Neill. See Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646 (1992). Professor O'Neill notes this recharacterization of fiduciary obligation, *id.* at 657, and argues that this recharacterization, which focuses on participant expectations, is better suited to the close corporation setting than the traditional formulation, *id.* at 689-708. Professor O'Neill's proposed solution is to allow dissolution of owner-managed close corporations at the will of any owner-manager. *Id.*

The value that the law should promote in owner-managed firms, rather, is the value of caring—that is, of enabling the participants to be attentive to their own needs and desires, and also receptive and responsive to their co-venturers' needs and desires. The rule proposed in this article, allowing dissolution of the enterprise at the will of any owner-manager, seeks to encourage the parties to resolve their differences by talking, listening and compromising. It seeks to allow them to pursue

tions of corporate bondholders to the corporations in which they have an interest.³¹⁷ One has even suggested that allowing variations in the standards of fiduciary duty would be an appropriate mechanism to reconcile the corporate form with the social goals of Indian tribal participants.³¹⁸ Scholars are working toward a

their own, and each other's, welfare in a healthy and caring relationship.

Id. at 708. Arguably, Professor O'Neill too quickly dismisses the traditional fiduciary formulation. In fact, she at one point describes in favorable terms a legal regime that approaches the traditional fiduciary world:

A legal regime that best accounts for these attributes of the participants' relationship would be one that, at least, encourages communication among the parties. The legal scheme would also encourage the parties to behave responsibly toward one another—not only in the sense of living up to their promises or commitments, but also in the sense of being responsive to each other's needs.

Id. at 699. But Professor O'Neill rejects legal mechanisms that require such behavior in favor of mechanisms that merely encourage it:

A regime that *requires* the participants to behave responsibly toward each other, however, would be unacceptable. An action is not authentically responsible unless it is freely chosen. A regime that gives a participant no practical option except to serve her colleagues' needs or desires is not promoting responsibility—it is creating servitude.

Id. at 699-700 (citations omitted). Advocates of the traditional fiduciary formulation would counter that actions taken in fulfillment of fiduciary obligations are "authentically responsible" because the parties exercise free choice in opting into the relationship. With this caveat, the traditional fiduciary regime would appear to fit Professor O'Neill's requirements, although inadvertent and unsophisticated partners—who do not realize they have committed to behave responsibly—complicate the analysis.

317. Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165 (1990). Professor Mitchell has identified the abandonment of fiduciary analysis with a narrowness in the dominant wing of contemporary corporation law scholarship:

Coupled with [a] needlessly formalistic analytical approach is an increasing parochialism in corporate law scholarship in identifying the goals of corporate law in ordering internal corporate relationships. All but ignored by this approach is the powerful use of legal principles to express higher aspirations of community and cooperation such as those underlying fiduciary duty.

Id. at 1167 (citations omitted).

318. Michael M. Pacheco, *Toward a Truer Sense of Sovereignty: Fiduciary Duty in Indian Corporations*, 39 S.D. L. REV. 49, 80 (1994). Pacheco proposes enactment of a federal corporations law specifically for Indian corporations, under which statute "a tribe or tribal corporation could set its own standards of fiduciary duty." *Id.* This is appropriate, he argues, because "[a] federal Indian corporation act allowing the tribes to regulate their own corporations and define their own standards of fiduciary duty

multi-fiduciary model of the corporation that recognizes the legitimate demands of non-shareholder constituencies and the social dimension of corporation law.³¹⁹

Correcting the substantive errors and resolving the ambiguities in the Revised Uniform Partnership Act is part of this larger debate.³²⁰ It is, in some way, a small thing to undo the contractarian error in partnership law when considered against the backdrop of the larger debate. As part of a more general response to the contractarian revolution, however, the return of partnership law to a fiduciary foundation is surely an appropriate undertaking.

would be more just and more faithful to the tribes' causes than the continued use of laws designed by non-Indians for non-Indians." *Id.* at 92. A fundamental divergence between the goals underlying Indian and non-Indian corporations supports such differential treatment:

Because of the unique group nature of Indian communities, a tribe's involvement in corporate activities necessarily must be a social process. . . . [T]he average Anglo corporation reflects the Anglo goal of the accumulation of material wealth. It follows, then, that Indian corporations should be permitted to reflect Indian goals. Since the maintenance and protection of peoplehood and community are foremost tribal priorities, Indian corporations "may be less about creating wealth than about creating . . . choices for the continued existence and cohesion" of the tribe.

Id. at 68 (second alteration in original) (quoting John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495, 499 (1991)) (other citations omitted).

319. See, e.g., David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty To Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

320. See Dickerson, *supra* note 2; Vestal, *supra* note 2, at 537-45.