

WHAT'S IN A WORD? THE EFFECT ON PARTNERS' DUTIES AFTER
REMOVAL OF THE TERM "FIDUCIARY" IN THE TEXAS REVISED
PARTNERSHIP ACT

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I. INTRODUCTION

Since the early development of partnership law, courts have recognized that partners owe to one another the highest of fiduciary duties.¹ Often quoted in this context is Cardozo's discussion of fiduciary duties in

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¹Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.").

Meinhard v. Salmon.² However, because new types of partnership and increased flexibility of old forms of partnership encourage use of the format for business, the typical partnership has become a business entity like any other, losing the connotations of intimacy the terms “partners” and “partnership” once implied.³ Even in 1962, Justice Douglas used his dissenting opinion in a securities regulation case to comment on the continually evolving construction of fiduciary relations, noting that Cardozo’s high standards for partners have fallen in modern times.⁴

Many scholars divide statutes’ approaches to partnerships into one of two types.⁵ One view is fiduciary in nature where partners may pursue their individual interests at the expense of the partnership only after notice to and informed consent of the other partners.⁶ The common law and the original Uniform Partnership Act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted this view.⁷ The second, referred to as “contractarian,” takes a more flexible approach, allowing partners to advance their own interests with less restriction by statute unless the partnership agreement contains provisions to the contrary.⁸ One scholar, commenting on the shift from the former view to the latter in the 1992 Revised Uniform Partnership Act (RUPA), argues that the Act “flatly rejects the existing collective loyalty concept and audaciously declares that ‘[a] partner does not violate a duty or obligation

² See, e.g., *Blau v. Lehman*, 368 U.S. 403, 416 (1962) (Douglas, J., dissenting); *Watson v. Ltd. Partners of WCKT, Ltd.*, 570 S.W.2d 179, 182 (Tex. Civ. App.—Austin 1978, writ ref’d n.r.e.); *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1928).

³ See Jack R. McCaffrey, *St. Thomas University School of Law Thesis Requirement: The Small Business Entity and Tax Avoidance*, 1 ROSF L. REV. 2, 24 (2003) (noting the “recent phenomenon” of limited liability partnerships); Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification*, 34 HOFSTRA L. REV. 405, 434 n. 135 (2005-2006) (noting the increased use of limited partnerships and citing various scholars’ arguments as to when the rise in use began).

⁴ *Blau*, 368 U.S. at 416 (“At the root of the present problem are the scope and degree of liability arising out of fiduciary relations. In modern times that liability has been strictly construed. The New York Court of Appeals, speaking through Chief Judge Cardozo in *Meinhard v. Salmon* . . . held a joint adventurer to a higher standard than we insist upon today.”).

⁵ Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523, 523 (1993).

⁶ *Id.* at 523–24.

⁷ *Id.* at 524.

⁸ *Id.*

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under [the Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.'"⁹

Recent changes to Texas partnership law present a question as to where on this continuum Texas partners' duties lie. The 1994 changes to Texas partnership law enacted by the Texas Revised Partnership Act (TRPA) seem to follow the contractarian trend to some extent. Adoption of less restrictive statutory language on partners' duties, accompanied by commentary reflecting an intent to rein in the "loose use of 'fiduciary' concepts" in the partnership context represents a shift from the Texas Uniform Partnership Act's (TUPA) emphasis on fiduciary duties.¹⁰ However, Texas courts have yet to answer the question as to whether Texas has realized a complete shift to this contractarian view or remains a jurisdiction that applies strict fiduciary standards or has settled somewhere between the two.

The purpose of this Comment is to analyze the 1994 amendments to the language on partners' duties in Texas partnership law and consider the dilemma posed by those changes.¹¹ Part II gives a summary of the background of Texas partnership law, discussing both the common law and TUPA, which expired in 1999.¹² Because there is little case law interpreting the new TRPA and its successor, the Business Organizations Code (BOC), Parts III.A and III.B of this Comment focus on analysis of the actual changes to the statutes themselves as well as legislative intent and drafters' comments indicating the intention of the legislature in amending the partnership laws. In Part III.C, case law under the former statute touching on the new statutory scheme as well as the little case law available under the new scheme assists in the analysis and provides some insight as to

⁹ *Id.* at 535.

¹⁰ See TEX. REV. CIV. STATS. ANN. art. 6132b §§ 4.03–.04, cmt. (Vernon Supp. 2006) [hereinafter TRPA]; Tex. Unif. P'ship Act, 57th Leg., R.S., ch. 158, §§ 20–21 Tex. Gen. Laws 289, 294–95 [hereinafter TUPA]; Revised Unif. P'ship Act § 404(f) (1997) [hereinafter RUPA].

¹¹ This Comment undertakes only an analysis of the statutory change in the law and its effect on partnerships which either do not have a partnership agreement or have not chosen to alter their duties through use of the partnership agreement. The author believes this is a relevant issue, despite partners' ability to alter their duties by agreement, due to the ease in informally creating a partnership with or without the knowledge or intent of the partners. For a discussion of partners' ability to alter their duties by agreement under RUPA see MICHAEL HAYNES, Comment, *Partners Owe to One Another a Duty of the Finest Loyalty . . . Or Do They? An Analysis of the Extent to Which Partners May Limit Their Duty of Loyalty to One Another*, 37 TEX. TECH L. REV. 433 (2004-2005).

¹² See generally TRPA.

the Texas courts' current treatment of TRPA. Finally, the analysis in Part IV looks at the evolution of partnerships over the last century and what effect that has had or should have on partnership law. It also considers possible interpretations and applications of the shift in Texas partnership law by analogizing it to agency law as well as considering the consequences of the different ways the law might now be applied.

This Author contends that although the duties partners owe to one another might not undergo the vast changes some might infer from the drafters' comments and some scholars' opinions of changes in partnership law, the change does present a dilemma that Texas courts must at least acknowledge. The linguistic change in the law, particularly the deliberate deletion of the term "fiduciary" from the statute, deserves an analysis by Texas courts.¹³ This analysis may find that the common law stands and lead to continued adherence to strict common law fiduciary concepts, or it may be interpreted more dramatically as a shift in partnership duties abrogating the common law and more narrowly tailoring the duties owed. Clarification of the answer to this dilemma would significantly benefit Texas partnerships and the Texas legal community. Will the courts rein in the broad rhetoric of pre-TRPA cases as well as post-TRPA cases such as *M.R. Champion v. Mizell* or maintain their view of partners as fiduciaries per se?¹⁴

II. BACKGROUND—THE OLD LAW

A. *The Common Law Approach*

At common law, the Texas Supreme Court as well as lower courts held throughout early jurisprudential history that partners undeniably owed one another a fiduciary duty.¹⁵ In *Bohatch v. Butler & Binion*, the court outlined a partner's fiduciary duty to his partners and the partnership under TUPA or the common law: "(1) full disclosure of all matters affecting the partnership; (2) accounting for all partnership profits and property, i.e.,

¹³ See *id.* § 4.04; TUPA § 20.

¹⁴ See generally *M.R. Champion v. Mizell*, 904 S.W.2d 617 (Tex. 1995) (per curiam).

¹⁵ *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 602 (Tex. App.—Houston [14th Dist.] 1995) (citing selected cases from 1951 to 1977), *aff'd*, 977 S.W.2d 543 (Tex. 1998). TUPA, not TRPA, governed the court's determination in *Bohatch*. *Id.*

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refraining from self-dealing; and (3) refraining from competition with the partnership.”¹⁶

When applied in the case of information disclosure, the courts were particularly strict. In a classic partner disclosure case, the Texas Supreme Court held one partner, Peckham, had an absolute duty to disclose information to the other, Johnson, when buying the other's half interest in partnership property.¹⁷ Peckham had purchased Johnson's interest without disclosing to Johnson that he was in negotiations with a third party for a lucrative sale of partnership land from which he later profited greatly.¹⁸ The supreme court rejected the court of civil appeals' rationale that no duty to disclose or fiduciary duty was present because discord between the partners had created an arm's length transaction, and therefore, the partners owed only the bare duties accompanying such an encounter.¹⁹ In fact, the supreme court rejected the idea that the suit for accounting and dissolution filed by Peckham absolved him from his strict duties to Johnson.²⁰ The unwillingness of the court to grant Peckham any leeway in his dealings with Johnson, a partner with whom he was attempting to sever his ties, is a good example of the early courts' strict stance on partners' high fiduciary duties. The court went on to set forth the generally accepted rule regarding partners that, “[s]ince each is the confidential agent of the other, each has a right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge *in any way relating to the partnership affairs*.”²¹ The court further opined that, “[i]f the existence of strained relations should be suffered to work an exception [to fiduciary relations], then a designing fiduciary could easily bring about such relations to set the stage for a sharp bargain.”²²

Also established at the common law was the idea that a managing partner's duty is somewhat distinguished from other partners' duties as the “highest fiduciary duties recognized in the law.”²³ Apparently, the courts elevated the managing partner above even the strict fiduciary duty of good

¹⁶ *Id.*

¹⁷ *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938).

¹⁸ *Id.*

¹⁹ *Id.* at 787–88.

²⁰ *Id.* at 788.

²¹ *Id.* at 787 (emphasis added).

²² *Id.* at 788.

²³ *Brosseau v. Ranzau*, 81 S.W.3d 381, 395 (Tex. App.—Beaumont 2002, pet. denied) (citing *Huffington v. Upchurch*, 532 S.W.2d 576, 579 (Tex. 1976)).

faith and candor owed by partners to one another.²⁴ Whether managing or not, these cases make clear that the common law and its interpretation of TUPA held partners to strict fiduciary duties.

B. Statutory—TUPA (1962-1999)

TUPA which was in effect from 1962 until its expiration in 1999, lays out a statutory scheme that parallels the strict common law view of partners as fiduciaries.²⁵ Section 20 is entitled “Duty of Partners to Render Information” and requires partners to disclose on demand true and full information of all things affecting the partnership to any partner or his legal representative.²⁶ In the commentary following the statute, Alan R. Bromberg writes that section 20 should not be construed to limit this disclosure obligation to instances *without* demand when fiduciary principles would call for a full disclosure.²⁷ The commentary reflects the same approach to the partner’s duty to disclose as discussed in *Johnson v. Peckham*.²⁸

The title of section 21 gives the reader a clear impression of the legislature’s intentions as to the duties of a partner. Entitled “Partner Accountable as a *Fiduciary*,” section 21 lays out a high duty to account to the partnership for any benefits derived by him and refers to this duty as comparable to that of a trustee’s.²⁹ The statute and following commentary make clear that the duty continues throughout the formation, business and terminal periods of the partnership.³⁰

²⁴ *Id.* at 394.

²⁵ See TUPA, *supra* note 10, §§ 20–22.

²⁶ *Id.* § 20.

²⁷ *Id.* § 20 cmt. (directing reader to the discussion of partners’ disclosure duties in *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786 (1938)).

²⁸ See TUPA § 20; *Johnson*, 120 S.W.2d at 787.

²⁹ TUPA § 21 reads:

Partner Accountable as a *Fiduciary*: (1) 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. (2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. TUPA § 21 (emphasis added).

³⁰ See TUPA § 21 cmt.

However, following the NCCUSL's promulgation of RUPA in 1992, the Texas Legislature significantly amended its partnership law by enactment of the TRPA in 1994.

III. THE NEW LAW

A. *TRPA (1994-2010) and BOC*³¹

The Texas Legislature passed the Texas Revised Partnership Act (TRPA) as House Bill 273 in 1993 during its seventy-third regular session.³² Its enactment substantially changed the statutory language regarding partnership duties in Texas, but the question is whether the change in semantics actually changed the real duties of partners to one another. This requires an analysis of additions to and changes in the statute that might affect partners' duties.

TRPA Section 4.03, which was derived from TUPA section 20, does not seem to effect a change in the statute as its requirement that information be furnished on request to a partner, his legal representative or assignee is almost identical on its face to the same mandate of information on demand found in its predecessor section.³³ However, the Bar Committee Comments following the TRPA statute reflect a far different interpretation than the comments on the TUPA language.³⁴ The Committee notes that, "This information right arises *only on request; the information need not be volunteered.*"³⁵ The commentary reflects a shift from Bromberg's earlier comments on section 20 of TUPA, which indicate the volunteering of information is necessary.³⁶ The amendment's commentary also leads the reader to wonder where that leaves the strict disclosure demands of *Johnson v. Peckham*.³⁷ Is there room for the drafters' new interpretation of the

³¹ Although the TRPA has been re-codified in the BOC, as indicated in the BOC revisor's comments, the legislature intended no substantive change so the resulting analysis applies to both. TEX. BUS. ORG. CODE ANN. §§ 152.202–.206 cmts. (Vernon's 2006 Pamphlet) [hereinafter BOC]. Because it is where the amendments first appeared and contains the relevant Bar Committee Comments, the Author will quote to TRPA and provide corresponding BOC cites for reference.

³² <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=73R&Bill=HB273>.

³³ Compare TRPA, *supra* note 10, § 4.03 with TUPA § 20; see also BOC §§ 152.212–.213.

³⁴ See TRPA § 4.03 cmt.

³⁵ *Id.* (emphasis added).

³⁶ See *supra* discussion in Part II.B of corresponding TUPA statute.

³⁷ See *supra* Part II.A.; see generally *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786 (1938).

statute and the propositions of *Johnson* to co-exist in the same body of law? The apparent intent of the drafters moves from a duty of full disclosure even without request to a regime requiring full disclosure only when requested.

TRPA section 4.04 is the corresponding section to TUPA section 21 where the General Standards of Partner's Conduct are set out.³⁸ Most noticeable is the change in section titles. The word "fiduciary" is wholly removed from the language of TRPA, where it was part of the title of the same section in TUPA.³⁹ TRPA section 4.04 specifically provides partners with duties of loyalty and care further elaborated on in the statute.⁴⁰ Section 4.04(d) mandates that partners must discharge their duties to the partnership and other partners under "this Act or under the partnership agreement, and exercise any rights and powers in the conduct or winding up of the partnership business: (1) in good faith; and (2) in the manner the partner reasonably believes to be in the best interest of the partnership."⁴¹ The Bar Committee comments indicate this good faith requirement is not a separate duty but the manner in which otherwise arising duties must be discharged.⁴² Because the good faith standard does not confer a separate duty but only gives a manner of performance for enumerated duties, it would be improper to argue a continuation of the high fiduciary duties under the common law and TUPA through this subsection.

TRPA also makes it clear that a partner does not violate a duty or obligation under TRPA or under the partnership agreement merely because his conduct furthers his own interests.⁴³ The Bar Committee commentary indicates that this section is a companion to TRPA section 4.01(k), which gives the partner the same rights and obligations with respect to a matter, whether it be lending money to or transacting other business with the partnership, as a person who is not a partner.⁴⁴ Do these statutes not create an incongruous situation for the partner? If the partner has the rights and

³⁸ Compare TRPA § 4.04 with TUPA § 21; see also TRPA § 4.04 cmt; BOC §§ 152.204–.206.

³⁹ Compare TRPA § 4.04 with TUPA § 21.

⁴⁰ TRPA § 4.04.

⁴¹ *Id.* § 4.04(d); see also BOC § 152.204.

⁴² TRPA § 4.04(d)cmt.

⁴³ *Id.* § 4.04(e); see also BOC § 152.204(c).

⁴⁴ TRPA § 4.01(k) ("Partner Transaction of Business with Partnership: A partner may lend money to or transact other business with a partnership and, subject to other applicable law, has the same rights and obligations with respect to that matter as a person who is not a partner."); see also BOC § 154.201.

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obligations of a third party when dealing with the partnership as well as the right to further his own interests, how then does he maintain those rights while acting as a fiduciary and disclosing all relevant information to the partnership and his partners?⁴⁵ This pair of statutes seems to run counter to the often upheld opinion in *Johnson* that partners' transactions with one another cannot be accomplished at arm's length.⁴⁶ Commenting on similar provisions in RUPA, Bromberg and Ribstein opine that RUPA's limitations on fiduciary duties allowing a partner to transact business with the partnership on the same basis as a third party "subject to applicable law" make it unclear how the limiting provisions work.⁴⁷ There is an apparent contradiction with other fiduciary principles expressed in RUPA.⁴⁸ Of importance is the phrase "subject to other applicable law."⁴⁹ It is necessary to consider if this was the legislature's way of implying that all common law in the area continues to stand. If so, it is necessary to balance the view of a partner as a third party against the common law idea that partners have high duties of disclosure.

Also of note in section 4.04 is subsection (f), which makes the trustee standard once used for dealings among partners and the partnership

⁴⁵The NCCUSL's comments in the Revised Uniform Limited Liability Company Act shed some light on their view of this section in the fiduciary context. See Revised Unif. Ltd Liab. Co. Act § 409 cmt. (2006) [hereinafter RULLCA]. When noting that they chose to leave this section out of the ULLCA, the drafters comment that, "[i]n the context of fiduciary duty, the language is at best incomplete, at worst wrong, and in any event confusing." *Id.*

⁴⁶See *supra* Part I.

⁴⁷ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001) § 8.404, 316 (2007 Aspen).

⁴⁸*Id.* A Kansas court analyzing Kansas' partnership statute, which tracks the RUPA language, observes that:

This provision is somewhat misleading in its use of the term "fiduciary duties." Fiduciary duty is defined as a "duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person," Black's Law Dictionary 625 (6th ed. 1990), while the provisions of subsection (e) expressly provides that a partner does not violate a duty or obligation under KUPA or under the partnership agreement merely because the partner's conduct furthers the partner's "own interest." KAN. STAT. ANN. § 56a-404(e). Thus, the use of the term "fiduciary" is inappropriate because a partner may legitimately pursue self-interest instead of solely the interest of the partnership and the other partners as must a true trustee.

Welch v. Via Christi Health Partners, Inc., 133 P.3d 122, 141 (Kan. 2006).

⁴⁹RUPA, *supra* note 10, § 404.

inapplicable.⁵⁰ The specific inclusion of this section of the statute into TRPA reflects a direct intent to at least somewhat affect past interpretations of partners' duties.⁵¹ The question becomes to what extent the cessation of use of the trustee standard affects the view of partners as fiduciaries.

B. Legislative Intent

The Bar Committee's commentary on TRPA section 4.04 specifically points out the absence of the term "fiduciary."⁵² In reference to this change, the comments illuminate the drafters' intent by noting that partners' duties "are not to be expanded by loose use of 'fiduciary' concepts from other contexts or by the rhetoric of some prior cases."⁵³ These comments seem a clear indication of legislative intent to abrogate the common law in the realm of partners' duties to some extent. However, Bar Committee Commentary is not black letter law, and while persuasive, courts are not required to follow its guidance.⁵⁴ Such a clear direction as to the interpretation of a law is worthy of attention from the Texas court system, but, after reviewing post-TRPA case law, it is clear that Texas courts have yet to adjust their interpretation of the common law.⁵⁵

The House Research Organization (HRO) Analysis of HB 273 reiterates that, while TRPA codifies general duties such as loyalty and care requiring discharge in good faith and in the best interest of the partnership, it eliminates the "fiduciary duty imposed by current law for partners to account to the partnership for benefits *and hold as trustee* for it profits

⁵⁰TRPA, *supra* note 10, § 4.04(f) cmt; *see also* BOC, *supra* note 31, § 152.204(d).

⁵¹The section speaks directly to past language such as TUPA section 21 ("Every partner must account to the partnership for any benefit, and holds as trustee for it any profits derived by him . . .") and *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) ("Joint adventurers, like copartners, owe to one another . . . the duty of the finest loyalty. . . . A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.").

⁵²TRPA § 4.04 cmt.

⁵³*Id.*

⁵⁴*Tex-Air Helicopters, Inc. v. Galveston County Appraisal Review Bd.*, 76 S.W.3d 575, 581 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (noting that the court's objective in construing a statute is to determine the legislature's intent from the plain meaning of words used and not resort to extraneous matters for an intent not stated in the statute); *see also* *Fetter v. Wells Fargo Bank Tex., N.A.*, 110 S.W.3d 683, 687 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (noting the commentary of uniform acts such as the UCC are not binding, but can be used in statutory construction by the court).

⁵⁵*See infra* Part III.C.

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derived without consent of the other partners from any transaction connected with the partnership.”⁵⁶ The HRO’s analysis of the bill while in the legislative process also serves as a guide to the Texas Legislature’s understanding of the meaning of the law as they would be enacting it. According to the bill analysis, the trustee status called for under previous statutes and the common law would be inapplicable under this reading of TRPA. Both the Bar Committee Commentary and the HRO Report reflect an intention to abrogate the common law, although they are unclear as to whether they look to a total or partial abrogation of common law fiduciary concepts.

A comparison of TRPA with RUPA does leave room for another interpretation of legislative intent somewhat contrary to that arrived at under analysis of the comments in the statute and HRO’s report. Under Section 404, General Standards of Partner’s Conduct, RUPA states that the “*only* fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care” as set out in the statute.⁵⁷ The uniform act goes on to note that the duties of loyalty and care

⁵⁶HOUSE COMM. ON BUSINESS & INDUSTRY, BILL ANALYSIS, Tex. H.B. 273, 73th Leg., R., 13 (1993) (emphasis added). It is important to note that TRPA does retain the duty of accounting, which is subsumed into the duty of loyalty. TRPA § 4.04(b)(1). The difference between the two is that TRPA makes clear these duties do not rise to those of a trustee. TRPA § 4.04(f).

⁵⁷RUPA, *supra* note 10, § 404(a) (emphasis added). The relevant section of the statute reads in part:

- (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).
- (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;
 - (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; and
 - (3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.
- (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.

are “limited” to specific situations outlined in the statute.⁵⁸ The variation between TRPA and RUPA, specifically the failure of TRPA to include words key in RUPA such as “only” and “limited,” opens the amendment to debate that the legislature intended to “leave room” in Texas partnership law for the common law to fill in gaps in partnership duties. However, a willingness to allow the courts to fill in the holes created by the new Texas statute does not necessarily indicate a desire to retain the entire body of common law from before the amendments.

Perhaps the legislature forewent adopting the strict and binding RUPA language in order to give the courts leeway in their interpretation of partners’ duties on a case by case basis allowing them to use facts rather than strict statutory limits as a guide. The NCCUSL made a similar choice when drafting the Revised Uniform Limited Liability Company Act (RULLCA).⁵⁹ The reporters note in the commentary of section 409 of that act that the language of RUPA serves to “fence or cabin in” all fiduciary duties within the statutory formulation with the intent to “respect freedom of contract, bolster predictability, and protect partnership agreements from second guessing.”⁶⁰ However, in RULLCA, NCCUSL decided that the “corral” in RUPA is not appropriate for limited liability companies and foregoes “only” and “limited to” to allow courts to continue to use fiduciary concepts to police disclosure obligations in member-to-member and member-LLC transactions.⁶¹ The intention of the drafters of TRPA could be analogized to that of the NCCUSL as an attempt to allow courts to continue to use fiduciary concepts when policing partnerships and partner to partner as well as partner-partnership transactions. Also of note is the fact that several other states have foregone use of all or some of the fencing in language.⁶²

Alternatively, if comparing TRPA to RUPA provides an indication of legislative intent, it is also necessary to look at the RUPA’s section

⁵⁸ RUPA § 404(b), (c).

⁵⁹ See RULLCA, *supra* note 45, § 409.

⁶⁰ *Id.* § 409 cmt.

⁶¹ *Id.*

⁶² See, e.g., RUPA § 404 Variations from Original Text, 2006 Electronic Pocket Part Update (“Illinois: In subsec. (a), substitutes ‘[t]he fiduciary duties a partner owes to the partnership and the other partners include’ for ‘[t]he only fiduciary duties a partner owes to the partnership and the other partners are’ . . . Florida: In subsec. (b), in the introductory paragraph, substitutes ‘includes without limitation’ for ‘is limited to’. Idaho: In subsec. (b), in the introductory paragraph, substitutes ‘includes the following’ for ‘is limited to the following’. In subsec. (b)(1), inserts ‘or information’ preceding ‘including the appropriation’.”).

regarding partners' rights to information. In RUPA, the Act gives the partner and partnership the right to information "without demand" if that information applies to their rights and duties under the partnership agreement or the Act.⁶³ However, as noted earlier, TRPA's disclosure statute indicates information must be furnished "on request," and the commentary indicates the right arises only on request.⁶⁴ This significant change in language from the uniform act to the one enacted in Texas shows unwillingness on the part of TRPA's drafters to follow RUPA's disclosure requirements. On the other hand, the Texas law's less restrictive definition of the duty of loyalty, as discussed above, might allow a court to read into that duty a mandate to volunteer information under certain circumstances involving partners' duties of loyalty.⁶⁵

C. Case Law

Several courts, although applying the old statutory scheme, have paused to recognize the change in the law as if to say interpretation under the new law might reach a different conclusion than under the old statutory and common law scheme. In a case by a partner against the managing partner of a partnership alleging breach of fiduciary duty, the Beaumont Court of Appeals cited to an older case espousing the traditional common law in recognizing partners' fiduciary duties to one another.⁶⁶ However, in a footnote, the court added the caveat that while a new statutory scheme for partnerships had been enacted in Texas, it did not apply in that case.⁶⁷ The Fourteenth Court of Appeals in Houston made the same observation in a case considering the existence of a fiduciary duty not to expel a partner in a

⁶³RUPA § 403(c)(1). The relevant portion of the statute reads in part:

(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:

(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]; and
(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.

⁶⁴TRPA, *supra* note 10, § 4.03 cmt.

⁶⁵*See id.*; § 4.04(b).

⁶⁶*Hawthorne v. Guenther*, 917 S.W.2d 924, 934 (Tex. App.—Beaumont 1996, writ denied) (citing *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 264–65 (1951)).

⁶⁷*Hawthorne*, 917 S.W.2d at 934, n.2.

partnership.⁶⁸ The courts' analyses under TUPA rather than an indication of no change in the law, as well as their nod to the new statutory scheme imply a shift in outcome might be possible under the new law. However, these do little to illuminate that new law's possible effect.

Texas courts have been reluctant to further address this change in the law and have failed to recognize the shift caused by the enactment of TRPA. Cited by courts of appeals as authority that partners' fiduciary duties stand under the new law as they did under the old law, *M.R. Champion, Inc. v. Mizell*⁶⁹ gives us a glimpse into the Texas Supreme Court's interpretation of partners' duties under TRPA.⁷⁰ This short opinion notes that the case was tried under and was governed by TUPA but comments that the revisions to TUPA, in the form of enactment of TRPA, do not change the principles as applied to the case at hand.⁷¹ In *M.R. Champion* a partner failed to obtain a contract for the partnership and instead obtained it for himself individually.⁷² In its analysis, while citing to TRPA, the court opines that partners owe a duty "in the nature of a fiduciary duty" in the winding up of partnership business.⁷³ It is clear that the court reads the duties of loyalty and care under the new statute as "in the nature of" fiduciary duties. However, section 4.04 speaks to a duty of loyalty and care in the winding up of partnership business without using the term "fiduciary".⁷⁴ Although duties of loyalty and care are often subsumed into fiduciary duties, this court's analysis of the new statute somewhat undermines the Bar Committee Comments accompanying the amendments to Texas partnership law.⁷⁵ Their direction that "fiduciary" is an inappropriate term for describing partnership duties was clearly overlooked or ignored by this court's interpretation of the law.⁷⁶ Paying close attention

⁶⁸ *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 602 (Tex. App.—Houston [14th Dist.] 1995), *aff'd*, 977 S.W.2d 543 (Tex. 1998).

⁶⁹ *M.R. Champion v. Mizell*, 904 S.W.2d 617 (Tex. 1995) (per curiam).

⁷⁰ See, e.g., *Long v. Lopez*, 115 S.W.3d 221, 226 (Tex. App.—Fort Worth 2003, no pet.); *US MCT, Inc. v. Brodsky*, No. 05-98-00204-CV, 2001 WL 1360301, at *10 (Tex. App.—Dallas Nov. 7, 2001, no pet.) (not designated for publication).

⁷¹ 904 S.W.2d at 618 n.1 (Tex. 1995) (per curiam).

⁷² *Id.* at 618.

⁷³ *Id.* ("Partners owe each other and their partnership a duty in the nature of a fiduciary duty in the conduct and winding up of partnership business, and are liable for a breach of that duty.") (citing TRPA §§ 4.04, 4.05).

⁷⁴ TRPA § 4.04.

⁷⁵ See *id.* § 4.04 cmt.

⁷⁶ See *id.*

to the language used by the court, it is an important caveat that it phrased its discussion in terms of duties owed by the partner being “*in the nature of a fiduciary duty*.”⁷⁷ Despite this qualification that the duty is only in the nature of a fiduciary duty, the rest of the court’s discussion regarding the lack of change in the law from TUPA to TRPA is confusing in light of the amendments to the law enacted by TRPA and merits further explanation and discussion.⁷⁸

A more proper foundation for the court’s assertion of partners’ fiduciary duties would be reference to common law fiduciary principles in the partnership context. While looking at the fiduciary duties of partners under the common law in cases such as *Johnson v. Peckham*, the Texas Supreme Court might have taken the opportunity to provide insight as to what aspects of those principles still stand.⁷⁹ It might be interpreted that the court’s insistence that partners owe duties to each other and the partnership “in the nature of a fiduciary duty,” indicates an intention to uphold that prior use of fiduciary concepts.⁸⁰ On the other hand, the subtle language indicating partners owe a duty “in the nature of a fiduciary duty” could also reveal a step toward characterizing partners, not as fiduciaries, but as something very similar.⁸¹

M.R. Champion is not dispositive of the question as to whether the extent of the fiduciary duties owed by partners changed with the implementation of TRPA. First of all, the court’s interpretation of the new statute is not controlling because the partnership under scrutiny was governed by the old statutory scheme.⁸² Also, the court did not even find a breach because it was applying its analysis in the context of a winding up of a partnership and found that, after termination of the partnership, fiduciary duties only apply to actions related to the winding up process.⁸³

The Fifth Circuit Court of Appeals has also weighed in on the revision of Texas partnership law in *Gupta v. E. Idaho Tumor Inst. (In re Gupta)*.⁸⁴ Despite its non-binding nature on Texas court decisions, the Fifth Circuit’s

⁷⁷ *M.R. Champion v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995) (per curiam) (emphasis added).

⁷⁸ *See id.* at 618 n.1.

⁷⁹ *See generally* *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786 (1938).

⁸⁰ *M.R. Champion*, 904 S.W.2d at 618.

⁸¹ *See id.*

⁸² *Id.* at 618 n.1.

⁸³ *Id.* at 618.

⁸⁴ *In re Gupta*, 394 F.3d 347, 348 (5th Cir. 2004).

analysis of the repercussions on partnership duties after enactment of TRPA can provide persuasive interpretation of the new law.⁸⁵ This analysis of our law on partnership came about as part of a case concerning the bankruptcy of a co-joint venturer.⁸⁶ The United States Bankruptcy Code does not allow for discharge of debt arising out of a judgment for “fraud or defalcation while acting in a fiduciary capacity.”⁸⁷ The Fifth Circuit had to consider whether Texas partnership duties rise to the fiduciary level necessary to allow application of collateral estoppel and bar re-litigation of the facts as to whether Gupta’s actions breached a fiduciary duty.⁸⁸ It is important to note that the fiduciary duty at issue is one specifically defined under federal law in the bankruptcy context and is not precisely the same fiduciary duty as that defined under Texas state cases.⁸⁹ In determining how to interpret the jury’s finding of a breach of fiduciary duty, the Fifth Circuit concluded that, while aspects of Texas partnership duties may reach fiduciary levels, Texas partners are not fiduciaries per se for purposes of federal bankruptcy law, and the case required further proceedings on the existence of a sufficient fiduciary duty.⁹⁰

In *Gupta*, Eastern Idaho Tumor Institute, Inc. brought suit against Gupta in state court alleging breach of fiduciary duty, and the jury found Gupta did have a fiduciary duty based on a relationship of trust and confidence.⁹¹ The question before the Fifth Circuit was whether the state law fiduciary duty found by the jury was sufficient to support a fiduciary finding under 11 U.S.C. section 523(a)(4).⁹² In its analysis, the court found that Texas law “fails to support [the] broad proposition” that “all partners are fiduciaries to each other for purposes of section 523(a)(4).”⁹³ The court cited to TRPA, specifically its mandate that the trustee standard is inapplicable and the Bar

⁸⁵ Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 295 (Tex. 1993) (per curiam).

⁸⁶ *Gupta*, 394 F.3d at 348.

⁸⁷ *Id.* (citing 11 U.S.C. § 523(a)(4) (2000)).

⁸⁸ *Id.*

⁸⁹ *Id.* at 350 (“The scope of the concept of fiduciary under 11 U.S.C. § 523(a)(4) is a question of federal law; however, state law is important in determining whether or not a trust obligation exists.” LSP Inv. P’ship v. Bennett (*In re Bennett*), 989 F.2d 779, 784 (5th Cir. 1993). The problem in this case is how to interpret the jury’s finding of a breach of fiduciary duty in light of Texas partnership law and this circuit’s interpretation of the federal standard.”).

⁹⁰ *Id.* at 348.

⁹¹ *Id.* at 349 & n.2.

⁹² *Id.* at 349 n.2.

⁹³ *Id.* at 351.

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Committee Comments discouraging use of “‘fiduciary’ concepts.”⁹⁴ The court commented that the duties of loyalty and care include certain duties that “may rise to the level of ‘fiduciary’ for purposes of section 532(a)(4).”⁹⁵ Further, the court mentioned that *M.R. Champion*’s finding that partnership fiduciary principles had not changed “*applied to the case before*” the court, which addressed a partners’ duty arising out of termination of the partnership.⁹⁶ Also, it noted that *M.R. Champion*’s language does not explicitly retain the fiduciary duty but refers to this partnership duty as “*in the nature of a fiduciary duty*.”⁹⁷ Even the Fifth Circuit’s analysis of *M.R. Champion* provides distance between a complete retention of TUPA and common law fiduciary duties and the actual state of the law under TRPA.

D. Texas Pattern Jury Charge

Also of note is the Texas Pattern Jury Charge’s (TPJC) continued acceptance of the common law concept of partners as fiduciaries.⁹⁸ Citing pre-TRPA case law, the TPJC questions as to existence of a fiduciary relationship and breach of a fiduciary relationship presuppose a fiduciary relationship between partners.⁹⁹ The comments on the question as to existence of a fiduciary relationship indicate the question is not even necessary in the partnership context because a formal fiduciary relationship automatically arises between partners.¹⁰⁰ The breach question considers whether the accused party placed his interests before the interests of the party owed the fiduciary duty or whether he used his position to gain benefit at the expense of the injured party.¹⁰¹ This question seems to run counter to TRPA’s assertion that a partner’s conduct furthering his own interest does not violate the Act.¹⁰²

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* (quoting *M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995) (per curiam) (emphasis added)).

⁹⁸ COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT PJC 104.1 & 104.2 (2006).

⁹⁹ *Id.*

¹⁰⁰ *Id.* PJC 104.1.

¹⁰¹ *Id.* PJC 104.2.

¹⁰² *See* TRPA § 4.04(e).

The TPJC appears to assume that the common law still stands for the idea that partners automatically owe one another and the partnership fiduciary duties, and that none of these common law concepts have been abrogated by the passage of TRPA.¹⁰³ However, the language of TRPA and the BOC seems a more appropriate starting point when approaching duties in a partnership case as little to none of the available case law analyzes the duties under this new law. This is yet another area of the law confused by the amendments to partnership law that would be well served by clarification and analysis of partners' duties under TRPA and BOC by Texas courts.

IV. ANALYSIS

A. Policy Considerations

Partnerships are no longer the small groups of intimately connected businessmen they once were. The size of partnerships has grown in modern times to encompass hundreds of partners in law firms, accounting firms, etc.¹⁰⁴ This transition over time of the typical partnership from a smaller to larger size leads to a need for a transition in the duties of partners to one another. Holding partners to the strict "punctilio of honor" standard of *Meinhard v. Salmon* can be restrictive in the large partnership context.¹⁰⁵ The House Research Organization report on the bill passing TRPA echoes this reasoning in its explanation of arguments for the bill.¹⁰⁶ The bill analysis criticizes TUPA as based on "archaic forms of business transactions."¹⁰⁷ It also briefly walks through the substantial changes to Texas partnership law wrought by TRPA including its clarification that partners are free to pursue individual interests that may benefit them while maintaining their duties of loyalty and care to the partnership.¹⁰⁸

¹⁰³ It is unclear whether this section of the TPJC has been revised since enactment of TRPA or, if it has, if the drafters have considered TRPA's potential impact on the TPJC. The charges cite post-TRPA/BOC case law on general fiduciary concepts but only pre-TRPA case law on partnership-specific principles. *See supra* note 99.

¹⁰⁴ *See* HOUSE COMM. ON BUSINESS & INDUSTRY, BILL ANALYSIS, Tex. H.B. 273, 73th Leg., R., 4-6 (1993).

¹⁰⁵ *See generally* *Meinhard v. Salmon*, 249 N.Y. 458, 168 N.E. 545 (1928).

¹⁰⁶ *See supra* note 105.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.* at 5.

Also, the transition from an aggregate to entity approach is reflected in the change in partnership law. The historical aggregate approach looked at the partnership as a group of partners whereas the current entity approach looks at the partnership as having existence apart from the partners. When considering a partnership as an aggregate, strict fiduciary duties and disclosure duties are more logical for maintenance of a functional and open relationship between partners because the partners are the integral pieces to the partnership puzzle. However, a partnership as an entity does not require the strict duties owed from partner to partner promulgated by the common law and TUPA. Partners in a partnership viewed as an entity are no longer key pieces of a puzzle as under the aggregate approach but are more fluid and transient parts of the continuing and flexible partnership entity. Mentioning the change in traditional partnerships from “small enterprises with 2 or 3 associates” to the possibility that an “organization[n] with thousands of employees may be [a] partnership[p],” the bill analysis reinforces the need for a change in partnership law moving away from a focus on single individuals to a focus on the organization.¹⁰⁹ The analysis of partners’ duties under the entity approach can be analogized to that of directors in the corporate context.¹¹⁰ This shift from aggregate to entity views of partnerships lends itself to a stronger focus on the partners’ duties to the partnership rather than to one another.

Partners’ duties of loyalty and care as well as the requirement that they discharge all these duties in good faith and in the best interest of the partnership serve policing functions to prevent abuse of limitations on their fiduciary duties.¹¹¹ Perhaps the Fifth Circuit’s observation that duties of loyalty and care have aspects that rise to fiduciary levels is an astute comment on what might be an appropriate interpretation of the TRPA amendments to Texas partners’ duties.¹¹² Subsuming partners’ fiduciary duties into more specifically defined, but not restrictive, duties of loyalty and care might allow Texas courts the guidance yet flexibility they need to apply certain aspects of fiduciary duties while avoiding the “loose use of fiduciary concepts” warned of by the Bar Committee Commentary on TRPA. Of note as well is the ability of an informal relationship to give rise to an independent fiduciary duty where one person trusts and relies on

¹⁰⁹ *Id.* at 4–5.

¹¹⁰ *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) (en banc) (stating that directors generally owe to the corporation and its shareholders fiduciary duties of loyalty, due care and good faith).

¹¹¹ *See* TRPA § 4.04.

¹¹² *See supra* note 90 and accompanying text.

another, whether the relation is a moral, social, domestic, or purely personal one.¹¹³

B. Application of Agency Law

In a general partnership, each partner is an agent of the partnership.¹¹⁴ Under the law of agency, agents are fiduciaries to their principal.¹¹⁵ This provides an alternative basis for applying fiduciary duties to partners. However, how does one reconcile the partner as an agent and, therefore, a fiduciary and the TRPA/BOC language reining in the fiduciary concepts used in referring to partners? This tension between these two ideas might reveal intent to release partners of fiduciary concepts in partnership case law but continue analysis of partners as fiduciaries in their agency capacity under agency case law. Considering the change in the statutes from TUPA to TRPA as well as the policy considerations above, this principal agent relationship might now present the court with a more proper context in which to evaluate partners' duties to one another and to the partnership.

Looking to Texas case law on agent's duties to his principal, a helpful case in this arena is *Johnson v. Brewer & Pritchard*.¹¹⁶ Before analyzing the specific case at issue, the court discussed fiduciary relationship in the agency context.¹¹⁷ The court did not attempt to define fiduciary for all contexts recognizing that the specific nature of a fiduciary duty sometimes varies by case.¹¹⁸ It generally notes that fiduciary duties are results of relationships of a special nature and generally apply to people in positions of peculiar confidence toward one another and "contemplates fair dealing and good faith rather than a legal obligation."¹¹⁹ The court goes on to warn

¹¹³Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962).

¹¹⁴BOC § 152.301; TRPA § 3.02(a).

¹¹⁵RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

¹¹⁶See generally 73 S.W.3d 193 (Tex. 2002). For further discussion of agency law in the law firm partnership context, see ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS §§ 3.1.4, 3.2 (2005 Supp.) (noting that pre-termination logistical planning as well as client grabbing is allowed to an extent). Also available is a discussion of application of partnership fiduciary duties to a departing attorney. *Id.* §§ 4.8.1, 4.8.2. Hillman discusses a Massachusetts' court's finding of no breach of fiduciary duty despite the departing group's secret competition with the firm but did find a breach concerning certain pre-termination activities meant to secure clients of their old firm. *Id.* § 4.8.1 (citing Meehan v. Shaughnessy, 404 Mass. 419, 535 N.E.2d 1255, 1264 (1989)).

¹¹⁷Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 199–200 (Tex. 2002).

¹¹⁸*Id.* at 199.

¹¹⁹*Id.*

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that the scope of fiduciary duties in the employer/employee context must be carefully defined when considering the pursuit of business opportunities.¹²⁰

In determining the issue in the case, whether an associate agent breached a duty to his principal and employer, a law firm, the Texas Supreme Court articulated a standard for an agent's duties to his principal in the context of the agent's ability to take advantage of outside opportunities.¹²¹ In this case, the court balanced the rights of the principal with that of the agent and adopted a view favorable to agents giving them freedom to pursue other opportunities.¹²² The holding gives an at-will employee the right to plan to compete with his employer and to take active steps to do so while employed.¹²³ The court observes that the employee does not have a general duty to disclose these plans to his employer, nor is he prevented from joining other employees "in the endeavor."¹²⁴ These rights do not go unrestricted by the court however.¹²⁵ It did find limits on the conduct of an employee planning to compete with his employer such as forbidding misappropriation of trade secrets, solicitation of employer's customers, or acting at the expense of his employer.¹²⁶ The at-will employee relationship can be closely analogized to the partners' role under the entity approach to partnerships. No longer does the partner's departure automatically dissolve the partnership's existence as it once did under the aggregate approach.¹²⁷

Also of note in the *Johnson* case is the court's mention and then prompt avoidance of addressing the repercussions of the amendment to Texas partnership law considered here.¹²⁸ While the court does recognize a fiduciary relationship between agent and principal, its analysis of the duties in this context seem more analogous to the Fifth Circuit's analysis of Texas

¹²⁰ *Id.* at 201.

¹²¹ *Id.* 201–02.

¹²² *Id.*

¹²³ *Id.* at 201.

¹²⁴ *Id.*

¹²⁵ *Id.* at 202.

¹²⁶ *Id.*

¹²⁷ *See supra* note 105, at 3.

¹²⁸ *Brewer*, 73 S.W.3d at 199–200 ("We have historically held that partners also owe certain fiduciary duties to one another. We need not consider here the impact of the provisions of the Texas Revised Partnership Act on duties partners owe to one another.").

partnership duties in that certain duties rise to a fiduciary level but are limited and not regulated by a strict fiduciary standard.¹²⁹

Although the Restatement of Agency Third defines an agency relationship as a fiduciary relationship, its comments indicate limits on the constraints of the relationship, particularly when relations are strained.¹³⁰ The Comments note that partners are not subject to fiduciary constraints in an adversarial transaction, and that this view is consistent with the Restatement's view that actions as an agent on behalf of the principal implicate fiduciary standards.¹³¹ These limits in the agency relationship can be carried over to the partnership relationship under the new statutory scheme.

The Restatement also recognizes a duty of disclosure that runs from the agent to the principal.¹³² The agent must provide the principal with information the agent knows or has reason to know the principal would wish to have or information that is material to the agent's duties to the principal.¹³³ However, the Restatement provides for non-disclosure when the agent owes a superior duty to another not to disclose the information to his principal.¹³⁴ There is a conflict between the Restatement and TRPA/BOC's description of the duty of disclosure since the statute contains no voluntary duty of disclosure.¹³⁵ This might be reconciled by subsuming the duty of disclosure generally accepted in agency law under the duty of loyalty in the partnership context.¹³⁶

It is necessary to find a balance between duty of loyalty to the partnership and partners' rights such as the balance struck between employer and employee in the *Johnson* case.

V. CONCLUSION

A partner's duties to his partners and partnership do not clearly fall under the scope of the body of pre-TUPA case law after the passage of

¹²⁹See *id.* at 199, 201.

¹³⁰RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

¹³¹*Id.* (citing *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1301 (5th Cir. 1993)); RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. E (2006).

¹³²RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006).

¹³³*Id.* § 8.11, cmt. b.

¹³⁴*Id.*

¹³⁵See *supra* note 57 and accompanying text.

¹³⁶See *supra* note 58 and accompanying text.

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TRPA in 1994, and the Texas Supreme Court must further interpret the change in the law to clarify the limitations of partnership duties in the default statutory scheme. One commentator observes that the cost of mandatory fiduciary duties may be high as they could prevent partners from feeling free to exercise their own discretion.¹³⁷ What duties are owed by partners might affect the cause of action pursued in breach of duty cases as well as the applicable statute of limitations and remedies available. Without clarification of where the fiduciary principles of partnership law stand, Texas partners cannot be sure of their liabilities under the current statutory scheme.

¹³⁷ Alan R. Bromberg & Larry E. Ribstein, *BROMBERG & RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT* (2001) § 8.404, 314 (2007 ed.) (“Mandatory fiduciary duties are a questionable policy. Fiduciary duties can be costly to the partnership because they may unduly deter the agent from exercising his discretion, and expose the firm to wasteful litigation. . . . Thus, it may be quite sensible for a firm to contract out of fiduciary duties.”).