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AN ANALYTIC FRAMEWORK FOR UNDERSTANDING AND EVALUATING THE FIDUCIARY DUTIES OF EDUCATORS

By Brett G. Scharffs* and John W. Welch**

I. INTRODUCTION

The law, it seems, is of increasing concern to teachers and educators.¹ A generation ago, teachers, administrators, schools, school districts, and universities seldom worried about being held legally liable for their actions or failures to act. This is no longer the case. In recent years, educators and educational institutions have been found legally liable for a variety of types of misconduct, in a wide range of contexts, and under several legal theories, including criminal law,² tort law,³ sexual

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1. See Mortimer B. Zuckerman, *Welcome to Sue City, U.S.A.*, U.S. News & World Rpt. 64, June 16, 2003; Mark Carpenter, "Education Not Litigation: The Paul D. Coverdell Teacher Liability Protection Act of 2001," http://www.cse.org/informed/pdf_files/cc293_Teacher_Protection_Act.pdf (March 21, 2001) ("[T]eachers are becoming more and more concerned each school year with the threat of lawsuits. In fact, a survey by the American Federation of Teachers shows that liability protection ranks among the top three concerns teachers want their unions to address."); Jessica Portner, *Fearful Teachers Buy Liability Insurance*, Education Week (March 29, 2000) (showing that the number of teachers purchasing liability insurance increased twenty-five percent between 1995 and 2000).

2. See e.g. *State v. Clay*, 2005 WL 17885 (Ohio App. 9th Dist. Jan. 5, 2005) (upholding the gross sexual imposition conviction of a driver's education teacher who fondled students who were fifteen and a half years old); *State v. Rainey*, 2003 WL 21302993 (Tenn. Crim. App. June 6, 2003) (upholding the conviction of a principal, who also served as the girl's basketball coach, on seven counts of sexual battery by an authority figure and eleven counts of statutory rape for his sexual

harassment statutes,⁴ contract law,⁵ “educational malpractice,”⁶ and recently under the vague and uncertain equitable concept of fiduciary duty.⁷

While there is nothing new about teachers, administrators, and schools thinking about their relationships with students and parents as deeply infused with responsibilities and obligations, historically these duties were not thought of in overtly legal terms.⁸ Now, however, a number of courts and commentators have suggested that the student-teacher relationship is a fiduciary relationship, carrying legal obligations and potential liability for misconduct.⁹

This article addresses two related questions. First, to what extent and under what circumstances does it make sense to characterize and treat the relationship of students with teachers, administrators, and educational institutions as a fiduciary relationship with legally enforced duties? Second, under what circumstances are teachers and educational institutions more or less likely to be considered to have breached a

relationship with a tenth grade student).

3. See *Hubbard v. Canton City Sch. Bd. of Educ.*, 780 N.E.2d 543, 547 (Ohio 2002) (holding that a city school board of education was not immune from liability on negligent retention and supervision claim asserted by parent of middle school students in connection with alleged sexual assaults on those students by a teacher on school premises); *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982) (holding that a school could be liable for a tort committed by a student on the school grounds).

4. See e.g. *Mandsager v. U. of N. C.*, 269 F. Supp. 2d 662, 678–79 (M.D.N.C. 2003) (holding that graduate student alleged sufficient facts to establish university’s liability for subjecting her to a sexually hostile environment resulting from professor’s sexual harassment).

5. See e.g. *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979) (analyzing duties between college and students under rubric of contract law, and noting that “the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication”), *rev’d*, 661 F.2d 756 (9th Cir. 1981) (the case was reversed on a provision of Montana’s Constitution regarding a waiver of immunity, the Ninth Circuit did not reach the merits of the contract claim).

6. A majority of states do not recognize a cause of action for “educational malpractice.” Kent Weeks and Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 156 (2002). See e.g. *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992) (rejecting student athlete’s claim that the university committed malpractice by failing to provide a meaningful education and prepare him for employment).

7. See *Chou v. U. of Chi.*, 254 F.3d 1347, 1354 (Fed. Cir. 2001); *Johnson v. Schmitz*, 119 F. Supp. 2d 90 (Conn. 2000).

8. This trend towards seeking juriscentric solutions to a wide range of social problems and frictions is in no way unique to the educational setting. Many commentators have expressed concern about the trend towards seeking legal solutions to every type of problem in every type of relationship. See Zuckerman, *supra* n. 1; Philip K. Howard, *The Collapse of the Common Good: How America’s Lawsuit Culture Undermines Our Freedom* (Ballantine 2002); Philip K. Howard, *Death of Common Sense: How Law Is Suffocating America* (G.K. Hall & Co. 1995).

9. See generally Melissa Astala, *Wronged by a Professor? Breach of Fiduciary Duty as a Remedy in Intellectual Property Cases*, 3 Houston Bus. & Tax L.J. 31 (2003); Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. Tex. L. Rev. 753 (2004); Weeks & Haglund, *supra* n. 6.

fiduciary duty?

In Part II of this study we will discuss the concept of fiduciary duty, the range of relationships to which this idea applies, and the doctrinal approaches usually taken in analyzing alleged breaches of fiduciary duty. We argue that while these doctrinal approaches are important, they are remarkably unhelpful in providing guidance in assessing and predicting the circumstances in which a court will find that there has been a breach of fiduciary duty. In Part III we introduce and develop a new framework for assessing the likelihood that a court will find a fiduciary duty to exist, and whether there has been a breach of that duty. This new analytic framework focuses upon a number of factors that courts use in a wide array of situations and relationships to assess first, whether a fiduciary relationship exists and if so whether the magnitude of duty owed by a particular fiduciary to a particular beneficiary is relatively large or small, and second, whether the magnitude of an alleged breach is large or small. In Part IV we apply this new framework for assessing the magnitude of duties and breaches to four areas in which courts have been asked to hold teachers or educational institutions liable as fiduciaries: (i) the evaluation and grading of students; (ii) professor-student research relationships; (iii) patents and other intellectual property; and (iv) sexual harassment. We conclude in Part V that teachers, educational institutions, attorneys, and courts will be able to assess alleged violations of fiduciary duty more effectively by applying this analytical framework to asserted violations of fiduciary duty.

II. THE CONCEPT OF FIDUCIARY DUTY

A. *What It Means to Be a Fiduciary*

Black's Law Dictionary defines a fiduciary as "one who owes to another the duties of good faith, trust, confidence, and candor."¹⁰ The word "fiduciary" stems from several Latin terms, including *fides*,¹¹ or faith,¹² which represented the conscience of the people, their morals,¹³

10. *Black's Law Dictionary* 640 (Bryan A. Garner ed., 7th ed., West 1999) [hereinafter *Black's*].

11. David Cowan Bayne, *The Philosophy of Corporate Control: A Treatise on the Law of Fiduciary Duty* 36 (Loyola U. Press 1986); *The Barnhart Dictionary of Etymology* 380 (Robert K. Barnhart ed., H.W. Wilson 1988) [hereinafter *Barnhart*]; *The Oxford Dictionary of English Etymology* 354 (C.T. Onions ed., Oxford U. Press 1966) [hereinafter *Oxford*].

12. *Black's*, *supra* n. 10, at 640; *see also* *Barnhart*, *supra* n. 11, at 380; Bayne, *supra* n. 11, at 36; *Oxford*, *supra* note 11, at 354.

13. Hans Julius Wolff, *Roman Law: An Historical Introduction* 65, 74-75 (U. of Okla. Press 1951).

and their trust or confidence,¹⁴ and the term *fiducia*,¹⁵ meaning a “position of trust,”¹⁶ or “in trust.”¹⁷ While rooted in concepts such as good faith, trust, and confidence, the duties that courts have categorized under the rubric of fiduciary duty are many and varied, and are often described in very lofty terms. These duties include the duty not to commit fraud, not to engage in self-dealing, to be loyal, obedient, diligent, and exercise good faith, to disclose material information, and to exercise care and prudence, among others.

For example, in perhaps the most well-known case ever decided about fiduciary duty, *Meinhard v. Salmon*, Judge Cardozo explained:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.¹⁸

While courts often resort to strongly normative language in describing fiduciary duties, in practice they are often much less demanding in the degree of selflessness and competence required of fiduciaries than their rhetoric would suggest. For example, in the *Meinhard* case, Judge Cardozo suggests that the managing coadventurer might have fulfilled his fiduciary duties merely by disclosing a business opportunity to his co-adventurer, and then letting him compete for it.¹⁹ As a further example, in the case of directors of corporations, the

14. Bayne, *supra* n. 11, at 36–37.

15. Barnhart, *supra* n. 11, at 380; Bayne, *supra* n. 11, at 36; Oxford, *supra* n. 11, at 354; Ernest Vinter, *A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts* 1 (3d ed., Cambridge 1955).

16. Vinter, *supra* n. 15, at 1.

17. See e.g. *id.*

18. *Meinhard v. Salmon*, 164 N.E. 545, 547 (N.Y. 1928) (citation omitted).

19. *Id.* at 547 (“[Salmon] might have warned Meinhard that the plan had been submitted, and that either would be free to compete for the award. If he had done this, we do not need to say whether he would have been under a duty, if successful in the competition, to hold the lease so acquired for the benefit of a venture than about to end, and thus prolong by indirection its responsibilities and duties. The trouble about his conduct is that he excluded his coadventurer from any chance to compete”). A duty to disclose and compete, however, would appear to be much less demanding than Cardozo’s earlier rhetoric (a “duty of the finest loyalty,” a “punctilio of an honor the most sensitive,” and “undivided loyalty”) might lead one to believe.

business judgment rule provides a presumption that directors act honestly, in good faith, and in an informed manner that is in the best interests of the corporation,²⁰ which creates a safe harbor that may shield directors from judgments that are mistaken,²¹ or even egregiously stupid.²² Thus, focusing on the morally charged language employed by judges in discussing fiduciary duties can create a misleading impression that all fiduciaries owe high magnitude duties in all situations, and that all fiduciaries will be held fully liable for the consequences of even low magnitude breaches of duty. The reality is much more complicated, as cases involving alleged breaches of fiduciary duties by educators bear out.

B. *Fiduciary Relationships and Duties*

Fiduciary duty is a concept that applies to a large variety of relationships in almost every imaginable precinct of law and life, including a trustee and beneficiary, a guardian and ward, an agent and principal, a lawyer and client, a member of the clergy and a parishioner, a director and a corporation, a partner and the other partners, an employer and an employee, and a broker and client. Indeed, the number of potential fiduciary relationships is continuously expanding,²³ and today sometimes includes the relationship of teachers, educators, and educational institutions and their students.

The concept is further complicated by the fact that fiduciary duties arise under a broad array of laws, including a variety of federal statutes, state statutes, and the common law. Add to this the literally thousands of cases decided by courts involving alleged violations of fiduciary duty, and the law of fiduciary duty is by any measure an exceedingly complex and nuanced area of the law.

C. *Teachers and Educators as Fiduciaries*

Historically, the association of teachers and their students has been viewed as a fiduciary relationship.²⁴ Over the past thirty years, however,

20. See e.g. *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

21. See e.g. *Kamin v. American Express Co.*, 383 N.Y.S.2d 807 (S. Ct. 1976), *aff'd*, 387 N.Y.S.2d 993 (App. Div. 1st Dept. 1976).

22. See *In re Caremark Intl. Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996) ("[W]hether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through 'stupid' to 'egregious' or 'irrational,' provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests.")

23. *Bennet v. Hodge*, 29 N.E.2d 524, 527 (Ill. 1940); *Studybaker v. Cofield*, 61 S.W.2d 246, 250 (Mo. 1901); *Peckham v. Johnson*, 98 S.W.2d 408, 416 (Tex. Civ. App. 1936); see also George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* § 7, 29 (2d ed., West 1984).

24. See e.g. Warren A. Seavey, *Dismissal of Students: "Duc Process"*, 70 Harv. L. Rev. 1406,

the pendulum, given momentum by concern for student privacy and free-speech rights, swung dramatically towards viewing this relationship as one defined by rights (primarily of students) rather than duties.²⁵ In recent years, fueled perhaps by the events of Columbine and other high-profile incidents, the pendulum has begun to swing back towards viewing the relationship as a trust concept defined by duties (of teachers and schools), as well as rights. It seems likely that the concept of fiduciary duty will play a growing role in the legal and moral assessment of educational relationships in the future.

Courts and commentators have identified a wide variety of fiduciary duties that teachers and educational institutions might owe to students, including a duty to provide an educational environment free of sexual harassment,²⁶ duties arising from the services provided by a university's faculty and staff as advisors to undergraduate students,²⁷ and duties governing the conduct of dissertation advisers and committees towards graduate students.²⁸

D. *The Doctrinal Approaches to Analyzing Fiduciary Duties*

The usual approach employed by U.S. courts and commentators for analyzing fiduciary duties focuses upon established doctrines and concepts. In its most basic form, the doctrinal approach first asks whether someone is a fiduciary, and if so who the beneficiaries of that fiduciary's duties are. Thus, the threshold question is whether or not a fiduciary relationship exists. In order for there to be a fiduciary relationship, there must be an element of entrustment by one person (the

1407 n. 3 (1957) ("Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students.").

25. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). *Tinker* significantly undermined the historic authority of schools, administrators, and teachers to make and enforce rules controlling student behavior. See Kelly Frels, *Balancing Students' Rights and Schools' Responsibilities*, 37 Hous. L. Rev. 117, 119–20 (2000). In the 1970s, *Tinker* provided the foundation for several cases regarding students' rights, including the right to distribute literature on campus, see e.g. *Trachtman v. Anker*, 563 F.2d 512, 516 (2d Cir. 1977); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076 (5th Cir. 1973); to use "indecent speech" in school newspapers and at student assemblies, see *Papish v. Bd. of Curators*, 410 U.S. 667, 671 (1973); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973); to wear long hair, see e.g. *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972); *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971), to boycott and skip classes, see e.g. *Dunn v. Tyler Indep. Sch. Dist.*, 460 F.2d 137, 146–47 (5th Cir. 1972), and to hold demonstrations on school grounds during the school day, see e.g. *Pickens v. Okolona Mun. Separate Sch. Dist.*, 594 F.2d 433, 437 (5th Cir. 1979); see Frels, *supra* n. 25, at 120–21.

26. Weeks & Haglund, *supra* n. 6, at 154.

27. *Id.*

28. *Id.*

beneficiary) to another (the fiduciary), an element of power and control by the fiduciary over the interests and well-being of the beneficiary, and an element of proactivity and protection where under the fiduciary subordinates her own interests in order to pursue and protect the interests of the beneficiary.

If a fiduciary relationship exists, the doctrinal approach then asks (i) what duties the fiduciary owes to the beneficiaries (*e.g.*, duty of loyalty, duty of care, duty of disclosure); and (ii) whether the fiduciary has breached any of those duties (*e.g.*, through a conflict of interest, gross negligence, or failure to disclose material information).

With so many relationships characterized as fiduciary relationships, and with so many distinctly identifiable fiduciary duties, it may be surprising that courts are not more aggressive in finding breaches of fiduciary duty. But fiduciary concepts apply in different ways in different areas of the law and in different situations within a particular area of the law. Supreme Court Justice Felix Frankfurter wrote, "To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?"²⁹ Enquiries about alleged breaches of fiduciary duty involve highly detailed factual analyses of a wide array of factors that affect the magnitude of duty and magnitude of breach in a given situation.

E. The Inadequacy of Traditional Doctrinal Approaches

The formulaic application of doctrinal categories often does as much to obfuscate as it does to illuminate the likely outcome of a particular case. Doctrinal approaches, while valuable, often do not seem to give much guidance as to whether or not liability will result from an alleged breach of duty. In the educational context, for example, sometimes courts conclude that the relationship between a teacher and a student is a fiduciary relationship,³⁰ and sometimes courts conclude that it is not a fiduciary relationship.³¹ In addition, at times a court will conclude that specific behavior constitutes a breach of fiduciary duty, while another court will conclude that apparently very similar behavior is not a breach of fiduciary duty.³² It is tempting to throw up one's arms in despair at

29. *Securities and Exch. Commn. v. Chenery Corp.*, 318 U.S. 80, 85–86 (1943).

30. *See Chou v. U. of Chi.*, 254 F.3d 1347 (Fed. Cir. 2001); *Johnson v. Schmitz*, 119 F. Supp. 2d 90 (Conn. 2000).

31. *Andre v. Pace U.*, 655 N.Y.S.2d 777 (App. Div. 2d Dept. 1996); *Ho v. U. of Tex. at Arlington*, 984 S.W.2d 672 (Tex. App. 7th Dist. 1998); *Maas v. Corp. of Gonzaga U.*, 618 P.2d 106, 108 (Wash. App. Div. 3 1980).

32. *Compare Chou*, 254 F.3d at 1347 with *U. of W. Va. v. VanVoorhies*, 278 F.3d 1288 (Fed. Cir. 2002).

finding any rhyme or reason to the myriad of cases with conflicting and difficult to reconcile results. Such a temptation, however, should be resisted, at least unless we really are certain that there are no underlying organizing principles that operate in this area of the law.

Focusing exclusively upon whether a fiduciary relationship exists, and whether a particular duty has been breached is often not particularly helpful in trying to determine whether a court is likely to find that there has been an actionable breach of fiduciary duty. As Arthur R. Pinto and Douglas M. Branson explain, “While [fiduciary] duty is described in terms of these two categories of care and loyalty, there is in fact a sliding scale of duty because some cases fall between those duties. As the [Delaware] Supreme Court indicated in *Guth v. Loft*, fiduciary duty is subject to “no fixed scale.”³³

III. AN ANALYTIC FRAMEWORK FOR ASSESSING THE MAGNITUDE OF DUTIES AND BREACHES

An analysis of cases involving alleged breaches of fiduciary duty in a broad array of relationships and in many areas of the law reveals that the law in practice, if not always in doctrine, has an extremely nuanced, subtle, and sophisticated approach to evaluating claims of breach of fiduciary duty.³⁴ Courts in nearly every imaginable jurisdiction have decided numerous cases concerning fiduciary duty,³⁵ including a surprisingly large number of cases that assess the claim that teachers or educational institutions have violated a fiduciary duty.³⁶ Collectively, a close reading of cases alleging breaches of fiduciary duty suggests that there are perhaps as many as thirty factors that courts routinely take into account when determining whether the particular duties owed by a fiduciary in a particular situation are of a high or low magnitude, and whether there has been a breach of fiduciary duty, and if so whether that breach is large or small. While courts’ consideration of these factors is by no means systematic, a study of numerous cases involving a wide variety

33. Arthur R. Pinto and Douglas M. Branson, *Understanding Corporate Law* 182 (LexisNexis 1999) (quoting *Guth v. Loft*, 5 A.2d 503 (Del. 1961)).

34. We are working on an article about quantifying the magnitude of fiduciary duties and their breach in a wide array of fiduciary relationships. A draft of the article, tentatively titled, “A General Theory of Fiduciary Relativity,” is on file with the authors.

35. For example, in a Westlaw search of the fifty state courts in the United States, the phrase “fiduciary duty” appears in over 27,400 cases. Search of Westlaw, ALLSTATES database (Jan. 17, 2005).

36. In the same directory, over 550 cases include the phrase “fiduciary duty” in the same paragraph with words like teacher, educator, school, university, or professor. Search of Westlaw, ALLSTATES database (Jan. 17, 2005).

of types of fiduciary relationships in a wide variety of contexts reveals a number of criteria and considerations that courts predictably and regularly utilize.

We propose that in determining the likelihood of legal liability for an alleged breach of fiduciary duty, one should engage in three inter-related enquiries. (1) The first enquiry involves considering and analyzing a set of factors and indicia to determine whether a fiduciary relationship between two parties exists and, more importantly, the *magnitude* of duty that arises within that particular relationship and context.³⁷ Such an enquiry helps determine whether a fiduciary in a particular situation owes a relatively high or relatively low degree of duty. (2) The second enquiry involves analyzing a related set of factors and indicia that will help determine the *height or degree* of the fiduciary's behavior. (3) The third step is to measure the amplitude of the fiduciary's performance to determine the *extent to which* that conduct exceeded or fell short of the required level of performance.³⁸ If there has been a shortfall or breach of duty, this enquiry then determines the *amount or type* of appropriate remedies. This step also considers how easy or difficult it would have been for the fiduciary to fulfill his or her duty, whether there are any special reasons why a court should not get involved in second guessing the fiduciary or substituting its judgment for that of the fiduciary, and whether there is an available remedy that would be appropriate in rectifying or at least ameliorating the effects of the breach of duty.³⁹

This approach to analyzing fiduciary duties is helpful in several ways. It inherently recognizes that all fiduciary duties are not created equal, and that all breaches will not be regarded as equally harmful.⁴⁰ For example, by conducting this type of analysis we learn that courts are most likely to find liability in cases involving duties of a high magnitude coupled with breaches of a high magnitude and where there is an available appropriate remedy. Conversely, if a low-degree duty is coupled with a low-degree breach and there is no remedy that seems appropriate for the situation, courts are unlikely to impose legal liability. Cases involving a high degree of duty and a low degree breach, or cases involving a low degree duty and a serious breach prove to be the most difficult situations in which to

37. *Infra*, Part III.A.

38. *Infra*, Part III.B.

39. *Infra*, Part III.C.

40. As Arthur R. Pinto and Douglas M. Branson explain, "While [fiduciary] duty is described in terms of [the] categories of care and loyalty, there is in fact a sliding scale of duty because some cases fall between those duties. As the [Delaware] Supreme Court indicated in the *Guth* case fiduciary duty is subject to 'no fixed scale.'" Arthur R. Pinto and Douglas M. Branson, *Understanding Corporate Law* 182 (LexisNexis 1999) (quoting *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1961)).

predict outcomes; but even in such cases, the approach outlined below allows lawyers, judges, and litigants to identify and produce all the evidence systematically relevant to a sound resolution of the case. In all cases, this approach identifies specific, quantifiable elements that allow judges, lawyers, and administrators to marshal the evidence and make reasonable judgments in calculating the magnitude of duty owed and the degree of violation of duty that may have occurred.

This analytical approach is also helpful in answering important doctrinal questions such as: What standard of review should a court apply to an alleged breach? Which party should bear the burden of proof? If there is a high magnitude duty, then a court is more likely to require defendants to bear the burden of proof that their performance was satisfactory. On the other hand, if the magnitude of duty is relatively low, courts will be more likely to require the plaintiff to bear the burden of proof. In determining the proper standard of review, if there is a large breach, it is unlikely that a strong presumption of propriety (such as that afforded by the business judgment rule) in favor of the fiduciary will apply. On the other hand, if there is only a small alleged breach, the plaintiff will more likely be required to bear the burden of proof before liability will be found.

This analytic framework is useful in evaluating a broad array of fiduciary relationships and is particularly helpful in the complex and multifaceted area of evaluating alleged breaches of duty by teachers and educators. Without such a framework, the cases may seem confusing or inconsistent since an overly simplistic application of doctrines such as “duty of care” and “duty of loyalty” may result in outcomes that are difficult to explain or reconcile with other decisions. When the underlying questions of magnitude of duty and magnitude of breach are considered, however, an underlying consistency and coherence in the decisions begins to come into focus, albeit of an imperfect and sometimes contestable nature.

As is the case in each unique context, some of the factors that contribute to an analysis of the magnitude of duties and the magnitude of breaches are of particular significance in the educational setting. For example, in assessing magnitude of duties and breaches in the educational context, the following considerations are often important: the degree of actual power or control entrusted to the fiduciary, the age and vulnerability of the beneficiary, the experience and sophistication of both the fiduciary and the beneficiary, the formality in the creation of the agreement between the fiduciary and beneficiary, the history and duration of the relationship, the degree and cause of reliance in a relationship, the divergence of interests between the fiduciary and

beneficiary, and the specificity of duty, among others.

The following section outlines the main factors and considerations that courts take into account in determining (A) the magnitude of duty, and (B) the magnitude of an alleged breach. Each of these many factors and considerations can become pertinent in any given case. Before turning to the application of these factors in educational settings, this section will also consider briefly (C) the availability and formulation of appropriate remedies.

A. *Quantifying the Magnitude of Duty Owed*

After determining that there is prima facie evidence that a fiduciary relationship exists,⁴¹ the first step in analyzing an alleged breach of fiduciary duty should be to quantify the magnitude of duty that exists in a particular case or situation. Four broad considerations are relevant to a determination of whether a relatively high or relatively low degree of duty is owed by the fiduciary to the beneficiary: (1) the characteristics of the parties, both the fiduciary and the beneficiary in absolute as well as relative terms; (2) the characteristics of the relationship between the fiduciaries and beneficiaries; (3) the characteristics of the subject matter of the alleged breach, including the significance of the event in question, the value of the entrustment at stake, and the public importance of the matter; and (4) the underlying source of the legal action. Many of these considerations exist on a continuum, with one end of the continuum corresponding to a higher degree of duty and the other end of the continuum corresponding to a lower degree of duty.

1. *Characteristics of the Parties*

The first group of factors in quantifying the magnitude of duty that a fiduciary owes a beneficiary relate to the respective characteristics of the parties. These characteristics are significant both in an absolute sense, and when comparing the relative characteristics of the fiduciary and beneficiary.

a. *The Fiduciary*

A number of characteristics of fiduciaries themselves are relevant to determining the degree of duty to which the fiduciary will be held. Most

41. Prima facie evidence that a fiduciary relationship exists will be based upon a determination that there has been an element of entrustment by one person (the beneficiary) to another (the fiduciary), an element of power and control by the fiduciary over the interests and well-being of the beneficiary, and an element of proactivity and protection under which the fiduciary subordinates her own interests in order to pursue and protect the interests of the beneficiary.

Similarly, if an alleged breach of duty takes place within a sphere of conduct where a fiduciary has a high degree of power and control, it is more likely that a high degree of duty will be found.⁵⁰ On the other hand, fiduciaries with relatively little power are subject to comparatively lower degrees of duty. A teacher or educator with a high degree of actual power or control over a student will more likely be found to have a high degree of duty.⁵¹ In contrast, if a teacher has relatively little control over a student, or is closely supervised and has little control over curricular and other choices, and is acting within the scope of his authority, it is more likely that he will be held to a lower degree of duty.

- *Degree of Delegated Fiduciary Discretion:* (high, medium, low). Closely related to power is discretion, which also exists on a continuum. A fiduciary who has a high degree of discretion in how he performs is more likely to be deemed to have a relatively high magnitude of duty.⁵² In contrast, a fiduciary who operates in

Ill. Dec. 23, 2003) (“The common law imposes [a fiduciary duty] when the disparity between the parties in knowledge or power relevant to the performance of an undertaking is so vast that it is a reasonable inference that had the parties in advance negotiated expressly over the issue they would have agreed that the agent owed the principal the high duty that we have described, because otherwise the principal would be placing himself at the agent’s mercy.” (citing *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992))); *In re Transcolor Corp.*, 296 B.R. 343, 372 (Bankr. D. Md. 2003) (“As the party in control of both Alleco and Transcolor, Lapidus owed a fiduciary duty to NCB as trustee”); *D’Addario v. Geller*, 264 F. Supp. 2d 367, 395 (E.D. Va. 2003) (“[I]t appears clear to the court that Florida state law imposes a fiduciary duty on corporate officers who control the corporation through ownership of a majority of the stock.” (citing *Tillis v. United Parts, Inc.*, 395 So. 2d 618, 619 (Fla. 5th Dist. App. 1981))). In contrast, if a fiduciary has a relatively low amount of actual power or control, it is less likely that he will be found in breach of a fiduciary duty. *Baker v. Kingsley*, 294 F. Supp. 2d 970, 976 (N.D. Ill. 2003) (noting that certain Management Committee members were not fiduciaries as to a funding plan because of a lack of power or control “with respect to the investment of the plan’s assets or the plan’s funding”), *rev’d and remanded*, F.3d 649, 664 (7th Cir. 2004); *In re Estate of King*, 2003 WL 21946723 at *2 (Tenn. Ct. App. Apr. 11, 2003) (finding that an executor and beneficiary of a will did not have sufficient power or control over the decedent to give rise to a fiduciary duty).

50. *Vikell Investors Pacific, Inc. v. Hampden, Ltd.*, 946 P.2d 589, 596–597 (Colo. App. 1997) (“A fiduciary relationship generally arises when one party has a high degree of control over the property or subject matter of another, when the benefiting party places a high level of trust and confidence in the fiduciary to look out for the beneficiary’s best interest, or when one party relies on another’s high degree of expertise in an area.”) (citing *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992)).

51. See e.g. *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 97 (D. Conn. 2000) (denying a motion to dismiss a breach of fiduciary duty claim, brought by a graduate student against his dissertation advisors and Yale University for misappropriating his dissertation ideas, on the basis that a fiduciary relationship might be established since the advisors and the university were “in a position of power and authority” over him).

52. See *McAdams v. Mass. Mut. Life Ins. Co.*, 391 F.3d 287, 303 (1st Cir. 2004) (“[T]he question of whether one party owes fiduciary duties to another is a question of fact. [A] [k]ey factor . . . in this fact-specific inquiry include[s] . . . whether one party has granted another party a

a tightly bounded environment with little discretion will more likely be found to have a relatively low magnitude of duty. We would expect that the degree of discretion that a teacher or educator enjoys would have a predictable effect on the magnitude of duty that such a teacher or educator will be deemed to have.

- *Dominance of One Fiduciary Over Other Fiduciaries:* (high, medium, low). Sometimes fiduciaries act as a group, such as the board of directors of a corporation. In such a situation, if a particular fiduciary among a group of fiduciaries exerts a dominant influence over the others, it is common for that fiduciary to be held to have a relatively higher degree of duty.⁵³ In contrast, a fiduciary who is dominated rather than the dominator may be held to have a lower degree of duty, although such a fiduciary will not be absolved from all duty and will not be allowed to cite alleged powerlessness as an excuse for abject failures or abdications of duty. We would expect in the educational context as well, that a fiduciary, such as a powerful school administrator or department chair, who dominates other fiduciaries will be held to have a higher degree of duty.
- *Amount of Compensation Received by Fiduciary:* (high, medium, low, none). As a general rule, highly compensated fiduciaries are likely to be deemed to have a comparatively greater degree of duty than fiduciaries who receive no significant monetary compensation.⁵⁴ Even fiduciaries who are not paid at

great deal of discretion.”) (citation omitted); *U.S. v. Britt*, 388 F.3d 1369, 1372 (11th Cir. 2004) (holding that because of her broad discretion and loose supervision, a part-time clerk with the Social Security Administration had a fiduciary relationship necessary to find an abuse of a position of trust); *Ohio Civ. Serv. Employees Assn., AFSCME Local 11, AFL-CIO v. St. Empl. Relations Bd.*, 759 N.E. 2d 794, 798–799 (Ohio App. 10th Dist. 2001) (“the authority to make discretionary investment and banking decisions shows a ‘highly fiduciary’ relationship.” (citing *State ex rel Charlton v. Corrigan*, 521 N.E.2d 804 (Ohio 1988))); *Blankenship v. Boyle*, 329 F. Supp 1089 (D.C. Cir. 1971) (finding that trustees who had considerable discretion to manage the trust breached the fiduciary obligation to maximize trust income by prudent investment); see also *In re Enron Corp.*, 2003 WL 1562202 at *16 (Bankr. S.D.N.Y. Mar. 21, 2003) (recognizing that “the authority to use estate property in the ordinary course of business confers upon the debtor the corresponding discretion to exercise reasonable judgment in ordinary affairs bounded only the debtor’s fiduciary duties”).

53. See e.g. *In re Abrams*, 229 B.R. 784, 791 (Bankr. App. 9th Cir. 1999) (“In reviewing the line of cases that gave rise to the rule in Texas that the managing partner of a partnership owes to his copartners the highest fiduciary obligations known at law, it is clear that the issue of control has always been the critical fact looked to by the courts in imposing this high level of responsibility.” (citing *In re Bennett*, 989 F.2d 779, 789 (5th Cir. 1993))); *Huffington v. Upchurch*, 532 S.W.2d 576, 579 (Tex. 1976) (holding that a managing partner “owed to his copartners one of the highest fiduciaries recognized in the law” and quoting Justice Cardozo’s comments concerning managing fiduciaries in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928) where he stated that “[f]or [managing coadventurers] the rule of undivided loyalty is relentless and supreme”).

54. See *Zimmer Paper Products, Inc. v. Berger & Montague*, 758 F.2d 86, 97 (3d Cir. 1985)

all, however, may be viewed as having violated their fiduciary duties, especially if there are other indicia that suggest a relatively high magnitude duty or high magnitude breach. The level of compensation of a teacher, professor, educator, or administrator will likely be a relevant factor in determining the degree of duty to which the individual will be held. We would also expect as a general matter that volunteers in an educational setting will be held to a lower degree of duty than paid professionals.

- *Other Roles of Fiduciary:* (full-time, part-time). If a fiduciary serves in a full-time capacity, it is more likely she will be held to a high degree of duty.⁵⁵ In contrast, if a fiduciary has a host of unrelated responsibilities, interests, or opportunities, a lower degree of duty may be applied.⁵⁶ We would expect this general consideration to apply in the educational context in a similar way, with full-time educational professionals being held to a higher degree of duty than part-time employees.

(Weis, J., dissenting) (arguing that lawyers who did not give adequate notice of an antitrust class action settlement “were not only fiduciaries, but well compensated ones as well”) (majority did not look at amount of compensation and found they did not breach any fiduciary relationship); *In re Est. of Maurice*, 249 A.2d 334, 336 (Pa. 1969) (finding that beneficiaries had grounds for their claim of surcharge against the executor who had overpaid taxes, because “[i]t is only reasonable and logical to expect that services so *well compensated* for should have been performed in a careful and skillful manner”) (emphasis added); *Compare with Sweickley Township Volunteer Fire Co. No. 3 v. First Nat'l Bank of Herminie*, 8 Pa. D. & C. 4th 297, 299–300 (Pa. Com. Pleas Ct. 1990) (finding that volunteer fire fighters did not have a fiduciary duty as there is a lower standard for “people like the officers and directors of a non-profit fire company, who serve the public without compensation and who, therefore, should not be held to the same standard as those who serve profit-making entities and derive remuneration for their services.”). Some courts affirmatively reject the suggestion that compensation should be a factor in assessing magnitude of duty. See e.g. *Matter of Neuschwander*, 747 P.2d 104, 106 (Kan. 1987) (“The fact that [the non-profit corporation’s] directors and officers served as volunteers without compensation does not reduce the fiduciary duty owed to the corporation.”); *Atty. Grievance Commn. v. Silk*, 369 A.2d 70, 71 (Md. 1977) (“[T]here appears to be no sound reason for regarding misappropriations committed in a non-professional capacity more leniently than those committed in a professional capacity. Each involves a breach of trust or of a fiduciary relationship and bear equally on the fitness of a lawyer to practice his profession.”).

55. See *T.A. Pelsue Co. v. Grand Enters., Inc.*, 782 F. Supp. 1476, 1486-1487 (D. Colo. 1991) (finding and emphasizing that a former, “full-time” employee violated his fiduciary duty by competing with his former employer).

56. See e.g. *BEP, Inc. v. Atkinson*, 174 F. Supp. 2d 400, 409 (D. Md. 2001) (finding defendant “was merely a part time employee and owed no fiduciary duty by competing with his former employer”); *Sweickley Township Vol. Fire Co. No. 3 v. First Natl. Bank of Herminie*, 8 Pa. D. & C. 4th 297, 299–300 (Pa. Com. Pleas Ct. 1990) (finding that volunteer fire fighters did not breach any fiduciary duty); but see *U.S. v. Britt*, 388 F.3d 1369, 1370 (11th Cir. 2004) (rejecting defendant’s argument that her part-time status as a clerk for the Social Security Administration excluded her from a fiduciary relationship, on the basis that her high degree of discretion and loose supervision was sufficient to place her in a position of trust).

(b) The Beneficiary

Characteristics of the beneficiary are also relevant to determining the degree of duty that a fiduciary will owe a beneficiary. Courts often focus upon the following characteristics:

- *Number and Uniqueness of Beneficiaries:* (large, medium, small). In general, if there is a large number of beneficiaries, such as in a large public corporation, fiduciaries will have a relatively high degree of duty.⁵⁷ If, however, the number of beneficiaries is small, but their needs are great or distinctive, then the fact that a fiduciary fails to tailor his services to those needs may also be relevant to an assessment of degree of duty. In the education context, we would expect the number of beneficiaries to be quite a complex factor in evaluating the magnitude of duty. A teacher of a small class of students for whom that teacher has primary responsibility might be held to a relatively high degree of duty, while a teacher who has less exposure to a much larger number of students might have a lower degree of duty. On the other hand, the expectations of an administrator who is responsible for a large school or district might be higher than those of an administrator with a smaller stewardship.
- *Age of Beneficiaries:* (aged, adult, young adult, adolescent, minor children, infants). The age of beneficiaries is also often a factor in assessing the degree of duty, particularly when the number of beneficiaries is relatively small and the similarities among the beneficiaries is high. Duties owed to infants, minor children, adolescents, young adults, adults, aged, and the infirm will vary according to the needs and capacities of the beneficiaries.⁵⁸ In general, a higher degree of duty will be owed to

57. See *Felix v. Lucent Technologies, Inc.*, 387 F.3d 1146 (10th Cir. 2004) (noting the large number, vulnerability, and reliance of plan beneficiaries who were impacted by a company merger decision in considering an ERISA preemption of employees' claims); *QVC Network, Inc. v. Paramount Commun. Inc.*, 635 A.2d 1245, 1266 (Del. Ch. 1993) (finding that the board of directors had breached their duty to shareholders of a large public company by not becoming fully informed during change of control negotiations); *Lewis v. Honeywell, Inc.*, 1987 WL 14747 at * 2 (Del. Ch. July 28, 1987) ("By reason of the director defendants' positions within the Company, they are in fiduciary relationships with plaintiff and the other class members [shareholders] and owe to them the highest obligations of good faith and fair dealing. The director defendants have breached their fiduciary duties to the Company's public shareholders. . . .").

58. See *U.S. v. Sanders*, 48 Fed. Appx. 527, 531 (6th Cir. 2002) (unpublished) ("[T]he purpose of appointing a conservator is 'to preserve the estate of an incompetent or disabled person.' . . . [A] conservator 'shall have the same duties and powers as a guardian of a minor, and all laws related to the guardianship of a minor shall be applicable to a conservator.' 'A conservator occupies a fiduciary position of trust of the highest and most sacred character.'" (quoting *Folts v. Jones*, 132 S.W.2d 205, 208 (Tenn. 1939)); *Moose v. U.S.*, 674 F.2d 1277 (9th Cir. 1982) (reversing the lower courts ruling that the court lacked jurisdiction over claims by minor Indian children against the United States

very young and very old beneficiaries. We would expect the age of beneficiaries to be a significant factor in the educational context, where the types and magnitude of duties owed to children in day care or pre-school situations will vary from the duties owed to elementary, secondary, high school, college, and graduate level students.⁵⁹ For example, one area where teachers, professors and other educators are often accused of fiduciary malfeasance involves sexual relationships with students. We would expect the magnitude of duty surrounding sexual relations with students would be much higher when dealing with minors than with adults, and even when dealing with adults, we would expect a higher degree of duty would attend younger adults in comparison with older adults.

- *Experience and Sophistication of Beneficiaries:* (high, medium, low). Closely related to age is the experience and sophistication of beneficiaries. Courts often consider this as a separate factor, however, since chronological age is an imperfect proxy for ascertaining experience and sophistication. In general, fiduciaries will owe a greater degree of duty to beneficiaries who are relatively inexperienced or unsophisticated.⁶⁰ In the educational

government for mismanagement of a fund created to pay a judgment intended to compensate Indian children's tribe for the loss of their homeland. The court found that the government did hold the judgment in trust for the children and reversed for determination on breach); *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 273 (1st Dist. 2003) ("The vulnerability that is the necessary predicate of a confidential [or fiduciary] relation . . . usually arises from advanced age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity." (internal citation omitted)).

59. See e.g. *Ward v. Greene*, 2001 WL 358873 at **6-7 (Conn. Super. Mar. 20, 2001) (recognizing the fiduciary relationship and duty of a day care provider, who fatally abused a two-year-old, and a child placement agency, which failed repeatedly to report previous cases of abuse by the provider); *Drueding v. St. Paul Fire & Marine Ins. Co.*, 482 So. 2d 83, 86 (La. App. 4th Cir. 1986) (finding that supervisors at day care nurseries are "charged with the highest duty of care toward children placed in their custody" and that "supervising teachers must follow a reasonable standard of care commensurate with the age of the children under the attendant circumstances").

60. See *Kearns v. Ford Motor Co.*, 203 U.S.P.Q. (BNA) 884, 888 (E.D. Mich. 1978) (contrasting sick, elderly plaintiffs in cases finding fiduciary relationships with a plaintiff who had "extensive education, experience, and presumed sophistication"); *Stokes v. Henson*, 265 Cal. Rptr. 836, 195-96 (App. 4th Dist. 1990) (holding that Henson breached his fiduciary duty to "unsophisticated" investors and knew as much); *Bero Motors v. Gen. Motors Corp.*, 2001 WL 1167533 at *5 (Mich. App. Oct. 2, 2001) (finding no fiduciary relationship where "the parties' existing and continued relationship was driven by profits" against "a commercial backdrop where sophisticated commercial entities . . . regulate the minutiae of their relationship through written contracts"); *Moore v. Gregory*, 131 S.E. 692, 706 (Va. 1926) (finding that a fiduciary relationship existed between an heir and the other parties in the transaction of his uncle's will, because the other parties "occupied a position of superiority and influence over the [heir], on account of the confidence he naturally reposed in them by reason of ties of relationship, age, and superior intelligence and experience" and because the heir "had barely reached his majority, was merely a college student, and had no business or legal training or experience").

context, as with age, we would expect courts to be quite sensitive to the experience and sophistication of students, both in an absolute sense, and also in comparison to their teachers and other fiduciaries.⁶¹ For example, in cases involving alleged sexual misconduct of teachers, the experience and sophistication of students is likely to be considered by courts, although not always explicitly or directly.

- *Vulnerability of Beneficiaries*: (high, medium, low). Another related factor is the vulnerability of beneficiaries. A high degree of beneficiary vulnerability will correlate with a high degree of duty, whereas beneficiaries who are not particularly vulnerable will correlate with a lower degree of duty being owed to them.⁶² In cases involving alleged breaches of duty by educators, we would expect vulnerability to be a relevant consideration, especially in the pre-collegiate context, where the age and experience of students, as well as mental, physical and emotional handicaps, might be relevant to an assessment of the degree of duty.⁶³

2. *Characteristics of the Relationship*

In addition to the characteristics of the parties, the characteristics of the relationship between a fiduciary and beneficiary are also important in determining the magnitude of duty of fiduciaries. Courts consider a number of features of the fiduciary relationship, including factors relating to its formation, the history and duration of the relationship before an alleged breach occurs, the nature of the beneficiary's reliance upon the fiduciary, and divergences in the interests of the fiduciary and beneficiary. It is not always possible, nor is it particularly important, to

61. See e.g. *Chou v. U. of Chi.*, 254 F.3d 1347, 1362–63 (Fed. Cir. 2001) (finding a fiduciary duty owed by department chairman to graduate student, based on the “disparity of their experiences and roles, and [the department chairman’s] responsibility to make patenting decisions regarding [the student’s] inventions”).

62. See e.g. *Interclaim Holdings Ltd. v. Ness, Motely, Loadholt, Richardson & Poole*, 298 F. Supp. 2d 746 (N.D. Ill. 2004) (allowing for punitive damages against a law firm that breached its fiduciary, noting that vulnerability is a factor in whether to allow punitive damages in this type of case to remain); *Ingle v. Glamore Motor Sales, Inc.*, 535 N.E.2d 1311, (N.Y. 1989) (Hancock, J., dissenting) (“The singular vulnerability of the minority in a close corporation has prompted courts of equity to impose fiduciary obligations on the majority shareholders in their dealings with the minority and to require ‘a high degree of fidelity and good faith.’” (quoting *Fender v. Prescott*, 476 N.Y.S.2d 128, 131–132 (App. Div. 1st Dept. 1984))).

63. See e.g. *Schneider v. Plymouth St. College*, 744 A.2d 101, 105 (N.H. 1999) (“In the context of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one. Students are in a vulnerable situation because [of] ‘the power differential between faculty and students.’” (citations omitted)) (quoting Karen Bogart & Nan Stein, *Breaking the Silence: Sexual Harassment in Education*, 64 Peabody J. Educ. 146, 157 (1987))).

clearly demark factors that might affect a court's assessment of a relationship as opposed to factors relevant to an assessment of the characteristics of the parties to that relationship. Nevertheless, courts often consider the relationship and its characteristics as a separate topic of enquiry, and it is useful to focus upon the relationship between the parties as well as the respective characteristics of each party.

(a) Formation of the Fiduciary Relationship

- *Timing and Length of Relationship*: (long-standing or recent; continuous, intermittent, one time). In general, a higher degree of duty will attend long standing, continuous fiduciary relationships in comparison to recent or one-time relationships, although heightened duties may occur at the outset and at important intermittent times during a relationship.⁶⁴ In the educational context, we would expect that teacher-student relationships that extend over many years, such as a research relationship between a professor and graduate student, or between a thesis advisor and a PhD candidate, might have an attendant heightened magnitude of duty. On the other hand, we would expect a much lower magnitude of duty to exist in a situation involving a professor of a large introductory course who is accused of a breach of duty by a student who received a disappointing grade.

- *Degree of Formality in Creation*: (formal, informal). In general, a higher degree of duty will exist in fiduciary relationships, such as trusts, where there is a high degree of formality in the creation of the relationship.⁶⁵ In contrast, relationships created merely through reliance will have a lower degree of duty. Cases involving breach of fiduciary duty often distinguish between formal and informal fiduciary relationships, and the magnitude

64. See *In re Sallee*, 286 F.3d 878 (6th Cir. 2002) (finding that debtors with no longstanding relationship with a bank, and merely a generalized trust in the bank, did not have a fiduciary relationship with the bank); *Lakewood Developments Corp. v. Schultheis*, 2004 WL 764729 at *7 (N.D. Tex. Apr. 6, 2004) (finding that no fiduciary duty existed between the parties because "there is no allegation of the type of long-standing interaction based on mutual trust necessary to suggest that any confidential relationship existed").

65. See *Thanksgiving Tower Partners v. Anros Thanksgiving*, 64 F.3d 227, 231 (5th Cir. 1995) ("[A] fiduciary relationship can be created outside of a formal agreement. . . . This relationship, however, 'is an extraordinary one' and will only be established in exceptional cases." (quoting *Stephanz v. Laird*, 846 S.W.2d 895, 901 (Tex. App. 1st Dist. 1993))); *Adorno v. Delgado*, 2004 WL 2348158 at *2 (Ohio App. 9th Dist. Oct. 20, 2004) ("A fiduciary relationship may be created either formally, by contract, or informally. An informal relationship, however, cannot be unilateral, and occurs only where "both parties understand that a special relationship or trust has been reposed." (quoting *Culbertson v. Wigley Title Agency, Inc.*, 2002 WL 219570 at *3 (Ohio App. 9th Dist. Feb. 13, 2002) (internal quotation omitted))).

of duty owed in informal fiduciary relationships tends to be lower. To the extent that a fiduciary relationship is found to exist between educators and students, we would expect courts to evaluate those situations under rubrics applicable to informal fiduciary relationships, in which case courts would be expected to focus upon factors such as whether there was an especially high degree of reliance and trust, an unusual amount of power, or particular vulnerability on the part of the beneficiary.

- *Names, Titles, and Level of Expectations:* (lofty, serious, mundane). A higher degree of duty will exist if names, titles, and expectations indicate a high degree of seriousness and responsibility.⁶⁶ Although in general we would not expect this factor to be of tremendous significance in cases involving teachers, it is more likely that titles might be emphasized in cases involving school administrators or university professors.
- *Nature and Degree of Promises Involved:* (solemn, serious, casual). If a fiduciary agrees to be bound by specific promises and covenants, it is likely that a higher degree of duty will exist, especially if those duties are described in ways that indicate a high degree of duty. We would also expect this factor to be of relatively little significance in the educational context, although courts might look to university publications such as course catalogues or promotional literature for evidence of specific promises or expectations that might be created.
- *Specificity of Powers and Duties of Fiduciary:* (core, peripheral; specific, unspecific). Another characteristic of the fiduciary relationship that will affect the magnitude of a fiduciary's duty is the specificity and clarity of the fiduciary's power's and duties. To the extent that the powers and duties of a fiduciary are described or understood in detail, or the closer that a matter lies to the core of a fiduciary's area of responsibility, it will be more likely that a high degree of duty will be required in connection with those rights and duties within their enumerated scope. If the expectations of a fiduciary are clearly defined, it is more likely that a fiduciary will be held to a strict standard of performance with respect to those expectations. As a corollary, if a fiduciary's

66. See *Shell v. King*, 2004 WL 1749186 (Tenn. App. Aug. 5, 2004) (emphasizing the defendant's position as Chief Manager of an LLC in determining that he violated his fiduciary obligations); *In re Abrams*, 229 B.R. 784, 791 (Bankr. App. 9th Cir. 1999) ("[T]he managing partner of a partnership owes to his copartners the highest fiduciary obligations known at law . . ."); *Moses v. McWilliams*, 549 A.2d 950, 964-65 (Pa. Super. 1988) (Cirillo, Pres. J., concurring and dissenting) (finding that when "the fiduciary relationship between a patient and physician—a relationship built on the highest expectation of trust—is betrayed," such a breach is "condemned").

rights and duties are specified in detail, it is less likely that a high degree of duty will attend events near the periphery or beyond the scope of the fiduciary's specific powers and responsibilities.⁶⁷ On the other hand, if the rights and duties of a fiduciary are vague or subject to minimal elucidation, as a general matter it is likely that a lower magnitude of duty will exist, but it is also possible that such a fiduciary may be held to have violated a duty that he did not even fully appreciate or understand, since the distinction between core and peripheral responsibilities and the boundary between what is and is not required of such a fiduciary is not clearly defined. With respect to teachers and educators, if a particular duty lies clearly near the core of the teacher's sphere of responsibility, or if a duty is specific and well-defined, we would expect the degree of duty to be higher than for duties that lie on the periphery of the teacher's responsibility or that are ill-defined.

- *Attempts to Contractually Alter Fiduciary Duties:* (contractual magnification, silence, contractual diminution; joint, unilateral). Fiduciaries and beneficiaries sometimes enter into contractual agreements that seek to alter the baseline duties that a fiduciary of a certain type normally owes. For example, under the corporate laws of many states, shareholders are able to pass an amendment to the corporation's charter or articles of incorporation that limit director liability for breaches of certain categories of fiduciary duty.⁶⁸ Similarly, many state statutes governing limited liability companies allow members to define down the degree of care and loyalty that managers owe members and that members owe each other. Thus, the magnitude of duty will often be lower in situations where parties have explicitly agreed contractually to limit fiduciary duties. On the other hand, parties might also increase baseline duties by contractual agreement, or define those baseline duties in such a way that magnifies them. It is less likely that attempts to limit fiduciary duty will be successful if the duties in question are not reciprocal, or if the party seeking to limit his duties has unequal bargaining leverage or sophistication.⁶⁹ It would seem unlikely that teachers

67. See *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel., Co.*, 375 N.E.2d 410, 417 (Ohio 1978) (holding that an exculpatory clause in a telephone company contract, which limited the company's liability for negligent failure to correctly display advertising in the classified section of its directory, was not void because absent any willful or wanton misconduct, the telephone company was entitled to contractually limit its liability for such a service).

68. See e.g. Delaware Code Ann. tit. 8, § 102(b)(7).

69. See *Labovitz v. Dolan*, 545 N.E.2d 304 (Ill. App. 1st Dist. 1989); *Appletree Square I v. Investmark, Inc.* 494 N.W.2d 889 (Minn. 1993); *Crosby v. Beam*, 548 N.E.2d 217 (Ohio 1989); *Hayes v. Northern Hills Gen. Hosp.*, 628 N.W.2d 739, 747 (S.D. 2001) ("Courts have generally held that

or educational institutions would enjoy a high degree of success if they were to attempt to limit or disclaim their fiduciary duties since there are such significant asymmetries in power between universities and would-be students in setting the terms and conditions of their relationship. But in certain circumstances courts could be expected to look to university handbooks and procedures, for example, for guidance about the nature and magnitude of duties.

- *Character of Negotiations and Bargaining Power*: (active negotiation, moderate, medium, minimal, non-existent; equal bargaining power, unequal bargaining power). In certain circumstances, courts are suspicious of contractual efforts to modify fiduciary duties, especially efforts to diminish duties in situations where there is no real negotiation between the parties, or if one party appears to be engaged in self-dealing. Thus, for example, a fiduciary who attempts to limit responsibility through adhesion contracts may not be successful.⁷⁰ On the other hand, if an effort to modify or limit the scope of fiduciary duties is the result of genuine negotiation between parties of roughly equivalent bargaining power and sophistication, then it is more likely that such efforts will be respected.⁷¹ We would expect that efforts by educators and educational institutions, particularly in the public sector, to limit or modify their duties will be of limited success, since there is no real opportunity for bargaining and negotiations. In contrast, in the private school setting, and in the context of higher education, efforts to define and limit fiduciary duties through contract might enjoy a higher degree of success.

where there is a contractual agreement limiting the scope of the fiduciary duty, and where self dealing is evident, such agreements are invalid.” (citing *Wartzski v. Bedford*, 926 F.2d 11 (1st Cir. 1991));

70. See *LaFrenz v. Lake County Fair Bd.*, 360 N.E.2d 605, 609 (Ind. App. 1977) (finding that part of the criteria for determining whether contractual exculpation provisions are invalid as affecting public interest includes whether, “[i]n exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.” (citations omitted)).

71. See *McTighe v. New England Telephone and Telegraph Co.*, 216 F.2d 26, 28 (2d Cir. 1954) (holding that contractual limitations of a telephone company’s liability for correct advertising was valid, finding that “[i]f there be some disparity in the bargaining power of the contracting parties it is no more than may be found generally to exist”); *LaFrenz*, 360 N.E.2d at 608 (Ind. App. 1977) (“[W]here one party is at such an obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other’s negligence, the contract is void as against public policy.”).

(b) History and Duration of Relationship before the Alleged Breach

- *History*: (established, periodic, episodic, occasional, one time). In general, the magnitude of duty will be greater in established relationships, than in relationships that are episodic, or based upon a single event or encounter.⁷² In the educational context, we would expect that fiduciaries in long-term, established relationships will be held to a higher degree of duty than will be individuals whose encounters with each other are less frequent or a matter of happenstance.

- *Voluntariness of the Association*: (mutual choice, unilateral choice, no choice). In general, duties will be greater, or at least more clearly defined, in associations in which the fiduciary and the beneficiary have mutually and voluntarily selected each other and agreed upon the terms and scope of the relationship.⁷³ If choice is unilateral, then a fiduciary might generally be held to a somewhat higher degree of duty if he has sought out and selected his beneficiary, whereas the degree of duty might be somewhat lower if it was the beneficiary who made the unilateral selection. In contrast, if fiduciaries and beneficiaries find themselves in an accidental relationship, or if the relationship is thrust upon them, then the magnitude of duty may be somewhat lower. In the educational context, if a teacher and student affirmatively and mutually select each other, as in a research or thesis advisory relationship, then we would expect the magnitude of duty to be relatively higher than if the relationship is based upon unilateral selection, or if it is the result of an assignment that does not reflect the will or preference of either party.

- *Exclusivity of the Relationship*: (exclusive, primary, nonexclusive). In general, a higher degree of duty will attend relationships that are exclusive in nature.⁷⁴ Similarly, if a particular fiduciary relationship represents the fiduciary's primary occupation, a relatively high degree of duty is likely to attend that relationship. On the other hand, if a fiduciary

72. *Fleming v. Tex. Coastal Bank of Pasadena*, 67 S.W.3d 459, 461 (Tex. App. 14th Dist. 2002) (holding that a bank and bank president had no fiduciary duty to disclose another customer's account information to a new customer, because the new customer had no long-term relationship with the bank or bank president which may have created an atmosphere of trust).

73. See *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 29 F. Supp. 2d 1253, 1264 (D. Kan. 1998) (finding a breach of fiduciary duty in part because the defendant "knowingly and voluntarily undertook fiduciary duties" to the plaintiff).

74. See *Boilermakers Local No. 374 v. Nat. Lab. Rel. Bd.*, 852 F.2d 1353, 1358 (D.C. Cir. 1988) (holding that a union's exclusive hiring hall arrangement is held to a high standard of fair dealing and fiduciary duty because of its potential for coerciveness and exclusiveness).

represents multiple beneficiaries, we would expect that this would sometimes result in a somewhat lower magnitude of duty. For example, a manager for an artist or athlete who works exclusively for that individual is likely to be held to a relatively higher magnitude of duty than an agent who represents multiple artists or athletes. Further down the continuum, a real estate agent representing numerous home buyers and sellers, or a travel agent who acts on behalf of numerous clients whom the agent may not even know, will be held to relatively lower degrees of duty. We would expect that teachers who have exclusive, or even primary, responsibility for a student will be held to a higher magnitude of duty with respect to that student than would a teacher who does not have such a degree of responsibility. Similarly, if a teacher has responsibility for a relatively small number of students, we would expect the degree of duty to be quite high. On the other hand, if a teacher interacts with hundreds or thousands of students at a time, the magnitude of duty towards each student may be quite low, although the duty to the students as a group may be higher.

- *Reciprocity*: (reciprocal, unilateral). Another factor that may affect the magnitude of duty in a fiduciary relationship is whether the duties owed are unilateral or reciprocal, and whether each party owes the same types of duty to the other. The implications of this consideration, however, do not always run in the same direction. In some circumstances, courts find a higher degree of duty to exist based upon the fact that duties are reciprocal. In a partnership, for example, where duties among partners are mutual, a relatively high degree of duty exists, and courts sometimes cite the reciprocity of duties as a factor in their analysis.⁷⁵ On the other hand, when a fiduciary has a great advantage over a beneficiary in power, experience, control, and expertise, duties that are unilateral may be magnified not only based upon these factors, but also based upon the fact of the duty being unilateral. For example, unilateral duties to those who are particularly vulnerable will often be very high. Thus, in different types of situations the fact that duties are reciprocal as well as the fact that duties are unilateral may be cited as factors that magnify a fiduciary's duty. In the educational context, we would also expect that whether duties are reciprocal or unilateral may enter

75. See *Hooper v. Yoder*, 737 P.2d 852, 859 (Colo. 1987) ("Partners in a business enterprise owe to one another the highest duty of loyalty; they stand in a relationship of trust and confidence to each other and are bound by standards of good conduct and square dealing."); *Couri v. Couri*, 447 N.E.2d 334, 337 (Ill. 1983); *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1929) ("Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty.").

into a court's analysis of the magnitude of duty. For example, in a situation involving duties among professors or colleagues, the mutuality of duties might be cited as a factor. On the other hand, in a situation involving the relationship between a teacher and student, the unilateral character of the duties may be cited among other factors such as age and vulnerability of the student beneficiaries as a basis for magnifying the duty owed.

- *Relative Power, Sophistication, Information, Control*: (fiduciary superior, equal, beneficiary superior). The degree of duty will also vary based upon the relative power, sophistication, information, and control of the parties.⁷⁶ It is not surprising that a fiduciary with a relative advantage will be held to a higher degree of duty. But it is also sometimes the case that when the beneficiary of a fiduciary's duty is comparatively powerful, sophisticated, and informed, the degree of duty in his favor will be lower.⁷⁷ We would expect such considerations to often be quite important in the educational context. Because professional educators will often be viewed as having relative advantages over students in these respects, this may provide a basis for heightened fiduciary duties. In cases involving children in elementary or secondary school, differentials in power, sophistication, information and control will be particularly acute. But we would also expect this to be considered as a factor in cases involving university professors and administrators as well.

(c) Reliance

The scope and nature of a beneficiary's reliance upon a fiduciary is

76. See e.g. *Zurich Capital Markets Inc. v. Coglianesi*, 332 F. Supp. 2d 1087, 1121 (N.D. Ill. 2004) (“[T]he touchstone of a fiduciary relationship is the presence of a significant degree of dominance and superiority of one party over another.” (quoting *Lagen v. Balcors Co.*, 653 N.E.2d 968 (Ill App. 2d Dist. 1995))); *In re Estate of Rothenberg*, 530 N.E.2d 1148, 1151 (Ill. App. 1st Dist. 1988) (“The factors which may be considered in determining whether a fiduciary relation exists are the degree of kinship, disparity in age, health, mental condition, education and business experience between the parties and the extent to which the allegedly servient party entrusted the handling of his business and financial affairs to the dominant party and reposed faith and confidence in him. Two things must appear: that one party was, in fact, ‘servient’ and the other party ‘dominant.’”)

77. See e.g. *Miles, Inc. v. Scripps Clinic & Research Found.*, 810 F. Supp. 1091, 1099 (S.D. Cal. 1993) (precluding liability for breach of fiduciary duty because, “[b]y selecting the corporate form as a manner of achieving their goals, Miles and Scripps, both sophisticated parties, elected the benefits granted under that form and rejected the . . . benefits of continuing with a joint venture.” (emphasis added)); *Ahan v. Grammas*, 2004 WL 2724111 at *13 (Md. Cir. Ct. Nov. 19, 2004) (finding no “evidence upon which a jury could reasonably conclude, or even infer, that there was a breach of any fiduciary duty” to plaintiff because, although not an attorney, plaintiff was “a sophisticated businessman” and “[t]he level of notice for consent therefore is not required to be as explicit as it would be for someone with lesser or no experience”).

another aspect of their relationship that will affect the magnitude of duty owed by the fiduciary to the beneficiary. Several different aspects or dimensions of reliance may be significant.

- *Degree of Reliance by Beneficiary*: (high, medium, low). Most obviously, the extent to which a beneficiary relies upon a fiduciary to serve and protect her interests will affect the magnitude of duty owed by the fiduciary. In general, the greater the degree of the beneficiary's reliance upon the fiduciary, the greater the degree of duty to which the fiduciary will be held.⁷⁸ On the other hand, if the beneficiary is not particularly dependent upon the fiduciary, the magnitude of duty may be somewhat lower. We would expect this consideration to apply in the expected manner in cases involving educators, and that it will often be quite a significant factor. Students often have quite a high degree of reliance upon teachers, educators, and educational institutions, and we would expect the degree of duty to be proportionally high. However, we would not expect that the mere fact that a student, especially an older student, places trust in a teacher or educational institution will necessarily result in a high magnitude of duty.⁷⁹
- *Cause of Reliance*: (induced by fiduciary, mutually agreed upon, implied by fiduciary, inferred by beneficiary, projected by beneficiary). The cause of the beneficiary's reliance may also affect the degree of duty owed by the fiduciary.⁸⁰ In general, duty will be higher if the fiduciary is responsible for the fact that a beneficiary feels a high degree of reliance. For example, if the fiduciary issues promises or assurances to the beneficiary that the fiduciary is looking out for and protecting the beneficiary's interests, then a relatively high magnitude of duty is likely to exist. This factor is most likely to be of significance in situations

78. See *U.S. v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (“[A]t the heart of the fiduciary relationship’ lies ‘reliance, and de facto control and dominance.’ The relation ‘exists when confidence is reposed on one side and there is resulting superiority and influence on the other.” (citations omitted)).

79. See *Zumbrun v. U. of S. Cal.*, 101 Cal. Rptr. 499, 506 (Cal. App. 2d Dist. 1972) (“The mere placing of trust in another person does not create a fiduciary relationship. An agreement to communicate one’s knowledge, exercising his special knowledge and skill in the area of learning concerned, does not create a trust but only a contractual obligation.”); *Ho v. U. of Tex. at Arlington*, 984 S.W.2d 672, 693 (Tex. App. 7th Dist. 1998) (finding no fiduciary relationship between a doctoral student and the university faculty advising and teaching that student); *Abrams v. Mary Washington College.*, 1994 WL 1031166 at *4 (Va. Cir. Apr. 27, 1994) (holding that there is no common law “special trust relationship” between college officials and all students).

80. See *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) (“If a person solicits another to trust him in matters in which he represents himself to be expert as well as trustworthy and the other is not expert and accepts the offer and reposes complete trust in him, a fiduciary relation is established.”).

where the affirmative assurances by a fiduciary are coupled with underhanded or secretive activities by that fiduciary that serve the interests of the fiduciary at the expense of the beneficiary, or that create a conflict of interest between the parties. On the other hand, if the reasons for reliance are merely implied by the fiduciary, or if the reasons for reliance are inferred by the beneficiary, then the degree of duty will move progressively towards the lower end of the spectrum. If reliance is based largely or entirely upon the projection of duty by a beneficiary upon a would-be fiduciary, this will likely result in an even lower magnitude of duty. We would expect this factor to apply in the educational context in the anticipated manner. If teachers or other professional educators have said or done specific things to encourage reliance, for example by giving assurances and asserting trustworthiness, this might have the effect of increasing the degree of duty, especially if the fiduciary is acting in a self-serving manner.⁸¹ On the other hand, if an older and relatively experienced student simply feels that his professors should have a responsibility to protect and defend his interests as he perceives them, this would be unlikely to result in a high magnitude of duty.⁸²

- *Awareness of Beneficiaries' Reliance*: (high, medium, low, nonexistant). A fiduciary in general will be held to a higher degree of duty if she is aware that the beneficiary is relying upon her, especially if she understands that the beneficiary's degree of reliance is high.⁸³ Increased knowledge always increases one's

81. See *Chou v. U. of Chi.*, 254 F.3d 1347, 1363 (Fed. Cir. 2001) (holding that a graduate student sufficiently stated a breach of fiduciary duty claim against her department chairman who "specifically represented to her that he would protect and give her proper credit for her research and inventions," and then who then named himself as the inventor of her discoveries).

82. See *Ho v. U. of Tex. at Arlington*, 984 S.W.2d 672 (Tex. App. 7th Dist. 1998) (finding, as a matter of law, that "formal fiduciary relationships do not exist between teachers and students in a normal education setting," and that no informal fiduciary relationship existed which would impose upon the university a duty to disclose information to stop the doctoral student from seeking a doctoral degree when the student was later dismissed from the doctoral program for academic reasons); *Maas v. Corp. of Gonzaga U.*, 618 P.2d 106, 108–09 (Wash. App. Div. 3 1980) (finding that a law school did not have a fiduciary duty to inform the student of the possibility of failure because it is unreasonable to require the university to warn applicants of the obvious).

83. See *Indus. Gen. Corp. v. Sequoia Pacific*, 44 F.3d 40, 44 (1st Cir. 1995) ("In determining whether such a transformation [from a business relationship into a fiduciary relationship] has taken place, courts look to the defendant's knowledge of the plaintiff's reliance and consider the relation of the parties, the plaintiff's business capacity contrasted with that of the defendant, and the 'readiness of the plaintiff to follow the defendant's guidance in complicated transactions wherein the defendant has specialized knowledge.'" (quoting *Broomfield v. Kosow*, 212 N.E.2d 556, 560 (Mass. 1965))); *Bonson v. Diocese of Altoona-Johnstown*, 67 Pa. D. & C. 4th 419, 433 (Pa. Com. Pleas Ct. May 11, 2004) (upholding a claim of breach of fiduciary duty against a Catholic Bishop who sexually molested an altar boy and the parish in part because the clergymen "repeatedly instilled in each of its

level of accountability in law, ethics, or the common sense of fairness. Thus, if professional educators are aware, or should be aware, that a student has an unusually high degree of reliance, we would expect that this might have the effect of elevating the degree of duty.

(d) Divergence of Interests of Fiduciary and Beneficiaries

- *Degree of Alignment of Interests:* (conflict of interest; low alignment; medium, high, identical interests). If the fiduciary's interests depart significantly from the interests of the beneficiary, the fiduciary will likely be held to a higher degree of duty, given the heightened risk that the fiduciary might serve his own rather than the beneficiary's interest.⁸⁴ Special rules imposing heightened duties exist in numerous contexts regarding conflicts of interest, corporate opportunities, and self-dealing, which are aimed to address problems that arise when interests of a fiduciary and beneficiary diverge. On the other hand, if the interests of the fiduciary and the beneficiary are closely aligned, it is more likely that a court will not feel a need to impose a high degree of duty, since a court may feel confident in presuming that the fiduciary will be motivated by self interest to exhibit the requisite degree of care and loyalty.⁸⁵ As an example, there is not a developed body of law about the fiduciary duties of airplane pilots towards their passengers, even though indicia such as reliance and relative expertise might lead one to believe that this ought to be a paradigmatic fiduciary relationship. But because the pilot's and passengers' interests are so closely aligned, we do not typically think of this relationship under the fiduciary rubric. In the educational context, we would expect teachers and

parishioners, including the plaintiff, the belief that priests are figures of authority who should be relied upon to protect the well-being of children in the parishes”).

84. See *In re Marriage of Egedi*, 88 Cal. App. 4th 17, 23 (2d Dist. 2001) (“[C]ounsel ‘who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice.’” (quoting *Klemm v. Superior Court*, 142 Cal. Rptr. 509 (App. 5th Dist. 1977))); *Bd. of Managers v. Fairway at N. Hills*, 193 A.D.2d 322, 325 (N.Y. App. Div. 2d Dept. 1993) (“[A] condominium’s first board of managers is subject to ‘a great potential for conflicts of interest,’ such that ‘a very high standard of duty’ must be imposed upon it to ensure that its members do not gear their decisions to benefit the sponsor at the expense of the association or its members.” (citation omitted)).

85. See *Off. Comm. of Unsecured Creditors of Color Tile, Inc. v. Investcorp S.A.*, 137 F. Supp. 2d 502, 507–512 (S.D.N.Y. 2001) (finding no breach of fiduciary duty to non-management directors by management directors or holders of preferred stock because “[a]ll the evidence demonstrates that the interests of the shareholder defendants were aligned with, and not in conflict with, the interests of all the other shareholders”).

administrators to be held to a heightened duty in situations where there is a conflict, or potential conflict, between their interests and the interests of students. For example, these duties would be particularly elevated when a teacher or professor stands to benefit by taking credit for work properly attributable to a student. On the other hand, in situations where a fiduciary does not stand to gain from an outcome that is disappointing to a student, such as a student who has received a failing grade, it is much less likely that a court will find a heightened duty.

3. *Characteristics of the Subject Matter*

In addition to the characteristics of the parties, and the characteristics of their relationship, the characteristics of the subject matter in question is also relevant to an assessment of the degree of duty to which courts will hold a fiduciary. Four related characteristics of the subject matter are often taken into account by courts: the significance of the event in question; the value and magnitude of the entrustment; the uniqueness of the entrustment; and the public visibility and importance of the case. In general, the greater the significance of the subject matter at stake, the more likely it is that a fiduciary will be held to have a high degree of duty.

(a) Significance of the Event in Question

- *Degree of Significance and Importance*: (high, medium, low; absolute terms, relative terms). If the subject matter of a fiduciary relationship has a high degree of significance, a high degree of duty will be expected.⁸⁶ On the other hand if the subject matter is only of little or incidental significance, the magnitude of duty will likely be lower. For example, a lawyer whose client faces potential capital punishment should be held to a higher standard of competence and performance than a lawyer who defends someone accused of committing a misdemeanor.⁸⁷ A fiduciary

86. For example, in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928), the significance of the subject matter had been greatly enhanced by the construction of Grand Central Station in the neighborhood. This is not mentioned in the case, although the location is given, but commentators often point out that the high degree of duty in that case may have been in part due to the richness of the corporate opportunity at issue.

87. See *Mayfield v. Woodford*, 270 F.3d 915, 919 (9th Cir. 2001) (vacating defendant's death sentence after finding en banc that defendant's counsel at the penalty phase was deficient and that defendant suffered prejudice and as a result); *Anderson v. Calderon*, 276 F.3d 483, 484–85 (9th Cir. 2001) (Reinhart, J., dissenting) ("I cannot join my colleagues in their decision to permit the state to proceed with the execution of an individual whose death sentence may well have been imposed, not because of the crime he committed, but because of the incompetence of an attorney with little integrity and a pattern of ineffective performance in capital cases.... If the courts appoint

might be held to a relatively high magnitude of duty even with respect to a matter that might appear to be of modest significance if it is of real significance to the particular beneficiary. For example, oxygen might appear to be relatively insignificant, unless someone is being denied access to it. Thus, the quantum of duty that attended the loss of a specific dollar amount of money might lie upon a sliding scale depending upon whether the beneficiary was very wealthy at one end of the spectrum as opposed to destitute at the other end of the spectrum.

(b) Corpus: Value and Magnitude of Entrustment

Sometimes a fiduciary is obliged to take care of a particular entrustment and to manage or invest that entrustment in the interests of specified beneficiaries. For example, a trustee will have responsibility to invest the funds in a trust according to standards of prudence, diversification, etc. The magnitude of duty that will be imposed upon such a fiduciary will often vary based upon the value and magnitude of the entrustment. There are several factors that contribute to an assessment of the value of a corpus of entrustment.

- *Tangible Amount Involved*: (large, medium, small, nonexistent). Most obviously, the tangible amount of an entrustment will affect the magnitude of duty that will attend the entrustment. If the financial value of the entrustment is large, it is more likely that a high degree of duty will exist, whereas if the financial value of the entrustment is small, the corresponding duty is likely to be of a lower magnitude. For example, trustees of large pension or retirement funds are subject to higher magnitude duties compared with the expectations of a family member who is assigned to invest funds in a small family trust.
- *Intangible Values Involved*: (large, medium, small, nonexistent). In addition to tangible value, a variety of factors may influence the intangible value of an entrustment. High magnitude intangible values may result in a heightened degree of duty.⁸⁸

incompetent counsel to handle a capital case, we should not then compound that judicial error by permitting the state to execute the ill-represented defendant.”); *Johnson v. State*, 1992 WL 158313 at *1 (Tenn. Crim. App. July 9, 1992) (holding that defendant did not have incompetent counsel in his representation for three misdemeanor charges).

88. See *In re Mullen*, 200 B.R. 352, 357 (Bankr. C.D. Cal. 1996) (“When a party uses a business’s goodwill to its own advantage, the party has breached a fiduciary duty owed to the business, and the party in interest and the business may recover [the value of this intangible asset].” (citing *Baker v. Pratt*, 176 Cal. App. 3d 370, 380–81 (2d Dist. 1986))).

For the most part fiduciaries in the educational context are not responsible for investing or managing funds. An exception is the management of universities' endowment and retirement funds, and we would expect the fiduciary standards that would apply in the educational setting would not vary significantly from the standards that apply to such situations in general.

(c) Uniqueness of Entrustment

- *Type of Property Involved:* (irreplaceable, unique, commodity, fungible). If the corpus of a fiduciary entrustment is unique or irreplaceable, a high degree of duty will attend that entrustment. Irreplaceable items such as antiquities, fine art and old documents of historic importance will carry high magnitude duties. In contrast, if the entrustment is in no way unique or irreplaceable, it is likely that a relatively lower degree of duty will exist.⁸⁹ In the educational setting, we would expect that the highest duties will attach to human beings, since bricks and mortar can be replaced.

(d) Public Importance

A final set of factors relating to the subject matter of an entrustment that affects the magnitude of duty is the public importance, profile, or impact of a case. As the visibility and perceived public importance of a case increases, it is more likely that a high degree of duty will be imposed.

- *Public Profile and Visibility:* (high, medium, low). One dimension of public importance is the profile or public visibility of the case. If public visibility is high, we would expect this to increase the likelihood that a high degree of duty will be found. If on the other hand, public visibility is low a court may subconsciously, if not consciously, apply a lower degree of duty. We would expect this factor to sometimes be significant in the educational context, especially if a case involves sexual misconduct of a teacher involving a minor, or other misconduct of a shocking or self-serving nature. Because education is an issue that is of tremendous public importance and often in the public eye, public profile and visibility of a particular case may

89. See *Comcast Sound Commun., Inc. v. Hoeltke*, 174 A.D.2d 1023, 10024 (N.Y. App. Div. 4th Dept. 1991) (holding that former salesmen did not breach fiduciary duty of loyalty for violation of noncompetition clauses because there was "no demonstration that defendants performed services of a unique nature for plaintiff" and "[a]lthough defendants were valuable sales personnel, they were not irreplaceable nor did their leaving plaintiff's employ cause plaintiff special harm").

have the effect of magnifying the degree of duty that a court finds in a case.

- *Public Concern or Attention:* (high, medium, low). Another dimension of public importance is the degree of public concern about an issue. Even if a case does not have a high degree of visibility, there may be a high degree of public concern or attention. We would expect this factor to also sometimes result in the magnification of duties in the educational context. For example, in the area of public education, often the attention of a vocal group of concerned parents can raise the stakes with respect to the magnitude of duty that will be applied to a case.
- *Public Image and Reputation of Parties:* (strongly positive, positive, neutral, negative, strongly negative; absolute, relative). A related, but distinct, element of public importance involves the public image and reputation of the parties, both the fiduciary and the beneficiary. If a fiduciary has a shady or questionable reputation, it may be that he is held to a higher degree of duty, based upon skepticism about his character or motives. On the other hand, a person with a good reputation for character and integrity may be more likely given the benefit of the doubt with respect to an alleged breach of duty, with the effect of holding that person to a lower degree of duty. This factor, however, does not always apply in such a simple or straightforward manner. At times the high public reputation of a fiduciary may be cited as a factor in holding that fiduciary to a particularly high standard of behavior. The public reputation of the beneficiary can also affect the magnitude of duty attributed to the fiduciary, with a good reputation enhancing duty and a bad reputation diminishing duty.

We would expect that in the educational setting, because of their generally positive reputations, teachers and educators may often be given the benefit of the doubt with respect to issues and decisions that lie squarely within their areas of expertise and competence, such as grading students and setting standards for receiving or failing to receive a degree. This might result in the perception and perhaps the reality of a relatively low magnitude of duty in these areas. On the other hand, when alleged misbehavior lies further from the core elements of the educational mission, we would expect it to be less likely that teachers would be afforded such leeway. Indeed, the fact that teachers have a reputation for trustworthiness might be considered a factor that enhances duty. For example, in cases involving alleged sexual misconduct or self-dealing, we would expect the high public reputation of educators to be a factor in

enhancing the degree of duty they owe students and other beneficiaries. The reputation of the beneficiary might also be a factor in the educational context. If a beneficiary appears to be an innocent victim, this may result in an enhanced degree of duty, whereas if the beneficiary himself appears to be engaged in self-dealing or self-deceptive behavior, this may result in a lowered standard of duty being applied to the fiduciary.

4. *Source of Legal Action*

A fourth category of considerations that affects the magnitude of duty is the source of legal action under which an alleged breach of duty is asserted. Legal claims alleging a breach of fiduciary duty arise under a large number of legal bases, including federal statutes, such as ERISA, state statutes, such as corporate codes, and under the common law, where fiduciary relationships are a long-standing feature of equity.

In general, actions under federal statutes will have higher degrees of duty compared with actions brought under state statutes, and actions brought pursuant to statutory enactment will carry higher degrees of duty than actions brought under the common law. This is of course an oversimplification, but as a general guidepost it is nevertheless somewhat helpful in assessing the likelihood that a fiduciary will be held to a relatively high or low degree of duty.

We would expect that in the educational context the degree of duty imposed on fiduciaries will vary based upon the underlying legal source of the claim. The most likely underlying legal claim will be based upon the common law standards applicable to fiduciaries, which often result in relatively low magnitudes of duty.

B. Quantifying the Magnitude of an Alleged Breach of Duty

Thus far, our analysis has identified a range of factors—including the characteristics of the fiduciary, the characteristics of the beneficiary, the characteristics of the subject matter, and the source of the legal action—that affect the magnitude of duty that will exist in a particular case or situation.

The second step in analyzing the magnitude of fiduciary duties and their breaches assesses the performance of the fiduciary, and seeks to measure to extent to which the fiduciary has either exceeded or fallen short in the expected standard of performance of her duties. Just as the magnitude of duty varies based upon a variety of factors, the magnitude of an alleged breach also varies. As one might expect, there are a variety of factors relevant to an assessment of a fiduciary's performance. Also as might be expected, when a high magnitude duty exists, a higher standard

of performance will be required in order to satisfy or meet that duty. On the other hand, if the magnitude of duty in a particular situation is relatively low, then the expectations of the fiduciary will be lower and the degree of performance required in order to satisfy that duty will be more modest. While a particular standard of performance may be sufficient to clear the bar in the case of a relatively low level duty, the same standard of performance may be insufficient in the case of relatively high magnitude duty.

In assessing a fiduciary's performance, there are four general categories of considerations that courts take into account: (i) the character of the harm suffered; (ii) the character of the fiduciary's deliberative process; (iii) the character of the fiduciary's motives; and (iv) the classification of the alleged breach of duty.

1. *Character and Extent of the Harm Suffered*

The first factor courts consider in quantifying the magnitude of an alleged breach of fiduciary duty is the character of the harm suffered. Courts are likely to view high magnitude losses as evidence of a high magnitude breach of duty and of a low level of performance by the fiduciary. In contrast, small magnitude losses are likely to be considered evidence of only small magnitude breaches, or even no breach of duty. If the harm suffered by the beneficiary is relatively small, then even a degree of performance by a fiduciary that might be somewhat deficient may not result in liability. On the other hand, if the harm suffered is of a high magnitude, then a similar standard of performance by a fiduciary might result in liability. In assessing the character and extent of harm suffered, courts focus on several different dimensions of harm, including the magnitude of loss or harm, the breadth of loss or harm, and the frequency of the loss or harm.

a. Magnitude of the Loss or Harm

- *Loss of Life*: (numerous, several, one). At one end of the spectrum of magnitude of loss or harm is loss of life. If many lives are lost, courts may view the degree of breach as being especially high. When such a high magnitude loss occurs, courts will often find liability even if the degree of duty owed was quite modest.⁹⁰ This is because a very low degree of performance (i.e., a

90. See *Robertson v. Sixpence Inns of America, Inc.*, 789 P.2d 1040, 1045 (Ariz. 1990) (holding a hotel liable for failing to warn independent contractor security guard of a robbery on the premises when the robber returned and shot and killed the security guard); *Maurer v. Cerkenik-Anderson Travel, Inc.*, 890 P.2d 69 (Ariz. App. Div. 2 1994) (holding travel agency liable for breaching duty to

very high magnitude breach of duty) will not be sufficient to clear even a relatively low level duty. We would expect that in the educational context, when students die as a result of the negligence or failures of oversight of teachers or administrators, there is a relatively high likelihood that a court might find a breach of duty. If the loss of life is due to affirmative malfeasance on the part of a teacher or other fiduciary, this will be viewed as an even higher magnitude breach, and the likelihood of liability will be even greater. If the risk of loss was foreseeable or could have easily been avoided, then this factor will likewise amplify the magnitude of breach and make liability for a breach of duty more likely.

• *Physical or Emotional Injury*: (large, medium, small). The magnitude of loss will also be very high in the event of serious physical or emotional injury.⁹¹ Physical and emotional injuries can occur along a spectrum of seriousness, and the greater the quantum of injury suffered by a beneficiary or beneficiaries, the more likely a fiduciary will be held to have violated a duty. On the other hand, if the degree of injury is relatively small, it becomes decreasingly likely that a court will consider there to have been a high magnitude breach of duty. We would expect that the magnitude of physical or emotional injury suffered by students could be an important factor in assessing the magnitude of breach of duty in the educational context. For example, a teacher involved in sexual misconduct with students, especially young students, will likely be liable.⁹² Some especially high magnitude breaches of duty, including sexual relations with a minor, are proscribed by criminal law. As a result, the equitable

warn of known dangers in selling its tour when student traveler was killed during train ride to Mexico); *Duncavage v. Allen*, 497 N.E.2d 433 (Ill. App. 1st Dist. 1986) (holding a landlord liable for breaching his duty to maintain the safety of the premises when a woman was raped and murdered in the residence by an intruder).

91. See *Dahlin v. Evangelical Child & Fam. Agency*, 252 F. Supp. 2d 666, 669 (N.D. Ill. 2002) (finding plaintiff's claim for injuries to their family and emotional distress overcame a motion to dismiss by defendant adoption agency which failed to disclose full information about the adopted child who later exhibited major emotional problems); *Markowitz v. Arizona Parks Bd.*, 706 P.2d 367, 371 (Ariz. 1985) (holding a state has a duty to take reasonable precaution to avoid injury to invitees in recreational area when boy was seriously injured after diving into shallow water); *Doe v. Roe*, 681 N.E.2d 640, 645-46 (Ill. App. 1st Dist. 1997) (permitting plaintiff to pursue damages for mental distress when her attorney breached his fiduciary duty by using his position as attorney and his knowledge of client's dependence upon him to gain sexual favors).

92. See e.g. *State v. Oddi*, 2002 Ohio 5926 (Ohio App. 5th Dist. 2002) (upholding the gross sexual imposition conviction of a driver's education teacher who fondled students who were minors (cited in *State v. Clay*, 2005 WL 17885 at *3 (Ohio App. 9th Dist. Jan. 5, 2005))); *State v. Rainey*, 2003 WL 21302993 (Tenn. Crim. App. June 6, 2003) (upholding the conviction of a principal, who also served as the girl's basketball coach, on seven counts of sexual battery by an authority figure and eleven counts of statutory rape for his sexual relationship with a tenth grade student).

principles used in assessing an alleged violation of fiduciary duty may not be directly implicated, but if a claim were mounted under the rubric of fiduciary duty (such as in a civil suit against the teacher or school district), the high magnitude injury would often be an important consideration in the decision to hold a teacher or other fiduciary liable.⁹³

- *Loss of Wealth*: (large, medium, small, *de minimis*). In general, monetary loss will exist somewhat further down the continuum of loss. As might be expected, however, the amount of money lost will be directly relevant to an assessment of the magnitude of loss. If fiduciary conduct results in a significant loss of wealth, it is more likely that a court will find a high magnitude breach of duty, whereas small losses are more likely to trigger a finding of low-degree breaches of duty, or even a finding that there has been no breach of duty.⁹⁴ If monetary stewardship lies at the center of a fiduciary's responsibilities, then monetary loss is more likely to be deemed a high-degree breach of duty. But if monetary loss is modest, or *de minimis*, even seemingly egregious failures by a fiduciary may not result in liability, especially if such failures are matters of carelessness rather than self-dealing.⁹⁵ Given the nature of the fiduciary entrustment of teachers, we would not expect monetary loss to be a common feature of alleged breaches of fiduciary duty. We would expect, however, that issues involving assertions of financial impropriety might be more common in the case of administrators with responsibility over significant budgets. In such cases, we would expect the magnitude of monetary loss to be relevant to a determination of whether there has been a breach of fiduciary duty, perhaps not so much as a matter of principle as a matter of expediency.

93. *Doe v. City of New Orleans*, 577 So. 2d 1024, 1025 (La. App. 4th Cir. 1991) (holding that a school board could be found liable for the sexual molestation of a nine-year-old student in a school restroom during school hours by an unknown man, even though no liability was imposed on the teacher who allowed the student to go to the restroom by herself, because board had the duty to promulgate official policy against allowing young children to leave the classroom alone during school hours).

94. See *Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 655 (E.D. Va. 2002) (upholding claim for breach of fiduciary duty of investment banking firm whose abuse of the fiduciary relationship and misappropriation of confidential business information resulted in plaintiff's "suffering significant financial losses").

95. If no loss results from a breach, then no monetary liability exists. See *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 920 (8th Cir. 1994); *Friend v. Sanwa Bank Cal.*, 35 F.3d 466, 469 (9th Cir. 1994); *Ironworkers Local No. 272 v. Bowen*, 695 F.2d 531, 536 (11th Cir. 1983) (where loss existed but did not result from alleged breach).

b. Breadth of Loss or Harm

- *Number of People Harmed:* (large, medium, small, single individual). In general, if a large number of people are harmed, it is more likely that a court will find a high magnitude breach of duty. Especially in cases involving a small magnitude of harm, such as relatively small per share stockholder losses, if the loss affects a large number of people the likelihood of liability is heightened. In general, if a small number of people suffer harm as a result of a fiduciary's alleged misconduct, it will be less likely that a court will find a breach of fiduciary duty. If, however, a small number of people, or even a single individual, suffers a very high magnitude of harm, this may be sufficient to trigger liability and the limited breadth of the harm will not serve to vindicate the fiduciary.⁹⁶ We would expect this general pattern to apply in the educational context. If large numbers of students are harmed, then a smaller per-student quantum of harm might be required before liability is imposed.⁹⁷ If a small number of students are harmed, we would expect that a larger quantum of per-student harm would be required before a court will find liability.

c. Frequency of the Harm Suffered

- *How Often Harm Suffered:* (continuous, ongoing, frequent, periodic, occasional, isolated incident). If the harm suffered is continuous or ongoing, it is more likely that a court will find a high magnitude of breach of fiduciary duty than if the harm is only occasional or limited to an isolated incident.⁹⁸ To be sure, if harm is of a high magnitude, the fact that it occurred only once

96. See *supra*, nn. 90–97 and accompanying text for discussion of the magnitude of the loss or harm.

97. See *Deitsch v. Tillery*, 833 S.W.2d 760 (Ark. 1992) (holding that parents of students at an elementary school stated a claim of negligence against the school district, school board, and school employees for negligence which resulted in exposure to asbestos).

98. See *Riverside Auto Sales, Inc. v. GE Capital Warranty Corp.*, 2004 WL 2106638 *7 (W.D. Mich. Mar. 30, 2004) (finding that “[w]hether [defendant] wrongfully removed fees each month may be an issue to consider with respect to Plaintiffs’ breach of fiduciary duty or breach of contract claims”); *Apollo Technologies Corp. v. Centrosphere Indus. Corp.*, 805 F. Supp. 1157, 1199–1200 (D.N.J. 1992) (denying preliminary injunctive relief on breach of fiduciary duty claim because there was no longer an ongoing harm to corporation, yet finding that the corporation demonstrated the likelihood of success on the merits of its breach of fiduciary duty claim arising from Centrosphere continuing to hold itself out as Apollo’s agent after the expiration of the agency relationship). *Harris v. Archer*, 134 S.W.3d 422, 438 (Tex. App. 7th Dist. 2004) (finding that although a partner’s breach of fiduciary duty was “reprehensible” because it was “an intentional action intended to gain a benefit for himself,” the breach was not “particularly egregious” for purposes of determining punitive damages because it was an isolated incident, the harm was only economic, and the harmed partner was not in a position of vulnerability).

or infrequently will not serve as a persuasive basis for forestalling liability. In general, however, if the harm is frequent or ongoing, even if the harm is of a relatively low magnitude, the high frequency will serve as a basis for magnifying the breach of duty. We would expect this pattern to apply in the usual fashion in the educational context, with frequent breaches of high magnitude duties being the most likely to result in liability.

- *Duration of Alleged Breach:* (longstanding, moderate, brief). A factor closely related to but distinct from frequency of harm is the duration of when the harm occurs. In general, breaches of an extended duration are more likely to be considered a high magnitude breach of duty than are breaches of short duration. For example, a trustee that has engaged in a long pattern of monetary expropriations is more likely to be found liable than a trustee who can plausibly claim that a single exceptional instance of misconduct was a mistake or oversight that should not result in liability.⁹⁹ As is the case with frequency, however, the fact of short duration may not serve as a basis for forestalling liability in the case of a severe breach. In the educational context, we would expect that if a pattern of fiduciary misconduct extends over a long period of time, it is more likely that a court will find a breach of duty. This factor is most likely to be relevant in instances of relatively low-level breaches of duty, which come to be viewed as significant due to their chronic nature.

2. *Character of the Fiduciary's Deliberative Process*

A second set of factors that will affect a determination of the magnitude of an alleged breach of fiduciary duty is the nature and character of the fiduciary's deliberative process. In general, the greater the defects in a fiduciary or a group of fiduciaries' deliberative process the greater the likelihood that a court will find a high magnitude breach of duty, whereas an adequate or, better yet, admirable deliberative process will make it more likely that even in the event of an unfortunate outcome a court will find a low magnitude breach, if indeed it finds any breach at all. If the character and process of deliberation is sufficient, fiduciaries will be insulated from liability even in the face of many

99. See *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 800–01 (Del. Ch. 2004) (refusing to dismiss a breach of fiduciary duty claim because “the unusual pattern of conduct is suggestive of injury to NCT as a firm” and “a suspicious pattern of dealing . . . raises the legitimate concern that the NCT board is not pursuing the best interests of NCT's creditors as a class”); *Beacon Hill CBO, Ltd. v. Beacon Hill Asset*, 314 F. Supp. 2d 205, 210 (S.D.N.Y. 2003) (finding that plaintiffs stated a claim for breach of fiduciary duty through the assertion that defendant violated fiduciary duties through a “systematic pattern of misconduct”).

failings in outcome. The character of the deliberative process will be particularly important in situations involving business decisions or other discretionary decisions that affect the monetary status of beneficiaries. For example, courts often scrutinize the deliberative processes of corporate directors, money managers, and trustees who have investment discretion over client funds. The deliberative process is likely to be of heightened importance when decisions are made collectively by a group of fiduciaries. There are several sub-factors relevant to an assessment of deliberative process, including the character of deliberations and the diligence with which they are conducted, the quality and quantity of information upon which a decision was based, the character and consistency of fiduciaries' recollections and accounts of a collective deliberative process, and whether alternatives other than the ultimate course of action were analyzed and considered.

a. Character of Deliberations/Diligence

- *Length*: (long, medium, short; many occasions, several occasions, one occasion). In general, lengthy deliberations are more likely to result in a court finding a low-magnitude breach, or no breach, of fiduciary duty, even when things turn out badly, whereas short or perfunctory deliberations may result in a finding of a breach, possibly even a high magnitude breach, of duty, even when things arguably turn out well. In general, when important decisions are at stake, such as a board of directors' decision to sell a company, longer and multiple deliberations will be viewed more favorably by courts than shorter or one-time deliberations.¹⁰⁰ What constitutes an adequate length of deliberation varies significantly based upon the nature of the decision and the environment in which the decision is made. If there are factors which make urgent action necessary, it is less likely that a court will fault fiduciaries for not engaging in lengthy deliberations. If on the other hand, time is not of the essence in making a decision, or if the sense of emergency is artificial or manufactured, then it is less likely that the perceived

100. See *Dynamics Corp. of Am. v. WHX Corp.*, 967 F. Supp. 59, 66 (D. Conn. 1997) (finding no breach of fiduciary duty in the manner in which the Board reached its decisions because "[e]ach of the Board's decisions was made deliberately, after extensive discussion and consideration of the advice of its financial and legal advisors and consideration of a range of alternative strategies"); *Lewis v. Playboy Enterprises, Inc.*, 664 N.E.2d 133 (Ill. App. 1st Dist. 1996) (holding that no fiduciary duty had been breached because the board spent a considerable amount of time studying and digesting the plan); *Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del. Super. 1985) (holding that board breached its fiduciary duty of care because its approval of the sale of the company on two hours consideration without prior notice did not satisfy its duty to act with informed reasonable deliberation).

emergency will be seen as a valid reason for foreclosing or shortening deliberations. A court's assessment of the adequacy of deliberations will also be affected by notification and preparation for deliberating an important matter. For example, if a board of directors is going to deliberate a proposed sale or merger of their company, and they have advance notice and detailed information about a proposed transaction, it is more likely that their deliberations will be deemed adequate.¹⁰¹ If on the other hand, the board hears about a proposed transaction for the first time at the meeting at which the transaction is ultimately approved, then it is more likely that a court will find fault with the character of their deliberations. In the educational context, a court would likely look to faculty meetings, formulation of school policies, conferral with colleagues, etc. to determine the length of deliberations.

- *Character*: (solemn, serious, casual, flippant; multiple options considered, several options, single option; high participation, medium participation, low participation; active questioning, moderate questioning, low questioning, no questioning; in person, on phone, absent). The character and seriousness of deliberations will also be relevant to a determination whether there has been a high or low magnitude breach of duty. Deliberations that are active as opposed to passive will be less likely to result in liability.¹⁰² Deliberations in which only one option is considered will be more likely to result in liability than deliberations in which the respective merits of a variety of options are debated.¹⁰³ If deliberations are ad hoc or uninformed,¹⁰⁴ if written materials have not been prepared in advance,¹⁰⁵ if the majority of participants are on the phone rather

101. *Lewis*, 664 N.E.2d at 135 (finding no breach of fiduciary duty by Board members in part because “[p]rior to the meeting they received a detailed, thirty-four page memorandum explaining the advantages and disadvantages of the proposed plan”).

102. See e.g. *Strassburger v. Earley*, 752 A.2d 557, 574 (Del. Ch. 2000) (finding breach of fiduciary duty in part because “the evidence shows that the remaining directors passively allowed Walden—the fiduciary having the strongest conflicting interest—to dominate the decision making process with the result that the outcome was favorable to him”).

103. See e.g. *Dux Capital Mgt. v. Chen*, 2004 WL 1936309 at *11 (N.D. Cal. Aug 31, 2004) (finding breach of fiduciary duty in part because defendants failed to duly consider other alternatives to bankruptcy); *Strassburger*, 752 A.2d at 573–74 (holding that corporation’s board of directors breached fiduciary duties in part because “the evidence does not support the contention that the board seriously considered the alternatives to a repurchase, and to the extent that alternatives were (in fact) raised, they were quickly brushed aside because [the director with the strongest conflicting interest] disfavored them”).

104. *Infra* nn. 106–113, and accompanying text.

105. See e.g. *In re Walt Disney Co. Derivative Litig.*, 825 A.2d at 275, 287 (finding lack of business judgment where directors neither received nor attempted to review actual draft

than present in person, if a large number of participants are missing, or if memories of deliberations are sketchy and vague—these sorts of factors increase the likelihood that a court will find a breach of fiduciary duty.

- *Consultations with Experts*: (meaningful, pro forma, non-existent). One way in which fiduciaries can decrease the likelihood of being found in violation of their fiduciary duties is by consulting with relevant experts before making a decision.¹⁰⁶ On the other hand, the failure to consult experts when doing so would enhance the likelihood of making a good decision can be a factor in finding a breach of duty.¹⁰⁷ The qualifications and reputation of the experts, their level of preparation and thoroughness, and the quality of their written and oral materials and presentations will also affect the degree of deference that a court is willing to give to a fiduciary's or group fiduciaries' deliberations.

b. Information upon Which an Action was Based

- *Quality*: (high, medium, low). If important decisions are based upon information of a high quality, it is less likely that a court will find a breach of fiduciary duty than if decisions are based upon information of poor quality.¹⁰⁸
- *Quantity*: (highly informed, somewhat informed, anecdotal, ad hoc, uninformed; written materials (detailed, somewhat detailed, not detailed; accurate, somewhat accurate, inaccurate; complete, mostly complete, incomplete)). Similarly, the sheer quantity of

employment agreements but rather received merely a summary of terms and conditions, and where there was no further board or committee review of the final agreement which “differed substantially from the original draft”).

106. See *Brehm v. Eisner*, 746 A.2d 244, 261 (Del. Super. 2000) (finding that directors did not breach their fiduciary duty in creating a compensation package for the president partially because they relied on an outside executive search consultant); *Lewis*, 664 N.E.2d at 134 (finding no breach of fiduciary duty in part because the Board solicited the advice of its law firm and its broker, and “[b]oth recommended the plan that the board ultimately adopted”).

107. See *In re Walt Disney Co. Derivative Litig.*, 825 A.2d at 288 (Del. Ch. 2003) (holding that directors and president breached fiduciary duties in dealing with the president's employment contract and non-fault termination, emphasizing that “no expert was retained to advise the Old Board, the committee, or [the CEO]”).

108. See *Malone v. Brincat*, 722 A.2d 5, 10–12 (Del. Super. 1998) (holding that “directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder violate their fiduciary duty”); *Solomon v. Armstrong*, 747 A.2d 1098, 1127–28 (Del. Ch. 1999) (finding that “courts inquire as to the type and quality of information in shareholders' hands prior to the vote” in determining whether directors have complied with their duty to disclose all material information, when they are seeking the affirmative vote of shareholders, such that shareholders are “fully informed”).

information can also make a difference in an assessment of whether fiduciaries have fulfilled their duties. In general, a greater amount of information taken into account will decrease the likelihood of liability.¹⁰⁹

- *Time to Study and Digest*: (ample, adequate, minimal, inadequate). In general, if fiduciaries have had ample time to study and digest information, especially if it is of a complex and multifaceted nature, it is less likely that a court will find them to be in violation of fiduciary duties, including the duties of diligence and care.¹¹⁰ On the other hand, if complex or difficult decisions are made hastily, without adequate time to study and digest relevant information, it is more likely that a court will find a breach of duty.¹¹¹

- *Due Diligence*: (thorough, adequate, cursory, nonexistent). When important discretionary decisions are being made, fiduciaries are expected to conduct an investigation of a proposed course of action, often referred to as conducting due diligence.¹¹² If a fiduciary fails to conduct adequate due diligence, it increases the likelihood that a court will find a breach of fiduciary duty.¹¹³

109. See e.g. *Lewis v. Playboy Enters., Inc.*, 664 N.E.2d 133, 137 (Ill. App. 1st Dist. 1996) (finding no breach of fiduciary duty when the evidence clearly demonstrated that “the Board considered several alternatives in addition to the plan and that it had a substantial amount of outside information and counsel from both the law firm and the investment banking groups” (internal quotation omitted)).

110. See *Gray v. Zondervan Corp.*, 712 F. Supp. 1275, 1280–82 (W.D. Mich. 1988) (holding that directors of target corporation did not breach their fiduciary duties to shareholders because decision to recommend acceptance of lock-up, topping, and expense fees and employment contracts was made by a committee of outside directors after substantial deliberation and extensive input from financial and legal experts).

111. See *In re Walt Disney Co. Derivative Litig.*, 825 A.2d at 287–88 (finding breach of fiduciary duty when compensation committee and Board spent a fraction of an hour deliberating and asked no questions about the proposed employment contract of the prospective new president).

112. *Liss v. Smith*, 991 F. Supp. 278, 288 (S.D.N.Y. 1998) (holding that defendants’ omissions, including failure to properly investigate investments and failure to exercise due diligence, constituted a “prototype for breached fiduciary duty”).

113. See e.g. *Leigh v. Engle*, 727 F.2d 113, 124 (7th Cir. 1984) (failing to make an intensive and independent investigation of investment options constitutes breach of fiduciary duty); *Keach v. U.S. Trust Co., N.A.*, 256 F. Supp. 2d 840, 842 (C.D. Ill. 2003) (upholding claim of breach of fiduciary duty since evidence “could support the reasonable inference that [defendant’s] due diligence investigations failed to rise to the level of prudence necessary to insulate it from liability for breach of fiduciary duty”).

c. Consistency of Fiduciaries' Memories and Accounts of Decision Making

- *Degree of Consistency and Detail:* (high, medium, low; documented, vaguely documented, undocumented). Fiduciaries are often required to give an account of the process they engaged in when making important decisions. If a fiduciary or group of fiduciaries have a clear, detailed, recollection of the decision-making process, and if the relevant accounts are consistent with each other, it decreases the likelihood that a court will find that there has been a breach of duty. Documentation to support such recollections, such as detailed board minutes, or written materials from presentations about a proposed course of action, will also decrease the likelihood of liability. On the other hand, if a fiduciary has very little detailed recollection, or if individual members of a group of fiduciaries do not remember details, or if memories are vague or inconsistent, it increases the likelihood that a court will find a breach of duty.¹¹⁴

d. Consideration of Alternatives

- *Alternatives Considered:* (multiple, several, two, one). When important discretionary decisions are subject to scrutiny, if a fiduciary or group of fiduciaries has actively considered a range of alternative courses of action, as opposed to only one or two favored options, it increases the likelihood that a court will not find a breach of duty.¹¹⁵ On the other hand, if deliberations were limited to a single possible course of action, or if only one option was seriously considered, it is more likely that a court will find a breach of duty.¹¹⁶

- *Actions Taken to Foreclose Alternatives:* (high prohibitive effect, medium, low). Sometimes a fiduciary or group of fiduciaries will take affirmative actions to foreclose alternatives

114. See *In re Walt Disney Co. Derivative Litig.*, 825 A.2d at 289 (refusing to grant directors protection under the business judgment rule in part because there was no evidence in the board meeting minutes that the directors seriously undertook their duty to consider the terms of the president's hiring and subsequent termination, giving the impression that the directors "consciously and intentionally disregarded their responsibilities" (emphasis removed)).

115. See *Lewis v. Playboy Enterprises, Inc.*, 664 N.E.2d 133, 134 (Ill. App. 1st Dist. 1996) (finding no breach of fiduciary duty in part because "[s]enior management considered four different restructuring transactions").

116. See *Strassburger v. Earley*, 752 A.2d at 573-74 (Del. Ch. 2000) (holding that corporation's board of directors breached fiduciary duties in part because "the evidence does not support the contention that the board seriously considered the alternatives to a repurchase, and to the extent that alternatives were (in fact) raised, they were quickly brushed aside").

that might be in the best interest of beneficiaries, which will increase the likelihood that a court will find a breach of fiduciary duty. For example, if a board of directors that has decided to sell the company takes actions to foreclose higher potential competing bids, this will increase the likelihood that a court will find the board liable for a breach of fiduciary duty.¹¹⁷

3. *Character of the Fiduciary's Motives*

An important third set of factors that courts utilize in assessing the magnitude of an alleged breach of duty centers around the fiduciary's motives. In general, questionable or unacceptable motives increase the likelihood of a court finding a breach of duty, and salutary or unassailable motives increase the likelihood of a court finding no breach of duty. Improper motives, such as greed, also exist along a continuum, and the more unacceptable the motive, the more likely it is that a high magnitude breach will be found. In addition, and perhaps less intuitively obvious, inappropriate motives themselves exist along a spectrum, with greed, self-dealing, disloyalty, and conflicts of interest, for example, being more problematic than anger, fear, laziness or inattentiveness. Of course, high magnitude instances of even the less objectionable motives can result in liability, such as when negligence rises to the level of recklessness or gross negligence, or when carelessness rises to the level of abdication. Problematic motives often combine with other defects in the fiduciary's behavior or performance, in which case courts sometimes treat them as something like an aggravating factor in increasing the magnitude of a breach.

a. Conflicts of Interest

Fiduciaries are expected to act exclusively in the interests and for the benefit of their beneficiaries.¹¹⁸ In Judge Cardozo's memorable

117. See *Roth v. Mims*, 298 B.R. 272, 285–86 (N.D. Tex. 2003) (holding that president breached fiduciary duty of care to corporation under Texas law by failing to diligently market corporation's assets and seek out potential buyers because, even though president did not preclude other buyers from making competing offers, he did not take affirmative steps to market the corporation's assets other than to the company who secretly negotiated with the president).

118. See *Pegram v. Herdich*, 530 U.S. 211, 224 (2000) ("Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." (quoting George Gleason Bogart & George Taylor Bogert, *The Law of Trusts and Trustees* § 543, 217 (2d ed., West 1984))); *Meinhard*, 164 N.E. at 546 ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.").

formulation fiduciaries owe an “undivided loyalty” and a “punctilio of an honor the most sensitive.”¹¹⁹ Conflicts of interest take many forms and are condemned under a variety of doctrinal rubrics including the duties of loyalty and good faith, prohibitions on self-dealing and self-enrichment, and the corporate opportunities doctrine.

- *Selfish Motives/Greed*: (high, medium, low; dominant motive, intermediate degree motive, insignificant motive). One of the ways that a fiduciary will most dramatically increase the likelihood that a court will find her liable for a breach of fiduciary duty is to act from selfish motives.¹²⁰ Greed is probably the predominant selfish motive that results in a finding that a fiduciary has breached her duty. Greed may or may not be good when an individual is acting in pursuit of her own conception of her own self-interest, but is almost always an unacceptable motive in a fiduciary. An exception exists in cases where there is a close alignment of the fiduciary’s interests and the beneficiaries’ interests, such as is often the case of directors and their corporations. But greedy fiduciaries often act in ways that create dissonance between their interests and their beneficiaries’ interest, in which case a court is likely to find a breach of duty. Selfish motives will be evaluated according to their magnitude, as well as their relative place among other motives. Not surprisingly, courts are more likely to find legal liability in cases involving high-magnitude selfishness as opposed to lower-magnitude selfishness, which may result in only indignant disapproval or acquiescence. For example, a fiduciary may have a plausible argument that her interests and the beneficiary’s interests were closely aligned, and even there are grounds for doubting the fiduciary’s assertion, a court may be reluctant to conclude that the fiduciary has breached her duty. Since educators do not generally have a financial stewardship, we would not expect that greed would not be a dominant factor in assessing the magnitude of duty in the educational context. But if educators act in a greedy or self-serving manner, for example by trying to take credit for a student’s research or invention, the

119. *Meinhard*, 164 N.E. at 546.

120. See *Renz v. Beeman*, 589 F.2d 735, 747 (2d Cir. 1978) (“To upset the balance of control for selfish gain is to commit a breach of the high fiduciary duty of undivided loyalty.”); *People v. Banman*, 901 P.2d 469, 471–72 (Colo. 1995) (finding that since “the respondent’s breach of his fiduciary duty to his clients was in large part motivated by greed,” mitigating factors did not apply and that such greed was in fact an aggravating factor); *O’Neill v. Gallant Ins. Co.*, 769 N.E.2d 100, 112 (Ill. App. 5th Dist. 2002) (holding that an insurer acted in bad faith because “corporate greed motivated [the insurer’s] breach of fiduciary duty and that its greed was pervasive,” deliberate, and routine).

fiduciary's greed could be a contributing factor in assessing the degree of a breach of duty.¹²¹

- *Self-Enrichment*: (significant, moderate, small, *de minimis*). Closely related to greed is self-enrichment. One of the particular ways in which a fiduciary can increase the likelihood of liability for breaching her fiduciary duty is to enrich herself at the expense of the beneficiary.¹²² For example, when a director approves the sale of a company, but receives a lucrative severance package or consulting contract, this can create a private benefit that does not accrue to all shareholders, which will increase the likelihood that the director will be found liable for a breach of fiduciary duty. Self-enrichment will likely be viewed as a higher-magnitude breach if it takes place covertly, in which case the likelihood of liability is increased.¹²³

- *Corporate Opportunities*: (secretive, partial disclosure, full disclosure, full disclosure and authorization). Another type of conflict of interest arises when a fiduciary appropriates for himself an opportunity that would be of interest to his beneficiaries. A fiduciary is generally forbidden to take for himself an opportunity that would be of interest to his beneficiaries, without first presenting the opportunity to the beneficiaries, having the beneficiary pass on the opportunity, and giving the fiduciary permission to pursue it privately.¹²⁴ For example, a partner who, upon receiving a very lucrative engagement, immediately decides to resign from the partnership

121. See *infra* Part IV (B)-(C).

122. See e.g. *Beckstrom v. Parnell*, 730 So. 2d 942, 948 (La. App. 1st Cir. 1998) (holding that stockholder breached his fiduciary duty to investor through self-dealing, which was held to the "higher degree of loyalty owed by a fiduciary").

123. See e.g. *Ries v. Humana Health Plan, Inc.*, 1995 WL 669583 at *7 (N.D. Ill. Nov. 8, 1995) ("A fiduciary's covert profiteering at the expense of insureds is inconsistent with its duties of acting 'solely in the interest of the participants and beneficiaries,' and of refraining from engaging in self-dealing. Moreover, the failure to inform [plaintiff] of the discounting arrangement transgresses the fiduciary duty of conveying important information and ensuring against misleading plan participants." (quoting 29 U.S.C. § 1104(a)(1)(A))).

124. See *In re Sullivan*, 305 B.R. 809, 819-20 (Bankr. W.D. Mich. 2004) ("It is widely recognized that the appropriation of a corporate opportunity by an officer or director constitutes a breach of the fiduciary duty of good faith. . . . 'A corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain. The rule is that if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake which is, from its nature, in the line of the corporation's business and is of practical advantage to it, and which is one in which the corporation has an interest or a reasonable expectancy, and if, by embracing the opportunity, the self interest of the officer or director will be brought into conflict with that of this corporation, the law will not permit him to seize the opportunity for himself.'" (quoting *Prod. Finishing Corp. v. Shields*, 405 N.W.2d 171, 174 (Mich. App. 1987))).

and pursue the opportunity for himself is guilty of expropriating a partnership opportunity. When assessing whether an opportunity was a corporate or partnership opportunity, a court will consider the line of business in which the corporation or partnership is engaged and how closely the opportunity is aligned with the corporation or partnership's business.¹²⁵ A court will also consider whether the partnership is a term partnership, or an at will partnership. If it is a term partnership, and the term of the partnership has expired, then an opportunity that does not arise until the expiration of the term may not be viewed as a partnership opportunity. As the *Meinhard* case illustrates, however, a fiduciary's self-serving characterization of when an opportunity arises may be rejected by a court.¹²⁶ We would not expect the corporate opportunities doctrine to be a significant theory of liability in the educational context. But if, for example, a group of educators were working together in a partnership, and if one of the partners were accused of seizing for himself an opportunity that would have been of interest to the partnership, then we would expect such behavior to be analyzed in the usual manner.

- *Anger, Hatred, Jealousy, Animus*: (high, medium, low). Conflicts of interest can manifest themselves in less straightforward ways as well, including when a fiduciary acts out of passion or animus, rather than out of a careful evaluation of the best interests of the beneficiaries. Greed is not the only emotion that can create a conflict of interest between a fiduciary and his beneficiaries. For example, if a fiduciary acts out of anger, hatred, or vengeance (among other inappropriate emotions), even if there is no economic self-dealing, a court may conclude that the fiduciary has violated fiduciary duties of loyalty and good faith by engaging in a type of self-dealing.¹²⁷ We would expect this factor to apply in the usual manner in the educational context.

125. See *Gen. Automotive Mfg. Co. v. Singer*, 120 N.W.2d 659 (Wis. 1963).

126. *Meinhard*, 164 N.E. at 550 (Andrews, J. dissenting) (characterizing the original lease as creating a relationship analogous to a term partnership).

127. See *In re R.J.R. Nabisco, Inc. Shareholders Litig.*, 1989 WL 7036 at *15 (Del. Ch. Jan. 31, 1989) (finding that "the protections of the business judgment rule would [not] be available to a fiduciary who could be shown to have caused a transaction to be effectuated . . . for a reason unrelated to a pursuit of the corporation's best interests" and that "[g]reed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or . . . shame or pride").

c. Fear

Fiduciaries who are paralyzed by fear increase the likelihood of being found liable for a breach of fiduciary duty. On the other hand, fiduciaries who are extremely fearless, as manifested, for example, by an extreme toleration or appetite for risk, are also likely to be found in violation of their fiduciary duty. Fear can manifest itself in a variety of ways, including an extreme aversion to making a mistake, or concern about being found out, which may result in hiding mistakes.

- *Extreme Aversion to or Appetite for Risk*: (extremely cautious, moderately cautious, appropriately cautious, moderately risky, extremely risky). A fiduciary can breach his fiduciary duty both by being too risk averse and by having too great an appetite for risk. If a fiduciary has an unusual and unwarranted aversion to risk and as a result fails to take advantage of opportunities that a prudent person would take advantage of, this will increase the likelihood that a court will find a breach of fiduciary duty. On the other hand, if a fiduciary has an inappropriately large appetite or tolerance for risk, this also can increase the likelihood that a court will find a breach of duty. What constitutes an appropriate degree of risk aversion will vary significantly based upon a number of contextual considerations including the character of the beneficiary, and the goals and expectations of the beneficiary. For example, the types and degree of risks that are appropriate when investing the retirement funds of someone who is only a few years from retirement will be significantly different than the types and degree of risks that are appropriate for someone who is still several decades away from retirement. In both contexts, however, there will be a continuum, with types of behavior that are too risk averse and other types of behavior that embrace too much risk. Since educators are for the most part not fiduciaries with oversight responsibility for investing money, we would not expect this factor to be of particular significance in the educational context.
- *Hiding Mistakes*: (systematic, ongoing, occasional, one time). Another type of fear that may result in a court viewing a breach of duty as being of a heightened magnitude is when a fiduciary makes a mistake and does not want it to be discovered. If a fiduciary tries to hide or cover up mistakes, this will increase the likelihood that a court will find the underlying mistake to be a high-degree breach of duty, and the act of hiding the mistake will act as a magnifying factor.¹²⁸ Not surprisingly, systematic or

128. See *Lasley v. Helms*, 880 P.2d 1135, 1137-38 (Ariz. App. Div. 1 1994) (holding that a

ongoing hiding of mistakes is more likely to be characterized as a high magnitude breach than hiding that is an exception to a general pattern of candor and disclosure, or that represents a one-time lapse. We would expect that this factor would apply in the usual manner in the educational context.

d. Laziness or Inattentiveness

- *Degree of Carelessness*: (willful blindness, gross negligence, negligence, care, diligence). A fiduciary can increase the likelihood of liability for breach of fiduciary duty by being lazy, inattentive, or careless. The greater the degree of negligence, the greater the likelihood that a fiduciary will be found in breach of duty. Usually the threshold of carelessness is quite high before liability will exist. For example courts require gross negligence or reckless disregard of important information to trigger fiduciary liability rather than simple negligence, but if negligence rises to the level of willful blindness, it is quite likely that a court will find a breach of duty.¹²⁹ We would not expect educators to be liable for breaches amounting to simple negligence, but that liability for carelessness would be possible in instances where neglect of duty rose to the level of gross negligence or willful disregard of duty.

4. *Classification of the Alleged Breach*

The manner in which an alleged breach of fiduciary duty is classified will often have a significant effect on whether a breach of duty will be found and on whether that breach will be regarded as being of a high or low magnitude. For example, in Delaware, the state legislature adopted a statutory amendment to the corporate code that enables companies to adopt an amendment to their corporate charters that eliminates monetary liability for breaches of the duty of care by directors, even in

doctor who negligently overprescribed an addictive sleeping pill and then continued to assure patient that he was not addicted nor being harmed constituted constructive fraud, which "requires a fiduciary . . . relationship," because "[t]he professional's fiduciary and confidential relationship with his client or patient both compels the professional to disclose, rather than conceal, his error and mitigates the injured person's duty to discover it independently" (quoting *Gutierrez v. Mofid*, 705 P.2d 886, 890 (Cal. 1985)).

129. See *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 206 (5th Cir. 1994) (Goldberg, J., dissenting) ("The deliberate indifference standard is a high legal threshold, used to distinguish simple negligence from the type of willful blindness that is so extreme that it qualifies as active conduct for determining culpability."); see also *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979) (discussing liability based on gross negligence and reckless disregard for the safety of others).

the event of gross negligence.¹³⁰ This has had the effect of reducing the magnitude of breach associated with the duty of care. If a Delaware corporation has adopted such a charter amendment under Section 102(b)(7), and if shareholders allege that directors have violated only their duty of care, the court will dismiss the complaint. On the other hand, in Delaware if plaintiffs provide evidence of a violation of the duty of loyalty, then the burden of proof shifts to the directors to establish the “entire fairness” of the transaction at issue, in which case the directors’ performance with respect to all of their fiduciary duties, including the duty of care, will be evaluated as a part of an assessment of “entire fairness.” In such a case, an evaluation of the directors’ alleged violations of their duty of care will come in through the back door. Thus, in a case involving Delaware directors, if a Section 102(b)(7) charter amendment has been adopted, the fiduciary duty of care will typically only receive substantive review if there has been a violation of a different fiduciary duty.

a. A Hierarchy of Alleged Breaches of Duty

Not all breaches of fiduciary duty are viewed as being equally egregious. Most notably is the distinction between malfeasance (affirmative misconduct) and nonfeasance (failure to act appropriately). In general, a court is more likely to find liability for fiduciary conduct that can fairly be characterized as malfeasance as opposed to nonfeasance. There is something of an informal, if inexact, hierarchy of alleged breaches of duty, based upon the nature of the breach, with fraud at the top of the list of seriousness and prudence at or near the bottom. We would suggest that the hierarchy would run approximately as follows: fraud, self-dealing, disloyalty, conflicts of interest, disclosure, disobedience, diligence, care, and prudence.

(i) Fraud

The prohibition on fraudulent conduct is at or near the top of the hierarchy of types of breach of fiduciary duty. If a fiduciary commits fraud, there is a high likelihood that a court will find a breach of fiduciary duty.¹³¹ Indeed, the conduct may be covered by criminal and other civil

130. See, e.g. Delaware Code Ann. tit. 8, § 102(b)(7).

131. See e.g. *In re Mushroom Transp. Co.*, 382 F.3d, 325, 342 (3d Cir. 2004) (the court is especially concerned with fraud and the fiduciary because “it is this type of very special relationship that enables a wayward fiduciary to engage in acts of concealment that ‘cause the [principal] to relax vigilance or deviate from the right of inquiry” (emphasis removed) (citing *Rubin Quinn Moss Heaney & Patterson, P.C. v. Kennel*, 832 F. Supp. 922, 935 (E.D. Pa. 1993)); see also *Schwartz v. Pierucci*, 60 B.R. 397, 403 (Bankr. E.D. Pa. 1986).

liability provisions, and so the concept of fiduciary duty may not explicitly be a part of the analysis of legal culpability.¹³² The definition of fraud will vary from context to context and, in general, in areas where there are other indicia that would suggest the existence of high-magnitude fiduciary duties, fraud will often be defined in a way that makes it easier to prove the elements of the offense, which will have the effect of magnifying the prohibition of fraudulent behavior.

(ii) Self-Dealing

A related high magnitude breach of duty is self-dealing, or behavior in which the fiduciary uses the beneficiary's property for his own purposes, without regard for, or even contrary to, the interests of the beneficiary.¹³³ Because it is a high magnitude breach of duty, self-dealing is also likely to result in fiduciary liability for breach of duty.¹³⁴ Self-

132. See e.g. *Securities Exchange Act of 1934*, Rule 10b-5, 17 C.F.R. § 240.10b-5 (2004) (federal securities rule that prohibits making "any untrue statement of a material fact", and also prohibits engaging "in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person" in connection with purchase or sale of any security of any national securities exchange); 29 U.S.C.S. § 1105 (LEXIS 2005) (ERISA provision which spells out liability for breach by co-fiduciary, including concealing acts or omissions of other fiduciaries); 29 U.S.C.S. § 1106 (LEXIS 2005) (ERISA provision that enunciates prohibited transactions by a fiduciary, particularly forbidding a fiduciary to deal with "assets of the plan in his own interest or for his own account").

133. For examples of self-dealing, see *Jernberg v. Mann*, 358 F.3d 131, 135 (1st Cir. 2004) (fiduciaries "[m]ay not misuse their official positions so as to harm the corporation . . . in order to advance their personal interests, their fiduciary obligations arise from and are bounded by the corporate relationship"); *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 32 (2d Cir. 2002) (the court referred to ERISA § 1106 (*infra* n. 143), and found that the insurance company breached its fiduciary duty to avoid self-dealing because it "dealt with the assets of the plan in [its] own interest," by charging itself below-market rental rates on office properties); *Sanford v. Sanford*, 137 S.W.3d 391, 398 (Ark. 2003) (in a discussing fiduciary duties of a trustee, and citing the rule that "[i]n administering the trust, the trustee must act for the beneficiaries and not for himself in antagonism to the interest of the beneficiaries; he is prohibited from using the advantage of his position to gain any benefit for himself at the expense of the beneficiaries and from placing himself in any position where his self interest will, or may, conflict with his duties" (quoting *Riegler v. Riegler*, 553 S.W.2d 37, 40 (Ark. 1977))).

134. Cases discussing self-dealing are highly critical of any evidence of a fiduciary's acting in their own self interest at the expense of a corporation or beneficiary. In one case the judge stated that "[t]he fact that [the defendant] profited at all from the transfer of . . . assets, even relatively minimally, indicates the self-dealing nature of the switch." *O'Malley v. Boris*, 2002 Del. Ch. LEXIS 33 at *19 n. 24 (Del. Ch. Mar. 18, 2002). See *Epstein v. U.S.*, 174 F.2d 754, 764 (6th Cir. 1949) (demonstrating suspicion that directors could be acting in their own interest or the interest of one other company: "[t]ransactions between corporations having interlocking directorates, the fairness and good faith of which transactions are challenged, are jealously regarded by the law"); *Continental Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1238 (Del. Ch. 2000) (stating that even where a limited partnership ended upon profiting from the self-dealing, their disloyal, self-dealing act would still entitle the other partners to recover: "Delaware law does not allow a disloyal fiduciary to profit from his breach.").

dealing is closely related to the duty of loyalty, and sometimes self-dealing is treated as a particularly egregious violation of the duty of loyalty.¹³⁵

(iii) Disloyalty

Also near the top of the hierarchy of breaches of fiduciary duty is disloyalty. Disloyalty is a high magnitude breach that is quite likely to result in a finding of a violation of fiduciary duty. For example, in the corporate context, whereas the business judgment rule protects directors from liability for mistakes that are made in good faith and after reasonable investigation, there is no analogous shield protecting directors from a violation of their duty of loyalty.¹³⁶ In its strongest formulation, the duty of loyalty requires that a fiduciary put aside his own interests and act in furtherance only of the interests of a beneficiary.¹³⁷ If there is an alignment of interests, such as in a partnership, the expectation of selflessness will be lower as long as the alignment of interests is maintained. In some contexts it is also possible to contractually lower the

135. Not only does self-dealing lead to sanctions, but courts apply other legal remedies to help the beneficiaries of a self-dealing fiduciary. For example, “[t]he benefit of the statute of limitations will be denied to a corporate fiduciary who has engaged in fraudulent self-dealing.” *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 169–70 (Del. 1976). Additionally, self-dealing is considered so serious that when there is self-dealing, courts sometimes find that there has been a breach of fiduciary duty “even when the act taken is innocent and unintentional.” *Cole v. Laws*, 76 S.W.3d 878, 883 (Ark. 2002). Courts find that “[t]he duty of loyalty derives from the prohibition against self-dealing that inheres in the fiduciary relationship. The fiduciary is not to benefit at the expense of the corporation . . . ‘no matter how meticulous he is to satisfy technical requirements.’” *Saginaw Products Corp. v. Cavallo*, 1994 Conn. Super. LEXIS 2030 at *11 (Conn. Super. Aug. 11, 1994) (quoting *In re Western World Funding, Inc.*, 53 B.R. 743, 763 (Bankr. D. Nev., 1985) (internal quotation omitted)).

136. Although the business judgment rule holds that a court will not “second-guess” a board’s decision, if a plaintiff shows a breach of fiduciary duty, the burden will shift to the fiduciary directors to prove the “entire fairness” of a transaction. *Cede & Co. v. Technicolor Inc.*, 634 A.2d 345, 361 (Del. 1991); See *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 768–69 (2d Cir. 1980) (“[u]nder normal circumstances the directors of a corporation may determine, in the exercise of their business judgment . . . without review of the merits of their decisions by the courts. The business judgment rule places a heavy burden on shareholders who would attack corporate transactions. But the business judgment rule presupposes that the directors have no conflict of interest. When a shareholder attacks a transaction in which the directors have an interest other than as directors of the corporation, the directors may not escape review of the merits of the transaction.” (citations omitted)).

137. *Meinhard*, 164 N.E. at 547 (finding that partner in joint venture “held [the business opportunity] as a fiduciary, for himself and another, sharers in a common venture” and describing the duty of loyalty as “[n]ot honesty alone, but the punctilio of honor the most sensitive” (*supra* n. 19 and accompanying text)). This expression of the duty of loyalty is constantly cited by courts. See *Lawrence v. Cohn*, 197 F. Supp. 2d 16, 33–34 (S.D.N.Y. 2002) *aff’d*, 325 F.3d 141 (2d Cir. 2003); *N.E. Gen. Corp. v. Wellington*, 82 N.Y.2d 158, 162 (N.Y. 1993); *British Am. Oil Producing Co. v. Midway Oil Co.*, 82 P.2d 1049, 1053 (Okla. 1938).

obligations associated with the duty of loyalty.¹³⁸ But if a fiduciary appropriates a corporate or partnership opportunity for his own benefit, the alignment of interests will be broken, and the fiduciary that has taken the opportunity for himself will be in violation of his duty of loyalty.¹³⁹

(iv) Conflicts of Interest

Closely related to the duty of loyalty are problems that arise from conflicts of interest. When the interests of the fiduciary and beneficiary diverge, special measures must be taken by the fiduciary in order to avoid breaching her fiduciary duty. For example, if a board of directors takes defensive measures to prevent an unsolicited offer to buy the company, due to the potential conflict of interest that exists between directors (who may want to perpetuate themselves in office) and shareholders (who may be interested in a sale at a premium of current stock price), courts often subject the steps taken by directors to thwart such overtures under an enhanced scrutiny standard.¹⁴⁰ When a transaction is subject to intermediate scrutiny, a court will ask whether the board's actions were in response to a reasonable perception of a threat to the corporation, and whether the measures taken were proportional to the threat that existed.¹⁴¹ As a further example, when a director is involved as a principal in a transaction with the corporation, her interests may conflict with

138. Uniform Limited Liability Company Act § 103(b)(2). When an LLC is formed, an operating agreement sets up the structure of the LLC. The operating agreement can be constructed quite broadly, but the act specifies that it may not "eliminate the duty of loyalty" entirely. § 103(b)(2). The operating agreement may, however, "identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable." *Id.* at (b)(2)(i). See *McConnell v. Hunt Sports Enterprises*, 725 N.E.2d 1193, 1214 (Ohio App. 10th Dist. 1992) (finding no breach of duty to loyalty when one member separately started hockey franchise that was initially proposed to the LLC and stating that "[n]ormally, the presence of such a relationship would preclude direct competition between members of the company. However, here we have an operating agreement which by its very terms allows members to compete with the business of the company.").

139. See e.g. *Wartski v. Bedford*, 926 F.2d 11, 14 (1st Cir. 1991) ("[A] partner has a fiduciary obligation to the partnership of the utmost good faith and loyalty and cannot divert a business opportunity for his own gain without first making a complete and unambiguous disclosure to the partnership."); *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996) ("a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation").

140. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954-55 (Del. 1985) ([t]he standard of proof . . . is designed to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or other misconduct").

141. *Id.*; see also *Flake v. Hoskins*, 55 F. Supp. 2d 1196, 1216 (D. Kan. 1999); *Gilbert v. El Paso Co.*, 575 A.2d 1131 (Del. 1990).

those of the corporation, and she must fully disclose the conflict to the remaining disinterested members of the board and recuse herself from the decision making process while the disinterested board members decide whether the transaction is in the best interests of the corporation.¹⁴²

(v) Disclosure

A medium-level breach of duty is a violation of a fiduciary's obligations to disclose relevant material information to beneficiaries. The exact contours of the duty of disclosure vary significantly from context to context.¹⁴³ Fulfilling the duty of disclosure may also involve a measure of judgment, since determining what information is relevant or material may not always be easy.¹⁴⁴ The duty to disclose material information often arises in the corporate context. For example, directors have a duty to disclose all material information to shareholders when soliciting shareholder approval for a course of action the directors are recommending.¹⁴⁵ It is quite common for disclosure failures to be linked to other substantive fiduciary duties, such as the duty of loyalty or the duty of care. If a failure to disclose material information or the disclosure of materially inaccurate information is the result of a breach of the underlying duty of care, it is less likely that liability will be found than if the incomplete or inaccurate disclosure is based upon a breach of the underlying duty of loyalty.¹⁴⁶ This should not come as a surprise, since

142. *Burcham v. Unison Bancorp, Inc.*, 77 P.3d 130, 149 (Kan. 2003) (“[t]he presence of a majority of outside independent directors will materially enhance such evidence [that a reasonable investigation determined that defensive measures are necessary]”).

143. In some ERISA and securities cases, there is a duty to disclose any material fact that is connected to the fiduciary's obligations. See *Dobson v. Hartford Fin. Servs. Group*, 389 F.3d 386, 401 (2d Cir. 2004) (“A number of authorities assert a plan fiduciary's obligation to disclose information that is material to beneficiaries' rights under a plan, even if such information goes beyond the four corners of the plan itself.”). In other situations, the duty of disclosure is much more limited. See *Monetta Fin. Servs. v. Secs. Exch. Commn.*, 390 F.3d 952, 957–58 (7th Cir. 2004) (in finding that there was no awareness of duty to disclose IPO allocations, the court emphasized that no disclosures were expressly required, thus disclosure was not part of fiduciary duty for personal liability).

144. Partial disclosure can trigger full disclosure duties even with respect to information that by itself may not have been material. *Lewis v. Bank of America NA*, 347 F.3d 587, 587 (5th Cir. 2003) (citing *Union Pacific Resources Group Inc. v. Rhone*, 247 F.3d 574 (5th Cir. 2003) (“[a] duty to speak arises by operation of law when . . . one party voluntarily discloses some but less than all material facts, so that he must disclose the whole truth, i.e. all material facts, lest his partial disclosure convey a false impression”).

145. See *Erickson v. Horing*, 2002 WL 31163611 at *14 (Minn. App. Oct. 1, 2002) (“Under Delaware law, a director owes a fiduciary duty to ‘disclose fully and fairly all material information within the board's control when it seeks shareholder action.’” (quoting *Arnold v. Socy. for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1277 (Del. 1994))).

146. See e.g. *Johnson v. Shapiro*, 2002 WL 31438477 at *8 (Del. Ch. Oct. 18, 2002) (holding that knowing or reckless withholding of material information is not shielded by Del. Code Ann. tit. 8 §

loyalty is further up the hierarchy of duties than is care. Disclosure problems based upon disloyalty will be treated more severely than disclosure failures that are a result of mere carelessness.

(vi) Disobedience

A somewhat lower magnitude duty is the duty of obedience. The primary reason obedience is regarded as a less onerous duty is because the element of judgment and discretion is largely absent.¹⁴⁷ Rather, the expectation is that the fiduciary will follow instructions and act in a manner that is consistent with those instructions. In general, doing what one is told is less difficult than is exercising good judgment in situations involving complex and competing considerations. Because obedience places relatively straightforward obligations upon a fiduciary, when a fiduciary acts directly contrary to instructions given by a beneficiary, this is quite likely to be viewed as a breach of duty.¹⁴⁸ In some fiduciary relationships where the degree of discretion of the fiduciary is very high, direct questions of obedience may be unlikely.¹⁴⁹ On the other hand, if the fiduciary is given clear instructions, then the duty of obedience is more likely to be contested. For example, if a fiduciary is responsible for the management of funds and the fiduciary has been given explicit instructions or guidelines about the type of investments that are suitable, direct disobedience of instructions is quite likely to result in liability, especially if other indicia of degree of breach discussed above indicate a breach of large magnitude.¹⁵⁰

102(b)(7) (2001) but rather falls under a breach of the duty of loyalty).

147. See *Ebasco Servs., Inc. v. Pa. Power & Light Co.*, 402 F. Supp. 421, 448 (E.D. Penn. 1975) (citing the Restatement (Second) of Agency § 33 (1958) (“an agent is a fiduciary,” and as such, must “obey the will of the principal as he knows it or should know it”). In Texas, the only duty of obedience is to act within the powers of the corporation, so in order to breach the duty of obedience, it is necessary to knowingly commit “acts beyond the scope of the powers of a corporation as defined by its charter.” *Resolution Trust Corp. v. Bonner*, 1993 U.S. Dist. LEXIS 11107, at *4–5 (S.D. Tex. June 3, 1993) (quoting *Gearhart Indus. v. Smith, Int’l.*, 741 F.2d 707, 719 (5th Cir. 1984)).

148. See e.g. *Gagnon v. Coombs*, 654 N.E.2d 54, 61 (Mass. App. 1995) (finding violation of fiduciary duty of obedience where woman who had power of attorney refused to comply with the principal’s expressed wishes regarding property).

149. See e.g. *Tyson v. Clayton*, 784 F. Supp. 69, 75–76 (S.D.N.Y. 1992) (finding that boxing manager did not violate fiduciary duty by refusing to sign a promotional contract because, as boxing manager, “[manager] had a more complex responsibility to his client than does an ordinary fiduciary to his principal . . . [he was] hired to manage [boxer], a function that anticipates something more than blind obedience to the boxer’s every inclination”).

150. The scope of fiduciary duty owed by a broker for a non-discretionary trust is often fairly limited, but courts will find “a duty to properly carry out transactions ordered by the customer.” *Index Futures Group, Inc. v. Ross*, 557 N.E.2d 344, 348 (Ill. App. 1st Dist. 1990).

(vii) Diligence

The fiduciary duty of diligence falls somewhat lower down the hierarchy of fiduciary duties. Diligence is closely linked to the fiduciary duty of care and can be seen as a magnified version of care.¹⁵¹ When particularly important decisions are being made, courts are more likely to describe the duty of care as a duty of diligence. For example, when a board of directors is contemplating an important transaction, such as the sale of the business, they are expected to exercise due diligence in making a decision and recommendation to shareholders.¹⁵² The degree of care that will be expected of them is somewhat higher than the degree of care that will exist with respect to the day-to-day operations of the business, which are much more likely to be given broad protection by the business judgment rule.¹⁵³ Diligence is particularly important when discretionary decisions are entrusted to fiduciaries, or where large financial losses can accompany a failure to diligently investigate potential courses of action.¹⁵⁴

(viii) Care

One of the most common and basic fiduciary duties is the duty of care. While the duty is often described in rather lofty and demanding ways, in practice a rather significant breach of the duty of care is required

151. See e.g. *In re Blinder, Robinson & Co.*, 131 B.R. 872, 883 (Bankr. D. Colo. 1991) (acknowledging that law firm was honest and made full disclosures about its knowledge of conflict of interest, but finding that a "fiduciary duty of diligence required that a member of the firm scan the . . . register" to fulfill duty of care to eliminate possibility of conflict of interest); *Rayman v. Peoples Savings Corp.*, 1989 U.S. Dist. LEXIS 10920 at *10 (N.D. Ill. Sept. 12, 1989).

152. See e.g. *Smith*, 488 A.2d at 872 (In determining whether the business judgment rule applied in a merger that precluded a company from soliciting bids from other companies, the court stated, "[t]he determination of whether a business judgment is an informed one turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'").

153. See e.g. *Schlensky v. Wrigley*, 237 N.E.2d 776, 779 (Ill. App. 1st Dist. 1968) (The court dismissed a derivative suit against corporation, holding that the court would not examine the business decision of whether the defendant should have held night games to generate more revenue. "In a purely business corporation . . . the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors." (quoting *Toebelman v. Missouri-Kansas Pipe Line Co.*, 41 F. Supp. 334, 339 (D. Del. 1941), *aff'd in part and reversed in part*, 130 F.2d 1016 (3d Cir. 1942)). The court merely cited fraud, illegality, or conflict of interest as reasons for the court to interfere with the honest business judgment in this purely business decision.).

154. See e.g. *In re Estate of Collins*, 72 Cal. App. 3d 663 (2d Dist. 1977) (holding that even where a settlor has granted an absolute discretionary trust, trustee still has a fiduciary duty to reasonably investigate and gain information about investments); *Francis v. United Jersey Bank*, 432 A.2d 814, 821-22 (N.J. 1980) ("[d]irectors are under a continuing obligation to keep informed about the activities").

before courts are likely to find legal liability. The duty of care is often linked to the concept of negligence. But a court is very unlikely to hold liable a fiduciary guilty of simple negligence. Rather, negligence must often rise to the level of gross negligence or reckless disregard of relevant information before liability will be found.¹⁵⁵ Some business forms affirmatively contemplate co-owners being able to contractually reduce the degree of care owed to each other.¹⁵⁶ Courts, however, are sometimes suspicious of such efforts at limitation if they are not the result of real agreement and equal bargaining power.¹⁵⁷ As noted above, some states in their corporate codes have limited or eliminated the duty of care of directors.¹⁵⁸ Nevertheless, the duty of care is deeply imbedded in the equitable concept of fiduciary duty, and even in jurisdictions where the duty has been affirmatively limited by statute, the duty has exhibited a stubborn persistence.¹⁵⁹

(ix) Prudence

Just as the duty of diligence can be viewed as a magnification of the duty of care, the duty of prudence may be understood as a less

155. See e.g. *In re Provenza*, 316 B.R. 225, 230 (Bankr. E.D. La. 2003) (“In determining whether a member of a member-managed LLC or a manager-managed LLC has breached a fiduciary duty to the LLC and its members, the courts employ, at a minimum, a gross negligence standard and the business judgment rule.”) (emphasis added); *Bass v. Cal Life Ins. Co.*, 581 So. 2d 1087, 1090 (Miss. 1991) (holding that while adjusters are not liable to insureds for simple negligence in adjusting claims, they can incur liability when their conduct constitutes gross negligence, malice, or reckless disregard for insureds’ rights).

156. See e.g. Uniform Limited Liability Company Act § 103(b)(3) (1996) (operating agreements may not “unreasonably reduce the duty of care” (emphasis added)); Uniform Partnership Act (1997) § 103(b)(4) (partnership agreements may not “unreasonably reduce the duty of care” (emphasis added)).

157. See e.g. *BT-I v. Eq. Life Assurance Socy.*, 75 Cal. App. 4th 1406, 1412 (4th Dist. 1999) (holding “a limited partnership agreement cannot relieve the general partner of its fiduciary duties in matters fundamentally related to the partnership business”).

158. See e.g. Del. Code. Ann. tit. 8, § 102(b)(7) (2004); see also Thomas C. Lee, *Limiting Corporate Directors’ Liability: Delaware’s Section 102(b)(7) and the Erosion of the Directors’ Duty of Care*, 136 U. Pa. L. Rev. 239, 241–42 (1987); John L. Reed & Matt Neiderman, “Good Faith” and the Ability of Directors to Assert §102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty, 29 Del. J. Corp. L. 111, 111 (2004).

159. See *Emerald Partners v. Berlin*, 787 A.2d 85, 99 (Del. 2001) *aff’d*, 840 A.2d 641 (Del. 2003) (holding that once the threshold of a breach of duty of loyalty or good faith is shown, the burden shifts to directors to prove entire fairness of the transaction, and this includes a consideration of all fiduciary duties, including duty of care); *Prod. Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 794 (Del. Ch. 2004) (holding that since creditors did not approve the § 102(b)(7) enactment, they should not be limited by the statute’s shielding of directors from duty of care in the way that shareholders can be limited); *Johnson v. Shapiro*, 2002 WL 31438477 (Del. Ch. Oct. 18, 2002) (holding that reckless or intentional failure to disclose material information is not shielded by § 102(b)(7)).

substantive and robust version of the duty of care. When a court says that a fiduciary owes a duty of prudence, it is describing a very modest standard of care. The duty of prudence can usually be fulfilled with minimum procedural and substantive care.¹⁶⁰

b. Significance of the Hierarchy of Breaches

A breach of a duty at or near the top of this hierarchy of duties is more likely to result in legal liability than is a breach of a duty at or near the bottom. Thus, not only will the specific description of the alleged breach of duty be important, the way in which a court characterizes and categorizes a breach of duty will have a direct effect on the likelihood that legal liability will eventually be found. For example, sometimes a single pattern of conduct could be described as amounting to a violation of the duty of loyalty or the duty of care, but if a court accepts a characterization that emphasizes carelessness (which might be viewed as nonfeasance) it is less likely that the court will find liability than if the court characterizes the behavior as implicating the duty of loyalty (which is more likely to be viewed as malfeasance). Thus not only does the category, character, and description of a fiduciary's misconduct affect whether or not liability will attach, how a court *chooses* to categorize, characterize and describe a fiduciary's misconduct will telegraph how the court is likely to decide the case. Courts can magnify or diminish an alleged violation of fiduciary duty by the way in which it categorizes the breach.

c. Applying the Hierarchy of Duties to Educators

In general, we would expect that this general hierarchy of types of breaches of duty will apply in the educational context in a manner similar to other contexts. Educators who are viewed as committing fraud, violating their duties of loyalty, or exploiting conflicts of interest are much more likely to be held legally liable than fiduciaries who are accused of inattentiveness or imprudence. We would expect that sexual misconduct by teachers, especially with minors or young adults, will be viewed by courts as akin to a violation of the duty of loyalty or as self-dealing, in which case such conduct will be viewed as high-magnitude breaches of duty with a high likelihood of legal liability. At the other end

160. See 29 U.S.C. § 1104(a)(1)(B) (2005) (which provides in relevant part that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.").

of the spectrum, we would expect it to be quite unlikely that educators will be held liable in cases where their sole wrongdoing involves an alleged violation of a duty of care or prudence.

C. *The Availability of an Appropriate Remedy*

The third step in an analysis of the likelihood that a fiduciary will be found liable for a breach of fiduciary duty focuses upon the availability of an appropriate and meaningful remedy. It might seem that the remedy would only become a focus of consideration after a determination has been made that liability should attach, but in a number of cases it appears that courts consider whether a remedy is available as a part of their determination of whether liability should exist at all. This might be in part because a court may be reluctant to find liability when an appropriate remedy does not seem to exist. On the other hand, if there is an available and obvious remedy to an alleged breach, this may actually increase the likelihood that a court will find that there has been a breach of duty.

A wide array of remedies are imposed in cases involving breaches of fiduciary duty. Similar to breaches, potential remedies seem to exist in an informal hierarchy based upon the degree of burden or magnitude of penalty placed upon the fiduciary to remedy his breach of fiduciary duty. At the bottom of the hierarchy would be the requirement to give an accounting, followed in roughly ascending order by, disclosure, disgorgement, recession, restitution, actual damages, an injunction, specific performance, removal from office, punitive damages, decertification, and imprisonment.

In general, courts reserve the most severe penalties for instances of high magnitude breaches of high magnitude duties. So for example, imprisonment, decertification, and punitive damages will normally be reserved for severe breaches of serious duties. On the other hand, a remedy such as requiring an accounting or requiring a full disclosure will be more common in situations involving lower degree violations of lower degree duties. If a severe penalty is sought, a court will most likely require proof of a high magnitude breach and high magnitude duty. If an appropriate remedy does not seem to exist, this will decrease the likelihood that a court will find that a fiduciary relationship exists or, if such a relationship does exist, that there has been a breach of duty.

IV. APPLYING THE ANALYTIC FRAMEWORK IN FOUR TYPES OF EDUCATION CASES

The analytic framework introduced in Part III helps us understand

and evaluate how courts will address a wide variety of issues involving alleged violations of fiduciary duties by educators. When the facts of a particular case are evaluated against the factors that are utilized by courts in assessing the magnitude of duties, the magnitude of breaches, and the availability of an appropriate remedy, it is usually possible to ascertain with some confidence whether or not a court will find that there has been a breach of fiduciary duty. By way of illustration, we will briefly address four sets of recurring issues that arise in education: (i) cases involving the evaluation and grading of students; (ii) cases involving research relationships; (iii) cases involving patents and other intellectual property; and (iv) cases involving allegations of sexual harassment or misconduct.

A. *Academic Evaluation and Advisement*

Disgruntled students have brought a variety of lawsuits alleging violations of fiduciary duty by schools and universities in the grading and evaluation process. These cases tend to involve rather low degree alleged duties combined with small magnitude alleged breaches, and thus it is not surprising that courts have often refused even to recognize that such claims involve a fiduciary relationship,¹⁶¹ or have concluded that the student has failed to prove the elements of a fiduciary relationship.¹⁶² When a fiduciary relationship is acknowledged in the context of grading and evaluation, courts have uniformly found no breach of duty.¹⁶³

161. Some courts sidestep or explicitly reject the claim that such cases involve a violation of fiduciary duty by characterizing the cases as involving assertions of "educational malpractice," or "inadequate services." See e.g. *Ross v. Creighton U.*, 957 F. 2d 410, 414 n. 2 (7th Cir. 1992) (citing cases from eleven other states that have considered and rejected educational malpractice claims); *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 855 (App. 1st Dist. 1976) (rejecting student claim alleging inadequate education). So classified, courts usually follow the road of declining to entertain claims of educational malpractice or inadequate educational services as a matter of public policy. See *Regents of the U. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985); *Ross*, 957 F.2d at 414 (stating that federal courts are inapt to evaluate the substance of academic decisions made by educators on daily basis); *Gally v. Columbia U.*, 22 F. Supp. 2d 199, 210 (S.D.N.Y. 1988) (dismissing student's claim that school failed to provide an effective education as an "impermissible attempt to avoid the rule that there is no claim in New York for 'educational malpractice'"). Other courts sidestep the claim that such cases involve fiduciary relationships by asserting that the relationship between the student and the university is strictly contractual. See e.g. *Andre*, 655 N.Y.S. 2d at 779; *Prusack v. State*, 117 A.D.2d 729, 729 (N.Y. App. Div. 2d Dept. 1986).

162. In evaluation cases, courts often conclude that the student has failed adequately to prove that a fiduciary relationship exists. See *Zumbrun v. U. of S. Cal.*, 101 Cal. Rptr. 499, 506 (App. 2d Dist. 1972) ("The mere placing of trust in another person does not create a fiduciary relationship"); *Shapiro v. Butterfield*, 921 S.W.2d. 649, 651-52 (Mo. App. 1996) (holding student failed to establish that a fiduciary relationship existed with her faculty advisor); *Abrams v. Mary Washington College.*, 33 Va. Cir. 449, 454 (Va. Cir. 1994) (holding that there is no common law "special trust relationship" between students and college officials).

163. One tactic courts use is to reject claims based on the evaluation or grading process on the basis that student has failed to exhaust all administrative remedies. See e.g. *Montalvo v. U. of Miami*,

Consider the following representative cases.¹⁶⁴

In *Maas v. Corp. of Gonzaga University*,¹⁶⁵ the Washington Court of Appeals rejected a law student's claim that her law school had a duty to warn her of the possibility that she might fail, and denied her request that the law school be ordered to grant her a law degree. This cases involves a low-level alleged duty (failure to warn of possible failure in law school),¹⁶⁶ with a low level alleged breach (negligence on the part of the law school),¹⁶⁷ and a very demanding request for relief (ordering the law school to grant plaintiff a law degree). Not surprisingly, the court refused even to acknowledge the existence of a fiduciary duty in the case,¹⁶⁸ and noted that as a "general rule, courts will not interfere with purely academic decisions of a university."¹⁶⁹

In *Andre v. Pace University*,¹⁷⁰ a New York trial court noted that educators assume fiduciary duties towards students they supervise when it granted a student request for a tuition refund for a class in which a professor had incorrectly assured them that the course would not be too difficult for them in spite of their limited math and science backgrounds.¹⁷¹ The case was reversed on appeal, on the grounds that the relationship between students and a university is contractual in nature and that the claim was an invalid assertion of "educational malpractice."¹⁷² The court declined to engage "in a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of textbook was appropriate, or preferable, for a graduate level course"¹⁷³

705 So. 2d 1042, 1043 (Fla. 3d Dist. App. 1998).

164. See also *id.* (rejecting the claim of a graduate student who had failed his comprehensive oral exam that the University had breached a fiduciary duty through bias and animosity on grounds that student failed to provide any direct evidence that the University breached a fiduciary duty owed to him).

165. *Maas v. Corp. of Gonzaga U.*, 618 P.2d 106 (Wash. App. Div. 3 1980).

166. The court states, "It is unreasonable to require the university to warn applicants of the obvious." *Id.* at 108.

167. The court points out that Maas did not allege bad faith on the part of the law school in its refusal to accept transfer credits from another institution. Bad faith would constitute a higher magnitude breach than negligence. *Id.* at 109. The court also goes out its way to document the lengths to which Gonzaga Law School went in trying to accommodate Maas, noting that she was twice reinstated after falling below the minimum grade point average. *Id.* at 107-08.

168. "The relationship of students and universities is generally contractual rather than confidential or fiduciary." *Id.* at 108.

169. *Id.* at 109.

170. 655 N.Y.S.2d 777 (N.Y. App. Div. 2d Dept. 1996).

171. *Id.* at 780.

172. *Id.*

173. *Id.* at 779-80.

The outcome of *Andre* is what one would expect from an analysis of the magnitude of duty and magnitude of breach alleged in the case. The alleged duty is a duty to warn students of the possibility that they might fail if they did not have the requisite math and science backgrounds. This is a low level duty, and does not seem to be the type of information that a student would have to rely upon professors to ascertain. The alleged breach was an assurance by the professor that students with limited math and science backgrounds would be able to pass the course. This would seem to be at best a very low-magnitude breach of duty. Thus, the case combines a low magnitude duty with an alleged breach which is of a low magnitude. Since the duty is modest, the level of performance by the fiduciary does not need to be particularly high in order to clear the fiduciary bar. Not surprisingly, the court deferred to something akin to an educational judgment rule and declined to engage in a substantive review of the range of educational and policy factors that went into the university's judgment that students with a certain background could take the course.

In *Ho v. University of Texas at Arlington*,¹⁷⁴ the Texas Court of Appeals granted summary judgment to university professors in a claim by a disappointed doctoral candidate who alleged that her professors' failure to disclose material information to her caused her to continue within the doctoral program and suffer damages. In this case, the plaintiff alleged a relatively low-level duty (a duty to inform),¹⁷⁵ and a relatively high degree breach of duty (a fraudulent misrepresentation of material facts).¹⁷⁶ This combination of low-degree duty and high-degree breach might result in liability if the plaintiff successfully proved fraud.

The fraud claim rested upon a finding that the student-teacher relationship is a fiduciary relationship that triggered an affirmative duty on the part of the professors to inform the plaintiff of material facts and that the failure to disclose those facts amounted to a material false representation.¹⁷⁷ The court began its analysis by noting that there is no formal fiduciary relationship between teachers and students in a normal educational setting. Thus, liability in this case turned upon whether an informal fiduciary relationship existed based upon an unusual degree of trust and reliance. The court noted that "an informal relationship may give rise to a fiduciary duty where one person trusts in and relies upon

174. 984 S.W.2d 672 (Tex. App. 7th Dist. 1998).

175. The court stated that "[a] duty to speak may arise when a fiduciary relationship exists between parties." *Id.* at 691.

176. The court notes that "silence may equate to a positive misrepresentation of material facts when there is a duty to speak." *Id.*

177. *Id.* at 692.

another, whether the relationship is a moral, social, domestic, or purely personal one.”¹⁷⁸ On the other hand, the court also observed that “although fiduciary relationships are based upon trust, not all relationships involving a high level of trust and confidence require that the parties act with good faith and with due regard to the interests of the one reposing confidence.”¹⁷⁹

In determining whether an informal fiduciary relationship existed in this situation, the court focused upon whether “influence ha[d] been acquired and abused,” and whether the alleged fiduciary “personally gain[ed] from the trust and confidence reposed by another.” The court credited the professors’ testimony that they “did their usual job duties of teaching, advising, and evaluating,” and that the duties of Ho “were those usually and normally required of doctoral students.”¹⁸⁰ On this basis the court concluded that an informal fiduciary relationship did not exist and the professors did not have an affirmative duty to speak. Because the degree of power or control in this student-teacher relationship was not heightened, and because there was no evidence of personal gain, self-dealing, or selfish motives on the part of the professors, the court held that there was no informal fiduciary relationship giving rise to a duty to speak.¹⁸¹ In this case although the plaintiff alleged a high-degree breach, the factual basis for the allegation of fraud was very weak, and the court did not perceive a high magnitude breach of duty. The low-level duty combined with insufficient evidence of a high-level breach resulted in a finding of no liability for the university.

B. Research Relationships

An informal fiduciary relationship might arise between a student and a professor or university in the research environment, where a student may invest a high degree of trust and confidence in a teacher or advisor. Courts examine such relationships closely in order to determine the magnitude of an alleged duty and the magnitude of an alleged breach in claims involving research relationships. A case involving a Yale University doctoral candidate who alleged that his dissertation advisors misappropriated his research ideas and published them as their own is a good case in point.

In *Johnson v. Schmitz*,¹⁸² a graduate student at Yale University

178. *Id.* at 692.

179. *Id.*

180. *Id.* at 693.

181. *Id.*

182. 119 F. Supp. 2d 90 (D. Conn. 2000).

accused professors on his dissertation committee of stealing his ideas and discouraging him from pursuing them in order to allow themselves to misappropriate the ideas for themselves.¹⁸³ He also accused the university of failing to intervene to protect his interests. The district court analogized the relationship of a dissertation committee and a graduate student to that of an attorney and client.¹⁸⁴ The court noted that fiduciary duties could arise in new situations and stated that fiduciary relationships are “characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.”¹⁸⁵

This case involved an alleged heightened degree of duty (based upon the unique degree of trust and reliance placed by a graduate student upon his dissertation committee due to the professors’ superior knowledge, skill or expertise),¹⁸⁶ combined with a very high degree breach of duty (faculty misappropriation and plagiarism of a student’s idea).¹⁸⁷ Given the procedural posture of the case, the factual allegations were assumed to be true, and the district court denied the university’s motion to dismiss. The outcome is not unexpected given the combination of heightened duty and high degree alleged breach.

C. *Patents and Inventions*

Another area with a potential combination of high-degree duties and

183. *Id.*

184. *Id.* at 98.

185. *Id.* at 97.

186. The court noted that plaintiff alleges that since Yale was “‘in a position of power and authority’ over him and ‘in a position of trust and confidentiality with regard to his education ideas and work product,’ Yale had a fiduciary duty toward him, based on the ‘unique[ness]’ of the particular relationship between a ‘graduate-level student and an educational institution.” *Id.* at 97. The court also noted that “Yale allegedly represented that it would safeguard its students from faculty misconduct and provide a nurturing environment for its students.” *Id.* at 98. “Plaintiff may further develop such factual issues as Yale’s representation of its mission towards graduate students, and whether or not it represented that it would take care of graduate students to the exclusion of all others, which could be relevant to the determination of whether Yale owed a fiduciary duty to Johnson.” *Id.*

187. On a motion to dismiss, the court assumes the accuracy of the plaintiff’s allegations, including that one of his professors published the student’s theory as his own without attributing the student. The court notes that “[u]pon further factual development, plaintiff may be able to show that the high degree of trust and confidence he placed in his professors was justified. His relationship with Schmitz and Skelly [bis advisors] was personal and individualized, and as his advisors, they had some duty to protect his interests. Accordingly, this relationship appears somewhat analogous to the attorney-client relationship because the members of his committee were not entitled to act for their own benefit. Further, Schmitz allegedly encouraged Johnson to trust him in sharing his dissertation ideas, and stated that failure to do so would be detrimental to Johnson’s academic prospects. This act of encouragement is relevant to the consideration whether a fiduciary relationship was created here.” *Id.* at 98.

large magnitude breaches is student research that results in patentable inventions. There have been a number of cases in which students have claimed that faculty supervisors and universities have breached their fiduciary duty by failing to give students credit for patentable work. In these cases, courts examine closely the alleged magnitude of duty and alleged magnitude of breach. Duties may be heightened based upon the intense student-mentor relationships that can exist between graduate students and professors, and the superior knowledge and skill that may create heightened reliance and dependence of students upon professors. Breaches are also potentially large since the possibility of deception, self-dealing, and self-enrichment on the part of professors and universities may exist. A pair of cases with apparently similar facts, but different outcomes, provides an interesting view of courts' subtlety and sophistication in evaluating such claims.

In *Chou v. University of Chicago*,¹⁸⁸ a graduate student sued a supervising professor claiming that the professor and the University had breached a fiduciary duty by fraudulently stealing patent and inventorship rights that belonged to her. The professor, Dr. Bernard Roizman, allegedly told Chou that her discoveries could not be patented, while at the same time filing a patent application naming himself as the sole inventor.¹⁸⁹ Chou alleged fraud, a high-level breach of duty, and claimed that Dr. Roizman had a duty to disclose her participation in the invention, a rather low-level duty. Thus the case combined a relatively low level duty, which would not seem to require a high degree of performance, and a very high-level breach. In effect, the student argued that although Dr. Roizman did not have to do very much to fulfill his duties to her, he failed miserably even in performing this relatively modest duty, and instead engaged in affirmative wrongdoing.

The district court, however, dismissed Chou's claim on the grounds that she lacked standing because she had "surrendered all her rights to the University under an employment agreement."¹⁹⁰ The court of appeals reversed, holding Roizman liable for a breach of fiduciary duty,¹⁹¹ and holding the University liable under a theory of respondeat superior.¹⁹² The court of appeals noted that some fiduciary duties arise automatically from certain types of relationships, and others arise informally from

188. 254 F.3d 1347, 1354 (Fed. Cir. 2001).

189. *Id.* at 1353. Professor Roizman told the United States Patent and Trademark Office that though the discoveries were outlined in publications co-authored with Chou, she was only working "under his direction and supervision." *Id.*

190. *Id.* at 1354.

191. *Id.* at 1362-63.

192. *Id.* at 1361.

special circumstances, “such as when one part justifiably places trust in another so that the latter gains superiority and influence over the former.”¹⁹³ The court considered a number of factors to support its conclusion that a fiduciary duty existed in this situation: “disparity in age, education, and business experience between the parties, and the extent to which the ‘servient’ party entrusted the handling of its affairs to the ‘dominant’ party and placed its trust and confidence in that party.”¹⁹⁴ These factors all have the effect of increasing the degree of duty in the case. The court also noted the element of self-dealing in Professor Roizman’s seeking a selfish benefit at the expense of the beneficiary,¹⁹⁵ a consideration that increases the degree of breach. The court of appeals found liability by engaging in a process of analysis that increased the magnitude of duty in the case. When the duty was viewed as being of a higher magnitude, the court could more easily view the conduct of Dr. Roizman as constituting a breach of duty.

In a subsequent case, *University of West Virginia v. VanVoorhies*,¹⁹⁶ the same court of appeals that granted Chou’s claim did not find a breach of fiduciary duty in a case with superficial similarities to the *Chou* case. In *VanVoorhies*, the University of West Virginia sued VanVoorhies for failing to assign an invention to the University that VanVoorhies invented around the time he received his doctoral degree from the University, as required by University regulations.¹⁹⁷ VanVoorhies filed a counterclaim in which he alleged that Dr. James E. Smith, a professor with whom he worked while in the process of attaining his doctorate degree violated his fiduciary duty to VanVoorhies by “inducing VanVoorhies to list [Smith] as a co-inventor [on an earlier patent] application,” enabling the professor to share in the revenues from the patent.¹⁹⁸ The court distinguished the *Chou* case on several grounds. In *VanVoorhies* there did not exist the same type of relationship of trust as in the *Chou* case, and that even if a relationship of trust did exist, there was no evidence that the professor violated that trust by inducing VanVoorhies to list the professor as a co-inventor of the first invention.¹⁹⁹ These factors indicate that the degree of duty was lower than in *Chou*. Also missing was the element of secrecy that existed in the *Chou* case. The court noted that VanVoorhies “participated in and acceded” to

193. *Id.* at 1362.

194. *Id.*

195. *Id.*

196. 278 F.3d 1288, 1299 (Fed. Cir. 2002).

197. *Id.* at 1294.

198. *Id.* at 1299.

199. *Id.* at 1300.

the joint patent application, knowing that this would mean that his professor would share in the proceeds under the University's patent policy.²⁰⁰ Thus, the magnitude of the alleged breach was also lower than in the *Chou* case.

These two cases provide an interesting contrast. In *Chou* the court found that a fiduciary relationship existed with respect to graduate students and their patent applications, whereas in *VanVoorhies* the court found that a fiduciary relationship did not exist. When we consider the factors that contribute to a calculation of the magnitude of duty and the factors that contribute to a calculation of the magnitude of breach, the outcomes are not surprising. The magnitude of duty for the two cases hinges on the cause of reliance and amount of trust the student placed in the professor. In *Chou* the court noted that Roizman had assured Chou that he would take care to properly protect her research and inventions, and she trusted him to do so. In *VanVoorhies* however, no such element of elevated trust was present, as VanVoorhies had acceded to the decisions being made regarding his invention by jointly signing the patent application and assignment with Smith. The magnitude of the breach differs in the two cases as well. Chou claimed that Roizman breached his duty to her by acting in his own interest to unjustly enrich himself when he named himself inventor of Chou's discoveries.²⁰¹ On the other hand, although VanVoorhies claimed Smith had breached a fiduciary duty owed to him by inducing VanVoorhies to list Smith as a co-inventor of his first invention, the court in *VanVoorhies* noted that VanVoorhies failed to present any evidence that Smith had breached his duty. Rather, VanVoorhies had acceded in the decisions being made regarding his inventions, and was aware that Smith would be entitled to a share of the proceeds under the school's patent policy.²⁰² These cases exhibit a high level of sensitivity to the types of consideration that have been identified as affecting the degree of duty and the degree of breach in situations where a violation of fiduciary duty is alleged.

D. Sexual Harassment

Claims of sexual harassment often combine a high magnitude duty with a high magnitude breach, so not surprisingly this is an area where courts have been willing to find a fiduciary relationship between universities and students.²⁰³ Even in situations where courts find that the

200. *Id.*

201. *Chou*, 254 F.3d. at 1362-63.

202. *U. of W. Va.*, 278 F.3d at 1300.

203. See *Schneider v. Plymouth St. College.*, 744 A.2d 101, 103-05 (N.H. 1999) ("In the context

magnitude of duty is low, sexual harassment is viewed by many courts as such an egregious act that the court may still find the defendant legally liable for breach.

For example, in *Schneider v. Plymouth State College*,²⁰⁴ the Supreme Court of New Hampshire held that “in the context of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one.”²⁰⁵ The *Schneider* case involved a high degree duty combined with a high degree breach of duty. In assessing the degree of duty, the court noted that “[s]tudents are in a vulnerable situation because ‘the power differential between faculty and students . . . makes it difficult for [students] to refuse unwelcome advances and also provides the basis for negative sanctions against those who do refuse.’”²⁰⁶ The Court also observed that

[t]he relationship between students and those that teach them is built on a professional relationship of trust and deference, rarely seen outside the academic community. As a result, we conclude that this relationship gives rise to a fiduciary duty on behalf of the defendants to create an environment in which the plaintiff could pursue her education free from sexual harassment by faculty members.²⁰⁷

While the degree of duty to provide an educational environment free from professorial harassment is characterized as being high, the degree of breach by Professor Leroy Young was also very high. As a sophomore in college, Schneider enrolled in two graphic design courses taught by Young. Schneider decided to major in graphic design, and Young, the only graphic design professor at the University, became her academic advisor. Soon after, Young began harassing Schneider. According to the court, “Young’s behavior included pressuring the plaintiff to accompany him on trips to various locations off campus, kissing her, sending her flowers, taking off her shirt, and placing her hand on his genitalia. Young’s conduct escalated to the point that . . . he completely disrobed in

of sexual harassment by faculty members, the relationship between a post-secondary institution and its students is a fiduciary one.”); Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 Tex. L. Rev. 525, 552 (1987) (describing faculty-student relationships as a fiduciary relationship); *But see Williamson v. Bernstein*, 5 Mass. L. Rptr. 94 (Mass. Super. 1996) (holding that professor who offered therapy sessions to student without qualification or authorization and engaged in sexual relationship with student did not breach fiduciary duty and university did not breach fiduciary duty by failing to investigate professor’s conduct).

204. *Schneider*, 744 A.2d 101.

205. *Id.* at 104.

206. *Id.* at 104, quoting Bogart & Stein, *Breaking the Silence: Sexual Harassment in Education*, 64 Peabody J. Educ. 146, 157 (1987).

207. *Id.* at 106.

his office while the plaintiff was working on his computer.”²⁰⁸ When Schneider attempted to rebuff Young’s advances, “he would become angry, yell at her, and threaten to make her life very difficult. Young withheld academic support for her academic work and ridiculed her in front of faculty. He also gave the plaintiff a grade of ‘C-’ for her work as in intern at a graphic design company without ever consulting with her supervisor at the company.”²⁰⁹ A number of professors had various degrees of knowledge of the harassment, but no action was taken until after Schneider had graduated. The combination of a duty that is characterized as being of a high magnitude and the breach of duty, which was of a very high magnitude, resulted in a holding that a fiduciary duty existed and an affirmation of the jury’s finding that there had been a breach of fiduciary duty.

Williamson v. Bernstein,²¹⁰ provides a striking contrast to *Schneider*. In *Williamson*, a female student brought claims of negligence against her professor Alan Bernstein, Fitchburg State College, and the Commonwealth of Massachusetts, claiming that Bernstein had negligently provided educational and therapeutic counseling services and induced her to have a sexual relationship with him. The Massachusetts court dismissed the claims against the college and commonwealth for breach of fiduciary duty due to the fact that even if Williamson were to prove that a fiduciary relationship existed with Bernstein, his “undertaking to provide therapeutic services and engaging in sexual relations . . . does not give rise to a fiduciary relationship between [Williamson] and the College” because he was not acting within the scope of his duty as a professor.²¹¹

It may be that the outcomes in this case and the *Schneider* case are simply irreconcilable, except based upon different policy conceptions about the scope of employment and the doctrine of respondeat superior. After all, Professor Young’s behavior appears to have been no more within the scope of his employment than Professor Bernstein’s behavior was. The opinions in the two cases, however, do suggest that there may have been some additional differences. Williamson’s claim was based upon allegations of negligence, a relatively low-level duty, whereas the alleged duty in the *Schneider* case was a higher magnitude affirmative duty to create an educational environment free from sexual harassment by faculty members. The court’s characterization of the degree of duty in the *Schneider* case was much higher than even the plaintiff’s

208. *Id.* at 103.

209. *Id.* at 104.

210. *Williamson v. Bernstein*, 5 Mass. L. Rep. 94 (Mass. Super. 1996).

211. *Id.* at 110.

characterization of the duty in the *Williamson* case. In addition, the court in *Schneider* based the magnitude of fiduciary duty upon the uniqueness of the relationship that occurs when a student enrolls in the college, thus becoming dependent upon the school for her education, and “requiring them to act in good faith and with due regard for [her] interests.”²¹² In contrast, the *Williamson* court asserts that Williamson “does not allege that she placed any trust or confidence in the College for any particular purpose so as to create a fiduciary relationship”²¹³ The magnitude of breach in *Williamson* was also arguably lower than the magnitude of breach in *Schneider*. For example, it appears that the Massachusetts court did not view Williamson as being as vulnerable and trusting as the New Hampshire court viewed Schneider as being. Whereas Schneider is described as a nineteen-year-old college sophomore subject to unwanted sexual advances of a sexual predator who had harassed multiple students, Williams is described as a mother of two children who engaged in a consensual affair with her professor after complaining to him that “her husband did not understand her or her problems”²¹⁴ In any event, the cases illustrate the importance of the manner in which the magnitude of the degree of duty and the magnitude of the degree of an alleged breach of duty is characterized in cases of this nature.

V. CONCLUSION

Assertions that educators have fiduciary duties continue to be controversial. The teacher-student relationship is not a “formal fiduciary relationship,” but a number of courts have held that this relationship rises to the level of an “informal fiduciary relationship” in a variety of contexts and circumstances. If a case of alleged breach of fiduciary duty in the educational context is analyzed against the framework for quantifying the magnitude of an alleged duty and the magnitude of an alleged breach outlined in this article, educators, supervisors, attorneys and judges will be able to assess reliably the likelihood that an educator or educational institution will, and should, be found by a court to have violated his or her fiduciary duties to students, as well as the probable severity of remedy that the court would impose.

212. *Schneider*, 744 A.2d at 105.

213. *Williamson*, 5 Mass. L. Rep. at 95.

214. *Williamson*, 1996 Mass. Super. LEXIS 673 at *3.