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A *Comprehensive* Uniform Limited Partnership Act? The Time Has Come

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The Revised Uniform Partnership Act of 1994 (RUPA)[1] is about to make the world of general partnerships chaotic.[2] It promises to do the same to the world of limited partnerships.

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[1] The National Conference of Commissions on Uniform State Laws designates the revised statute the "Uniform Partnership Act (1994)." U.P.A. § 1002 (1994). However, to avoid confusion with the original Uniform Partnership Act, text references are to the "Revised Uniform Partnership Act," or "RUPA"; footnote references to RUPA are styled "U.P.A. (1994)." Text references to the original Uniform Partnership Act are to the "Uniform Partnership Act," or "UPA"; footnote references to the Uniform Partnership Act are styled "U.P.A. (1969)." Text references to the Revised Uniform Limited Partnership Act are to the "Revised Uniform Limited Partnership Act," or "RULPA"; footnote references to RULPA are styled "R.U.L.P.A. (1985)."

[2] The Revised Uniform Partnership Act has been the subject of criticism from both the right and the left. *See* Claire Moore Dickerson, *Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111 (1993) (criticizing RUPA for failure to maintain fiduciary approach); Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45 (1993) [hereafter Ribstein, *Prime Time*] (criticizing RUPA for failure to adopt contractarian approach); Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993) [hereafter Vestal, *Contractarian Error*] (criticizing RUPA for failure to maintain fiduciary approach).

That chaos can be avoided if we move without delay to delink the law of limited partnerships from that of general partnerships by drafting and adopting a comprehensive uniform limited partnership act. A comprehensive act would have the primary benefit of advancing certainty and uniformity in limited partnership law. It would have the secondary benefit of permitting us to correct some of RUPA's worst policy errors, and adopt one of its valuable policy innovations.

Historically, the link between general partnership law and limited partnership law has worked well for three reasons. First, the nexus is reasonably clear if rarely articulated; the fit between the two statutes has been well-recognized. Second, the substance of partnership law thus imported has been appropriate to the limited partnership context. Third, partnership law has been uniform, thus discouraging manipulation of the link between the two bodies of law to gain advantage in the limited partnership context. RUPA, however, eliminates each of these three reasons. The nexus is no longer clear, the substance is no longer appropriate, and the uniformity (and the associated benefit of stability for limited partnerships) is fast disappearing.

Part I of this article discusses the confused nexus between general partnership law under RUPA and limited partnership law. Part II traces the substantive errors embodied in RUPA that make application of that statute inappropriate to limited partnerships. Part III outlines the limited partnership problems arising from non-uniformity in partnership law.

I. UNCERTAIN FIT WITH THE REVISED UNIFORM PARTNERSHIP ACT

By design, the Revised Uniform Limited Partnership Act[3] (RULPA) is not a comprehensive statement of the law of limited partnerships.[4] It depends upon the Uniform Partnership Act (UPA) to supplement its specialized provisions of limited partnership law.[5] RULPA treats general partnership law as linked with, and prior to, the law of limited partnerships.[6]

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[3] Two jurisdictions, Vermont and the Virgin Islands, retain the original limited partnership act as their primary limited partnership statute. VT. STAT. ANN. tit. 11, §§ 1391-1419 (1993); 26 V.I. CODE ANN. tit. 26, §§ 201-228 (1994); UNIF. LIMITED PARTNERSHIP ACT, 6 U.L.A. 295 (Supp. 1994). One jurisdiction, Louisiana, has not adopted any of the uniform limited partnership statutes. UNIF. LIMITED PARTNERSHIP ACT, 6 U.L.A. 295 (Supp. 1994); REVISED UNIF. LIMITED PARTNERSHIP ACT (1976) with the 1985 Amendments, 6 U.L.A. 346 (Supp. 1994). Forty-nine jurisdictions have adopted some form of the Revised Uniform Limited Partnership Act of 1976, with or without the 1985 amendments. REVISED UNIF. LIMITED PARTNERSHIP ACT (1976) with the 1985 Amendments, 6 U.L.A. 346-47 (Supp. 1994). Because of this distribution, this discussion focuses on the Revised Uniform Limited Partnership Act of 1976, with the 1985 amendments.

[4] R.U.L.P.A. § 403 (1985). The Uniform Limited Partnership Act (1916) is not a comprehensive statement of the law of limited partnerships, either. U.L.P.A. § 9(1) (1916).

[5] Courts have held that the Uniform Partnership Act provides the rules applicable to limited partnerships on a variety of questions. Crocker Nat'l Bank v. Perroton, 255 Cal. Rptr. 794 (Cal. Ct. App. 1989) (deciding rights of limited partnership charging order creditors); Bedolla v. Logan & Frazer, 125 Cal. Rptr. 59, 66 (Cal. Ct. App. 1975) (holding that UPA applies when knowledge of a limited partner is attributed to partnership); Mahon v. Harst, 738 P.2d 1190, 1194-95 (Colo. Ct. App. 1987) (determining whether general partner entitled to compensation for services rendered); Madison Hills Ltd. Partnership II v. Madison Hills, Inc., 644 A.2d 363, 367-68 (Conn. App. Ct. 1994) (deciding rights of limited partnership charging order creditors); Frye v. Manacard Ltd., 431 So. 2d 181, 183-84 (Fla. Dist. Ct. App. 1983) (determining rights of deceased partner's estate when partnership continues); Inland Real Estate Corp. v. Christoph, 437 N.E.2d 658, 662 (Ill. App. Ct. 1981) (determining rights of general partners to convey limited partnership property); College Station v. Knowles, No. L-93-060, 1993 WL 496687, at *5 (Ohio Ct. App. Dec. 3, 1993) (determining extent of liability of limited partner liable as general partner); Major Real Estate & Inv. v. Republic Fin., 695 P.2d 893, 894 (Okla. App. 1985) (deciding rights of limited partnership charging order creditors); J. WILLIAM CALLISON, PARTNERSHIP LAW AND PRACTICE § 21.05 (1993) (discussing general partner entitlement to compensation for services rendered). The Uniform Partnership Act also generally applies to limited partnerships formed under the Uniform Limited Partnership Act (1916). *See* Horn v. Builders Supply Co. of Longview, Ltd., 401 S.W.2d 143, 148 (Tex. Civ. App. 1966).

[6] Courts have variously characterized the relationship between general and limited partnership law. *See College Station*, 1993 WL 496687, at *5 ("[t]he drafters [of the Uniform Limited Partnership Act] intended a synergistic relationship between the UPA and the ULPA.").

The mechanism by which the body of general partnership law supplements limited partnership law is one focus of concern as we move from the UPA to RUPA.[7] There are two ways that

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[7] The Uniform Partnership Act revision effort has produced multiple drafts. First, an American Bar Association committee produced a listing of objectives, not really a draft as such. Uniform Partnership Act Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, Section of Business Law, American Bar Association, *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121 (1987) [hereafter the *ABA Report*].

The Drafting Committee to Revise the Uniform Partnership Act of the National Conference of Commissioners on Uniform State Laws generated at least 14 working drafts leading to the first promulgation of the Revised Uniform Partnership Act, in 1992. UNIF. PARTNERSHIP ACT (Jan. 9, 1989 Draft) [hereafter R.U.P.A. JAN. 1989 DRAFT]; UNIF. PARTNERSHIP ACT (Feb. 17, 1989 Draft) [hereafter R.U.P.A. FEB. 1989 DRAFT]; UNIF. PARTNERSHIP ACT (July 28 - Aug. 4, 1989 Meeting Draft) [hereafter R.U.P.A. JULY 1989 DRAFT]; UNIF. PARTNERSHIP ACT (Dec. 3, 1989 Draft) [hereafter R.U.P.A. DEC. 1989 DRAFT]; UNIF. PARTNERSHIP ACT (Feb. 14, 1990 Draft) [hereafter R.U.P.A. FEB. 1990 DRAFT]; UNIF. PARTNERSHIP ACT (Apr. 16, 1990 Draft) [hereafter R.U.P.A. APR. 1990 DRAFT]; UNIF. PARTNERSHIP ACT (July 13 - 20, 1990 Meeting Draft) [hereafter R.U.P.A. JULY 1990 DRAFT]; UNIF. PARTNERSHIP ACT (Dec. 6, 1990 Draft) [hereafter R.U.P.A. DEC. 1990 DRAFT]; UNIF. PARTNERSHIP ACT (Jan. 19, 1991 Draft) [hereafter R.U.P.A. JAN. 1991 DRAFT]; UNIF. PARTNERSHIP ACT (Mar. 11, 1991 Draft) [hereafter R.U.P.A. MAR. 1991 DRAFT]; UNIF. PARTNERSHIP ACT (Aug. 2 - 9, 1991 Meeting Draft) [hereafter R.U.P.A. AUG. 1991 DRAFT]; UNIF. PARTNERSHIP ACT (Dec. 13, 1991 Draft) [hereafter R.U.P.A. DEC. 1991 DRAFT]; REVISED UNIF. PARTNERSHIP ACT (June 1, 1992 Draft) [hereafter R.U.P.A. JUNE 1992 DRAFT]; UNIF. PARTNERSHIP ACT (July 30 - Aug. 6, 1992 Meeting Draft) [hereafter R.U.P.A. JULY 1992 DRAFT].

The 1992 annual meeting of the Conference considered the July 1992 draft (R.U.P.A. JULY 1992 DRAFT) and several amendments. REVISIONS TO UNIF. PARTNERSHIP ACT JULY 30, 1992 (July 30, 1992 revisions) [hereafter R.U.P.A. 1992 ANN. MEETING JULY 30 REVISIONS]; AMENDMENTS TO UNIF. PARTNERSHIP ACT AUG. 2, 1992 (Aug. 2, 1992 revisions) [hereafter R.U.P.A. 1992 ANN. MEETING AUG. 2 REVISIONS]; AMENDMENTS TO UNIF. PARTNERSHIP ACT AUG. 3, 1992 (Aug. 3, 1992 revisions) [hereafter R.U.P.A. 1992 ANN. MEETING AUG. 3 REVISIONS].

At the 1992 annual meeting of the Conference, state delegations passed RUPA by a unanimous vote. UNIF. PARTNERSHIP ACT (1992) (Aug. 1992 adoption) [hereafter R.U.P.A. 1992 ADOPTED TEXT]. Pursuant to Conference policy, the adopted text was then reviewed and modified in non-substantive detail to produce a final text. REVISED UNIF. PARTNERSHIP ACT (1992) (Nov. 2, 1992) [hereafter U.P.A. (1992)].

Continuing consultations between the Conference's Drafting Committee to Revise the Uniform Partnership Act and various A.B.A. committees produced further revisions proposed. *See* Subcommittee on RUPA of the Committee on Partnerships and Unincorporated Business Organizations of the American Bar Association's Section on Business Law, Report (Nov. 1992) (on file with the author) [hereafter A.B.A. Nov. 1992 Subcommittee Report]; REVISED UNIF. PARTNERSHIP ACT (Apr. 14, 1993 Draft) [hereafter R.U.P.A. APR. 1993 DRAFT]. The Conference reconsidered parts of the Revised Uniform Partnership Act at its 1993 annual meeting, and passed a series of amendments. AMENDMENTS TO UNIF. PARTNERSHIP ACT (1992) (July 30 - Aug. 6, 1993) [hereafter R.U.P.A. 1993 ANN. MEETING REVISIONS]. This generated another draft. REVISED UNIF. PARTNERSHIP ACT (1992) (July 2, 1993) [hereafter R.U.P.A. JULY 1993 DRAFT]. Next, the Conference issued an amended text. RE-

states link their general partnership statutes with their limited partnership statutes. One method works downstream from general partnership law to limited partnership law; the other, upstream from limited partnership law to general partnership law.[8] RUPA disrupts both.

A. Abandonment of the Downstream Link Between General and Limited Partnership Law

The downstream link between general partnership law and limited partnership law arises when general partnership law adopts broad provisions that include limited partnerships within its sweep. The link consists of two provisions. First, a broad provision extends coverage of the general partnership law to limited partnerships. A second provision establishes the relative priority of the general and limited partnership laws when they conflict. Thus, the UPA includes limited partnerships within the definition of "partnership" as "an association of two or more persons to carry on as co-owners a business for profit."[9] And

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VISED UNIF. PARTNERSHIP ACT (1992) (Aug. 17, 1993) [hereafter R.U.P.A. 1993 ADOPTED TEXT]. Once again the text was subject to a non-substantive style review, and a final version was issued. UNIF. PARTNERSHIP ACT (1993) (Oct. 14, 1993) [hereafter U.P.A. (1993)].

Continuing consultations between the Conference's Drafting Committee to Revise the Uniform Partnership Act and various A.B.A. committees again produced further proposed revisions. *See* Subcommittee on RUPA of the American Bar Association Section of Business Law, Supplemental Report by the Subcommittee on RUPA (Oct. 1993) (on file with author) (recommending against enactment of the Revised Uniform Partnership Act in its then-existing form) [hereafter A.B.A. Oct. 1993 Subcommittee Report]. Further drafts followed. UNIF. PARTNERSHIP ACT (1993) (Dec. 7, 1993) [hereafter R.U.P.A. DEC. 1993 DRAFT]; UNIF. PARTNERSHIP ACT (1994) (Jan. 18, 1994) [hereafter R.U.P.A. JAN. 1994 DRAFT]; UNIF. PARTNERSHIP ACT (1994) (Feb. 5, 1994) [hereafter R.U.P.A. FEB. 1994 DRAFT]; UNIF. PARTNERSHIP ACT (1994) (June 1, 1994) [hereafter R.U.P.A. JUNE 1994 DRAFT]. The June 1994 draft was approved by the Conference at its annual meeting in August 1994. UNIF. PARTNERSHIP ACT (1994) [hereafter U.P.A. (1994)]. Also in August 1994, the House of Delegates of the American Bar Association approved the Revised Uniform Partnership Act.

[8] *See* Temple v. White Lakes Plaza Assocs., Ltd., 816 P.2d 399, 405 (Kan. Ct. App. 1991) (citing both upstream and downstream links between UPA and RULPA).

Because the linkages were so clear and so uniform, commentators have understandably not gone into much detail in discussing the relationship. *See* CALLISON, *supra* note 5, at § 17.2. "In addition to the ULPA and RULPA, the Uniform Partnership Act (UPA) applies to limited partnerships except to the extent that the applicable limited partnership statute is inconsistent with the UPA." *Id.*; *see also* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 264, at 444 (1979) (citing upstream link only).

[9] U.P.A. § 6 (1969).

the UPA determines relative priority by providing that affirmative provisions of the limited partnership statute override the otherwise applicable provisions of the general partnership statute: "[T]his act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith."[10] Thus, under the downstream link, the UPA applies to limited partnerships simply because it says it applies. In cases of conflict between the two uniform laws, RULPA has priority because the UPA defers.

RUPA abandons the downstream link because it excludes limited partnerships from the coverage of general partnership law. The RUPA definition of "partnership" begins by tracking

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> (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.
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> (2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

Id.

Actually, the mechanism may be more complicated than it at first appears, but the drafters finessed the point. If limited partners are not "co-owners" within the meaning of the first subsection, then limited partnerships are not included in the UPA definition of "partnerships." U.P.A. § 6(1) (1969). Even if limited partners are co-owners so as to bring limited partnerships within the UPA "partnerships" definition, they would be excluded under the first clause of the second subsection. The UPA excludes "any association formed under any other statute of this state," and would exclude limited partnerships because they are clearly formed under RULPA. U.P.A. § 6(2) (1969). The UPA might save the partners, however, under the next exception. The UPA qualifies the first clause's exclusion by excluding associations "unless such association would have been a partnership in this state prior to the adoption of this act." U.P.A. § 6(2) (1969). Presumably this would depend on whether the state had a limited partnership statute prior to adoption of the UPA. All of these questions are mooted because the specific statutory directive states "this act shall apply to limited partnerships . . . ." U.P.A. § 6(2) (1969).

This same link makes the Uniform Partnership Act applicable to limited partnerships formed under the Uniform Limited Partnership Act. *Horn*, 401 S.W.2d at 148. *But see* ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 11.02(c), at 11:24 (1988).

> U.P.A. . . . applies somewhat differently to R.U.L.P.A. partnerships than to U.L.P.A. partnerships. The reason is that "partner" (used throughout the U.P.A.) includes limited partners in R.U.L.P.A. but not in U.L.P.A.

Id.

[10] U.P.A. § 6(2) (1969).

the UPA's definition of "partnership." This is the definition that *links* general partnership and limited partnership law in the existing regime: "'Partnership' means an association of two or more persons to carry on as co-owners a business for profit . . . ."[11] The RUPA definition then excludes limited partnerships by restricting the universe of business associations which qualify as "partnerships" to those "formed under [Revised Uniform Partnership Act] Section 202, predecessor law, or comparable law of another jurisdiction."[12]

Limited partnerships formed prior to the adoption of RUPA arguably should be considered "partnerships" under RUPA because they were indeed "formed under . . . predecessor law," since the predecessor law — the UPA — covered limited partnerships.[13] Nevertheless, the RUPA drafters do not *intend* the partnership definition to include limited partnerships:

> "Partnership" is defined to mean an association of two or more persons to carry on as co-owners a business for profit formed under Section 202 (or predecessor law or comparable law of another jurisdiction), that is, a *general* partnership. Thus, *as used in RUPA, the term "partnership" does not encompass limited partnerships*, contrary to the use of the term in the UPA.[14]

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[11] U.P.A. § 101(4) (1994). *Compare* U.P.A. § 101(4) (1994) (definition excluding limited partnerships) *with* U.P.A. § 6(1) (1969) (definition including limited partnerships).

[12] U.P.A. § 101(4) (1994).

[13] *Id.* Limited partnerships formed prior to the adoption of RUPA may be partnerships only because the RUPA drafters inverted the first order exclusion of "any association formed under any other statute of this state." U.P.A. § 6(1) (1969). This inversion would seem to exclude limited partnerships formed under RULPA from the statutory definition of a partnership. However, it would seem to include associations formed under the UPA. Such associations include limited partnerships in the statutory definition of a partnership if one accepts the quite reasonable premise that limited partnerships are formed under both the Uniform Partnership Act and the Revised Uniform Limited Partnership Act.

[14] U.P.A. § 101(4) cmt. (1994) (emphasis added). An exchange during the floor debate seems to support this reading:

> This act does not apply — this act itself does not apply to limited partnerships. It is true that RUPA currently says that general partners will be governed by the UPA, or perhaps it will, with RUPA. There is no doubt that they're [sic] going to be a number of changes that have to be made to the Limited Partnership Act. But the subject before us is the General Partnership Act, and it does not deal with limited partners.

Proceedings of the National Conference of Commissioners on Uniform State Laws, Uniform Partnership Act, Proceedings of the Committee of the Whole, July 31 - Aug. 6, 1992,

The second part of the downstream link under the existing UPA regime is establishing priority between general partnership law and limited partnership law where the two conflict.[15] Because RUPA is not intended to apply to limited partnerships, no parallel provision is included in the new uniform law.

B. Disruption of the Upstream Link Between General and Limited Partnership Law

The upstream link between general partnership law and limited partnership law arises when limited partnership law incorporates by reference provisions of the general partnership law. This approach is taken by RULPA, which includes two reference provisions. The first provides: "In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern."[16] The second reference provision deals with the rights, powers and liabilities of general partners:

> (a) Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.
>
> (b) Except as provided in this [Act], a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.[17]

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at 478 (Commissioner H. Lane Kneedler, Chair, Drafting Committee to Revise the Uniform Partnership Act) [hereafter *1992 National Conference Proceedings*].

[15] U.P.A. § 6(2) (1969).

[16] R.U.L.P.A. § 1105 (1985). The affirmative provision is unnecessary because partnerships formed under the Revised Uniform Limited Partnership Act are within the Uniform Partnership Act's definition of partnership. R.U.L.P.A. § 1105 cmt. (1985). "The result provided for in Section 1105 would obtain even in its absence in a jurisdiction which had adopted the Uniform Partnership Act, by operation of Section 6 of that act." *Id.* There is no parallel provision in the Uniform Limited Partnership Act.

[17] R.U.L.P.A. § 403 (1985). Under RULPA the term "partner" means "a limited or general partner." R.U.L.P.A. § 101(8) (1985). The Uniform Limited Partnership Act (1916) contains parallel language specifically incorporating provisions of general partnership law. U.L.P.A. § 9(1) (1916).

Thus, under the upstream link, the UPA applies to limited partnerships when no RULPA provision addresses an issue. The UPA also applies because, in specific cases, the limited partnership law is cast in terms of the applicable general partnership law.

RUPA also affects the upstream link. It does not directly eliminate the upstream link because it does not amend RULPA, but it does subvert the operation of the upstream link. The analysis begins with the relationship between RUPA and the UPA. It would have been possible — and, I have argued in another context, desirable — to draft RUPA as a coexistence-model statute.[18] Under this model, RUPA would apply to partnerships formed after its effective date and to any pre-existing partnerships that elected to be governed by its terms. Pre-existing partnerships that made no election would continue to be governed by the UPA. Under such an arrangement, the linkage of RULPA to the UPA could continue, presumably even as to limited partnerships formed after the effective date of RUPA. However, RUPA is not a coexistence-model statute. It is a displacement-model statute, one which replaces the prior regime to the constitutional limits, and makes the new regime applicable to pre-existing general partnerships.[19] Consistent with the displacement model, RUPA repeals the UPA.[20]

But even if the UPA is repealed, could the RULPA references be interpreted as being to the old regime? Do the upstream

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[18] Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994 Really Be Retroactive?*, 50 BUS. LAW. 267 (1994) [hereafter Vestal, *Retroactive*]. By "coexistence model" I mean an arrangement under which the new statute would not alter the substance of existing partnership agreements, but under which newly-formed partnerships would be governed by the new statute. *Id.* at 285-86.

[19] Vestal, *Retroactive*, *supra* note 18, at 271-72. By "displacement model," I mean "an arrangement under which the new statute alters the substance of existing partnership agreements in that both existing and newly-formed partnerships are governed by the new statute to the extent allowed under the Constitution." *Id.*

[20] U.P.A. § 1005 (1994). RUPA does not immediately apply to existing partnerships; the statute provides for a transition period. U.P.A. § 1006(b) (1994). RUPA does not specify a period of time for the transition period, although the official comment notes the parallel provision of Texas law is five years. U.P.A. § 1006 cmt. (1994). For our purposes, a transition period which only delays the imposition of the new regime has no consequence other than to give the states a brief period of time in which to make the modifications of RUPA and RULPA. Of course, RUPA does not require courts to interpret the upstream link in RULPA to incorporate the UPA and not RUPA during the transition period. Especially as to limited partnerships formed after the enactment of RUPA, it would seem to be a close call.

links tie RULPA to the UPA or RUPA? The better answer is that RULPA will be tied to RUPA, not the UPA. The analysis begins with the two types of "statutes of reference" recognized by the canons of statutory construction: statutes of general reference and statutes of specific reference.[21] A statute of general reference refers to a general area of law.[22] A statute of specific reference refers to a specific statutory section or provision.[23] The basic rule is that statutes of general reference include amendments of the statute referred to, while statutes of specific reference do not.[24]

RULPA contains two references to the law of general partnerships that can only be general references. These provisions define the rights, powers, and liabilities of a general partner in a limited partnership by reference to the rights, powers, and liabilities "of a partner in a partnership without limited partners."[25] As such, these provisions are subject to amendment of the law to which they refer, and would become references to RUPA.

But RULPA also contains a reference to general partnership law which is arguably a specific reference. Section 1105 provides that "[i]n any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern."[26] If this is a specific reference, and if none of the exceptions to the general rule of statutory construction applies, then this refers to the UPA as it

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[21] 2B NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51.07 (5th ed. 1992).

[22] *Id.*

[23] *Id.*

[24] *Id.* § 51.08.

[25] R.U.L.P.A. § 403 (1985).

> (a) Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.
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> (b) Except as provided in this [Act], a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

Id.

[26] R.U.L.P.A. § 1105 (1985).

existed at the time RULPA was passed, without any subsequent amendments.

Is RULPA section 1105 a specific reference? Commentators and courts distinguish between references to the general law of a subject, which they treat as general references,[27] and "adoption by reference of limited and particular provisions of another statute," which they treat as specific references.[28] RULPA section 1105 does not refer to a specific section, or even an enacted code chapter of the enacting state's law; it refers generically to the uniform act.[29] Indeed, even references to specific statutes and code sections have been treated as general references, and thus subject to subsequent amendments, when the precise code reference is to a comprehensive body of law.[30] Thus, the better reading is that the RULPA section 1105 reference is general, not

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[27] *See, e.g.*, Howard v. State *ex rel.* Stuckey, 267 S.W.2d 763, 764-65 (Ark. 1954) (treating reference to law controlling appeals from justices of the peace as general reference).

[28] *See* State *ex rel.* Ostrowski v. Haguewood, 782 P.2d 213, 215 (Wash. Ct. App. 1989) (treating reference to identified statutory section as specific reference).

[29] R.U.L.P.A. § 1105 (1985). The RULPA drafters knew how to indicate that adopting states should customize a particular section to that state's laws. *See* R.U.L.P.A. § 802 (1985) (bracketing appropriate court, indicating need to customize); R.U.L.P.A. § 908 (1985) (bracketing designation of appropriate official, indicating need to customize); R.U.L.P.A. § 1104 (1985) (bracketing reference to existing limited partnership act to be repealed, indicating need to customize).

To further complicate matters, three states, Alabama, Connecticut, and Massachusetts, have altered the uniform text to refer not generically to the Uniform Partnership Act, but rather specifically to the Uniform Partnership Act as enacted in that jurisdiction. 6 U.L.A. 543 (Supp. 1994). These state actions strengthen the argument that these are intended as specific references, although the following arguments that these are really general references apply equally to these states. Two states, North Dakota and Wisconsin, omit this section. *Id.*

[30] Pearce v. Director, Office of Workers' Compensation Programs, 603 F.2d 763, 768 (9th Cir. 1979). In *Pearce*, the Ninth Circuit had to resolve whether the Defense Base Act generally or specifically referred to the Longshoremen's Act. The court held that the Defense Base Act to be a general reference statute in part because the Act "went . . . far beyond incorporating just a few selected provisions." *Id.* "Rather, it incorporated virtually the entire Longshoremen's Act." *Id.*; *see* Equal Employment Opportunity Comm'n v. Chrysler Corp., 546 F. Supp. 54, 74 (E.D. Mich. 1982); Muenich v. United States, 410 F. Supp. 944, 946-47 (N.D. Ind. 1976) (citing 2A C. DALLS SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 51.07 (4th ed. 1973)). Although it does not identify this as a separate ground for treating the reference as general, the *Chrysler* court noted that "Congress intended to incorporate the general [Fair Labor Standards Act] enforcement scheme" in the Age Discrimination in Equal Employment Act of 1987. *Chrysler*, 546 F. Supp. at 74; *see* United States v. Rodriguez-Rodriguez, 863 F.2d 830, 831 (11th Cir. 1989) (treating reference to specific code section as general, as "part of a larger legislative scheme").

specific, and that, upon passage of RUPA, the RULPA reference should be deemed a reference to the new regime.[31]

The New Jersey Supreme Court explained the underlying policy for treating such references as general:

> [W]here a statute refers specifically to another statute by title or section number, there is no reason to think its drafters meant to incorporate more than the provision specifically referred to. Nor is there any reason to think repeal of the incorporated statute indicates any intention to negate the incorporating statute, which may bear on an entirely different subject. Reference to a general body of law implies more, however, if only because there are likely to be facets of that law beyond those immediately occupying the Legislature's attention. Incorporating that general body of law then implies a judgment that the overall policies governing the incorporat-

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[31] Even if RULPA § 1105 is wrongly held to be specific in form, two exceptions to the general rule might be invoked. One commentator suggests that the exceptions may be so broad as to change the underlying rule. *See* SINGER, *supra* note 21, § 51.07 (citing *Chrysler*, 546 F. Supp. at 73 ("it does seem to be the general rule that incorporations are designated as general and effect is given to subsequent amendments.").

One exception applies when "the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute." SINGER, *supra* note 21, § 51.08; *see also Chrylser*, 546 F. Supp. at 74; Campbell v. Hunt, 155 S.E.2d 682, 684 (Ga. Ct. App., 1967) (finding that phrase "as is now provided" evidenced legislature intended specific reference); Pacific First Fed. Sav. & Loan Ass'n v. Pierce County, 178 P.2d 351, 355-56 (Wash. 1947) (finding that phrase "now or hereafter provided by law" evidenced that legislature intended general reference). Treating RULPA § 1105 as a general reference is justified especially because the legislature has included in RULPA § 403 references which are clearly general.

Another exception is that "[a] provision which reads as a specific reference may, in context, be construed as a general reference." SINGER, *supra* note 21, § 51.08; *see also Chrysler*, 546 F. Supp. at 73-74. The *Chrysler* court determined that a reference to a single section of the Fair Labor Standards Act in the Age Discrimination in Equal Employment Act of 1967 was a specific reference in form. Nevertheless, the court found that Congress intended to place no limitation on the applicability of future amendments, and to treat the reference as general. *Id.*; *see* Doe v. Indiana State Bd. of Educ., 550 F. Supp. 1204, 1205-06 (N.D. Ind. 1982). The *Doe* court determined that the context of a food stamp eligibility determination statute required treating a statutory reference, specific in form, as a general reference subject to subsequent amendments of the statutory section. *Id.* Even if the reference to the Uniform Partnership Act is deemed specific, the context suggests a general reading.

For those seeking another way out of the dilemma, I would note that the official name of the Revised Uniform Partnership Act is the Uniform Partnership Act (1994). U.P.A. § 1002 (1994). Properly analyzed, however, it would not matter if the official name was the Revised Uniform Partnership Act or some other variation on the theme. If the reference is specific, it is to the act as it existed when the legislature enacted the RULPA, and no subsequent amendments are relevant. If the reference is general, then it is to a body of partnership law, however denominated.

> ed law should likewise govern the statute incorporating it. On this assumption, it makes sense to incorporate new developments in that body of law into the incorporating statute as well.[32]

As much as I disagree with the underlying policy embodied in RUPA, the RULPA section 1105 reference is to an integrated body of law. Changes in that body of law should — absent a delinking of the laws of limited and general partnerships — flow through to limited partnership law as well.

Thus, when RULPA refers to "the Uniform Partnership Act," it will presumably be taken as a reference to RUPA.[33] And therein lies the problem. There is a "Uniform Partnership Act" to which parties can be referred out of RULPA. But RUPA does not, by *its* terms, speak to limited partnerships. As we have seen, the definition of "partnership" excludes limited partners.[34] The term "partner" is nowhere defined in RUPA, but it would seem completely disingenuous to argue that a limited partner is a "partner" under RUPA when the limited partnership is not a partnership. The upstream link to RUPA is a dead-end: cases not provided for in RULPA are governed by the provisions of RUPA. RUPA, however, does not provide for those cases either.

C. The Solution is a Comprehensive Limited Partnership Statute

There are two easy but incorrect fixes for the linkage problems, and a third correct one. First, the downstream link could be resurrected by changing the coverage of RUPA to include limited partnerships. This could be done by changing the RUPA definition of "partnership" to include limited partnerships, an easy fix.[35] With this change, limited partnerships would again

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[32] *In re* Commitment of Edward S., 570 A.2d 917, 925 (N.J. 1990).

[33] R.U.L.P.A. § 1105 (1985) ("In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern.").

[34] U.P.A. § 101(4) (1994). The drafters also attempted to block the back door. "An association formed under a statute other than this [Act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this [Act]." U.P.A. § 202(b) (1994).

[35] The language could be quite straightforward. If one considers limited partners as co-owners, then what would initially be involved is a simple change in the partnership definition:

have a body of partnership law to which they could look to supplement specific limited partnership law. The problem with this approach is that RUPA has been drafted without consideration of the special problems of limited partnerships, and it contains fundamental substantive changes in partnership law which may not be appropriate for the limited partnership context.

The second easy fix looks to the upstream link. This option would change the RULPA reference to the "Uniform Partnership Act," which will be taken to refer to RUPA after the repeal of the UPA, to instead incorporate the UPA as it existed prior to adoption of RUPA.[36] This would solve the problem both as

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> (4) "Partnership" means an association of two or more persons to carry on as co-owners a business for profit; but this [Act] shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

U.P.A. § 101(4) (1994). If one did not consider limited partners as co-owners, then an affirmative directive to include limited partners, parallel to that in the UPA, could be added:

> (4) "Partnership" means an association of two or more persons to carry on as co-owners a business for profit; and in addition this [Act] shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

U.P.A. § 101(4) (1994). In parallel changes, U.P.A. § 202(b) (1994) and the reference to § 202(b) in § 202(a) would be deleted.

[36] The language would be straightforward. First, the general incorporation language of RULPA § 1105 would need to be changed:

> § 1105. RULES FOR CASES NOT PROVIDED FOR IN THIS [ACT]
>
> In any case not provided for in this [Act] the provisions of the Uniform Partnership Act [add cross reference to state enactment of U.P.A. (1969)] govern.

Second, the specific incorporation language of RULPA § 403 would need to be changed:

> § 403. GENERAL POWERS AND LIABILITIES
>
> (a) Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners formed under [add cross reference to the state enactment of U.P.A. (1969)].
>
> (b) Except as provided in this [Act], a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners formed under [add cross reference to the state enactment of U.P.A. (1969)] to persons other than the partnership and the other partners. Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited

to existing limited partnerships and as to those formed after the effective date of RUPA.[37] The problem with this approach is that it requires the states that adopt RUPA to keep the UPA on the books for the sole purpose of providing a body of law for limited partnerships to incorporate by reference. While this might have the salutary effect of causing such states to rethink the retroactivity provisions of RUPA,[38] it is an odd and awkward way of solving the limited partnership problem.

The harder, but better, solution would be to abandon the linkage between general and limited partnership law altogether, and rewrite limited partnership law as a comprehensive, stand-alone statute. RUPA has taken the first step by eliminating the downstream link. The general upstream link has been brought into question. All that remains is to rewrite RULPA to make the split both clear and final.

II. SUBSTANTIVE ERROR IN THE REVISED UNIFORM PARTNERSHIP ACT

Beyond the question of how the bodies of general partnership law and limited partnership law are linked under the new regime is the basic question of whether they should be linked at all. At issue here is the substance of the new general partnership regime, and whether RUPA is appropriate to the limited partnership relationship.

I conclude that central aspects of the regime of partnership law embodied in RUPA are inappropriate to the limited partner-

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partners formed under [add cross reference to the state enactment of U.P.A. (1969)] to the partnership and to the other partners.

Presumably one would also want to modify the Revised Uniform Partnership Act section which repeals the Uniform Partnership Act, U.P.A. § 1005 (1994), so that the Uniform Partnership Act remained on the books, to be incorporated into the Revised Uniform Limited Partnership Act. This modification would avoid the awkwardness of incorporating a statutory chapter that is no longer on the books.

[37] Of course incorporating the UPA as it existed prior to RUPA will only work in jurisdictions which have adopted the Revised Uniform Limited Partnership Act. The Uniform Limited Partnership Act does not contain a general upstream link with general partnership law. Thus, jurisdictions operating under the Uniform Limited Partnership Act, Vermont and the Virgin Islands, will need to fashion a different remedy if they adopt the Revised Uniform Partnership Act.

[38] Vestal, *Retroactive*, *supra* note 18, at 283-84.

ship relationship. The link between RUPA and RULPA is substantively and procedurally in error. To say that it is error to apply RUPA to the limited partnership relationship is not, however, to deny that we can learn from the thought that has gone into the drafting of RUPA; the new statute should be examined with an eye toward borrowing appropriate features for a new, comprehensive limited partnership law.

The following topical discussions illustrate these conclusions. From an examination of the changing standards of fiduciary duty under RUPA, we see the error in importing RUPA provisions into the limited partnership setting. The retroactivity provision of RUPA illustrates the procedural error of continued linkage. And the information discussion illustrates how RUPA provisions may help us improve limited partnership law — not by applying RUPA provisions by reference, but rather by using RUPA's provisions as models for specialized provisions in a comprehensive limited partnership statute.

A. Changing Standards of Fiduciary Duty

The obligation of general partners to limited partners has been described as "the highest fiduciary duty recognized by law"[39] and a "duty . . . characterized by a loyalty of the highest order."[40] But the fiduciary duty of a general partner in a limited partnership is not ordained by RULPA; it is a function of the UPA as applied to the circumstances of limited partnerships.[41]

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[39] Crenshaw v. Swenson, 611 S.W.2d 886, 890 (Tex. Civ. App. 1980).

> It is axiomatic that a managing partner in a general partnership owes his co-partners the highest fiduciary duty recognized in the law. In a limited partnership, the general partner acting in complete control stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust.

Id. (citations omitted).

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

> A fiduciary duty . . . is owed from a general partner to a limited partner: This duty is characterized by a loyalty of the highest order. When acting for the partnership and the limited partners, the general partner, as a fiduciary, must walk a moral path above that tread by other members of the economic marketplace. The general partner thus shoulders a heavy burden.

Id. (citations omitted).

[41] R.U.L.P.A. § 403 (1985).

General partners in limited partnerships are partners bound by the general fiduciary obligations of partners, and they are more: they are managing partners, who, as such, owe their non-managing partners "one of the highest fiduciary duties recognized in the law."[42]

RUPA makes fundamental changes in the fiduciary duties of partners *inter se*,[43] and, if the links between general and limited

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[42] Huffington v. Upchurch, 532 S.W.2d 576, 579 (Tex. 1976). A series of Texas cases illustrates the point. The Texas court adopted Justice Cardozo's analysis of the heightened fiduciary duties of managing partners in general partnerships.

> As managing partner of their partnership enterprise, respondent owed his partners even a greater duty of loyalty than is normally required. In the *Meinhard v. Salmon* case . . . the court said: "Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation. He was much more than a coadventurer. He was a managing coadventurer . . . For him and for those like him the rule of undivided loyalty is relentless and supreme."

Smith v. Bolin, 271 S.W.2d 93, 96 (Tex. 1954) (as cited in Huffington v. Upchurch, 532 S.W.2d 576, 579 (Tex. 1976)). The Fifth Circuit, applying Texas law, applied the *Smith-Huffington* analysis to the fiduciary obligations of general partners in limited partnerships. Palmer v. Fuqua, 641 F.2d 1146, 1155 (5th Cir. 1981); *see* CALLISON, *supra* note 5, § 21.07 (citing *Palmer*, 641 F.2d 1146) ("Since 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."); *see also Crenshaw*, 611 S.W.2d at 890.

> It is axiomatic that a managing partner in a general partnership owes his co-partners the highest fiduciary duty recognized by law. In a limited partnership, the general partner acting in complete control stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of the trust.

Id. (citations omitted); Ebest v. Bruce, 734 S.W.2d 915, 922 (Mo. Ct. App. 1987) ("Where a general partner of a limited partnership acts with complete control he stands in the same position to the limited partners as a trustee stands to the beneficiary of a trust.").

[43] The Revised Uniform Partnership Act narrowly and exclusively defines the fiduciary duties owed by a partner to the partnership and the other partners:

> (a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).
>
> (b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:
>
> (1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
>
> (2) to refrain from dealing with the partnership in the conduct or wind-

partnership law are maintained, in the fiduciary duties of general partners in limited partnerships. On the broad fiduciary duty point, RUPA differs from the UPA in four essential respects: RUPA is statutory and exclusive, restrictively defined, temporally limited, and broadly amendable.[44] I have argued that none of the four changes is appropriate to general partnership law.[45] They are even less appropriate when RUPA is applied to limited partnerships.

1. Statutory and Exclusive

RUPA is cast as an exclusive, statutory statement of the fiduciary duties of partners *inter se*. "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)."[46] This is a foundational change from the existing re-

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ing up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

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

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

U.P.A. § 404 (1994); Dickerson, *supra* note 2, at 143-47; J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. U. L. REV. 727, 752-58 (1992); John W. Larson et al., *Revised Uniform Partnership Act Reflects a Number of Significant Changes*, 10 J. PARTNERSHIP TAX'N 232 (1993); Robert M. Phillips, Comment, *Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 1179 (1993); Ribstein, *Prime Time*, *supra* note 2, at 52-61; Vestal, *Contractarian Error*, *supra* note 2, at 537-45; Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 16-28 (1993) [hereafter Weidner & Larson, *Overview*].

RUPA includes the duty of care as a component of partners' fiduciary duties. U.P.A. § 404(a) (1994). RUPA changes — or at least clarifies — the law in this regard. "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." U.P.A. § 404(c) (1994); Norwood P. Beveridge, Jr., *Duty of Care: The Partnership Cases*, 15 OKLA. CITY U. L. REV. 753 (1990); Dickerson, *supra* note 2, at 147-49; Weidner & Larson, *Overview*, *supra*, at 21-23.

[44] Vestal, *Contractarian Error*, *supra* note 2, at 531-34.

[45] *Id.* at 532, 537-45 (statutory and exclusive); *id.* at 532-33, 545-55 (restrictively defined); *id.* at 534, 555-56 (temporally limited); *id.* at 534, 556-63 (broadly amendable).

[46] U.P.A. § 404(a) (1994); Vestal, *Contractarian Error*, *supra* note 2, at 532. The drafters

gime. Starting with the common law and continuing after the adoption of the UPA, partnership law has been one of status, not contract, of broadly defined obligations, not narrowly cast agreements.[47] The fiduciary obligations of general partners in limited partnerships have been similarly cast.[48]

The transition from the broad concept of fiduciary duty under the UPA to the narrow, statutory and exclusive formulation under RUPA is inappropriate in at least three ways, each of which is even more important in the limited partnership context. First, the new regime is less flexible than the existing regime. RUPA is less able to cope with new situations and changing social expectations than is the UPA.[49] This is even more critical in the limited partnership context, given the recent history of change — one hesitates to say progress — in the development of alternative business forms such as limited liability companies, limited liability partnerships, and the like.

Another disadvantage is that, by recasting the general obligations of the fiduciary regime as more narrowly defined requirements, RUPA invites partners to take their conduct closer and closer to the outer boundary of permissible conduct.[50] A truly

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intended the formulation to be "both comprehensive and exclusive." U.P.A. § 404 cmt. 1 (1994). The evident intent is to displace, not merely supplement, principles of law and equity. U.P.A. § 104(a) (1994). "Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]." *Id.* This includes the law of agency. U.P.A. § 104 cmt. (1994).

[47] Vestal, *Contractarian Error*, *supra* note 2, at 526.

> Simply by virtue of being partners, the participants owed each other certain general obligations of conduct: "The duty of each partner to exercise toward the others the highest integrity and good faith is the very basis of their mutual rights in all partnership matters."

Id. (quoting EUGENE A. GILMORE, HANDBOOK ON THE LAW OF PARTNERSHIPS, INCLUDING LIMITED PARTNERSHIPS 375 (1911)) (footnote omitted).

[48] Boxer v. Husky Oil Co., 429 A.2d 995, 997 (Del. Ch. 1981); Ebest v. Bruce, 734 S.W.2d 915, 922 (Mo. Ct. App. 1987); Glanzer v. St. Joseph Indian Sch., 438 N.W.2d 204, 211 (S.D. 1989); Crenshaw v. Swenson, 611 S.W.2d 886, 890 (Tex. Civ. App. 1980).

[49] Vestal, *Contractarian Error*, *supra* note 2, at 537-38. Professor Deborah DeMott has made the parallel point with respect to intracorporate fiduciary obligations. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879-80.

[50] Vestal, *Contractarian Error*, *supra* note 2, at 539. Professor Larry Mitchell has nicely stated the general point in his treatment of close corporations:

> The language expressing these [fiduciary] norms is aspirational and studiously imprecise. The very ambiguity of the language conveys its moral content as the court's refusal to set lines is designed to discourage marginal conduct by mak-

fiduciary regime, in contrast, discourages such behavior since "fiduciary discourse has complex psychological appeal that simultaneously speaks to our better side to desire noble aspirations, while reprimanding our other side by instilling fear of fiduciary breach."[51] This is a problem in general partnership law; it is an even more significant problem when dealing with limited partnerships where one class of participants, the limited partners, are by definition removed from the day-to-day operations of the venture.[52]

Finally, the transition to a statutory and exclusive formulation of fiduciary duties in the general partnership situation is inappropriate because it predictably disadvantages classes of participants who ought not be structurally disadvantaged by the law: unsophisticated participants, inadvertent partners, partners with insufficient resources to retain counsel and enter into lengthy negotiations, and individuals with inadequate experience to appreciate the problem.[53] Except for inadvertency,[54] these characteristics are shared by limited partners. Limited partners are, as a general proposition, less sophisticated than the general

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> ing it difficult for a fiduciary to determine the point at which self-serving conduct will be prohibited, and thus to encourage conduct well within the borders.

Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1696 (1990); *see also* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829-32 (1983).

[51] Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 954, 968 (1993).

[52] Bassan v. Investment Exch. Corp., 524 P.2d 233, 237-38 (Wash. 1974).

> The benefit of this [fiduciary] standard is nowhere more apparent than in a limited partnership of this nature. The articles give the general partner the authority to conduct "any and all of the business of the Partnership . . . " Once the limited partner has joined the partnership he has no effective voice in the decision-making process. He must, then, be able to rely on the highest standard of conduct from the general partner. Any deviation from this must be clearly stated in terms that would give the limited partner the option of deciding whether or not, in the first instance, to join the partnership.

Id.; *see* Konover Dev. Corp. v. Zeller, 635 A.2d 798, 808-09 (Conn. 1994). The *Konover* court based its conclusion that "wise public policy counsels the retention of fiduciary principle" in "a balance between flexibility and fidelity" on the recognition that "an active general partner may use its position in the partnership for its advantage at the expense of a passive limited partner . . . ." *Id.*

[53] Vestal, *Contractarian Error*, *supra* note 2, at 541.

[54] R.U.L.P.A. § 201 (1985).

partners who typically organize the venture.[55] They are less likely to have retained counsel than general partners, and are less likely to enter into protracted negotiations.[56] Furthermore, limited partners are frequently without the experience to appreciate the hazards they face from general partner misconduct.[57]

2. Restrictively Defined

The decision to incorporate a statutory and exclusive statement of partners' fiduciary duties into RUPA inevitably — and inappropriately — narrowed the sweep of such duties.[58] But the RUPA formulation of partners' fiduciary duties is narrower and more restrictive than the statutory and exclusive form requires.[59] RUPA falls short in this regard in two distinct ways. First, the RUPA formulation excludes existing fiduciary obligations.[60] The common law obligates partners to make disclosures to each other in certain well-defined situations involving transac-

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[55] Courts have appropriately looked to differences in the sophistication levels of general and limited partners to determine whether a self-interested transaction by a general partner is fair. *Konover*, 635 A.2d at 804.

[56] *Id.* at 809. The *Konover* court adopted the Illinois Supreme Court's analysis on the question of what circumstances to evaluate to determine whether a fiduciary has met her burden of demonstrating that a self-interested transaction was fair. *Id.* (citing Brown v. Commercial Nat'l Bank of Peoria, 247 N.E.2d 894, *cert. denied*, 396 U.S. 961 (1969), *reh'g denied*, 396 U.S. 1047 (1970)). One of the three *Brown* factors the *Konover* court adopted, although not alone necessarily dispositive, is "that the principal had competent and independent advice before completing that transaction." *Id.* The *Konover* court weakened the *Brown* formulation somewhat by only requiring access to independent advice, and not requiring receipt of such advice. *Id.*

[57] *Id.* at 804. The *Konover* court noted that general partner actions in a limited partnership are "impressed with a fiduciary duty." *Id.* The court also held that such acts are to be evaluated "in light of all the facts of the case, including . . . the relative degrees of sophistication and bargaining power between the parties . . . ." *Id.*

[58] Vestal, *Contractarian Error*, *supra* note 2, at 545-46.

[59] *Id.* at 545-55; Letter from Melvin A. Eisenberg to the Commissioners on Uniform State Laws 2 (July 27, 1992) (criticizing June 1992 draft as narrow and restricted) (on file with author) [hereafter Eisenberg July 27, 1992 Letter].

[60] Vestal, *Contractarian Error*, *supra* note 2, at 546-49; U.P.A. § 404(b), (c) (1994).

tions between the partner and the partnership and the sale of partnership interests between partners.[61] This common-law disclosure obligation is distinguishable from — and was not displaced by — the statutory, demand-driven disclosure obligation under the UPA.[62] RUPA does not include such a disclosure obligation within the fiduciary duty formulation.[63] It can be argued, however, that RUPA may not displace the common law in this regard,[64] or that the common-law disclosure obligation can be found within the four corners of the statute.[65] Notwithstanding these contentions, it is bad policy to eliminate the common-law disclosure obligation in the partnership setting.[66] The error is compounded if this policy is also applied to limited partnerships. Both parts of the common-law disclosure obligation — partner transactions with the partnership and partner sales of partnership interests *inter se* — are more likely to protect limited partners than general partners.[67]

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[61] Allan W. Vestal, *"Ask Me No Questions and I'll Tell You No Lies": Statutory and Common-Law Disclosure Requirements Within High-Tech Joint Ventures*, 65 TUL. L. REV. 705, 727-35 (1991) [hereafter Vestal, *Disclosure*].

[62] U.P.A. § 20 (1969). "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." *Id.*; *see* Vestal, *Disclosure*, *supra* note 61, at 735-39.

[63] U.P.A. § 404(b) (1994).

[64] Allan W. Vestal, *The Disclosure Obligations of Partners Inter Se Under the Revised Uniform Partnership Act of 1994: Is the Contractarian Revolution Failing?*, 36 WM. & MARY L. REV. (forthcoming June 1995) [hereafter Vestal, *Contractarian Failing*].

[65] Vestal, *Contractarian Failing*, *supra* note 64 (discussing partners' transactions with partnership and partner transactions *inter se*).

[66] Vestal, *Disclosure*, *supra* note 61, at 746-57, 761-69.

[67] General partners control the day-to-day operations of the entity and the flow of information concerning entity affairs. As to transactions with the partnership, general partners are thus undoubtedly better situated to take unfair advantage of the limited partnership. Similarly, because of their control of the flow of information, general partners are more likely better positioned to take advantage of other partners in the sale and purchase of partnership interests. However, it is certainly possible to construct situations where limited partners will take advantage of each other when one has information the other lacks.

The second failure of the RUPA fiduciary duty formulation is that it affirmatively approves a key nonfiduciary premise.[68] RUPA provides: "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."[69] This is error of substantial proportions: error that turns the fiduciary premise of historic partnership law on its head,[70] while at the same time offending RUPA's organizational theory.[71] Self-interested transactions are more likely to be a problem in the limited partnership setting, where general partners typically have the advantage of better information and more opportunity for misconduct because of their day-to-day authority over enterprise activities. This provision, therefore, is particularly troublesome as applied to limited partnerships.

3. Temporally Limited

RUPA also changes the fiduciary duties of partners by shortening the period during which the duties are in force.[72] Under

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[68] Vestal, *Contractarian Error*, *supra* note 2, at 553-55.

[69] U.P.A. § 404(e) (1994).

[70] Vestal, *Contractarian Error*, *supra* note 2, at 553-55. Examining the original formulation from which the drafters started, which is a fair restatement of the current law, illustrates just how radical the change is. The drafters started from the formulation that "[a] partner must act solely on behalf of the partnership in all matters connected with that partner's position as a partner." R.U.P.A. JAN. 1989 DRAFT, *supra* note 7, § 20Y(a), at 17.

[71] Vestal, *Contractarian Error*, *supra* note 2, at 554. RUPA is organized so that the partnership agreement may modify statutory provisions governing relations of the partners *inter se* except where the right to modify is restricted. U.P.A. § 103(a) (1994). The section which states the restrictions on the power to modify the statutory defaults contains a general prohibition on elimination of the fiduciary duty of loyalty and the establishment of mechanisms through which acts that would otherwise violate the duty might be authorized. U.P.A. § 103(b)(3) (1994). There are no restrictions on the partnership agreement *increasing* the fiduciary duty of loyalty, and absent such restrictions the partners should be free to agree to such increases. But section 404(e) purports to take away that ability, by declaring that a partner cannot violate the fiduciary duty of loyalty or any obligation under the partnership agreement by self-interested actions. Such a provision is flatly inconsistent with the organizational premise of RUPA.

[72] Vestal, *Contractarian Error*, *supra* note 2, at 555-56; U.P.A. § 404(b), (c) (1994).

the UPA, the parties' fiduciary duties arise during the pre-partnership period, extend through the partnership period, and end only with the winding up of the partnership business.[73] In contrast, under RUPA, the parties' fiduciary duties do not arise in the pre-partnership period and end, as to one part of the duty, prior to the winding up period.[74] This restriction of coverage is particularly unfortunate in the case of limited partnerships because the formation period is a time of particular vulnerability for limited partners.

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[73] Vestal, *Contractarian Error*, *supra* note 2, at 555; Vestal, *Disclosure*, *supra* note 61, at 732.

> Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him [sic] 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 [sic] of its property.

U.P.A. § 21(a) (1969).

[74] Vestal, *Contractarian Error*, *supra* note 2, at 555-56. The fiduciary duty of loyalty obligation to account, and the prohibition on adverse dealings with the partnership apply during "the conduct and winding up of the partnership business . . . ." U.P.A. § 404(b)(1), (2) (1994). The third element of the fiduciary duty of loyalty, the non-competition requirement, is even more restricted. The duty is "to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership." U.P.A. § 404(b)(3) (1994). Presumably no partnership business can exist during the formation phase, rendering this formulation even less extensive than the first. Vestal, *Contractarian Error*, *supra* note 2, at 556 n.143.

Although there is some very weak authority to the contrary,[75] "the best rule is that general partners can breach their fiduciary

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[75] CALLISON, *supra* note 5, § 21.14. The two cases cited by Mr. Callison are pretty weak authority; he may be overly generous in an attempt to be perfectly fair. In Winslow v. Wong, 713 F. Supp. 1103, 1108 (N.D. Ill. 1989), Judge Aspen deals with the fiduciary duty count in a cursory manner:

> Finally, plaintiffs charge in Count X that the misrepresentations and failures to disclose made prior to formation of the partnership relationship constitute a breach of fiduciary duty. At a minimum, plaintiffs must plead a fiduciary relationship. The only alleged fiduciary relationship between the plaintiffs and defendants arises from their partnership agreement . . . . However, that relationship came into being after defendants' alleged misconduct. . . . Accordingly, plaintiffs have failed to state a claim of breach of fiduciary duty.

713 F. Supp. at 1108. The critical error in Judge Aspen's analysis is his assumption that because the fiduciary duty "arises from their partnership agreement," it is measured in time by that agreement. *Id.* In support of this step, Judge Aspen cited two cases. *See id.* (citing Bandringa v. Bandringa, 170 N.E.2d 116 (Ill. 1960); Nelson v. Warnke, 461 N.E.2d 523 (Ill. App. 1984)). Neither case stands for the proposition for which it is cited. *Bandringa* is a dispute over business assets between a widow and the deceased husband's son by prior marriage. *Bandringa*, 170 N.E.2d at 117-18. The husband and son had a partnership, and the Illinois Supreme Court stated that "[i]n a partnership, each partner is a fiduciary of the other." *Id.* at 120. However, nothing in the case related to the question of whether a fiduciary duty arises in the formation period. *Id.*

The use of *Nelson* is equally curious. This case involved a limited partnership in which one limited partner claimed the general partner breached his fiduciary duty by placing funds due plaintiff in non-interest-bearing accounts instead of placing the funds in interest-bearing accounts. *Nelson*, 461 N.E.2d at 523-24. The court cited the general rule that "a fiduciary relationship exists between partners." *Id.* at 524. However, the court found that the partnership agreement provision that specifically allowed the general partner to invest funds in non-interest-bearing accounts controlled. *Id.* The *Nelson* court noted in passing that courts have long respected partners' rights to establish, by means of an agreement, the duties and obligations owed one another. *Id.* It is quite a stretch to get from that unremarkable statement to Judge Aspen's proposition that no fiduciary duties arise in the formation stage. *Winslow*, 713 F. Supp. at 1108.

The other case cited in the Callison treatise is Waite v. Sylvester, 560 A.2d 619 (N.H. 1989). *Waite* does not support the general proposition that fiduciary duties do not arise in the limited partnership formation stage. The *Waite* court applied Georgia partnership law to the question of whether fiduciary duties arise during the formation stage of a Georgia limited partnership. *Waite*, 560 A.2d at 624-25. Citing numerous authorities, the court correctly stated the majority rule that such duties do arise in the formation stage:

> The rule generally accepted by other jurisdictions under the Uniform Partnership Act imposes a fiduciary duty not only with respect to transactions occurring during the partnership but also with respect to "those taking place during the negotiations leading to the formation of the partnership." . . . This rule reflects the assumption that during negotiations to form a partnership, the

duties in connection with pre-formation actions."[76] The rationale for the rule has been well-stated:

> [I]f this court were to accept defendant's contentions [that no fiduciary duty arises during the formation of a limited partnership], general partners would be immune from a claim of breach of fiduciary duty as long as they were careful to undertake the obligation prior to the purchase of any limited partnership interests. Such a result hardly comports with the dictates of justice. Therefore, this Court adopts the

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> parties are not dealing with one another at arm's length, but rather are attempting to structure a common enterprise, one which must be based on trust and loyalty.

Id. at 625. The court then noted that an alternative assumption, "that parties negotiating to form a partnership deal at arm's length in a struggle for competitive advantage, gives rise to the alternative rule imposing no fiduciary duty until the actual formation of a partnership." *Id.* Because Georgia had not adopted the UPA until 1985, and because another pre-UPA Georgia case supported the second assumption, the *Waite* court concluded that Georgia would have followed the minority rule, prior to the adoption of the UPA. *Id.* at 625-26. *Waite* thus hardly supports the general proposition that no fiduciary duty arises under the UPA until formation of the limited partnership.

Some pre-UPA cases support the "no fiduciary duty during pre-formation" rule. Hancock v. Gunter, 24 S.E.2d 772, 775 (Ga. 1943); Walker v. Patterson, 208 N.W. 3, 4-5 (Minn. 1926); Uhler v. Semple 20 N.J. Eq. 288, 292 (1869).

A partnership-related case lends some support for the proposition that no fiduciary duties arise during the pre-formation period. Phoenix Mut. Life Ins. Co. v. Shady Grove Plaza Ltd. Partnership, 734 F. Supp. 1181 (D. Md. 1990), *aff'd*, 937 F.2d 603 (4th Cir. 1991). *Phoenix Mutual* involved failed negotiations between a life insurance company and a Maryland limited partnership over the formation of a joint venture to develop a parcel of real property owned by the limited partnership. *Id.* at 1183. In rejecting a breach of fiduciary duty claim, the court stated:

> The [breach of fiduciary duty] claim . . . must fail because no fiduciary duty was owed by defendants to plaintiff. Plaintiff contends that a "special relationship" existed between the parties giving rise to creation of a fiduciary duty. This contention is specious. A fiduciary relationship hardly arises when commercial parties engage in contract negotiations. No trustee-beneficiary relationship arose here, nor do the facts indicate that any other sort of special relationship existed between these two negotiating parties.

Id. at 1191-92. The support from *Phoenix Mutual* is undercut in several ways. There is no indication that the plaintiff pled partnership as the special relationship. The parties intended a joint venture, not a partnership. *Id.* at 1182. The parties did not even form the joint venture. *Id.* To the extent *Phoenix Mutual* is considered on point, it seems to misstate the law.

[76] CALLISON, *supra* note 5, § 21.14. *See* Tobias v. First City Nat'l Bank & Trust Co., 709 F. Supp. 1266 (S.D.N.Y. 1989); Elk River Assocs. v. Huskin, 691 P.2d 1148, 1152 (Colo. App. 1984) (citing Lucas v. Abbott, 601 P.2d 1376, 1377 (Colo. 1978)) ("[a] fiduciary relationship can attach during the negotiations which precede formal execution of the certificate of limited partnership.").

> rule . . . that prior to formation of the partnership, a duty of good faith and highest integrity may attach . . . .[77]

4. Broadly Amendable

The final way in which RUPA changes the fiduciary duties of partners is by making those duties broadly amendable by the agreement of the partners.[78] RUPA allows parties to modify its statutory provisions, except where RUPA specifically limits the power of modification.[79] The fiduciary duty of loyalty is protected from modification by partner agreement only to the extent that they may not "eliminate" it.[80] In addition to allowing modifications of the duty of loyalty short of complete elimination, RUPA allows the parties two mechanisms for removing transactions from the sweep of the duty. One mechanism applies to classes of transactions,[81] the other to specific transactions.[82]

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[77] *Tobias*, 709 F. Supp. at 1278.

[78] Vestal, *Contractarian Error*, *supra* note 2, at 556-63.

[79] U.P.A. § 103(a), (b) (1994).

[80] *See* U.P.A. § 103 (b)(3) (1994) ("The partnership agreement may not . . . (3) eliminate the duty of loyalty under Section 404(b) . . . ."). The drafters were quite precise in how they formulated the restrictions on modifications of rights, duties, obligations, powers, and requirements. *See* U.P.A. § 103(b)(1), (6), (7), (8) (1994) (stating partnership agreement may not "vary"); U.P.A. § 103(b)(2) (1994) (stating partnership agreement may not "unreasonably restrict"); U.P.A. § 103(b)(3), (5) (1994) (stating partnership agreement may not "eliminate"); U.P.A. § 103(b)(4) (1994) (stating partnership agreement may not "unreasonably reduce"); U.P.A. § 103(b)(9) (1994) (stating partnership agreement may not "restrict"). The protection against elimination of the fiduciary duty of loyalty is the weakest protection of all, since it allows the duty to be diminished by a series of agreements which stop just short of total elimination. Vestal, *Contractarian Error*, *supra* note 2, at 558-59.

[81] *See* U.P.A. § 103(b)(3)(i) (1994) ("[t]he partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable.").

[82] *See* U.P.A. § 103(b)(3)(ii) (1994) ("[a]ll 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.").

In this respect, at least, application of RUPA to limited partnerships would not be a significant change. The Uniform Limited Partnership Act required the consent of all of the limited partners for a general partner to possess partnership property for personal gain. U.L.P.A. § 9(1) (1916). "[W]ithout the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to . . . (d) Possess partnership property . . . for other than a partnership purpose . . . . " *Id.*; *see also* Phillips v. KULA 200, Wick Realty, Inc., 629 P.2d 119, 122-23 (Haw. 1981). The rule under RULPA is different, however, in that the partnership agreement may specify a less than unanimous consent. R.U.L.P.A. § 403(a), (b) (1985); Alaska Continental Bank v. Anchorage Commercial Land Assocs., 781 P.2d 562, 564-65 (Alaska 1989).

This is quite different than the UPA rule, under which the duty of loyalty cannot be modified by contract[83] — it can only be specifically waived.[84]

Application of the RUPA rule to permit the structural modification of fiduciary duties would change the existing rule for limited partnerships as well. Notwithstanding the seemingly plenary power set forth in the statute,[85] the parties to a limited partnership agreement may only identify specific transactions as to which a fiduciary duty may be waived.[86] Public policy pre-

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[83] Vestal, *Contractarian Error*, *supra* note 2, at 557; Dickerson, *supra* note 2, at 111; REUSCHLEIN & GREGORY, *supra* note 8, § 181, at 263.

> The fiduciary duty of a partner . . . cannot be varied by a contrary agreement. This is very obvious because these rights are so fundamental to fair play and the basic concept of a partnership that even without explicit statutory language courts would likely have reached the same result.

REUSCHLEIN & GREGORY, *supra*, § 181, at 263. Professor Melvin Eisenberg gets to the same result from the "general principle of law . . . that contractual provisions that purport to materially vary the rules governing fiduciary duties, especially those concerned with self-dealing, would violate public policy." Letter from Melvin A. Eisenberg to the Commissioners on Uniform State Laws 2 (July 17, 1992) (on file with the author) [hereafter Eisenberg July 17, 1992 Letter].

[84] Vestal, *Contractarian Error*, *supra* note 2, at 557; Dickerson, *supra* note 2, at 116. "Fiduciary duty, once imposed, may be removed, but only by a showing of disclosure and consent." Dickerson, *supra* note 2, at 116.

[85] The RULPA section which makes the upstream linkage makes both the "rights and powers," and the "liabilities" of general partners what they would be in a general partnership, "[e]xcept as provided in this [Act] or in the partnership agreement . . . ," except that liabilities to third parties cannot be restricted by the partnership agreement. R.U.L.P.A. § 403(a), (b) (1985). The statutory language contains no restrictions on such partnership agreement provisions.

[86] The limited partnership agreement may authorize transactions which would otherwise violate the general partners' duty of loyalty. Bassan v. Investment Exch. Corp., 524 P.2d 233, 236 (Wash. 1974).

> Partners may include in partnership articles practically any agreement they wish and if the asserted self-dealing was actually contemplated and specifically authorized with a method for determining, in advance, the amount of the profit it would not, ipso facto, be impermissible and deemed wrongful.

Id. Broad, generic authorizations will not suffice. *See* Jerman v. O'Leary, 701 P.2d 1205, 1210-11 (Ariz. Ct. App. 1985) (finding general partner self-dealing transaction generically authorized in limited partnership agreement not removed from fiduciary duty); Labovitz v. Dolan, 545 N.E.2d 304, 310 (Ill. App. Ct. 1989), *appeal denied*, 550 N.E.2d 557 (Ill. 1990); Knopke v. Knopke, 837 S.W.2d 907, 915 (Mo. Ct. App. 1992) ("[g]rant of plenary authority is always subject to the fiduciary obligations of the general partner, who must deal prudently and honestly with the partnership and the other partners").

cludes the enforcement of limited partnership agreement provisions that strike at the fiduciary basis of the relationship.[87] This change would be particularly unfortunate, because limited partners often do not have adequate counsel regarding the partnership agreement. Moreover, limited partners usually have insufficient bargaining power to force serious negotiation of the partnership agreement.

B. The Problem of Retroactivity

RUPA is retroactive.[88] After an unspecified, but presumably brief, transition period, RUPA applies to all general partnerships, including those formed under the prior regime,[89] and

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> It is . . . clear . . . that despite having such broad discretion, [the general partner] still owed his limited partners a fiduciary duty, which necessarily encompasses the duty of exercising good faith, honesty, and fairness in his dealings with them and the funds of the partnership. . . . It is no answer to the claim that plaintiffs make in this case that partners have the right to establish among themselves their rights, duties and obligations, as though the exercise of that right releases, waives or delimits somehow, the high fiduciary duty owed to them by the general partner — a gloss we do not find anywhere in our law. On the contrary, the fiduciary duty exists concurrently with the obligations set forth in the partnership agreement whether or not expressed therein. . . . [A]lthough "partners are free to vary many aspects of their relationship *inter se* . . . they are not free to destroy its fiduciary character."

Labovitz, 545 N.E.2d at 310 (quoting Saballus v. Timke, 460 N.E.2d 755, 760 (Ill. App. Ct. 1983)).

[87] Appletree Square I Ltd. Partnership v. Investmark, Inc., 494 N.W.2d 889, 893 (Minn. Ct. App. 1993).

> Partners may change their common law and statutory duties by incorporating such changes in their partnership agreement . . . . However, where the major purpose of a contract clause is to shield wrongdoers from liability, the clause will be set aside as against public policy. Additionally, while "partners are free to vary many aspects of their relationship . . . they are not free to destroy its fiduciary character."

Id. (quoting *Saballus*, 460 N.E. 2d at 760; *see also* Konover Dev. Corp. v. Zeller, 635 A.2d 798, 807-09 (Conn. 1994); *Labovitz*, 545 N.E.2d at 310-11.

[88] Vestal, *Retroactive*, *supra* note 18, at 271-73.

[89] U.P.A. § 1006 (1994). RUPA section 1006 applies the new regime to partnerships formed after its effective date and to partnerships formed prior to its effective date which elect to be governed by the new regime. U.P.A. § 1006(a)(1), (2), (c) (1994). RUPA also establishes a transition period. U.P.A. § 1006(a) (1994). The duration of the transition period is left to the various states, but the commentary notes the parallel provision of Texas law which sets the transition period at five years. U.P.A. § 1006 cmt. (1994). At the end of the transition period RUPA is made applicable to all partnerships, including pre-

repeals the UPA.[90] RUPA's retroactivity is inappropriate for three reasons. First, RUPA makes a significant number of substantive changes in partnership law beyond the changes in the fiduciary duties of partners. These changes include a move toward an entity theory of the partnership relation.[91] RUPA changes the rules governing the authority of partners to bind the partnership.[92] The nature of a partnership's interest in property is changed by RUPA,[93] as are the rules governing the transfer of interests in partnership property.[94] RUPA also chang-

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existing partnerships which have not opted in to the new regime. U.P.A. § 1006(b) (1994).

[90] U.P.A. § 1005 (1994).

[91] "A partnership is an entity distinct from its partners." U.P.A. § 201 (1994). *See generally* Weidner & Larson, *Overview, supra* note 43, at 3 (discussing entity theory); The Committee on Uniform State Laws of the Association of the Bar of the City of New York, *The Entity Theory of Partnership and the Proposed Revisions to the Uniform Partnership Act*, 46 REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 563 (1991) (discussing entity theory); Larson et al., *supra* note 43 (discussing entity theory).

[92] Ribstein, *Prime Time, supra* note 2, at 46-48. Professor Ribstein traces one problem in this respect to the definition of when a person "receives a notification." *Id.* at 47. Under RUPA, a person "receives a notification . . . when the notification: (1) comes to the person's attention; or (2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications." U.P.A. § 102(d) (1994). Ribstein criticizes the definition because "[n]otification is too flexible a term to use in barring a third party from relying on a partner's authority." Ribstein, *Prime Time, supra* note 2, at 47. Furthermore, Ribstein is critical because "it is not clear how notification will be defined in the context of verbal statements." *Id.* Professor Ribstein also argues that the Revised Uniform Partnership Act will decrease the ability of third parties to rely on the "apparently . . . usual" nature of a transaction, forcing such parties to secure written evidence of authority. *Id.* at 47-48. RUPA does allow for written statements of partnership authority to be filed. U.P.A. § 303 (1994). Professor Ribstein notes that these filings will assist "only more formal partnerships and those dealing with them." Ribstein, *supra* note 2, at 47-48. A more supportive analysis of the Revised Uniform Partnership Act provisions on this point exists. Edward S. Merrill, *Partnership Property and Partnership Authority Under the Revised Uniform Partnership Act*, 49 BUS. LAW. 83, 87-90 (1993). The Reporters note that the apparent authority standard has been expanded. Weidner & Larson, *Overview, supra* note 43, at 31. UPA section 9(1) defined the standard as "apparently carrying on in the usual way the business of the partnership." U.P.A. § 9(1). RUPA section 301(1) defines the standard as "apparently carrying on in the ordinary course of the partnership business or business of the kind carried on by the partnership." U.P.A. § 301(1) (1994).

[93] "Property acquired by a partnership is property of the partnership and not of the partners individually." U.P.A. § 203 (1994). The Reporters for the Revised Uniform Partnership Act cite this section as "perhaps the most dramatic illustration of the benefits of an entity approach." Weidner & Larson, *Overview, supra* note 43, at 28-30. RUPA provides rules for determining when property is partnership property. U.P.A. § 204 (1994); *see also* Merrill, *supra* note 92, at 84-87 (discussing partnership property under RUPA); Larson et al., *supra* note 43, at 234 (discussing partnership property under RUPA).

[94] Although this is a subset of the general partner authority discussion, the Revised

es the formulation of partner liability for partnership debts,[95] as well as the method for calculating the partners' financial participation in the enterprise.[96] The remedies available to partners vary between the UPA and RUPA.[97] To change the substantive

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Uniform Partnership Act provides specific rules regarding the transfer of partnership property. U.P.A. § 302 (1994); *see also* Merrill, *supra* note 92, at 90-94 (discussing transfer of partnership property); Weidner & Larson, *Overview*, *supra* note 43, at 30-38 (discussing transfer of partnership property).

[95] The Revised Uniform Partnership Act makes all partner liability joint and several, unlike the Uniform Partnership Act which has joint, but not several, liability for other than wrongful acts and breaches of trust. *Compare* U.P.A. § 306(a) (1994) *with* U.P.A. § 15 (1969).

> Except as otherwise provided in subsection (b) [which provides "[a] person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as a partner"], all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

U.P.A. § 306(a) (1994). RUPA also contains an exhaustion requirement that a judgment creditor must satisfy before making recourse to individual partners' assets. *Id.* § 307(d); Hynes, *supra* note 43, at 731-33; Ribstein, *Prime Time*, *supra* note 2, at 48-50.

[96] *See* Ribstein, *Prime Time*, *supra* note 2, at 50 ("The major difference between the UPA and RUPA regarding financial rights is RUPA's assumption that each partner has an 'account' that is 'credited with' partner contributions and shares of profits and 'charged with' distributions and partner shares of losses."). The UPA states:

> Each partner is deemed to have an account that is:
>
> (1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and
>
> (2) charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

U.P.A. § 401(a) (1994).

[97] The Revised Uniform Partnership Act is intended to remove the accounting predicate for an action by a partner against the partnership:

> A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:
>
> (1) enforce the partner's rights under the partnership agreement;
>
> (2) enforce the partner's rights under this [Act] . . . or
>
> (3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

U.P.A. § 405(b) (1994); *see also* Ribstein, *Prime Time*, *supra* note 2, at 61-62 (discussing remedies under RUPA); Vestal, *Contractarian Failing*, *supra* note 64 (discussing remedies under RUPA); Susan J. Swinson, Note, *Partner v. Partner: Actions at Law for Wrongdoing in a Partnership*, 9 GA. ST. U. L. REV. 905, 925-27 (1993).

law of existing limited partnerships in these ways seems extraordinarily inappropriate.

The second way in which it is inappropriate to apply RUPA retroactively to existing limited partnerships is that RUPA attempts a critical change in the nature of the partnership relation.[98] Under the UPA, a general partner has an obligation to advance the collective interest and to refrain from using rights under the partnership agreement to unfairly disadvantage the other partners.[99] This is not the case under RUPA, which moves clearly toward increased tolerance of self-interested transactions by declaring: "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."[100] It is unclear how partners in existing general partnerships are intended to make this transition.[101] There is no

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[98] Vestal, *Retroactive, supra* note 18, at 274-79 (discussing substantive changes in partnership law under RUPA).

[99] Vestal, *Contractarian Error, supra* note 2, at 524-30 (discussing fiduciary duty under UPA).

[100] U.P.A. § 404(e) (1994). On one point, the allowance of transactions with the partnership, RUPA follows policy already established in RULPA. RUPA section 404(f) is derived from RULPA section 107. U.P.A. § 404 cmt. 6 (1994). *Compare* R.U.L.P.A. § 107 (1985) *with* U.P.A. § 404(f) (1994).

> Except as provided in the partnership agreement, a partner may lend money to and transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.

R.U.L.P.A. § 107 (1985).

> A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

U.P.A. § 404(f) (1994). RUPA omits the "[e]xcept as otherwise provided in the partnership agreement" language. *Id.* However, the omission is not consequential because under RUPA this statutory default is subject to unlimited modification by the agreement of the partners. U.P.A. § 103(a), (b) (1994).

The provision may be less powerful as it is applied than it appears as it is written. Retzke v. Larson, 803 P.2d 439, 442-43 (Ariz. Ct. App. 1990). In interpreting the Arizona enactment of RULPA section 107, the *Retzke* court found another portion of RULPA, the Arizona enactment of RULPA section 607, to constitute "other applicable law." *Id.* at 442. This reading of RULPA section 107 is highly questionable.

[101] Vestal, *Retroactive, supra* note 18, at 282-83 (discussing dynamics of retroactive application).

guidance at all on how this approval of self-interest will translate to the limited partnership setting. The lack of guidance is neither surprising nor inappropriate since the RUPA drafters did not intend their work to be applied to limited partnerships.

The final way in which it is inappropriate to make RUPA retroactively applicable to existing limited partnerships is that RUPA changes the role of the partnership agreement.[102] The difference is the latitude given partners to vary the terms of the statute. Under the UPA the parties are affirmatively given the authority to vary certain statutory provisions.[103] However, the parties are much less free to vary certain other statutory and common law provisions, particularly those regarding their fiduciary obligations *inter se*.[104] This is the essence of the fiduciary basis of existing partnership law.[105] RUPA is fundamentally different in this respect; the parties are given much more latitude to deviate from the terms of the statute.[106] Whether one agrees

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[102] *Id.* at 280-81.

[103] An important example is section 18. Section 18 provides that "[t]he rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules . . . ." U.P.A. § 18 (1969).

[104] Vestal, *Contractarian Error*, *supra* note 2, at 524-30 (discussing fiduciary regime under UPA).

[105] *See* Dickerson, *supra* note 2 (arguing that fiduciary duty is "fundamental"); Vestal, *Contractarian Error*, *supra* note 2 (arguing that fiduciary duty is foundational, not contractual); Eisenberg July 17, 1992 Letter, *supra* note 83 (stating that alteration of traditional fiduciary duty violates public policy); Eisenberg July 27, 1992 Letter, *supra* note 59 (stating same).

[106] RUPA tends toward a contractarian view of the partnership relation. Vestal, *Contractarian Error*, *supra* note 2, at 556-59; *see also* Ribstein, *Prime Time*, *supra* note 2, at 55; Larry E. Ribstein, *A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act*, 46 BUS. LAW. 111 (1990). In contractarian theory, the core rights and obligations of partners are contract-based, fully amendable, and narrowly construed. Professor Terry O'Neill traces the parallel evolution of corporation law. Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646, 656 (1992). In this view, fiduciary obligations are mere gap fillers, dependent on the express and implied terms of the specific contract at issue. Ribstein, *Prime Time*, *supra* note 2, at 52.

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

with the transformation of the partnership agreement's role between the UPA and RUPA, the role is clearly quite different. Retroactive application removes existing partnership agreements from the UPA, a system of fairly narrow limits on the range of possible outcomes, to RUPA, a system with very broad limits on the outcomes to which partners can negotiate, without the consent of the parties. In so doing, we engage in the assumption that the parties would have reached the same agreement under RUPA as they in fact negotiated under the UPA. There is no reason to believe the assumption is valid. Moving from general partnerships to limited partnerships compounds the problem because the general partnership statute is most important when we are dealing with questions of fiduciary duty. And on these questions, the courts have traditionally taken language with a contractarian tone[107] and given it a decidedly fiduciary interpretation.[108] How the changed role of the general partnership

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Id. (footnotes omitted). As gap fillers, they are merely defaults and are fully amendable by the parties. Dickerson, *supra* note 2, at 111-13; O'Neill, *supra*, at 656-57. Professor O'Neill correctly observes that, "[d]espite its seeming neutrality as to content . . . recharacterizing fiduciary rules as default rules fundamentally alters the source of . . . obligations, and thus requires a radically different analysis of them." O'Neill, *supra*, at 657. If the partners do not alter the statutory defaults, then the role of the court is to determine how the parties would have contracted on the term at issue. Thus the court does not review partner conduct against a generalized standard of conduct. The court instead attempts to determine how the parties would have resolved the situation had they addressed it ex ante. Ribstein, *Prime Time*, *supra* note 2, at 52. The Revised Uniform Partnership Act imperfectly adopts the contractarian view in this respect. As a general rule, the agreement of the parties controls over inconsistent provisions of the statute. U.P.A. § 103(a) (1994).

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

Id. There are, however, exceptions to the general rule; statutory provisions restrict the power of the parties to alter the statute. U.P.A. § 103(b) (1994). There is a strong argument that these restrictions are less effective than they first appear. However, even taken at face value, the restrictions in RUPA leave the parties with much more room in which to maneuver than they have under the Uniform Partnership Act. Vestal, *Contractarian Error*, *supra* note 2, at 556-63.

[107] *See* R.U.L.P.A. § 403(a), (b) (1985) ("Except as provided in this [Act] or in the partnership agreement . . . .").

[108] Jerman v. O'Leary, 701 P.2d 1205, 1209-10 (Ariz. Ct. App. 1985); Labovitz v. Dolan, 545 N.E.2d 304, 310 (Ill. App. Ct. 1989), *appeal denied*, 550 N.E.2d 557 (Ill. 1990); Knopke v. Knopke, 837 S.W.2d 907, 915 (Mo. Ct. App. 1992).

agreement under RUPA will factor into these limited partnership situations is an open — and significant — question.

C. Access to Information

There is one area where adoption of RUPA should not cause difficulties for limited partnerships: the core information rights of limited partners. While RUPA does change the information rights of partners, and does so in ways that are open to criticism,[109] the statutory information rights of limited partners should not be affected because RULPA has a specific provision on point that preempts any otherwise applicable general partnership law.[110] Moreover, RUPA continues the policy under the UPA[111] and RULPA[112] that the statutory disclosure provisions augment, rather than displace, the common-law disclosure obligations.[113] Nevertheless, it is instructive to review the RUPA in-

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[109] Vestal, *Contractarian Failing*, *supra* note 64.

[110] R.U.L.P.A. § 305 (1985).

> Each limited partner has the right to:
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> (1) inspect and copy any of the partnership records required to be maintained by Section 105; and
>
> (2) obtain from the general partners from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the limited partnership, (ii) promptly after becoming available, a copy of the limited partnership's federal, state, and local income tax returns for each year, and (iii) other information regarding the affairs of the limited partnership as is just and reasonable.

Id.

[111] The statutory information rights of partners in general partnerships under the Uniform Partnership Act did not displace their common-law information rights. Vestal, *Disclosure*, *supra* note 61, at 732, 736-39.

[112] The statutory information rights of limited partners in limited partnerships under the Revised Uniform Limited Partnership Act did not displace their common-law information rights. *See* Appletree Square I Limited Partnership v. Investmark, Inc., 494 N.W.2d 889, 893 (Minn. Ct. App. 1993) ("[RULPA § 305] did not eliminate respondents' common law duty to disclose material information to their partners.").

[113] The statute does not directly state whether it displaces or augments disclosure requirements, but the better argument is that RUPA does not displace the common-law disclosure obligations of partners. Vestal, *Contractarian Failing*, *supra* note 64. Like the Uniform Partnership Act, the Revised Uniform Partnership Act does not call for the wholesale displacement of the common law of partnerships. Rather, RUPA provides "[u]nless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]." U.P.A. § 104(a) (1994). No language in the RUPA statutory provisions that set forth the statutory disclosure obligations even hints that the drafters intended to work a displacement of the common-law disclosure obligations. *Compare* U.P.A. § 404(a) (1994)

formation provisions both to revisit the policy choices incorporated into RULPA and to consider the provisions of RUPA for inclusion in a comprehensive limited partnership statute.

As to the statutory formulations, the RULPA provision grants limited partners substantially narrower information rights than general partners have under RUPA.[114] Limited partners under RULPA have a right to inspect and copy only those records required to be maintained under that statute.[115] The inspection rights of partners under RUPA are to a broader, albeit undefined, class of "partnership books and records."[116] Limited partners under RULPA also have a right to "obtain from the general partners from time to time upon reasonable demand . . . true and full information regarding the state of the business and financial condition of the limited partnership . . . ."[117] The parallel provision of RUPA, under which a partner is entitled to receive "on demand, any . . . information concerning the partnership's business and affairs, except to the extent the de-

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("The only fiduciary duties a partner owes . . . .") *and* U.P.A. § 404(b) (1994) ("A partner's duty of loyalty . . . is limited to the following . . . .") *with* U.P.A. § 403(b) (1994) ("A partnership shall provide . . . access to its books and records."), U.P.A. § 403(c) (1994) ("Each partner and the partnership shall furnish . . . .") *and* U.P.A. § 405(b) (1994) ("A partner may maintain an action . . . with . . . an accounting . . . ."). The commentary supports the non-displacement interpretation. "Subsection [403](c) is a substantial revision of UPA Section 20 and provides a more comprehensive, *although not exclusive*, statement of partners' rights and duties with respect to partnership information other than books and records." U.P.A. § 403 cmt. 3 (1994) (emphasis added).

An exception would be the obligation to account for the unapproved use of partnership property. The obligation is an exception because the duty to account is included within the fiduciary duty of loyalty, U.P.A. § 404(b)(1) (1994), as to which the RUPA drafters did intend to displace the common law. Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427, 457 (1991).

[114] *See* Vestal, *Contractarian Failing*, *supra* note 64. *Compare* R.U.L.P.A. § 305 (1985) *with* U.P.A. § 403 (1994).

[115] R.U.L.P.A. § 305(1) (1985). RULPA requires each limited partnership to keep certain records including the names and addresses of partners; limited partnership certificates and amendments; recent tax returns and reports; written partnership agreements; recent financial statements; and information on contributions, distributions, and events of dissolution. R.U.L.P.A. § 105(a) (1985).

[116] U.P.A. § 403 (1994); Vestal, *Contractarian Failing*, *supra* note 64, at 13-14. RULPA and RUPA also differ in the ability of the partners to restrict access to the statutorily established body of available information. The Revised Uniform Limited Partnership Act permits no further restrictions. General partners under the Revised Uniform Partnership Act may change the statutory default, but may not by their agreement "unreasonably restrict the right of access to books and records under Section 403(b)." U.P.A. § 103(b)(2) (1994).

[117] R.U.L.P.A. § 305(2)(i) (1985).

mand or the information demanded is unreasonable or otherwise improper under the circumstances,"[118] is somewhat broader, although not as broad as the formulation under the original UPA.[119] Limited partners under RULPA have a right to "obtain from the general partners from time to time upon reasonable demand . . . promptly after becoming available, a copy of the limited partnership's federal, state, and local income tax returns for each year . . . ."[120] There is no directly parallel RUPA provision; access to partnership books and records is presumably broad enough to encompass access to partnership tax records.[121]

The final information right of limited partners under RULPA is to "obtain from the general partners from time to time upon reasonable demand . . . other information regarding the affairs of the limited partnership as is just and reasonable."[122] It is here RUPA provides the greatest measure of added protection, and suggests a provision which should be included in a comprehensive limited partnership statute. The information provided limited partners upon demand under RULPA[123] is also guaranteed general partners upon demand under RUPA,[124] but RUPA also guarantees partners, without a predicate demand, "any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act] . . . ."[125] With suitable modifications, which are facilitated in a comprehensive format, this type of non-demand-driven right to reasonably required information should be included in a comprehensive uniform limited partnership act.

Whether one agrees with the specific information-access provisions of RULPA is less important than the illustration of how a limited-partnership-specific provision can tailor important substantive requirements to this rather different situation.

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[118] U.P.A. § 403(c)(2) (1994).

[119] Vestal, *Contractarian Failing*, *supra* note 64.

[120] R.U.L.P.A. § 305(2)(ii) (1985).

[121] U.P.A. § 403(b) (1994); Vestal, *Contractarian Failing*, *supra* note 64.

[122] R.U.L.P.A. § 305(2)(iii) (1985).

[123] *Id.*

[124] U.P.A. § 403(c)(2) (1994).

[125] *Id.* § 403(c)(1); Vestal, *Contractarian Failing*, *supra* note 64.

D. The Solution is a Comprehensive Limited Partnership Statute

The fundamental question is whether the model for relations *inter se* of general partners in a general partnership is enough like the model for relations *inter se* of general and limited partners in a limited partnership to make it efficient to start from a common set of rules and overlay modifications for limited partnerships. The substantive changes in general partnership law embodied in RUPA both force the issue and strongly suggest making limited partnership law a comprehensive statute delinked from general partnership law.

III. UNIFORMITY AND CHOICE OF LAW

Beyond the procedural awkwardness and substantive inappropriateness of applying RUPA to limited partnerships lie two intriguing problems. The first involves a serious threat to the uniformity of law in this area; the second an opportunity for mischief by general partners.

A. The Threat to Uniformity

One reason the linkage between limited partnership law and general partnership law was acceptable for the last seventy-five years is that it was inconsequential. It was inconsequential because the general partnership laws of the various states have been remarkably stable and uniform, more so than has been the law of limited partnerships.[126] Thus, reference to the body of general partnership law has been a source of uniformity in limited partnership law.

It seems clear RUPA will change that situation; RUPA seems destined to be approved by the various states, if at all, in a number of substantively different versions.[127] In such a situation, continued reliance on the linkage between limited partnership law and the law of general partnerships would change from being a source of uniformity to being a source of dissonance.

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[126] Allan W. Vestal, *Choice of Law and the Fiduciary Duties of Partners Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219, 221-22 (1994) [hereafter Vestal, *Choice of Law*].

[127] *Id.* at 222; Vestal, *Contractarian Error*, *supra* note 2, at 577 n.237.

Commentators on both sides of the RUPA debate advance the merits of uniformity.[128] It would make sense, if we have failed to achieve uniformity in general partnership law, to delink the law of limited partnerships and attempt to preserve uniformity where we can.

B. Choice of Law and the Threat of General Partner Misconduct

The breakdown of uniformity in general partnership law also raises an interesting choice of law problem. Before RUPA, choice of law considerations in general partnership law have almost always been of merely theoretical interest — choice of law is not terribly important when the choices are identical. But with uniformity a thing of the past, choice of law becomes potentially important.[129]

The problem arises because the choice of law rules for limited partnership law and general partnership law are different. The selection of a body of law to govern the internal affairs of limited partnerships is straightforward: the law of the state of formation governs.[130] Selection of a body of law to govern the

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[128] Hynes, *supra* note 43, at 728 n.10; Vestal, *Contractarian Error*, *supra* note 2, at 577 n.237.

[129] Vestal, *Choice of Law*, *supra* note 126.

[130] That the laws of the state of formation govern the internal affairs of limited partnerships is implicit in the entire Revised Uniform Limited Partnership Act scheme. This implication may be analogous to the corporate internal affairs-*lex incorporationis* doctrine. Renunciation of authority over the internal affairs of foreign limited partnerships confirms this allocation of supervisory authority. R.U.L.P.A. § 901 (1985).

> Subject to the Constitution of this State, . . . the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners . . . .

Id.; CALLISON, *supra* note 5, § 28.02, at 28-1 to 28-2 (citing Gilbert Switzer & Assocs. v. National Hous. Partnership, Ltd., 641 F. Supp. 150 (D. Conn. 1986)). The Connecticut Federal District Court applied District of Columbia law to determine whether a limited partner in a District of Columbia limited partnership was a proper party for diversity purposes because District of Columbia law would govern such partner's liability. Gilbert Switzer & Assocs. v. National Hous. Partnership, Ltd., 641 F. Supp. 150, 152-53 (D. Conn. 1986).

Under the present regime, however, the law of the state of organization of a limited partnership does not always apply to determine the internal affairs of the venture. KE Property Management, Inc. v. 275 Madison Management Corp., 1993 WL 285900, *5 (Del. Ch. 1993). In *KE Property Management* the Delaware court applied New York law to determine whether the fraud of an agent of a general partner can be imputed to the general partner so as to allow ousting the general partner from a Delaware limited partnership. *Id.* The parties agreed to the application of New York law, but the court additionally noted that all

internal affairs of general partnerships is not as straightforward: the law of the jurisdiction in which the partnership has its "chief executive office" governs.[131]

The difference in choice of law rules could become critically important because the fiduciary obligations of general partners in a limited partnership are determined by reference to the general partnership statute, not the limited partnership statute.[132] The difference between the choice of law provisions leaves open the possibility that an unscrupulous general partner could manipulate the location of the chief executive office to reduce his or her fiduciary obligations to the limited partners. Such a general partner could write a limited partnership agreement reserving to the general partner the right to move the location of the chief executive office — a seemingly innocuous allocation of management power. The limited partnership could be formed in any jurisdiction which adopts RUPA and the chief executive office could be placed in a jurisdiction which adopts RUPA and has particularly lax fiduciary duty rules. By such a manipulation, the general partner could theoretically significantly reduce the protections available to the limited partners.[133]

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of the challenged acts occurred in New York. *Id.* The court then cited the most significant relationship test, before applying New York law. *Id.*

[131] U.P.A. § 106 (1994). "The law of the jurisdiction in which a partnership has its chief executive office governs relations among the partners and between the partners and the partnership." *Id.*

[132] R.U.L.P.A. § 403 (1985).

> (a) Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.
>
> (b) . . . Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

Id. Neither the Uniform Limited Partnership Act nor the Revised Uniform Limited Partnership Act contain provisions which themselves establish the fiduciary duties of general partners toward the limited partners.

[133] Another situation might appear at first glance to present a problem in determining fiduciary duties, but upon closer review does not. Consider a situation where State A is governed by RUPA and RULPA and State B is governed by the UPA and RULPA. If a limited partnership was formed by filing its certificate of limited partnership with the State A Secretary of State, then it is clearly governed by the limited partnership law of State A. R.U.L.P.A. § 201(b) (1985). But if the limited partnership has its chief executive office in State B is there a problem as to which general partnership law applies? The rules differ

C. The Solution is a Comprehensive Limited Partnership Statute

Both of these problems could be addressed by making the limited partnership law a comprehensive statute and delinking it from general partnership law. Such a move would give the various states an opportunity to increase the uniformity of limited partnership law, possibly even increasing the uniformity of the limited-partnership-specific elements of that law. And, by integrating all applicable provisions into one statute, with choice of law determined by state of formation, legislators could frustrate unscrupulous general partners who might otherwise manipulate general partnership choice of law to victimize limited partners.

CONCLUSION

RUPA places the existing regime of limited partnership law into an untenable position. The new partnership act confuses the linkage between limited partnership law and general partnership law, introduces inappropriate substantive rules into the limited partnership relationship, and promotes non-uniformity. Each of these problems could be solved by rewriting RUPA or by incorporating the prior general partnership law by reference. The best way to address the problem, however, would be to free limited partnership law from the body of general partnership law and reform it as a separate body of law. The time has come for a Comprehensive Uniform Limited Partnership Act.

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between the two jurisdictions. The general partnership law of State A, RUPA, provides: "The law of the jurisdiction in which a partnership has its chief executive office governs relations among the partners and between the partners and the partnership." U.P.A. § 106 (1994). The general partnership law of State B, the UPA, does not contain a choice of law provision, but defers to the general choice of law rules of State B. Assuming State B is a Restatement (Second) jurisdiction, the most significant relationship test determines which law applies. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 294 (1969); Vestal, *Choice of Law, supra* note 126, at 228-30. If the limited partnership agreement was negotiated and substantially performed in State A, then the choice of law rule of State B would normally select the law of State A. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(3) (1969); Vestal, *Choice of Law, supra* note 126, at 229-30. Thus the applicable rules differ. The problem, however, is avoided because the law of State A, the RUPA-based chief executive office test, does not claim application of the laws of State A in this circumstance. The chief executive office is, after all, in State B. In the absence of a claim that the law of State A should apply, the choice of law rule of State B, which would defer to such a claim, does not come into play. The law of State B applies.