

Management & Fiduciary Duties

- Management Rights

- Right to Know: Each partner has a right to obtain full and unfettered information about the partnership. This right is based on the partner's right to manage (which, presumably, would be impaired if the partner did not have full information) and risk of loss.
- Right to be Involved: Each partner has a right to participate in the partnership business.
- Right to Bind the Partnership: Similar to the agent's power to bind, a partner has the power to bind based on the partner's apparent authority and the power/right to bind based on the partner's actual authority.

Management & Fiduciary Duties

- Right to Bind the Partnership
 - Partner's Actual Authority
 - Partnership Agreement: Partners frequently describe the scope of a partner's actual authority
 - UPA/RUPA
 - A partner is an agent of the partnership. Accordingly, a partner has actual implied authority to bind the partnership for acts reasonably necessary to carry out the business of the partnership.
 - Absent a contrary agreement, all partners have equal rights of management. Accordingly, all partners have authority to make commitments reasonably made to carry out partnership business.

Management & Fiduciary Duties

- Partner's Actual Authority
 - An important limitation – Absent an agreement to the contrary, if a partner knows that one or more other partners would object to the action in question, the first partner has no actual authority to take the action.
- Right to Participate & Veto
 - Absent an agreement to the contrary, partners resolve disagreements by vote, each partner has one vote, some disputes requires a unanimous vote while others can be resolved by a majority vote.
- The Required Vote UPA:
 - Unless the partnership agreement provides otherwise,

Management & Fiduciary Duties

- The Required Vote UPA:
 - Continued: unanimous agreement is required for: extraordinary changes; assigning partnership property to creditors; disposing of good will; any act that would make it impossible to carry on business; confessing a judgment against partnership; submitting a partnership claim to arbitration; adding a new partner.
 - Matters in the ordinary course of business may generally be decided by majority vote, but an act in “contravention” of an agreement between the partners must receive unanimous approval.

Management & Fiduciary Duties

- The Required Vote RUPA:
 - Decisions requiring unanimous approval: admission of a new partner; substantial changes to partnership business; substantial increase in the size of the business that exposes partners to increased risk; changes to the standards for admitting/expelling partners.
- Management Deadlock: What happens when a majority vote is required, but is not possible?
 - Generally, the partner(s) forbidding the change win.
 - But, if the deadlock involves a substantial matter, the partners may choose to dissolve the partnership.

Management & Fiduciary Duties

- Agreements That Change Management Rights
 - Partners have the power/right to, and frequently do, change the default rules (e.g., one partner – one vote, majority vote, right to admit/expel partners, etc.).
 - In larger partnerships, partners frequently delegate decisions that might otherwise require a majority to a management committee.
- Limits on Agreements to Change Rights
 - UPA Limits: (1) partners cannot completely eliminate fiduciary duties, (2) changes related to fundamental matters are more likely to be judicially reviewed.
 - RUPA Limits: (1) partner's access to books/records may not be unreasonably restricted, (2) curtails right to change fiduciary duties, good faith and fair dealing.

Management & Fiduciary Duties

- Management Duties
 - Duty to Furnish Services: Partners have an affirmative right to participate in management but, apart from a contrary agreement, no duty to participate.
 - Duty of Care: Each partner owes a duty of care. The standard applied is "gross negligence."
 - It is a less demanding standard than that applied to agents. It presumes that a partner is both an agent and a principal, and thus owes a higher duty of care than mere agents.
 - A partner's misconduct may result in liability to the partner and the partnership.
 - Nonetheless, a partnership may still be required to indemnify the partner.

Management & Fiduciary Duties

- Fiduciary Duty of Loyalty - A Duty of the Highest Loyalty
 - RUPA Section 404(b) imposes on the partner a duty:
 - “(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
 - (2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and
 - (3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.”
 - It is a duty analogous to contract law’s duty of good faith and fair dealing and represents the current contractarian trend in the law.

Management & Fiduciary Duties

- Partner vs. Partnership Duty of Loyalty
 - Without informed consent, a partner may not:
 - Compete with the partnership
 - Steal opportunities from the partnership
 - Use partnership property for personal gain
 - Engage in conflicts of interest with the partnership
 - Noncompetition: A partner may not compete with the partnership, prior to dissolution, and will be required to disgorge any profits as a result of any competition.
 - Taking Business Opportunities: A partner may not take an opportunity from which the partnership might have profited or might have needed.

Management & Fiduciary Duties

- Using Partnership Property for Personal Gain: Any profits obtained will be disgorged and returned to the partnership. Note, however, the *de minimis* exception.
- Conflict of Interest: A partner has a conflict of interest when the partner causes or allows the partnership to do business with:
 - The partner,
 - A close member of the partner's family, or
 - An organization in which the partner has a substantial financial interest.
- The partner who violates this duty will be required to disgorge profits and pay damages.

Management & Fiduciary Duties

- Obligation of Good Faith & Fair Dealing: A contract term without specific definition intended to cover any breaches or obligations not covered by the duty of loyalty/care
- Different Interests Between/Among Partners
 - A partner does not violate a duty by dealing with another partner. Only excessive self-interest is wrongful, and falls into the following categories: (1) partner-to-partner transactions involving partnership-related financial transactions; (2) exercising discretionary right with copartners.
 - Full Disclosure: When transacting with a copartner involving buying or selling a partnership interest full disclosure, meaning disclosing material information regarding value and any item that could not be discovered by examining the books, is required.

Management & Fiduciary Duties

- Fair Dealing:
 - As a matter of process, partners are required to deal fairly with one another, which requires full disclosure and no coercion.
 - As a matter of substance, a partner is required to provide a “fair price” in partner-to-partner transactions.
 - Partners may not end a partnership nor expel a partner for the purpose of depriving a partner of legitimate and expectable profits.
- Agreements & Fiduciary Duties:
 - By contract, the partners may set standards against which a breach is determined, eliminate categories of behavior, but may not eliminate the duty of loyalty or obligation of good faith and fair dealing.
 - Contracts of waiver must be established by clear and convincing evidence, and are subject to contract law regarding construction and ambiguities.
 - Disagreements, claims for breach, may result in a claim for accounting just prior to dissolution. However, RUPA disfavors actions for an accounting.