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INTRODUCTION

Law students, lawyers, and even courts sometimes have a tendency to approach problems of legal ethics as one might approach tax—to begin and end with the rules of professional conduct, parse them with technical rigor, and conclude that conduct is permitted if not prohibited. To some extent, this is a result of the way law schools now teach legal ethics. The Multistate Professional Responsibility Examination tests primarily on the ABA Model Rules of Professional Conduct (Model Rules); legal ethics courses often teach to the test. To some extent, it reflects the fact that the obligations of lawyers are summarized in a restatement, the Restatement (Third) of the Law Governing Lawyers, which is separate from, and sometimes inconsistent with, the Restatement (Third) of Agency. This is unfortunate. Lawyers are, first and foremost, fiduciaries.

Consider the following hypothetical. A client retains a lawyer to assist in purchasing Blackacre, on which she plans to build a shopping center. In the course of his representation, the lawyer discovers that Whiteacre, immediately adjacent to Blackacre, is for sale. Because of what his client has told him of her plans, the lawyer knows that once the shopping center is built Whiteacre will rise significantly in value. He has not discussed Whiteacre with his client, nor has she mentioned it to him. Comment [5] to Rule 1.8 of the Model Rules states in part: "if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client . . . ."[1] The Comment does not explicitly prohibit purchase of adjoining parcels. May the lawyer purchase Whiteacre for himself without consulting his client? As will be discussed below in Part II.A, a lawyer who views legal ethics as a set of technical rules might well conclude that he may. Indeed, many of the legal ethics colleagues with whom I have explored this hypothetical have reached that conclusion.

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1. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 5 (2008).

And yet if the subject of our hypothetical were the real estate agent representing the very same client on the very same project, his fiduciary responsibilities would clearly prohibit him from doing so.[2] The same would be true if our hypothetical lawyer served as officer or director of the client, or as a partner in the partnership building the shopping center. Can it really be that lawyers are subject to less stringent ethical standards than other business people? If experts in legal ethics assert that they are, can we really blame the world for thinking poorly of our profession?

This Article reflects my sense that the lawyer's role as fiduciary has been inappropriately deemphasized in the consideration of legal ethical questions. Part I provides a brief history of the concept of agency and fiduciary duty, both in general and as applied to lawyers. The two, it turns out, are inextricably intertwined. The lawyer, with good reason, has been called the "quintessential fiduciary,"[3] and the attorney-client relationship the "archetype for the fiduciary obligation."[4] To ignore a lawyer's obligations under the black-letter law of agency in analyzing problems in legal ethics would be to ignore history.

Part II then analyzes the hypothetical given above under three apparently conflicting sets of rules: (1) the Model Rules, (2) the Restatement (Third) of Agency, and (3) the Restatement (Third) of the Law Governing Lawyers. Although the matter is not free from doubt, it seems likely that the Model Rules permit our hypothetical lawyer to buy Whiteacre without first consulting his client and obtaining her consent—in other words, to buy Whiteacre behind her back. The Restatement (Third) of Agency, by contrast, clearly prohibits him from doing so and affords his client ample remedies should he breach. The Restatement (Third) of the Law Governing Lawyers, finally, offers a muddled answer. If confidential information is involved in his decision to purchase Whiteacre, he may not do so without consulting his client and obtaining her consent. If no confidential information is involved, however, the position of the Restatement (Third) of the Law Governing Lawyers is unclear. He may possibly be required to inform her that Whiteacre is for sale and desist if she objects; however, even if he is required but fails to do so, his client may apparently not recover for such breach in the absence of quantifiable harm. The case law is equally muddled.

Part III, finally, proposes a resolution. The Model Rules are designed primarily to govern disciplinary proceedings. They should not be read to authorize or insulate from liability actions not explicitly prohibited. In particular, fiduciary duties may impose further limitations on a lawyer's actions. A lawyer's fiduciary duties, in turn, can usefully be broken into two

2. *See, e.g.*, *infra* Part II.B.

3. Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181, 1191.

4. *Id.* at 1182.

categories: duties of competence and diligence and duties of loyalty. Limiting remedies for breach of the duties of competence and diligence to standard negligence remedies, as some have suggested, may be appropriate. Remedies for breach of duties of loyalty, however, cannot properly be so limited. No less than any other agent, a lawyer should be liable for breach of such duties. Part III concludes that in the hypothetical with which this Article begins, the lawyer's duties of loyalty preclude him from purchasing Whiteacre without first consulting his client and obtaining her consent. Colloquially stated, they prohibit him from purchasing Whiteacre behind his client's back.

I. ORIGINS OF THE CONCEPT OF THE LAWYER AS AGENT AND FIDUCIARY

> I will to . . . be true and faithful, and love all which he loves and shun all which he shuns, according to the laws of God and the order of the world. Nor will I ever with will or action, through word or deed, do anything which is unpleasing to him, on condition that he will hold to me as I shall deserve it, and that he will perform everything as it was in our agreement when I submitted myself to him and chose his will.[5]

An agency relationship arises any time one person, a "principal," gives another person, an "agent," the power to act on the principal's behalf according to the principal's wishes, and the agent consents to do so.[6] Agency arises in relationships between client and attorney, employer and employee, partnership and general partner, and corporation and officer, among other contexts.[7] Once an agency relationship is formed, the agent "has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."[8] In particular, agents have a duty not to seek personal gain from third parties through the use of their position, treat their principals as adverse parties, act on behalf of adverse parties, or otherwise compete with the principals.[9] In addition, agents have a duty not to use their principals' property or confidential information for the agents' own purposes.[10]

Western law began wrestling with the problem of agency, particularly in the context of legal representation, long before there was any such thing as "fiduciary duty." Indeed, although the law of fiduciary duty did not reach its current form until the nineteenth century,[11] the concerns it reflects have been

5. Anglo-Saxon Oath of Commendation, *reprinted in* 4 TRANSLATIONS AND REPRINTS FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY: DOCUMENTS ILLUSTRATIVE OF FEUDALISM 3 (Edward P. Cheyney ed., 1898).

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

7. *See id.* § 8.01 cmt. c; s*ee also* Brickman, *supra* note 3, at 1182.

8. *See* RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

9. *Id.* §§ 8.02–8.04.

10. *Id.* §§ 8.02–8.05.

11. *See* Mary Szto, *Limited Liability Company Morality: Fiduciary Duties in Historical*

present, in one form or another, since the days of Socrates.[12] The core of fiduciary duty, after all, is loyalty.[13]

In ancient Greece, representative advocacy was not officially recognized; parties were required to represent their own interests.[14] Parties could, however, consult "interpreters" to explain the law to them[15] and retain "speech-writers" to draft arguments for the parties themselves to make in court.[16] Even in Greek law, however, collective organizations such as city-states and associations were represented by agents.[17] Despite these limited representative functions, the Greek orator became the model for the Roman orator—in turn the prototype for the modern lawyer.[18]

As the Roman state expanded, geography made representation a practical necessity. The vast majority of citizens and subjects lived too far away to appear in Rome in person.[19] This was true even with respect to appearances in provincial capitals—provinces often being very large.[20] As a result, it became common to appoint personal representatives in legal matters.[21] Only limited formalities were required in such appointments. At first, to appoint an agent for litigation, called a "cognitor," a party was required to use a set form of words with the adversary present.[22] Later, a more informal kind of agent, called a "procurator," could be appointed by any words amounting to legal instructions on how to handle a case; the adversary's presence, or even knowledge, was not required as long as the agent acted in good faith and represented that his principal would support his actions.[23] In any event, there was no licensed profession of attorneys or agents.[24] There were restrictions on who could act as agents in litigation, including prohibitions against representation by people under seventeen, women, the blind, the deaf and

Context, 23 QUINNIPIAC L. REV. 61, 100 (2004) (identifying agency principles from the nineteenth century as the basis for the Restatement of Agency).

12. *See* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 34 (1953) (arguing that larger organizations, like city-states or associations, could not literally appear in person and required agents to represent them).

13. *See* RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) ("General Fiduciary Principle: An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

14. *See* POUND, *supra* note 12, at 31.

15. *Id.* at 30.

16. *Id.* at 31–32.

17. *See id.* at 34.

18. *Id*. at 33.

19. *See* POUND, *supra* note 12, at 36–37.

20. *See id.* at 37.

21. *See id.*

22. *Id.*

23. *Id.*

24. *See* POUND, *supra* note 12, at 40.

"persons of bad character."[25] Beyond that, essentially anyone could act as a legal representative.[26]

The results were perceived as problematic. Roth tells us that Quintus Hortensius Hortalus (114–150 B.C.) was "the most prominent lawyer in Rome, rising to the head of the bar—and indeed to the consulship, the highest office in Rome—by dint of his oratorical skills and a complete lack of morals."[27] His contemporary Cicero (106–143 B.C.) "complained about lawyers who don't know their law."[28]

It was another half millennium, however, before the Romans began to regulate legal representation much as we do today. A licensed and accredited legal profession finally began to emerge in the fifth century A.D. A statute of 468 prohibited advocacy by persons not admitted to practice.[29] The study of rhetoric was no longer deemed adequate preparation. Those seeking to practice law were required to study law; as a result, law schools emerged in the major cities.[30] The law fixed fees and provided for professional discipline.[31] Collectively, these developments represented the foundations of the legal profession in the West;[32] they also necessitated a law of legal agency.

In Roman law, unlike modern law, actions of the agent were not deemed actions of the principal; they were rather deemed the agent's own.[33] Nevertheless, agent and principal were bound contractually so that any benefits derived from the agent's actions would accrue to the principal, and any losses or expenses suffered by the agent would be covered by the principal so long as the agent acted in good faith.[34] As Roman law became more complex, so did the ways in which agency concepts were employed. An early form of trust, called the "fideicommissio," permitted testators "to devise their legacies to a beneficiary who was incapacitated to receive a testament."[35] In addition, an early type of security interest, called the "fiducia," allowed a debtor to transfer ownership of a property to a creditor until the debt was repaid, during which time the property could not be sold.[36]

25. *Id.* at 39.
26. *See id.* at 40.
27. ANDREW ROTH & JONATHAN ROTH, DEVIL'S ADVOCATES: THE UNNATURAL HISTORY OF LAWYERS 8 (1989).
28. *Id.* at 11.
29. POUND, *supra* note 12, at 51.
30. *See id.* at 50.
31. *Id.* at 50–51.
32. *See id.*
33. *Id.* at 38.
34. POUND, *supra* note 12, at 38.
35. Szto, *supra* note 11, at 89.
36. *Id.* at 90.

Between the fall of the Western Roman Empire in 476 A.D. and the revival of the study of Roman law in Italian universities in the twelfth century,[37] development of what was to become the Anglo-American law of agency took a feudal turn. Loyalty—exemplified by the Anglo-Saxon oath of commendation quoted at the beginning of this section—was central to the feudal property system. The Roman concept of impersonal good faith was transformed into a Germanic notion of personal commitment.

During this period, major technical developments in the English law of fiduciaries took place in the property law context. Most importantly, the Anglo-American "trust," in which trustee is bound to beneficiary by fiduciary duty, evolved to permit circumvention of a variety of medieval property rules. The doctrine of *utilitas ecclesiae*,[38] for example, allowed early clerics to control church assets even when property ownership was prohibited by law or church rules.[39] In the 800s, influenced by *utilitas ecclesiae*, the Latin term *ad opus* started appearing in Anglo-Saxon records, referring to "a fiduciary relationship in favor of a beneficiary with no legal enforcement."[40] The term *ad opus*, after being transferred to Gallic in the Domesday Book and Laws of William the Conqueror as *al os* and *ues*, later became simply "use."[41] The Franciscans, founded in 1209, became the first to employ the use on a wide scale.[42] Franciscans were prohibited by their vows from owning property. They solved this rather awkward problem by vesting title to their land in others; the order merely held the *ad opus* or use.[43] Clerics also employed the use to circumvent Statutes of Mortmain, which prohibited religious corporations from possessing or controlling land.[44]

Uses also became popular under Edward III (1327–1377) to effect bequests of land.[45] At the time, such bequests were not legally enforceable. Instead, therefore, "[f]eoffors would convey land to feoffees, who then conveyed land to third persons—cestui que use—named in the feoffors' wills."[46] Such transactions made use of the terms "use," "confidence," and "trust" interchangeably.[47]

37. POUND, *supra* note 12, at 63.

38. Translated as "for the advantage of the church." Shael Herman, *Utilitas Ecclesiae Versus Radix Malorum: The Moral Paradox of Ecclesiastical Patrimony*, 73 TUL. L. REV. 1231, 1235 n.17 (1999).

39. *Id.* at 1235.

40. Szto, *supra* note 11, at 93.

41. *Id.*

42. *Id.* at 94.

43. *Id.*

44. *Id*. at 93.

45. Szto, *supra* note 11, at 95.

46. *Id.*

47. *Id.*

Perhaps of greatest concern to the Crown was the role of uses in avoiding the payment of incidents. In addition to services, feudal landholders, as holders of legal title were subject to various incidental obligations (or "relief") to the lords of whom they held—wardship, aid, forfeiture, escheat, and the like.[48] This "relief" could be extremely valuable to the lord and expensive to the landholder. Land held in use, however, was not subject to relief.[49] Not surprisingly, over time the employment of uses became increasingly common. In 1535, the Statute of Uses converted equitable uses into legal estates, thereby rendering them subject to relief.[50] Many uses, however, escaped conversion. Personal property held in use, for example, was unaffected.[51] A distinction was also drawn between general trusts, on the one hand, and special or active trusts, on the other. The latter escaped the Statute as well.[52] Uses that survived the Statute became "trusts," enforceable in the Court of Chancery.[53]

The first fiduciary rules applicable specifically to lawyers appeared in the Statute of Westminster I, Chapter 29, enacted during the reign of Edward I in 1275,[54] which criminalized "ambidexterity"—the act of taking retainers from opposing sides in a case[55]—as well as "deceit or collusion" of the court or a party at court.[56] The London Ordinance of 1280 regulated admission to practice law in the London courts, addressing in addition a variety of specific kinds of lawyer misconduct.[57] The ordinance also expanded the Statute of Westminster's prohibition against taking money from both sides in litigation to include representations adverse to a former client.[58]

Most of the cases decided under these statutes appear to have involved conflicts of interest between one client and another current or former client, the "ambidexterity" noted above.[59] A few cases from the fifteenth century,

48. Avisheh Avini, *The Origins of Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1144 (1996).

49. *Id.* at 1144–45.

50. *Id.* at 1146.

51. *Id.* at 1147.

52. *Id.*

53. Avini, *supra* note 48, at 1147.

54. Brickman, *supra* note 3, at 1191 & n.43; *see also* Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 145 (2000).

55. Brickman, *supra* note 3, at 1191–92.

56. Rose, *supra* note 54, at 145–46 ("The courts interpreted the prohibition on 'deceit and collusion' very broadly. It was applied to conflicts of interest as well as many other forms of lawyer misconduct. This regulation, the first and probably most significant regulation of lawyer conduct, was probably the primary and most important conflict of interest prohibition." (internal citations omitted)).

57. *See id.* at 146.

58. *See id.* at 146–47.

59. *See id.* at 151.

however, appear to have involved a conflict between the lawyer's own interests and those of his client. Three such cases appear to have involved allegations of the use of confidential information to acquire property adverse to the client—allegations somewhat similar to the facts of the hypothetical with which I began this Article. Although the outcome of these cases is not known, one infers that some remedy must have been available if such allegations were proven correct.[60]

In 1729, an act for the "Better Regulation of Attornies and Solicitors" was passed.[61] Together with the formation of the Society of Gentleman Practisers in 1739, this Act affirmed that lawyers should hold themselves to the standards of "gentlemen,"[62] which meant "above all the acceptance of moral as well as legal obligations; it meant fair dealing with friend and foe. . . ."[63] In other words, lawyers should aspire to the kind of chivalric standards that had historically been applicable to positions of feudal trust; and most importantly, to a duty of loyalty.[64] Although the statute and cases did not yet use the term "fiduciary," that concept was implicit.[65]

By the mid-1800s, the term "fiduciary" had come into common use to describe relationships of trust and confidence.[66] Today, in justifying its summary of a lawyer's duties to a client, the Restatement (Third) of the Law Governing Lawyers begins with a simple statement, viewed as self-explanatory: "A lawyer is a fiduciary . . . ."[67] Everything else, the authors imply, follows from those five words.

II. CONFLICTING VIEWS: THE MODEL RULES, THE RESTATEMENT (THIRD) OF AGENCY, AND THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS

Recall that our hypothetical lawyer has been retained by a client who wants to purchase Blackacre, on which she proposes to build a shopping center. During the course of his representation, the lawyer learns that an adjacent parcel, Whiteacre, is available for sale. The lawyer and his client have never discussed Whiteacre. Nevertheless, the lawyer expects, based on information made available to him by reason of his representation of his client, that Whiteacre will increase in value once the shopping center is finished. Clearly, the lawyer may purchase Whiteacre for his own account if he first

60. *See id.* at 174–75.

61. Philip Aylett, *A Profession in the Marketplace: The Distribution of Attorneys in England and Wales 1730–1800*, 5 LAW & HIST. REV. 1, 1 (1987).

62. HARRY KIRK, PORTRAIT OF A PROFESSION: A HISTORY OF THE SOLICITOR'S PROFESSION, 1100 TO THE PRESENT DAY, at 203 (Oyez Publishing 1976).

63. *Id.* at 204.

64. *See* Brickman, *supra* note 3, at 1187–88.

65. *See id.* at 1189.

66. *See id.* at 1188–91.

67. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000).

consults with his client, his client consents, and other requirements are met.[68] The more interesting question is whether the lawyer may purchase Whiteacre for his own account behind his client's back—that is, without consultation or consent. On this question, the Model Rules, the Restatement (Third) of Agency, and the Restatement (Third) of the Law Governing Lawyers seem to disagree.

A. The Model Rules

The Model Rules do not themselves impose any general fiduciary obligation, although they do occasionally refer to a "duty of loyalty,"[69] imposed, one assumes, by some other source of law. Comment [1] to Model Rule 1.15, entitled "Safekeeping Property," states: "A lawyer should hold property of others with the care required of a professional fiduciary. . . . Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities."[70] In other contexts, however, the Model Rules are framed without explicit reference to fiduciary duty. Two are relevant to our hypothetical.

1. Rule 1.8(a): Acquisition of an Interest Adverse to Client

Rule 1.8(a) states that a "lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" unless appropriate disclosure is made and consent obtained.[71] Note that under this rule, a lawyer is prevented from using *any* information to acquire interests adverse to his client, not merely confidential information. In other words, whether the lawyer in our hypothetical learned about Whiteacre by reason of the representation is irrelevant to the Rule 1.8(a) prohibition.

The harder question is whether purchasing Whiteacre would be "adverse" to the client. Note that Rule 1.8(a) actually places two prohibitions on the lawyer's actions unless specified disclosure and consent procedures have been followed: (1) "enter[ing] into a business transaction with a client;" and (2) "knowingly acquir[ing] an ownership, possessory, security or other pecuniary

68. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2008). More fully stated, Model Rule 1.7(b) permits the representation notwithstanding the conflict if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

Id.

69. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 5 (2008).

70. *Id.* R. 1.15 cmt. 1.

71. *Id.* R. 1.8(a).

interest adverse to a client."[72] Since our hypothetical lawyer is not proposing to enter into a transaction directly with his client, we are concerned with the second, which only limits the acquisition of "adverse" interests.

Unfortunately, the authors of the Model Rules offer no commentary with regard to the meaning or scope of this second prohibition. Can we use Comments [1] through [4], which address the first prohibition, to shed light on the second? Since direct lawyer-client business transactions are inherently adverse, perhaps comments on the first prohibition may be read to provide guidance, albeit indirect, with respect to the second.

Comment [1] offers two examples of direct lawyer-client transactions that can be undertaken only with appropriate disclosure and consent. In the first, a lawyer has been retained to draft his client's will.[73] He learns that the client needs money for an unrelated expense.[74] Instead of referring the client to a bank, the lawyer offers to lend the client the needed money himself.[75] In this situation, Rule 1.8(a) is violated "even when the transaction is not closely related to the subject matter of the representation" because the "lawyer's skill and training, together with the relationship of trust and confidence between lawyer and client, *create the possibility of overreaching*." The lawyer is, therefore, required to adhere to disclosure and consent procedures before making any such loan. The second example given in Comment [1] involves a lawyer who is "engaged in the sale of goods or services related to the practice of law."[76] Here, the lawyer sells title insurance or investment services to existing clients of his legal practice. Again, to minimize the possibility of overreaching, the lawyer must follow all Rule 1.8(a) disclosure and consent requirements before making any such sales. But if overreaching is the issue, as Comment [1] might be read to suggest, our lawyer's proposed hypothetical purchase of Whiteacre should not be a problem. After all, the seller of Whiteacre is unrelated to either lawyer or client and is presumably able to take care of himself.

Comment [3], however, states:

> The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses *a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction*. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7.[77]

72. *Id.*
73. *Id.*
74. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 1 (2008).
75. *Id.*
76. *Id.*
77. *Id.* R. 1.8 cmt. 3 (emphasis added).

In effect, Comment [3] suggests that a lawyer's own interest, concurrent or to be acquired, should be deemed adverse if it "poses a significant risk that the lawyer's representation of the client will be materially limited by [that interest]."[78]

Rule 1.7 supports such a reading. Rule 1.7(a)(2) provides that unless appropriate precautions are taken, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . there is *a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer*."[79] In other words, Rule 1.7 and Rule 1.8(a) protect against the same risk—Rule 1.7 by prohibiting the representation without disclosure and consent where the lawyer already holds the potentially adverse interest and Rule 1.8(a) by prohibiting acquisition of that interest without disclosure and consent once the representation has commenced. If so, we might re-frame our question as follows: if our hypothetical lawyer had owned Whiteacre from the outset, could he have undertaken to represent the client with regard to Blackacre without first telling her of his ownership of an adjoining parcel? Unfortunately, the answer to this question is no clearer.

The comments to Rule 1.7 distinguish between "directly adverse" and other possible conflicts. Comment [6], with regard to directly adverse conflicts, states: "The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively."[80] Feeling betrayed is a likely reaction to a breach of the duty of loyalty, although the Model Rules do not use betrayal to define the scope of that duty. I will return to whether betrayal of a client's reasonable expectations ought to play a larger role in defining the scope of a lawyer's duty of loyalty in Part III. Our hypothetical, however, does not appear to involve directly adverse interests.

Even if "direct adverseness" does not exist, however, Comment [8] states that "a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."[81] One can imagine circumstances, for example, in which our hypothetical lawyer's dispassionate consideration of his client's interests would lead him to advise his client to abandon the project—advice that might now compromise his own financial well-being as owner of Whiteacre.

78. *Id.*
79. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008) (emphasis added).
80. *Id.* R. 1.7 cmt. 6.
81. *Id.* cmt. 8.

The question posed by the Model Rules, however, is not whether ownership of Whiteacre would create *any* risk; the question is rather whether it would create a "significant risk." Comment [8] elaborates:

> The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[82]

One can easily imagine our hypothetical lawyer concluding that the risk of a difference in interests is not "significant" and that he can therefore purchase Whiteacre without complying with Rule 1.8(a)'s disclosure and consent requirements.

2. Rule 1.8(b): Use of Confidential Information

As I have noted, Rule 1.8(a) is not limited to the use of confidential information. Our hypothetical, however, does involve such information; our hypothetical lawyer believes that Whiteacre is currently undervalued precisely because he is privy to his client's plans. Does this make a difference? Rule 1.8(b) imposes an additional prohibition when confidential information is involved: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client" without the client's consent.[83] Comment [5], cited at the beginning of this Article, elaborates:

> Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. . . . For example, if a lawyer learns that the client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client . . . . *The Rule does not prohibit uses that do not disadvantage the client.*[84]

Our hypothetical lawyer clearly could not purchase Blackacre and then resell it to his client at a profit. Using a client's confidential information for personal advantage without informing the client appears to be permitted under Rule 1.8(b), however, *so long as there is no actual disadvantage to the client*. Our hypothetical lawyer might conclude that any disadvantage to his client by reason of his purchase of Whiteacre would be speculative, since his client has never mentioned interest in any property except Blackacre. Again, although not completely clear, the Model Rules appear not to prohibit the purchase.

82. *Id.*
83. MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (2008).
84. *Id.* cmt. 5 (emphasis added).

B. *The Restatement (Third) of Agency*

Let us change the profession of the agent whose duties we are exploring. The same client has also retained a real estate agent solely in connection with the same shopping center project. Like the lawyer, in the course of his work, the agent learns that an adjacent parcel, Whiteacre, is available for sale. The question, of course, is whether he may purchase Whiteacre for his own account behind his client's back—that is, without consultation or consent. Under the Restatement (Third) of Agency, the answer is clearly no, regardless of whether confidential information is involved.

1. Section 8.02: Material Benefit Arising Out of Position

Under Section 8.02 of the Restatement (Third) of Agency, "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position."[85] Although the section might not, on its face, appear to apply to our hypothetical, Comment (d) confirms that it applies to business opportunities generally:

> [A]ll agents, even those whose assigned work does not involve the assessment or pursuit of business opportunities, have a fiduciary duty to the principal not to take personal advantage of an opportunity . . . when either the nature of the opportunity or the circumstances under which the agent learned of it require that the agent offer the opportunity to the principal. In making this determination, courts appropriately apply the test applicable to determining whether a director or a senior officer of a corporation may take personal advantage of a corporate opportunity.[86]

In other words, all agents, not just corporate officers and directors, are subject to the corporate opportunity doctrine. Cross-reference is then made to the ALI's Principles of Corporate Governance: Analysis and Recommendations (Principles of Corporate Governance) Section 5.05(b) for definition of the term "corporate opportunity."[87]

Before examining that section, however, it may be useful to place the issue in historical context. Courts have struggled mightily to define the scope of the corporate opportunity doctrine.[88] In *Miller v. Miller*,[89] decided in 1974, the Minnesota Supreme Court summarized existing law as follows:

85. *See* RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006).

86. *Id.* cmt. d.

87. *Id.* For the definition of corporate opportunity, see A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 5.05(b) (1994).

88. *See, e.g.*, Kenneth B. Davies, Jr., *Corporate Opportunity and Comparative Advantage*, 84 IOWA L. REV. 211, 211 (1999) ("The law's efforts to define what constitutes a 'corporate opportunity'—those business opportunities that the corporation's officers and directors must turn over to the corporation rather than taking on their own behalves—have led to a multitude of

> We have searched the case law and commentary in vain for an all-inclusive or "critical" test or standard by which a wrongful appropriation can be determined and are persuaded that the doctrine is not capable of precise definition. Rather, it appears that courts have opened or closed the business opportunity door to corporate managers upon the facts and circumstances of each case and by application of one or more of three variant but often overlapping tests or standards: (1) The "interest or expectancy" test, which precludes acquisition by corporate officers of the property of a business opportunity in which the corporation has a "beachhead" in the sense of a legal or equitable interest or expectancy growing out of a preexisting right or relationship; (2) the "line of business" test, which characterizes an opportunity as corporate whenever a managing officer becomes involved in an activity intimately or closely associated with the existing or prospective activities of the corporation; and (3) the "fairness" test, which determines the existence of a corporate opportunity by applying ethical standards of what is fair and equitable under the circumstances.[90]

The *Miller* court then formulated a fourth test, which in turn has been summarized by Professor Maynard as follows:

> The first step in the *Miller* approach essentially involves a restatement of the traditional line of business test, while the second step focuses on "the equitable considerations existing prior to, at the time of, and following the officer's acquisition" of this corporate opportunity. Reduced to its essence, *Miller*'s second prong, the "fairness" inquiry, requires the court to take into account "ethical standards of what is fair and equitable under the circumstances" in deciding whether a director has breached his fiduciary duty by usurping a corporate opportunity.[91]

As Professor Maynard notes, the ALI's approach, articulated in its 1992 Principles of Corporate Governance, tracks the line of business test in its

formulations."); Therese H. Maynard, *Spinning in a Hot IPO—Breach of Fiduciary Duty or Spinning as Usual?*, 43 WM. & MARY L. REV. 2023, 2067 (2002) ("[T]he courts have struggled to craft a workable definition of what constitutes a 'corporate opportunity.'"); Eric G. Orlinsky, *Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability*, 24 DEL. J. CORP. L. 451, 454 (1999); Matthew R. Salzwedel, *A Contractual Theory of Corporate Opportunity and a Proposed Statute*, 23 PACE L. REV. 83, 84 (2002) ("[I]t is not clear in many jurisdictions what constitutes a corporate opportunity. It is even less clear what constitutes an illegal usurpation, or taking, of a corporate opportunity, which violates a fiduciary's duty of loyalty."); Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 277, 279 (1998) ("[T]he end product of this collective effort appears—by virtually all accounts—more tautologous than diagnostic, replete with exceptions and indecipherable distinctions that provide little guidance either to theorists or to practitioners.").

89. 222 N.W.2d 71 (Minn. 1974).
90. *See id.* at 79–80 (citations omitted).
91. *See* Maynard, *supra* note 88, at 2069 (citation omitted).

definition of corporate opportunity.[92] It is also "similar to the two-pronged analysis of corporate opportunity established in the *Miller* decision."[93] She concludes:

> Thus, the ALI approach allows the insider to take advantage of a corporate opportunity but only *if* the fiduciary has "fully disclose[d] to the corporation, all material facts concerning the opportunity." Because this disclosure-oriented approach provides a clear procedure for the insider to protect herself against liability, several courts have embraced the ALI formulation of the corporate opportunity doctrine.
>
> The same fundamental concerns at the heart of the ALI approach are likewise reflected in the most recent Delaware Supreme Court decisions addressing the scope of the corporate opportunity doctrine.[94]

Section 5.05(b) of the ALI's Principles of Corporate Governance provides in relevant part as follows (I have substituted "agent" and "principal" where appropriate):

> [A] corporate opportunity means:
>
> (1) Any opportunity to engage in a business activity of which the [agent] becomes aware, either:
>
> (A) In connection with the performance of functions as [agent]; or
>
> (B) Through the use of [the principal's] information or property, if the resulting opportunity is one that the [agent] should reasonably be expected to believe would be of interest to the [principal]; or
>
> (2) Any opportunity to engage in a business activity of which [the agent] becomes aware and knows is closely related to a business in which the [principal] is engaged or expects to engage.[95]

As the reader has probably already concluded, under the corporate opportunity doctrine in any of its incarnations, our hypothetical real estate agent must clearly disclose the availability of Whiteacre to his client before purchasing it himself. Whiteacre is immediately adjacent to Blackacre; its availability thus meets the "interest or expectancy" test. It is relevant to the client's "line of business" under the "line of business," *Miller*, and ALI approaches. The opportunity to purchase Whiteacre is also one the agent should reasonably believe would be of interest to the client. The "fairness" test, appealing directly to the agent's duty of loyalty, would lead to the same

92. *See id.* at 2069–70.
93. *Id.* at 2070.
94. *Id.* at 2071–72 (citations omitted).
95. A.L.I., *supra* note 87, § 5.05(b).

result. It seems clear, therefore, that our hypothetical agent may not purchase Whiteacre behind his client's back.[96]

The Restatement (Third) of Agency articulates at least two reasons for this conclusion. The first is:

> the ordinary expectation that a person who acts as an agent does so to further the interest of the principal and that it is the principal who should benefit from turns of good fortune that may occur in connection with the transactions that the agent undertakes on the principal's behalf.[97]

The second is precautionary:

> Although the agent may believe that no harm will befall the principal, the agent is not in a position disinterestedly to assess whether harm may occur or whether the principal's interests would be better served if the agent did not pursue or acquire the benefit from the third party. Only the principal can assess the potential impact on the principal's interests of an agent's anticipated receipt of a material benefit to be furnished by a third party.[98]

Both reasons apply to our hypothetical. Benefits from the fortuitous availability of Whiteacre should accrue to the benefit of the principal, not the agent. In addition, the principal, not the agent, is in a better position to determine whether she would be adversely affected if the agent were to purchase Whiteacre for his own account.

2. Section 8.11: Duty to Disclose

Even if the corporate opportunity doctrine were not itself clear enough, Section 8.11 of the Restatement (Third) of Agency further provides: "An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows . . . when . . . the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal."[99] Comment (b) elaborates:

> An agent's duty to provide information to the principal facilitates the principal's exercise of control over the agent. . . . Information that the agent provides to the principal may enable the principal to reconsider a course of action that the principal has previously decided upon . . . . An agent's duty to provide information extends to information about the agent when it is material to decisions the principal may wish to make. In some circumstances, the

96. *See* Davies, *supra* note 88, at 211 ("[T]he most common of those formulations share a similar orientation. They focus on the likelihood that the corporation, in light of its present business activities, would have found the opportunity worthwhile to pursue had the officer or director not intervened to divert it to herself.").

97. *See* RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. b (2006).

98. *See id.*

99. *See* RESTATEMENT (THIRD) OF AGENCY § 8.11 (2006).

> principal may determine that it is wise to make alternative arrangements or to take action to protect the principal's interests.[100]

Here, the client would almost certainly want to know about Whiteacre. Her agent is, therefore, required to tell her about the availability of Whiteacre. His disclosure will give her more precise control over his activities; it may lead her to change prior decisions or instructions; and, if she comes to believe that his loyalty is in question, it may permit her to take steps to protect herself.

3. Comments to Section 8.01: Remedies

The Restatement (Third) of Agency recognizes accounting, disgorgement, and constructive trust as standard remedies for breach of fiduciary duty, regardless of whether the principal can establish either that she has been harmed or the extent to which she has been harmed.[101] Comment (d)(1) to Section 8.01 states:

> The law of restitution and unjust enrichment also creates a basis for an agent's liability to a principal when the agent breaches a fiduciary duty, *even though the principal cannot establish that the agent's breach caused loss to the principal*. If through the breach the agent has realized a material benefit, the agent has a duty to account to the principal for the benefit, its value, or its proceeds.[102]

Where the breach does not produce any profit to the agent, the agent may forfeit all or part of his commission or other compensation. Comment (d)(2) to Section 8.01 continues:

> An agent's breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent's disloyalty. . . .
>
> *Forfeiture may be the only available remedy when it is difficult to prove that harm to a principal resulted from the agent's breach or when the agent realizes no profit through the breach*. In many cases, forfeiture enables a remedy to be determined at a much lower cost to litigants. Forfeiture may also have a valuable deterrent effect because its availability signals agents that some adverse consequence will follow a breach of fiduciary duty.[103]

Alternatively, the client can claim the property for herself on a constructive trust theory, generally after reimbursing the agent for his costs. Comment (e) to Section 8.02 provides:

100. *Id.* cmt. b.

101. Disgorgement of or accounting for profits is the standard remedy for appropriation of a corporate opportunity. *See, e.g.*, Orlinsky, *supra* note 88, at 524–25.

102. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d.1 (2006) (emphasis added).

103. *Id.* cmt d.2.

> [I]f an agent breaches the agent's fiduciary duty by taking personal advantage of a business opportunity . . . the principal may recover property that the agent acquired through the breach only if the principal reimburses the agent. The amount of reimbursement is either the amount paid by the agent for the property or the amount for which the principal could have obtained the property, whichever is less.[104]

The availability of the foregoing equitable remedies, of course, does not preclude liability for standard compensatory damages. Comment (b) to Section 8.02 makes this clear: "[W]hen the principal can establish that the agent's conduct resulted in harm to the principal, the principal may recover compensatory damages from the agent."[105]

In sum, under the Restatement (Third) of Agency, our hypothetical agent must tell his client about Whiteacre and may not purchase Whiteacre himself without his client's consent—or at least may not purchase it without first offering it to his client. If he breaches this duty, his client can ask that he be forced to disgorge any profits from his purchase. If he has no profits, she can ask that he forfeit all or part of his compensation. Alternatively, she can purchase the property from him at his cost. In any event, if she can demonstrate harm, she can sue for compensatory damages.

4. Applicability of the Law of Agency

But if the law of agency prohibits the client's real estate agent from buying Whiteacre behind the client's back, should it not also prohibit the client's lawyer from doing so? I turn to this question specifically in Part III. A review of the law's application to sister professions, however, may provide useful context.

a. Real Estate Agents

Real estate agents are clearly bound by the foregoing rules. A real estate agent's relationship to the buyer or seller he represents is one of agent to principal.[106] Thus, "the law imposes on a real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary."[107] In articulating the scope of this duty, the courts use the standard lofty language of fiduciary obligation. A real estate agent owes a duty that is "comprised of utmost good faith, integrity, honesty, and loyalty as well as a duty of care and diligence."[108] Based on this position of trust, the

104. *Id.* cmt. e.

105. *Id.* cmt. b.

106. *See* 12 AM. JUR. 2D *Brokers* § 109 (1997).

107. Batson v. Strehlow, 441 P.2d 101, 109 (Cal. 1968) (citations and internal quotation marks omitted); *see also* 12 AM. JUR. 2D *Brokers* § 173 (1997).

108. Perkins v. Thorpe, 676 P.2d 52, 55 (Idaho Ct. App. 1984); *see also* 12 AM. JUR. 2D

agent is under a duty "to disclose to [his] principal all material information [he] possesses or obtains concerning the transaction involved."[109] Therefore, the agent must disclose "'all facts within his knowledge which bear materially upon his principal's interests.'"[110] As a fiduciary, the agent must: "(1) account for all funds or property rightfully belonging to the principal; (2) refrain from acting adversely to the principal's interests; (3) avoid engaging in fraudulent conduct; and (4) communicate information he or she may possess or acquire which is or may be to the principal's advantage."[111]

These duties, it should be noted, are imposed regardless of the scope of the real estate agent's engagement. A general agent is "an agent authorized to conduct a series of transactions involving a continuity of service."[112] This type of relationship often arises when the agent is a full-time employee of the business—analogous to an in-house counsel. In the buying and selling of individual homes, the agent is classified as a special agent, "an agent authorized to conduct a single transaction or series of transactions not involving continuity of service"[113]—analogous to a lawyer retained to handle a particular case. Either way, the same rules apply.

b. Corporate Officers and Directors

As the Restatement (Third) of Agency's cross-reference to Principles of Corporate Governance makes clear, corporate officers and directors are subject to the same duties as well.[114] Corporate officers and directors owe fiduciary duties to the corporation and its stockholders;[115] those duties are commonly expressed in the standard language of fiduciary law. As the Delaware Supreme Court stated in the landmark corporate opportunity case of *Guth v. Loft, Inc.*[116]:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the

Brokers § 110 (1997).

109. Dubbs v. Stribling & Assoc., 712 N.Y.S.2d 19, 21 (N.Y. App. Div. 2000), *order aff'd*, 752 N.E.2d 850 (N.Y. 2001).

110. Goldberg Realty Group v. Weinstein, 669 A.2d 187, 190 (Me. 1996) (citing Jensen v. Snow, 163 A. 784 (1933)); *see also* RESTATEMENT (SECOND) OF AGENCY § 381 (1958).

111. 12 AM. JUR. 2D *Brokers* § 109 (1997).

112. RESTATEMENT (SECOND) OF AGENCY § 3(1) (1958).

113. *Id.* § 3(2).

114. *See supra* note 95 and accompanying text.

115. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

116. 5 A.2d 503 (Del. 1939).

> interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.[117]

If the lawyer in the hypothetical with which I began this Article were also an officer or director of his client, he would clearly be precluded from purchasing Whiteacre behind his client's back.

c. Partners

The answer for partners and joint venturers is more complex, but for reasons that actually reinforce a conclusion that lawyers should be subject to the broad duties outlined in the Restatement (Third) of Agency. Until recently courts had universally recognized a fiduciary duty between partners and joint venturers that imposed an obligation of the utmost good faith and integrity in their dealings.[118] As Justice Cardozo, then of the New York Court of Appeals, stated famously in *Meinhard v. Salmon*[119]:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is . . . the standard of behavior. . . . Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty . . . . It will not consciously be lowered by any judgment of this court.[120]

A fiduciary was to be "in a position in which thought of self was to be renounced, however hard the abnegation."[121] *Meinhard* has since been cited in over one thousand reported opinions.[122]

Although the Uniform Partnership Act of 1914[123] did not contain "a definitive statement"[124] of a partner's fiduciary duties, Section 9(1) provided

117. *Id.* at 510.

118. 59A AM. JUR. 2D *Partnership* § 280 (2003); *see also* Robert W. Hillman, *Closely Held Firms and the Common Law of Fiduciary Duty: What Explains the Enduring Qualities of a Punctilio?*, 41 TULSA L. REV. 441, 443–48 (2006) (discussing the continuing role of good faith and integrity in the courts, but also noting the contractarian views in the legal commentary).

119. 164 N.E. 545 (N.Y. 1928).

120. *Id.* at 546.

121. *Id.* at 548.

122. Hillman, *supra* note 118, at 445.

123. *See generally* UNIF. P'SHIP ACT (1914).

124. J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 113 (1997).

that "every partner is an agent of the partnership."[125] From this, courts concluded that the Act invoked the fiduciary rules of agency law.[126] In addition, Section 21 provided that "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."[127]

Under the UPA, courts have generally held that partners have duties of loyalty, care, fairness, and honesty to the partnership and their co-partners. These duties can be separated into the following categories:

> (a) a duty of loyalty, including a duty not to usurp partnership business opportunities, a duty not to compete with the partnership, and a duty not to act adversely to the partnership; (b) a duty of good faith and fair dealing; (c) a duty to to exercise appropriate care in partnership management; and (d) a duty to fully disclose matters that are material to the partnership and its business.[128]

Thus, based on the UPA, the South Dakota Supreme Court declared in 1989 that the fiduciary duty between partners is one "of the highest order" and that a partner "must walk a moral path above that tread by other members of the economic marketplace."[129] The court held that a partner owes his partners the same common law fiduciary duties that an agent owes his principal.[130]

In a UPA jurisdiction, if his partnership were purchasing Blackacre to build a shopping center, our hypothetical lawyer would likely be precluded from purchasing Whiteacre behind his partnership's back.

As a contractarian view of partnership began to challenge the *Meinhardian* perspective, in 1992 the National Conference of Commissioners on Uniform State Laws promulgated a markedly different approach to partnership fiduciary duty,[131] the Revised Uniform Partnership Act (RUPA).[132] Professor Hynes summarized the contractarian view in the following terms:

125. UNIF. P'SHIP ACT § 9(1) (1914).

126. Mark J. Loewenstein, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the 'Manifestly Unreasonable' Standard*, 41 TULSA L. REV. 411, 417 (2006).

127. UNIF. P'SHIP ACT § 21(1) (1914).

128. Callison, *supra* note 124, at 114.

129. Glanzer v. St. Joseph Indian Sch., 438 N.W.2d 204, 211 (S.D. 1989).

130. *See id.* at 212 & n.6 (noting that the trial court correctly instructed the jury on the fiduciary duty owed by a general partner to a partner and providing the breach of fiduciary duty instructions that were read to the jury).

131. *See* Michael Haynes, *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, 434, 447 (2005) (discussing background information on the content and passage of the Revised Uniform Partnership Act).

132. REVISED UNIF. P'SHIP ACT §§ 101–1211 (1997).

> The essence of the partnership relationship is freedom of association. . . . The relationship is a business relationship, entered into for profit. Absent gross overreaching, duress, or fraud, the parties ought to be able to define the limits of their relationship in the terms they wish. They alone must cope with the sometimes difficult personal situations that can develop in complex, long-term relationships. The parties, therefore, should be the ones who control the boundaries of their relationship, not a court standing outside the situation and second guessing actions that affect only the members of that relationship.[133]

In other words, "[b]ecause partnerships are often formed between sophisticated parties in an arm's-length transaction, the parties should be free to contractually define the nature of their association in any manner they deem appropriate."[134]

Section 404 of RUPA mounted a frontal challenge to *Meinhard*. Subsection (a) began by rejecting any reference to the general law of agency: "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)."[135] Subsection (b) then defined a partner's duty of loyalty narrowly:

> 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.[136]

Subsection (c) even more substantially limited a partner's duty of care, imposing a "gross negligence" standard: "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."[137] Subsection (d) acknowledged that: "A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership

133. J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. U. L. REV. 727, 751–52 (1992).

134. Haynes, *supra* note 131, at 450.

135. REVISED UNIF. P'SHIP ACT § 404(a) (1997).

136. *Id.* § 404(b).

137. *Id.* § 404(c).

agreement and exercise any rights consistently with the obligation of good faith and fair dealing;"[138] this obligation, however, was viewed as contractual, not fiduciary.[139] And Subsection (e) asserted ambiguously but provocatively that: "A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest."[140]

Even under RUPA, in the absence of contractual provisions limiting his duty of loyalty, our hypothetical lawyer would probably still be precluded from purchasing Whiteacre behind his partnership's back if the partnership were then engaged in purchasing and developing the adjoining Blackacre. Section 404(b)'s duty of loyalty, although narrower than that imposed under UPA, continues to prohibit "appropriation of a partnership opportunity."[141]

But perhaps our lawyer could contract out of this duty in advance. The UPA did not expressly address the extent to which a partner could limit his fiduciary duties by contract. The tone of *Meinhard*, however, "suggests that waivers [of fiduciary duty] would not be sympathetically reviewed by courts operating under UPA and, indeed, that has been the case."[142]

In *BT-I v. Equitable Life Assurance Society*,[143] for example, a general partner purchased and foreclosed a deed of trust on the partnership's office building, "squeezing out" the limited partner.[144] Interpreting the UPA, the California Court of Appeals reasoned that "every partner is bound to act in the highest good faith to his copartner" and may not acquire any advantage over his partner in any aspect of the partnership or any transaction.[145] It therefore concluded that the fiduciary duty of loyalty could not be contracted away in the partnership agreement:[146] "[t]he fiduciary obligations of a general partner with respect to matters fundamentally related to the partnership business cannot be waived or contracted away in the partnership agreement."[147]

The Court of Appeals of Minnesota came to a similar conclusion in *Appletree Square I Ltd. Partnership v. Investmark, Inc*.[148] The court there held that where one partner purchased an office building from other partners and asbestos was later discovered, the selling partners were liable for breach of

138. *Id.* § 404(d).
139. Callison, *supra* note 124, at 116.
140. REVISED UNIF. P'SHIP ACT § 404(e) (1997).
141. *Id.* § 404(b).
142. Loewenstein, *supra* note 126, at 418.
143. 89 Cal. Rptr. 2d 811 (Cal. Ct. App. 1999).
144. *Id.* at 813.
145. *Id.* at 815 (quoting Leff v. Gunter, 33 Cal. 3d 508, 514 (1983)).
146. *Id.*
147. Everest Investors 8 v. McNeil Partners, 8 Cal. Rptr. 3d 31, 40 (Cal. Ct. App. 2003) (citing *BT-I*, 89 Cal. Rptr. 2d at 816).
148. 494 N.W.2d 889 (Minn. Ct. App. 1993).

fiduciary duty for failure to disclose affirmatively, notwithstanding the fact that the contract provided that information would be granted upon request and that no such information had been requested.[149] Partners are not free to destroy the "fiduciary character" of a contract, the court reasoned.[150] The court further opined that "where the major purpose of a contract clause is to shield wrongdoers from liability, the clause will be set aside as against public policy."[151]

RUPA, again, affects a contractarian revolution. Section 103(b)(3) voids any attempt to eliminate the duty of loyalty completely, but provides further that:

> (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; or
>
> (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 loyalty . . . .[152]

Under this section, a contract provision purporting to allow partners to purchase for their own account, without consultation or consent, any land not previously identified for purchase by the partnership would be upheld "if not manifestly unreasonable."[153]

Since its promulgation, over 30 states have adopted RUPA in some form.[154] Its fiduciary duty changes, however, are "RUPA's most controversial provisions and are the ones most likely to be modified by adopting states."[155] Some states have moved further in the direction of freedom of contract:

> Delaware and Virginia simply delete the duty of loyalty from the listing of sections as to which the partners' ability to override the statute is limited. Alabama, Arizona, and Montana delete the "manifestly unreasonable" qualifier. Maryland takes a slightly different approach, eliminating the manifestly unreasonable qualifier but adding: "however, the partnership agreement may not be amended to expand or add any specific types or

149. *Id.* at 892–94.
150. *Id.* at 893.
151. *Id.*
152. REVISED UNIF. P'SHIP ACT § 103(b)(3) (1997).
153. *Id.*
154. Clay B. Wortham, *Revised Uniform Partnership Act: Anomalies of a Simplified, Modernized Partnership Law*, 92 KY. L.J. 1083, 1083 n.4 (2004) (citing ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT 1, at 531–32 (2003)).
155. Donald J. Weidner, Cadwalader, *RUPA and Fiduciary Duty*, 54 WASH. & LEE L. REV. 877, 904 (1997).

categories of activities that do not violate the duty of loyalty without the consent of all partners after full disclosure of all material facts."[156]

Other states have resisted full implementation of the intended RUPA changes. For instance, by omitting "only" from Section 404(a), California legislators suggested that RUPA's listing of fiduciary duties is not exclusive.[157] Other states modify individual elements of RUPA's listing. Florida, for example, has enacted a non-exclusive version of the duty of loyalty provision that permits courts to recognize unenumerated elements of that duty.[158] Still others further limit parties' ability to contract out of fiduciary duties: "California, Idaho, and Washington move in the other direction by making the 'manifestly unreasonable' qualifier apply to both categorical exclusions and authorizations or ratifications of violations. Oregon substitutes a different test, in this case an unconscionability test, for the manifestly unreasonable test under RUPA."[159] Even where RUPA has been enacted as proposed, courts sometimes resist its implications.[160] Indeed, RUPA case law sometimes appears to derive more from *Meinhard* than from RUPA's contractarian roots.

In *Enea v. Superior Court*,[161] for example, the trial court found that defendant partners had not breached their fiduciary duties when they rented an apartment to themselves at a below-market rate, thus leaving plaintiff partners with a lesser than expected financial return. In its decision, the trial court invoked RUPA Section 404(e): "A partner does not violate a duty or obligation . . . merely because the partner's conduct furthers the partner's own interest."[162]

The appellate court, reversing, invoked instead the classic language of fiduciary duty by noting that a "[p]artnership is a fiduciary relationship, and partners may not take advantages for themselves at the expense of the partnership."[163] The purpose of Section 404(e), it held, "is to excuse partners from accounting for incidental benefits obtained in the course of partnership

156. Allan W. Vestal, ". . . *Drawing Near the Fastness?"—The Failed United States Experiment in Unincorporated Business Entity Reform*, 26 J. CORP. L. 1019, 1027 (2001) (citations omitted).

157. *Id.*

158. *Id.* at 1028.

159. *Id.* (footnote omitted).

160. *See, e.g.*, Haynes, *supra* note 131, at 456 (exploring how Texas courts have resisted implementing RUPA).

161. 34 Cal. Rptr. 3d 513 (Cal. Ct. App. 2005).

162. REVISED UNIF. P'SHIP ACT § 404(e) (1997).

163. *Enea*, 34 Cal. Rptr. 3d at 517 (quoting Jones v. Wells Fargo Bank, 5 Cal. Rptr. 3d 835 (Cal. Ct. App. 2003)).

activities *without detriment to the partnership*."[164] The adoption of RUPA, the court concluded, was not intended to effect substantial change in this regard.[165]

Nevertheless, for the most part RUPA is the law in a majority of states and is enforced as such. In a majority of states, therefore, our hypothetical lawyer would apparently be permitted to purchase Whiteacre behind his partnership's back, notwithstanding the fact that the partnership was developing the adjoining Blackacre, so long as our lawyer was prescient enough to insert appropriate language into the partnership agreement limiting his duty of loyalty as a partner and provided further that RUPA was the only applicable law.

Perhaps surprisingly, the same would be true even if the partnership were a limited partnership and our lawyer the managing general partner. Two uniform acts have generally been adopted to govern limited partnerships in the United States: the Revised Uniform Limited Partnership Act (RULPA),[166] issued in 1976, which remains the law in a majority of jurisdictions,[167] and the Uniform Limited Partnership Act (ULPA),[168] issued in 2001. Like UPA, RULPA does not specify the fiduciary duties of a general partner, but states that in order "to determine the fiduciary duties owed by the general partners in a limited partnership, reference must be made to UPA or, in those jurisdictions that have adopted RUPA, to RUPA."[169] RULPA Section 403(b) states that a general partner in a limited partnership is subject to the same restrictions as a partner in a partnership without limited partners, no more, no less.[170] Similarly:

> ULPA tracks the fiduciary duty language of RUPA section 404 and generally provides that general partners owe the limited partnership and the other partners circumscribed fiduciary duties of loyalty and care, and that they are

164. *Id.* at 518.

165. *Id.*

166. REVISED UNIF. LTD. P'SHIP ACT §§ 101–1106 (1976) (amended 1985).

167. Mitchell A. Stephens, Comment, *A Trap for the Rational: Simultaneous Removal and Appointment of a General Partner Under the Revised Uniform Limited Partnership Act*, 2007 UTAH L. REV. 521, 524–26.

168. UNIF. LTD. P'SHIP ACT §§ 101–1207 (2001).

169. Kenneth M. Jacobson, *Fiduciary Duty Considerations in Choosing Between Limited Partnerships and Limited Liability Companies*, 36 REAL PROP. PROB. & TR. J. 1, 5 (2001).

170. REVISED UNIF. LTD. P'SHIP ACT § 403(b) (1976) (amended 1985). Some have asserted to the contrary that "[s]ince general partners in a limited partnership typically have the exclusive power and authority to control and manage the partnership, they owe the limited partners an even greater fiduciary duty than is imposed on general partners in the typical general partnership." J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 22:7 (2004).

> bound in the exercise of their duties to a non-fiduciary "obligation of good faith and fair dealing."[171]

In ULPA states, therefore, and perhaps in RULPA states that have also adopted RUPA, our lawyer might be able to contract out at least part of his duty of loyalty in advance.

He would almost certainly be able to do so in Delaware. Delaware's Code[172] expressly provides that a general partner's fiduciary duties to a limited partnership "may be expanded or restricted or eliminated by provisions in the partnership agreement."[173] Delaware has apparently adopted the ultimate contractarian position that limited partnerships "should be interpreted 'to give the maximum effect to the principle of freedom of contract and to the enforceability of . . . agreements.'"[174] Thus, in *Sonet v. Timber Co.*[175] plaintiffs argued that defendants breached common law fiduciary duties by partaking in a self-dealing transaction.[176] The court rejected their claim, holding that:

> [U]nder Delaware limited partnership law a claim of breach of fiduciary duty must first be analyzed in terms of the operative governing instrument—the partnership agreement—and only where that document is silent or ambiguous, or where principles of equity are implicated, will a Court begin to look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence.[177]

Since the limited partnership agreement was clear, the court concluded it governed.[178]

C. The Restatement (Third) of the Law Governing Lawyers

The client-lawyer relationship is clearly an agency relationship. The Introductory Note to Chapter 2, entitled "The Client-Lawyer Relationship," of the Restatement (Third) of the Law Governing Lawyers, states in part as follows:

> The subject of this Chapter is, from one point of view, derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client. A lawyer is an agent, to

171. J. William Callison & Allan W. Vestal, *The Want of a Theory, Again*, 37 SUFFOLK U. L. REV. 719, 722 (2004).

172. DEL. CODE ANN. §§ 101–5406 (2005).

173. *Id.* § 17–1101(d).

174. Andrew S. Gold, *On the Elimination of Fiduciary Duties: A Theory of Good Faith for Unincorporated Firms*, 41 WAKE FOREST L. REV. 123, 126 (2005) (alteration in original).

175. 722 A.2d 319 (Del. Ch. 1998).

176. *Id.* at 321 n.2.

177. *Id.* at 324.

178. *Id.*

> whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity.[179]

But the client-lawyer relationship is not an ordinary agency relationship. The Introductory Note continues:

> Because those characteristics of the client-lawyer relationship make clients vulnerable to harm, and because of the importance to the legal system of faithful representation, the law stated in this Chapter provides a number of safeguards for clients *beyond those generally provided to principals.*[180]

In other words, agency law as applied to lawyers is supposed to be *more protective* of clients than generally applicable agency law, not less. Only one exception is identified in the Introductory Note: "The law . . . limits client authority for the protection of third persons dealing with the lawyer and for the convenience of the judicial system."[181] This exception, however, is inapplicable to our hypothetical.

The question, therefore, is starkly posed. A lawyer is clearly an agent and fiduciary. As we have seen, however, Model Rules 1.8(a) and 1.8(b) convert fiduciary law's affirmative duty of loyalty into a series of limited prohibitions. The first part of Rule 1.8(a) targets "overreaching" by lawyers in their business dealings with clients;[182] the second limits acquisitions "adverse to a client."[183] Rule 1.8(b), however, targets the use of client-confidential information "to the disadvantage of the client."[184] In other words, Model Rules 1.8(a) and 1.8(b) provide that *lawyers should not hurt their clients*. Apparently, we need detailed rules to tell us this. In this part of the Model Rules, however, affirmative aspects of a broad duty of loyalty—"I will to my client be true and faithful"—are missing.

The Restatement (Third) of Agency could hardly offer a more complete contrast. An agent has an affirmative fiduciary duty "to act loyally for the principal's benefit. . . ."[185] The corporate opportunity doctrine, a part of this duty, applies to all agents, not just officers and directors.[186] Even if the corporate opportunity doctrine were for some reason not to apply, an agent has an affirmative duty to give his principal any information his principal would

179. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, introductory note (2000).

180. *Id.* (emphasis added).

181. *Id.*

182. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 1 (2008).

183. *Id.* R. 1.8(a).

184. *Id.* R. 1.8(b).

185. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

186. *See id.* § 8.02 cmt. d ("[A]ll agents . . . have a fiduciary duty to the principal not to take personal advantage of an opportunity and not to give the opportunity to a third person . . . .").

wish to have.[187] And breaches of these duties are broadly enforceable, regardless of whether the principal can show actual harm.[188] Real estate agents are subject to these rules, as are corporate officers and directors, partners in UPA states, and to some extent partners in RUPA states who have not contracted out of their obligations.

But are lawyers subject to these same broad duties and remedies? Or can they safely take refuge behind the Model Rules? The answer provided by the Restatement (Third) of the Law Governing Lawyers is mixed.

1. Section 60(2): Use of Confidential Information for Pecuniary Gain

Restatement (Third) of the Law Governing Lawyers Section 60(2) provides that "a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made."[189] In our hypothetical, if the lawyer uses the information he has been given regarding his client's shopping center plans to identify and purchase an adjacent undervalued property, he must disgorge any resulting profits to the client. End of story.

Here, the Model Rules are of no avail. At least at first blush, the Restatement (Third) of the Law Governing Lawyers sounds a lot like the Restatement (Third) of Agency. In practice, it would be very difficult for a lawyer who wants to buy Whiteacre to rationalize Section 60(2) away. The comments which accompany that section are equally clear. Comment (j), in particular, states:

> Subsection (2) prohibits a lawyer from using or disclosing confidential client information for the lawyer's personal enrichment, *regardless of lack of risk of prejudice to the affected client*. The duty is removed by client consent. The sole remedy of the client for breach of the duty is restitutionary relief in the form of disgorgement of profit. The lawyer codes differ over whether such self-enriching use or disclosure constitutes a disciplinary violation in the absence of prejudice to the client.
>
> The strict confidentiality duty of the Subsection is warranted for prophylactic purposes. A lawyer who acquires confidential client information as the result of a representation should not be tempted by expectation of profit to risk a possibly incorrect assessment of future harm to a client. There is no important social interest in permitting lawyers to make unconsented use or

187. *See id.* § 8.01 cmt. b ("An agent also has a duty to use reasonable efforts to provide material information to the principal.").

188. *Id.* cmt. d.1.

189. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2) (2000). Section 59 defines confidential client information as "information relating to representation of a client, other than information that is generally known." *Id.* § 59.

> revelation of confidential information for self-enrichment in personal transactions.[190]

Before we congratulate ourselves on the apparent willingness of the legal profession to subject itself to the same rules it has imposed on everyone else, however, we may want to consider three aspects of Section 60(2) that differ significantly from the Restatement (Third) of Agency's approach.

First, we must consider Section 60(2) in the context of its theoretical justification. Does Section 60(2) implement a concept of fiduciary duty? As we have noted, disgorgement of profits is one of the remedies that would be available in like circumstances for breach of any other agent's fiduciary duties to her principal. In addition, an action for accounting is equitable and might therefore be seen to reflect fiduciary duty's equitable origins. An order for disgorgement of profits is similarly equitable, as is the concept providing relief to a party without first requiring that party to demonstrate actual harm. On the other hand, Comment (j) justifies Section 60(2) purely on prophylactic grounds, not by reference to fiduciary obligations. The worry is rather of "a possibly incorrect assessment of future harm to a client."[191] Like the Model Rules, Section 60(2) seems more concerned that lawyers not harm their clients than about any affirmative duty of loyalty.

Second, remedy under Section 60(2) must be considered. Comment (j) is explicit: "The sole remedy of the client for breach of the duty is restitutionary relief in the form of disgorgement of profit."[192] Recall that the Restatement (Third) of Agency was more generous in its remedies for this kind of breach: disgorgement, forfeiture of fees, constructive trust, and consequential damages.

In the Restatement (Third) of the Law Governing Lawyers, fee forfeiture is addressed in Section 37, which provides:

> A lawyer engaging in *clear and serious* violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.[193]

The Comments to Section 37, however, never explicitly refer to fiduciary duty. Comment (c) states that "[t]he source of the duty can be civil or criminal law, including, for example, the requirements of an applicable lawyer code or the law of malpractice."[194] In addition, it is not at all clear that the violation in our hypothetical is "clear and serious." Comment (d) elaborates: "A violation is

190. *Id.* § 60 cmt. j (emphasis added) (citations omitted).
191. *Id.*
192. *Id.*
193. *Id.* § 37 (emphasis added).
194. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. c (2000).

clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful."[195] Since the Model Rules do not prohibit the purchase, our hypothetical lawyer might well argue that he was not on appropriate notice of any such prohibition. Comment (b) further states: "The remedy of fee forfeiture presupposes that a lawyer's clear and serious violation . . . destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation."[196] Our hypothetical lawyer, let us assume, has done everything his client has asked of him, and done it well. He may well argue that he deserves to be paid. According to the Restatement (Third) of the Law Governing Lawyers, he apparently should be.

Finally, the scope of Section 60(2) must be examined. Section 60(2) does not apply at all unless confidential information is involved.[197] Assume that our hypothetical lawyer is driving to work one morning. His route takes him past the shopping center construction site, where a large sign announces the client's plans. Next to the construction site is Whiteacre, in front of which is a sign publicly announcing its availability for purchase. Assume, therefore, that none of the information relevant to a possible purchase of Whiteacre by the lawyer is confidential. Now is the lawyer precluded from purchasing Whiteacre without first consulting his client?

Note that if our hypothetical lawyer were instead (or in addition) the client's real estate agent, officer, director, or partner, he would probably still be so precluded. Recall that Section 5.05(b) of the Principles of Corporate Governance defines "corporate opportunity" to include: "Any opportunity to engage in a business activity of which [the agent] becomes aware and knows is closely related to a business in which the [principal] is engaged or expects to engage."[198] Here, Whiteacre adjoins Blackacre. The potential for profit in the one is directly attributable to the client's development of the other. If none of the relevant information is confidential, however, Section 60(2) is inapplicable.

2. Section 16(3): Honest Dealing

The closest the Restatement (Third) of the Law Governing Lawyers comes to addressing this modified hypothetical is the portion of Section 16(3) that provides that: "[A] lawyer must, in matters within the scope of the representation . . . deal honestly with the client . . . ."[199] Arguably, honest dealing requires prior disclosure of the lawyer's intention to buy Whiteacre.

195. *Id.* cmt. d.

196. *Id.* cmt. b.

197. *See id*. § 60 cmt. a ("This section states the principal duties of a lawyer with respect to confidential client information.").

198. A.L.I., *supra* note 87, § 5.05(b)(2).

199. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (2000).

The fact that the client would likely feel betrayed if the lawyer were to purchase Whiteacre behind her back is itself evidence that failure to make prior disclosure may not be honest dealing. Once the lawyer has told the client of his intention, of course, the client may object. If she does, the purchase probably becomes adverse, and therefore prohibited.[200]

We are relieved to discover that Comment (b) justifies the honest dealing and other requirements of Section 16 explicitly by reference to the lawyer's fiduciary obligations: "A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital."[201] Comment (e), in turn, treats the obligation of honest dealing as part of the fiduciary duty of loyalty and requires affirmative disclosures in at least some circumstances: "A lawyer must be honest with a client. . . . A lawyer . . . must make disclosures to a client necessary to avoid misleading the client."[202]

The problem is that under the Restatement (Third) of the Law Governing Lawyers, the remedy of disgorgement is limited to Section 60(2). Since Section 60(2) is, by its terms, inapplicable to our modified hypothetical, disgorgement is apparently not available. Section 37 fee forfeiture may be, but only if the violation is "clear and serious."[203] Here, it arguably is not. Notwithstanding Section 16(3)'s bow in the direction of fiduciary duty, the Restatement (Third) of the Law Governing Lawyers then retreats from the ordinary consequences of breaches of such duties to non-lawyers. Section 49 provides: "In addition to the other possible bases of civil liability . . . , a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client set forth in § 16(3) and if that failure is a legal cause of injury within the meaning of § 53 . . . ."[204] But Section 53 then substantially limits Section 49: "A lawyer is liable under § 48 or § 49 *only if the lawyer's . . . breach of fiduciary duty was a legal cause of injury*, as determined under generally applicable principles of causation and damages."[205] What the Restatement giveth, the Restatement taketh away. Yes, lawyers are fiduciaries. But no, lawyers are not liable for breaches of fiduciary duty as other agents would be

200. Like Model Rule § 18(a), Section 125 of the Restatement (Third) of the Law Governing Lawyers provides that unless a client consents, "[A] lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests." *Id.* § 125.

201. *Id.* § 16 cmt. b.

202. *Id.* cmt. e.

203. *Id.* § 37 cmt. d.

204. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (2000).

205. *Id.* § 53 (emphasis added).

unless the client suffers actual harm, except to the extent of the prophylactic rule of Section 60(2) or the fee disgorgement provisions of Section 37.

We are left with consequential damages, a far less effective remedy in this context. What is the dollar amount by which the client has been injured by her lawyer's purchase of Whiteacre? In most cases, the client will probably not be able to prove a dollar amount. In most cases, therefore, she will have no remedy.

Why? This aspect of the Restatement (Third) of the Law Governing Lawyers may reflect an ongoing difficulty courts have had in distinguishing breaches of fiduciary duty from negligence actions for legal malpractice, to which I now turn.[206]

3. Breaches of Fiduciary Duty v. Legal Malpractice

It is clear that a cause of action for breach of fiduciary duty is separate and distinct from a cause of action for professional negligence. The relationship between the two, however, appears to have puzzled some courts and commentators.[207] This may be due to the dominance of the Model Rules. It may be due to the fact that courts and commentators rarely refer back to the basic law of agency, focusing instead on tort law, the Model rules, or the

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206. *See* Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 719–42 (1998) (exploring history of Restatement's treatment of actions for breach of fiduciary duty).

207. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48, 49 (2000); *see also* Ray Ryden Anderson & Walter Steele Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235 (1994) (discussing how the courts confuse the breach of fiduciary duty and legal malpractice actions); Kevin William Gibson, *Breach of Fiduciary Duty*, DEL. LAWYER, Winter 2004–2005, at 29 ("[C]ourts sometimes fail to distinguish among the various types of legal malpractice actions, and alternatively, interpret a breach of fiduciary duty action as a malpractice action based upon claims of professional negligence."); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 112–18 (1995) (explaining how courts and commentators have said little concerning the connection between a lawyer's liability for legal malpractice and breach of fiduciary duty); Christopher Brian Little, *Breach of Fiduciary Duty in the Lawyer's Professional Liability Claim*, COLO. LAWYER, Nov. 2000, at 101 ("Courts have routinely found that the breach of fiduciary duty claim is nothing more than a reiteration of the negligence or standard of care claim, and they consider the two claims as duplicative."); Stephen E. McConnico et al., *Unresolved Problems in Texas Legal Malpractice Law*, 36 ST. MARY'S L.J. 989, 1025 (2005) ("One of the more difficult fracturing issues has been the question of where to draw the line between traditional legal malpractice (professional negligence) claims and breach of fiduciary duty claims."); Daniel J. Pope & Suzanne Lee, *Breach of Fiduciary Duty and Punitive Damages*, 66 DEF. COUNS. J. 257, 259 (1999) (explaining how "[s]ome courts have determined that a client's fiduciary duty claim against an attorney is" equated with legal malpractice); Melissa A. Thomas, *When Is an Attorney's Breach of Fiduciary Duty in Missouri Not Legal Malpractice?*, 63 MO. L. REV. 595, 595 (1998) ("[C]onfusion [exists] about when attorney misconduct constitutes legal malpractice and when it does not.").

Restatement (Third) of the Law Governing Lawyers. Or it may be due to the fact that the issue is most commonly presented and analyzed in the litigation malpractice context, where profit opportunities like those presented in my hypothetical are uncommon.

As a cause of action, "[a] breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's trust, engaging in self-dealing, or making misrepresentations."[208] A legal malpractice claim, on the other hand, focuses on the quality of the representation provided by the attorney to her client, as it requires demonstrating negligence—a showing that the attorney provided legal services at unacceptable levels of competence or diligence.[209]

Notwithstanding these differences, courts and practitioners sometimes conflate the two.[210] In fact, it appears to be common practice to include the terms "negligence and breach of fiduciary duty" in legal-malpractice complaints as near-synonyms, the one following the other without apparent reflection.[211] As a result, decisions which have treated fiduciary breach as a separate cause of action sometimes generate shockwaves among attorneys within the relevant jurisdictions.[212] Of greatest concern to attorneys is the fact that, in many situations, a cause of action for breach of fiduciary duty does not require a showing of actual damage to the client.[213]

While the notion of recovery without damages may seem exotic to personal injury lawyers, it is standard in the law of agency, as we have seen. Recall Comment (d)(1) to Section 8.01 of the Restatement (Third) of Agency:

> The law of restitution and unjust enrichment also creates a basis for an agent's liability to a principal when the agent breaches a fiduciary duty, *even though the principal cannot establish that the agent's breach caused loss to the principal*. If through the breach the agent has realized a material benefit, the agent has a duty to account to the principal for the benefit, its value, or its proceeds.[214]

208. McConnico et al., *supra* note 207, at 1025–26 (quoting Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921 (Tex. App. 2002)).

209. Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1142 (1999).

210. Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 692 (2006).

211. *See id.*

212. *See, e.g.*, McConnico et al., *supra* note 207, at 1029 (describing the fact that the fee forfeiture remedy was available for violations of fiduciary duty without a showing of actual damage to the client in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999)).

213. *See id.*

214. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt d.1 (2006) (emphasis added).

Recall also Comment (d)(2) with regard to fee forfeiture:

> Forfeiture may be the only available remedy when it is difficult to prove that harm to a principal resulted from the agent's breach or when the agent realizes no profit through the breach. In many cases, forfeiture enables a remedy to be determined at a much lower cost to litigants. Forfeiture may also have a valuable deterrent effect because its availability signals agents that some adverse consequence will follow a breach of fiduciary duty.[215]

There is no obvious reason that real estate agents, directors, officers, and partners should be subject to these principles, but attorneys exempt. And at least some courts have so held.

In *Burrow v. Arce*,[216] for example, clients alleged that their attorneys placed their own interests in obtaining fees, computed as a percentage of the total settlement amount, over their clients' interests in individual claims. The Texas Supreme Court concluded that client-plaintiffs' complaints were well-founded, and therefore summary judgment was not appropriate for the issue of whether the attorney-defendants had indeed breached their fiduciary duties.[217] The court found client-plaintiffs did not have to prove the amount of any actual damages to obtain forfeiture of attorney's fees, however, and it remanded for determination of a disgorgement of the fees that attorney-defendants had negotiated for themselves as part of the settlement.[218]

Nevertheless, *Burrow* and similar cases have caused some to argue for further restrictions on remedies for lawyers' breaches of fiduciary duty. Professor Duncan, for example, has argued that "[a] lawyer who has breached a fiduciary obligation should be liable to the aggrieved client in the absence of harm only if such breach was a criminal offense or was the result of a scheme to defraud the client."[219] Without such a limitation, fiduciary breach will eventually supplant legal malpractice as the preferred cause of action because of the relative ease of proving fiduciary breach.[220] She would apparently reject both Section 60(2) and Section 37 of the Restatement (Third) of the Law Governing Lawyers, themselves significantly less protective of principals than the Restatement (Third) of Agency applicable to other professions.

Collapsing fiduciary duty into legal malpractice completely can produce bizarre results. In *Vallinoto v. DiSandro*,[221] for example, plaintiff retained defendant attorney to represent her in divorce proceedings. Plaintiff admitted that defendant supplied excellent legal representation. She also asserted,

215. *Id.* cmt. d.2 (emphasis added).
216. 997 S.W.2d 229 (Tex. 1999).
217. *Id.* at 237.
218. *Id.*
219. Duncan, *supra* note 209, at 1172.
220. *See id.* at 1158–59.
221. 688 A.2d 830 (R.I. 1997).

however, that defendant compelled her to perform sexual acts with him by threatening to discontinue representation, which he said would result in deportation and loss of her child.[222] Plaintiff later sued defendant, asserting legal malpractice, intentional infliction of emotional distress, battery, deceit and negligence.[223] Although the jury found for plaintiff, the Supreme Court of Rhode Island found no legally cognizable harm, since defendant's legal work was concededly excellent.[224] Without evidence of damages, plaintiff could not prevail on a negligence-based legal malpractice claim; therefore the court reversed the judgment below.[225] Additionally, the court agreed that plaintiff's evidence regarding defendant's alleged breach of fiduciary duty was correctly excluded from trial because plaintiff failed to properly plead a fiduciary duty claim.[226] Was defendant's conduct a "criminal offense" or "a scheme to defraud the client" within Professor Duncan's meaning? Probably not. Was it a "clear and serious" violation of defendant's fiduciary duties within the meaning Section 37's fee forfeiture rule? Probably so. Unfortunately, the plaintiff in *Vallinoto* did not properly plead breach of fiduciary duty; therefore, the court refused to address the possible breach.[227] And without actual negligence, there could be no injury from negligence.[228]

Given some courts' and commentators' difficulties with lawsuits for breach of fiduciary duty brought against lawyers, the apparent failure of the Restatement (Third) of the Law Governing Lawyers to impose all of the ordinary consequences of the black-letter law of agency on lawyers is perhaps understandable, although not excusable. Some better and more internally coherent resolution is needed.

III. A PROPOSED RECONCILIATION

Here, I propose to undertake two final tasks: first, to reconcile the Restatement (Third) of the Law Governing Lawyers with the Model Rules; and second, to offer one possible approach to reconciling the law governing lawyers with the black-letter law of agency applicable to everyone else—an approach that takes into account the concerns of the legal malpractice defense bar while at the same time acknowledging the vital role that an independent duty of loyalty should continue to play in the legal profession.

222. *Id*. at 833.
223. *Id.* at 834.
224. *Id.* at 836.
225. *Id.* at 836–37.
226. *Vallinoto*, 688 A.2d at 836–37.
227. *Id.* at 834.
228. *Id.* at 836.

A. The Model Rules and the Restatement (Third) of the Law Governing Lawyers

Although the matter is not free from doubt, in theory the Model Rules would allow our hypothetical lawyer to purchase Whiteacre behind his client's back. As a practical matter, they would almost certainly do so. The Restatement (Third) of the Law Governing Lawyers, by contrast, would almost certainly prohibit the purchase without prior consultation and consent if confidential information was involved, and it would require our hypothetical lawyer to disgorge to his client his profits, if any, from that purchase.

Why the difference? The answer is that the purposes of the two are different. As Comment (b) to Restatement Section 1 states: "Lawyer codes [the Restatement's term for codes based on the Model Rules] are promulgated and applied primarily for the purpose of establishing mandatory standards for the assessment of a lawyer's conduct in the course of a professional-discipline proceeding."[229] The Restatement itself, by contrast, purports to summarize all generally applicable law governing lawyers, not just the portion that governs disciplinary proceedings. Comment (b) continues:

> The lawyer codes and much general law remain complementary. The lawyer codes draw much of their moral force and, in many particulars, the detailed description of their rules from preexisting legal requirements and concepts found in the law of torts, contracts, agency, trusts, property, remedies, procedure, evidence, and crimes. Thus, *lawyer codes particularize some general legal rules in the particular occupational situation of lawyers but are not exhaustive of those rules. . . .The lawyer codes . . . do not preclude application of remedies prescribed by other law.*[230]

Most notably, it is clear that the authors of the Restatement view a lawyer's fiduciary role as central, as a matter of law, to defining his duties to his client.[231] By contrast, the authors of the Model Rules do not view references to that fiduciary role as the best way to structure disciplinary rules;[232] precision, after all, is not one of fiduciary law's obvious attributes. The Restatement and the Model Rules, therefore, are not inherently inconsistent.

But if this is so, analysis of problems in legal ethics cannot begin and end with the professional rules. The Restatement captures elements of the law governing lawyers—*enforceable* elements of that law—that the Model Rules do not.[233] Even if and to the extent that parts of a lawyer's duty of loyalty are

229. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000).

230. *Id.* (emphasis added).

231. *See supra* Part II.B.

232. *See supra* Part II.A.

233. *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. d (2000) (invoking the reasonable person standard to prove a clear violation of duty to a client) *with*

not enforceable in a particular jurisdiction, a good lawyer will still consider herself duty-bound.

B. The Restatement (Third) of the Law Governing Lawyers and the Restatement (Third) of Agency

The harder problem is how to bring the law governing lawyers back into compliance with the black-letter law of agency applicable to everyone else. The premise that lawyers are and should be subject to less stringent, less enforceable rules of fiduciary responsibility than everyone else is simply unacceptable.

The client-lawyer relationship is not like a partnership—a simple economic relationship in which each is presumed capable of protecting his interests vis-à-vis the other, at least in UPA jurisdictions.[234] Ordinary lawyers and ordinary clients are inherently unequal in negotiating the terms of their relationship. As the Restatement (Third) of the Law Governing Lawyers recognizes: "A license to practice law confers great power on lawyers to do good or wrong. Lawyers practice an occupation that is complex and often, particularly to nonlawyers, mysterious. Clients and others are vulnerable to wrongdoing by corrupt lawyers."[235] It is for this reason, the Restatement explains, that we limit the practice of law to individuals of good character.[236] It is also for this reason that we impose on lawyers, as we do on others in positions of trust, the amorphous, not-fully-codifiable standards of fiduciary law.

Even if this were not true, it would be profoundly inefficient to require clients to negotiate retainer agreements to protect the reasonable expectations that fiduciary rules protect. As Comment (b) to Restatement (Third) of Agency Section 8.01 explains: "The fiduciary principle supplements manifestations that a principal makes to an agent, making it unnecessary for the principal to graft explicit qualifications and prohibitions onto the principal's statements of authorization to the agent."[237] Ordinary client expectations should be built into fiduciary law to avoid the transaction costs required to implement them by contract. In defining the scope of the duty of loyalty, it may therefore be useful to ask if the reasonable client in like circumstances would feel even mildly betrayed by a particular action. Would the client in our hypothetical likely feel betrayed if her lawyer were to

MODEL RULES OF PROF'L CONDUCT R. 1.8 (2008) (invoking a vague standard that "does not prohibit uses [of information] that do not disadvantage the client").

234. *See* REVISED UNIF. P'SHIP ACT § 404(e) (1997) ("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." (alteration in original)).

235. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2 cmt. d (2000).

236. *Id.*

237. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006).

purchase Whiteacre behind her back? Probably. Would a reasonable plaintiff in *Burrow* likely feel betrayed if his lawyers browbeat him into acquiescing in a settlement that gave them their full contingency fee with relatively little work while largely ignoring his interests? Probably. Would the ordinary client in a divorce case feel betrayed if her lawyer threatened deportation and loss of her child if she refused to sleep with him? Probably. Should we require each of these clients to protect against such betrayals by negotiating appropriate contractual limitations on their lawyers' behaviors in advance? Of course not. One should not have to hire a lawyer to hire a lawyer.

Finally, for the legal profession to impose on itself duties less rigorous, enforceable by remedies less onerous, than those it imposes on others in like positions of trust would itself be a betrayal. If we, as lawyers, desire honor, we must practice honor. If we, as lawyers, desire loyalty, we must practice loyalty.

I do not mean to suggest that the concerns of practitioners, courts, and commentators about the increasing use of fiduciary duty to circumvent the ordinary rules of negligence are unfounded. There is, however, a relatively simple solution. As the Restatement already acknowledges, a lawyer's fiduciary obligations can be divided into two parts: (1) duties of competence and diligence[238] and (2) duties of loyalty.[239] As we have seen, RUPA already draws this distinction formally,[240] limiting liability for the first in ways that it does not limit liability for the second.[241] The law governing lawyers should draw the same distinction by limiting an attorney's liability for incompetence or lack of diligence to situations in which his conduct fails to meet ordinary negligence standards and limiting recovery, in most situations, to compensatory damages. The law governing lawyers should not, however, so limit causes of action for breaches of duties of loyalty. For this purpose, by "loyalty" I mean simply putting the client's interests first—to "love all which he loves and shun all which he shuns." Lawyers should be subject to the same duty of loyalty imposed on others in positions of trust and to the same remedies for breach.

238. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(2) (2000) ("[A] lawyer must . . . act with reasonable competence and diligence.").

239. *See id.* § 16(3) ("[A] lawyer must . . . comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client.").

240. *See* REVISED UNIF. P'SHIP ACT § 404(a) (1997) ("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).").

241. *See 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 . . . .").

This distinction may already be reflected in the case law; it may simply not yet have been recognized. Regardless, it is workable, would meet the reasonable objections of those concerned about plaintiff overreaching, and would allow lawyers legitimately to claim the same high moral regard now accorded to real estate agents, business executives, and partners.

CONCLUSION

In recent years, the lawyer's role as fiduciary has been inappropriately deemphasized in the consideration of legal ethical questions. This is now reflected in the way many teach legal ethics. It is increasingly reflected in the way courts analyze client-lawyer disputes. This is both unfortunate and unnecessary. A lawyer's fiduciary duties, particularly her duties of loyalty, are easily reconciled with both her obligations under professional disciplinary rules and her obligations in tort. Their reemphasis would protect legitimate client expectations, enhance the ability of good lawyers to gain clients' trust and thereby serve clients more effectively, and bring our profession into better repute. Lawyers are, first and foremost, fiduciaries.