
WHY THE DELAWARE COURTS
EXPRESS TWO, AND ONLY TWO,
FIDUCIARY DUTIES: A RESPONSE TO
*HOW MANY FIDUCIARY DUTIES ARE
THERE IN CORPORATE LAW?*, 83 S. CAL.
L. REV. 1231 (2010).

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Professor Julian Velasco’s well-written article describes the nuances of the “inherently complex” law of fiduciary duties.¹ He concludes that the best way to define fiduciary duties is by looking at the “paradigms of enforcement” used by the Delaware courts, and accordingly defines five specific fiduciary duties.²

The better way to answer the question “How many fiduciary duties are there in corporate law?” is by understanding why the Delaware courts define the duties as they do. As made clear in *Stone v. Ritter*,³ there are only two fiduciary duties: the duty of care and the duty of loyalty. The values expressed by the Delaware courts are the best means by which they can affect the behavior of directors given the miniscule likelihood of liability that results from the divergence of standards of conduct and

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1. Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231 (2010).

2. *Id.* at 1235–36. Professor Velasco’s five paradigms of enforcement, and accompanying fiduciary duties are: (1) process/gross negligence (care), (2) conflicts/fairness (loyalty), (3) bias/reasonableness (objectivity), (4) misconduct/intent (good faith), and (5) substance/waste (rationality). *Id.*

3. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

standards of review.⁴ My thesis is this: although fiduciary duty law can be parsed into ever finer pieces as an academic or intellectual exercise, the Delaware courts themselves are motivated to consolidate duties as a part of their effort to make corporate law easy to transmit to directors, and thus to affect the relevant social norms.

This Article proceeds in four steps. First, it reviews the literature on the expressive value of law and how, together with social norms, the law can achieve its aims. Second, it discusses how Delaware courts express values regarding fiduciary duties. Third, it turns to how directors learn of fiduciary duties. Fourth, it explains how understanding the process of transmitting the expressed values can show that the Delaware courts have intentionally avoided making fiduciary duties complex so that their guidance is understood and internalized. At this point, it explains that the fear of oversimplification is unjustified because a court can send simple messages to directors while retaining the nuances of fiduciary duty law.

A. WHY WORDS MATTER—EXPRESSIVE VALUES AND SOCIAL NORMS

Although directors are rarely found to have violated their fiduciary duties, the Delaware courts continue to produce lengthy, detailed opinions “interpreting the bounds of fiduciary responsibilities.”⁵ So why do the Delaware courts note findings in such detail if directors will so rarely face liability?

The answer is that the opinions contain expressive statements that affect the norms associated with director decision making. “At the most general level, expressive theories tell . . . individuals . . . to act in ways that express appropriate attitudes toward various substantive values.”⁶ To put it plainly, “[a]ctions are expressive; they carry meanings.”⁷ As a result, when the values expressed by the law are connected with, and change, social norms, individual actors can be directed towards or away from certain behaviors.⁸

4. See Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993) (examining the reasoning and policies underlying the duties of care, good faith, and loyalty, among others). The likelihood of exculpation further reduces any potential liability, and as Professor Velasco stated, the “history of such provisions is well known and need not be repeated here.” Velasco, *supra* note 1, at 1256.

5. James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3, 7 n.8 (1999).

6. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

7. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021 (1996).

8. *Id.* at 2022.

Delaware courts are perhaps the best evidence of this concept in practice. In his influential article *Saints and Sinners: How Does Delaware Corporate Law Work?* Professor Edward B. Rock proposed that “the Delaware courts generate in the first instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as ‘corporate law sermons.’”⁹ To make sense of the apparent “mushiness of Delaware fiduciary duty case law,”¹⁰ Professor Rock explained that what the “Delaware courts do is tell stories as a way of articulating and expressing norms.”¹¹ These “parables or folktales of good and bad managers and directors, . . . collectively describe their normative role,” and result in a reasonably determinative set of guidelines that lawyers use in advising directors.¹² He later expanded upon this point:

Norms may help explain the manner in which the law, in the absence of bright line rules, influences corporate governance. Norms may also explain why standards rather than rules work well in a corporate setting. Indeed, norms may justify the prevalence of aspirational judicial standards that are far from the actual standards that the courts enforce.¹³

Justice Randy J. Holland of the Delaware Supreme Court has stated that Professor Rock “was exactly right” in saying that “Delaware fiduciary duty law is best understood as ‘a set of parables’ about good and bad directors.”¹⁴

The law of fiduciary duties can thus “serve both regulatory and norm-supporting and norm-defining functions.”¹⁵ It is not clear whether the opinions aim to shame bad actors, set up frameworks to establish trust within the corporate structure, or blend both concepts.¹⁶ What is clear is that the Delaware courts aim to affect directorial norms and in fact do so.

9. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997).

10. *Id.* at 1101.

11. *Id.* at 1063.

12. *Id.* at 1106.

13. Edward B. Rock & Michael L. Wachter, *Norms & Corporate Law: Introduction*, 149 U. PA. L. REV. 1607, 1608 (2001).

14. Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 700 (2009).

15. Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1266 (1999).

16. Compare David A. Skeel, Jr. *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1823 (2001) (“Corporate law also offers unusually clear evidence of the effect of shaming sanctions.”), with Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1794 (2001) (“[W]hat can make a norms-based theory of corporate law both powerful and persuasive—is the empirical phenomenon of trust behavior.”).

B. DELAWARE'S EXPRESSIVE VALUE

“Creating a norm requires people to know about it and to become aware of the sanctions that come with violation. This is where norm entrepreneurs have a powerful role to play.”¹⁷ The Delaware courts are the norm entrepreneurs of fiduciary duties and demonstrate their awareness of this role in two ways. The first is the substantial guidance provided in written opinions. The second is what former Chief Justice Myron T. Steele has called their “Guidance Function,” meaning judges’ extrajudicial speeches and writings.¹⁸

The primary tool used by the Delaware courts is the written opinion; the Court of Chancery is renowned for its lengthy, fact-intensive opinions that “leave little doubt as to which parties have or have not acted appropriately—that is, of whom the court does and does not approve.”¹⁹ Chief Justice Myron T. Steele has noted that “the Delaware judges have frequently crafted dicta to give valuable guidance to deal lawyers on unanswered questions.”²⁰ Interestingly, certain opinions explicitly state they are providing such guidance.

For example, in *In re The Walt Disney Company Derivative Litigation*,²¹ former Chancellor William B. Chandler cited the relevant facts and law “in a detailed manner” in part “because of the possibility that the Opinion [would] serve as guidance for future officers and directors—not only of The Walt Disney Company, but of other Delaware

17. Sandeep Gopalan, *Shame Sanctions and Excessive CEO Pay*, 32 DEL. J. CORP. L. 757, 790 (2007).

18. Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 192 (2007). The supposed “guidance” can also be seen as the Delaware judiciary selling the advantages of their corporate law to targeted audiences in a bid to attract both new incorporations and cases. See Timothy P. Glynn, *Delaware's Vantagepoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 105 (2008) (noting that Delaware’s courts “are keenly aware of, and respond to, chartering market preferences and threats to Delaware’s primacy”); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1941 (1998) (describing how Delaware’s judges encourage litigation because litigation places them “at the center of the business arena” while they “develop intricate corporate jurisprudence”).

19. David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 164 (1997). Chancellor Leo E. Strine’s recent opinion in *In re El Paso Corporation Shareholder Litigation*, 41 A.3d 432 (Del. Ch. 2012), shows how the Delaware courts criticize corporate directors for acting in ways that leave great room for improvement, even though the threat of liability is virtually nonexistent. *Id.* at 448. In his opinion, Chancellor Strine offered a harsh critique of the board’s actions, even though he denied the shareholder request for preliminary injunction and stated that “it appear[ed] unlikely” that the independent directors would face monetary damages. *Id.*

20. Steele & Verret, *supra* note 18, at 207.

21. *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005).

corporations.”²² He “hope[d] that th[e] case [would] serve to inform stockholders, directors and officers of how the [Disney] fiduciaries underperformed.”²³ Similarly, former Chancellor William T. Allen believed his opinion in *In re Caremark International Inc. Derivative Litigation*²⁴

[W]ould change directors’ behavior through its simple statement that directors have a duty to oversee legal compliance. [He] believed that *Caremark*’s standard of conduct could change behavior, notwithstanding its narrow standard of review, because he believed that directors generally want to satisfy their legal duties. [He] believed that *Caremark*[] would alter directors’ behavior through its moral suasion and associated impact on directors’ norms.²⁵

In addition to their opinions, the members of the Delaware judiciary regularly participate in public debates about corporate law and policy. They give speeches and draft articles “about the direction and patterns they perceive in case law from their unique vantage point,” and also serve “as members of committees of the American Bar Association (“ABA”) and other model rule making bodies.”²⁶ The articles and speeches by current and former members of the Delaware judiciary are too numerous to cite, but two examples are worth noting.

The first entails statements by two members of the Delaware judiciary and was noted by former Chief Justice Steele. Prior to *Stone*, the case law was unclear as to whether “good faith” formed a “triad” of fiduciary duties along with care and loyalty. But, before *Stone* settled the question, former Chief Justice Steele’s public remarks²⁷ and an article by former Chief Justice Norman E. Veasey²⁸ foreshadowed the result, counseling that “the emphasis on good faith in the then-ongoing Disney litigation would not

22. *Id.* at 698.

23. *Id.* at 772.

24. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

25. Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 871 (2009) (alteration in original) (quoting Jennifer Arlen, *The Story of Allis-Chalmers, Caremark, and Stone: The Directors’ Evolving Duty to Monitor*, in CORPORATE LAW STORIES 323, 341–42 (J. Mark Ramseyer ed., 2009)).

26. Steele & Verret, *supra* note 18, at 192.

27. Chief Justice Myron T. Steele, Remarks at the Third Annual Symposium on the Law of Business Entities: Is Good Faith A Viable Standard of Conduct for Corporate Governance, or Vehicle for Second-Guessing by Hindsight (Oct. 5, 2006), available at <http://blogs.law.harvard.edu/corpgov/2007/05/> (follow “Chief Justice Steele’s Remarks on the Duty of Good Faith” hyperlink; then follow “here” hyperlink).

28. See E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1405 (2005).

represent a major shift in” how Delaware courts viewed good faith as part of “a foundation of the business judgment presumption.”²⁹ These observations foretold the outcome in *Stone*, the case in which the Delaware Supreme Court clarified that good faith is a subset of the duty of loyalty.³⁰ This example makes clear that lawyers who follow the extrajudicial statements of the Delaware bench can gain insight into how cases will be decided.³¹

Current Chief Justice, then Chancellor, Leo E. Strine Jr.’s recent remarks at a conference for directors provide another example. In particular, he stated that although the chance of personal liability is low for outside directors, the chances of “looking like a chump” or appearing as if the director has “failed [his or her] mission” are quite high if directors are not made aware of common pitfalls.³² The Chief Justice conceded that the Delaware courts rarely impose individual liability on corporate directors *at a conference for corporate directors*. Still, he warned the directors to do as they are told, and he seemed confident that the directors would get the message. But, understanding the transmission of that message helps us understand the contents of the message itself.

C. TRANSMITTING THE MESSAGE

“To be useful for instruction . . . the judicial message somehow must be communicated to” directors.³³ Professor Melvin Eisenberg believed that the messages shifted the “social norms concerning the directorial” role, and thereby created an “increased level of care.”³⁴ Because the opinions often do not increase the threat of liability, how they make an impact is an intriguing question.

29. Steele & Verret, *supra* note 18, at 203.

30. *Id.* Decisions by then Vice Chancellor Strine also foretold the result. See *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (“There is no case in which a director can act in subjective bad faith towards the corporation and act loyally.”); *Nagy v. Bistricher*, 770 A.2d 43, 49 n.2 (Del. Ch. 2000) (“By definition, a director cannot simultaneously act in bad faith and loyally towards the corporation and its stockholders.”).

31. Another example is the seminal 2001 article by former Chancellor Allen and then Vice Chancellors Jacobs and Strine that proposed numerous doctrinal changes related to standards of review that have played out over the years. See William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859 (2001).

32. Kevin LaCroix, *Chancellor Leo Strine Addresses Stanford Directors’ College*, THE D&O DIARY (June 27, 2012), <http://www.dandodiary.com/2012/06/articles/securities-litigation/chancellor-leo-strine-addresses-stanford-directors-college/>.

33. Johnson, *supra* note 25, at 870.

34. Eisenberg, *supra* note 15, at 1268.

Professor Rock has offered two hypotheses for how the “parables” of the Delaware courts would reach directors. The first was that the “stories themselves might be transmitted directly to the target audience (directors and officers), either in detail or in summary form.”³⁵ Professor Rock believed this might occur through reports in the media.³⁶ Professor Eisenberg also believed the media played a role, and was likely to convey a message in a way that would reach directors:

The business press, like the general press, has become increasingly willing, and indeed eager, to report on the shortcomings of directors and officers. A juicy story about feckless directors on page one of the *Wall Street Journal* is the equivalent of a picture of Brad Pitt on the cover of *Vanity Fair*. The increased likelihood of such stories, with their consequence of shaming and the loss of esteem, may have been one factor in making directors more attentive.³⁷

Professor Rock’s second hypothesis was that “the stories may be digested by an intermediary, Delaware corporate lawyers (whether based in Delaware or elsewhere), who then apply the norms without actually telling the stories to the clients.”³⁸ But it is hard to capture how lawyers are advising directors. Some scholars have looked to the free, public legal guidance provided by law firms to gain insight on this question,³⁹ and even former Chief Justice Steele has cited law firm white papers concerning the *Disney* decision.⁴⁰ It seems unlikely, however, that these reports fully address the questions lawyers are paid to answer. If the Delaware courts are trying to affect norms, one can assume that they want the message internalized and will thus craft it to make transmission through the media or lawyers, and subsequent internalization by the directors, as simple as possible. After all, “[t]he lawyer’s advice is not the last step in the cognitive process; the client’s processing of that information is.”⁴¹ This Article contends the language of fiduciary duties is how the Delaware courts accomplish their goal.

35. Rock, *supra* note 9, at 1063–64.

36. *Id.* at 1067–68 (quoting “one experienced Wall Street transactional lawyer” who in private conversation stated “[w]e’re not afraid of what the Delaware courts say. . . . [w]e’re afraid of what the press says”).

37. Eisenberg, *supra* note 15, at 1268.

38. Rock, *supra* note 9, at 1064.

39. *Id.* at 1070–72 (discussing a “memorandum to our clients”); Johnson, *supra* note 26, at 868–73 (analyzing law firm reports of the *Disney* decision).

40. Steele & Verret, *supra* note 18, at 203 n.39.

41. Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 825 (2001).

D. TAKING THE MESSAGE TO HEART

The Delaware courts produce detailed opinions expressing guidance on how best to satisfy fiduciary duties, despite the fact that liability is rarely imposed. They continue to send messages and express values because they believe their messages are both relayed to and understood by directors. Most members of the Delaware judiciary have practiced corporate law,⁴² and they have an intuitive sense of how best to describe fiduciary duties in ways that will affect norms and help lawyers guide directors toward making better decisions. They do this through the relatively simple ideas of care and loyalty.

Chip and Dan Heath discuss the importance of using simple messages to convey complex ideas in *Made to Stick: Why Some Ideas Thrive and Others Die*.⁴³ Simplicity is the first of six characteristics⁴⁴ the Heaths find in “sticky” ideas, meaning “ideas [that] are understood and remembered, and have a lasting impact—they change [the] audience’s opinions or behavior.”⁴⁵ The Heaths argue that “it is possible to create complexity through the artful use of simplicity.”⁴⁶ The authors do not advocate paring down complicated subjects like the law to only a few compact messages; rather, they believe that if “simple ideas are staged and layered correctly, they can very quickly become complex.”⁴⁷ This is because “[g]enerative metaphors and proverbs both derive their power from a clever substitution: They substitute something easy to think about for something difficult.”⁴⁸ From their review of psychological studies and various real-world examples, they conclude “that ‘finding the core,’ and expressing it in the form of a compact idea, can be enduringly powerful.”⁴⁹

This concept translates into fiduciary duties. As Professor Eisenberg has stated, “the legal messages that are primarily directed to [directors] . . . should be simple, so that they can be effectively communicated, and to the extent possible should reflect social norms of upright business behavior

42. Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1696 (2001) (“From years of corporate practice, [Delaware judges] typically know a lot about the way the Delaware corporate world works.”).

43. CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* (2007).

44. The others are (1) unexpected; (2) concrete; (3) credible; (4) emotional; and (5) stories. *Id.* at 14–18.

45. *Id.* at 8.

46. *Id.* at 53.

47. *Id.*

48. *Id.* at 61.

49. *Id.* at 62.

that directors . . . can be expected to know even if they do not know the law.”⁵⁰ The Delaware courts focus upon care and loyalty because they are simple values that ensure directors understand the message.⁵¹ This underscores the shortcoming of Professor Velasco’s five fiduciary duties approach. The lexicon of fiduciary duties helps attorneys convey the expressed values so as to affect the norms associated with director decision making, not to help directors understand the minutia.⁵²

The nuance and detail that exists within the case law will not be easily explained to a director, but his or her lawyer aims to ensure that the director takes the correct actions.⁵³ The Delaware courts use care and loyalty because directors should understand the concepts, and can internalize them for use in a variety of situations.⁵⁴ This happens because care and loyalty are “qualities [that] are presumably still valued, and perhaps more or less comprehended, in both the corporate and broader social arenas.”⁵⁵ It is important that these values are expressed so strongly and in such detail by the courts because “[t]hose who counsel boards and managers, . . . have more force behind their recommendations when a judge that stands as the potential reviewer of their decisions has expressed support for the practice.”⁵⁶

And so this Article’s primary critique of Professor Velasco’s concept of five fiduciary duties is that, while well motivated, the level at which he

50. Eisenberg, *supra* note 4, at 466.

51. See Johnson, *supra* note 25, at 872 (“Thus, Delaware’s judges can continue to demand loyalty and care because those qualities are presumably still valued, and perhaps more or less comprehended, in both the corporate and broader social arenas.”).

52. Eisenberg, *supra* note 4, at 466–67 (explaining that divergence of standards of conduct and standards of review “turns on the desirability of reserving complexity in the law for those legal standards that are primarily addressed to actors that can deal with legal complexity in making their decisions”).

53. See Eisenberg, *supra* note 15, at 1277 (“[I]t is the courts that have made the general principle of loyalty fully meaningful by spinning out the principle into specific rules governing such matters as the fairness of self-interested transactions, disclosure, corporate opportunities, the use of corporate assets, and so forth. Once these rules have been developed, they serve to support the social norm of loyalty in a variety of ways—for example, by giving clarity to the norm and by providing a focal point around which overlapping instantiations of the norm can cohere. . . . Thus, in the loyalty area the specific rules developed by courts simultaneously regulate the conduct of corporate actors, and are transmuted into social norms concerning the conduct of corporate actors.”).

54. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. L. 1287, 1294 (2001) (“Given the blunt nature of the fiduciary doctrine tool, judges must [] describe fiduciary duties in general terms that can (it is hoped) be sensibly and fairly applied in future diverse circumstances in which directors are called upon to act.”).

55. See *supra* note 51.

56. Steele & Verret, *supra* note 18, at 207.

views fiduciary duties may overwhelm directors with details and specificity.⁵⁷ That is not the aim of the Delaware courts in defining fiduciary duties. If the message a lawyer conveys to a director does not impact social norms and the director's view of his or her role, then Delaware courts will not effectively guide director behavior given the rarity of legal liability. The quality of corporate governance could then reasonably be expected to suffer.

Professor Velasco is thus both right and wrong when he states that “[f]iduciary duties should not be forced into simplistic frameworks.”⁵⁸ He is right that the Delaware courts, academics, and lawyers should not use overly simplistic frameworks in analyzing the details of each case. He is wrong, however, in that simple frameworks are more easily communicated to, and have a greater effect upon the behavior of directors responsible for making decisions. Directors are more likely to understand a lawyer and internalize what he or she is saying when the lawyer discusses the duty of care or loyalty and tells a story summarizing relevant decisions, than when the duty of objectivity and standard of review (or paradigm of enforcement) are enunciated in detail.⁵⁹ This will not, as Professor Velasco rightfully fears, oversimplify fiduciary duties.

The Delaware Supreme Court has already illustrated its ability to consolidate the “triad” of duties,⁶⁰ without abandoning the nuances of acting in “good faith.” Despite the arguments of academics that good faith underlies both care and loyalty,⁶¹ the Delaware Supreme Court has placed

57. See Johnson, *supra* note 25, at 870–71 (“This is not to say that ‘pointers’ and ‘tips’ and ‘rules’ do not matter. Of course they do. The danger is that compliance with them is wrongly thought to fully discharge one’s duties. A specification of particular behaviors to adopt or avoid in order to be a ‘careful’ or ‘loyal’ director is useful by way of example and illustration, but specific instances of a category (‘loyalty’ or ‘care’), although cognitively helpful, do not (and cannot) exhaust the breadth of those qualities any more than literally complying with every traffic rule makes one a ‘safe’ driver. Loyalty and care not only are open-ended standards, not rules, they are attributes of a particular disposition of the actor. Loyal and careful behavior is more likely to result from a director who, through cogent remembrance, recalls that he or she must habitually ‘be’ loyal and careful as a matter of course, not just episodically.” (footnote omitted)).

58. Velasco, *supra* note 1, at 1304.

59. See Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1595 (2000) (“I would guess that a good corporate lawyer, wanting to induce managers’ compliance with norms of fiduciary responsibility, does much more by telling a story from some recent cases of the court’s displeasure with another high level executive’s bow to a comparable temptation than any systematic analysis of elements of the cause of action in evaluating breaches of fiduciary duty.”).

60. Depending on one’s perspective this “consolidation” might be a “nonexpansion” since the state of the law was in flux.

61. See, e.g., Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 43 (2005) (“Whether the question is confronted from the

it squarely within the duty of loyalty. Why? Partly, this Article submits, because the Delaware courts believe the duty of loyalty is the best way to frame their message so that it is understood by directors and impacts their behavior.

Along these lines, Justice Holland has stated that “the focus of Delaware’s fiduciary duty law [has become] sharp and that focus is on loyalty.”⁶² Chief Justice Strine similarly has written that the “rhetorical shrinking of the concept of loyalty” that could result from defining good faith as a separate duty would be troublesome.⁶³ This understanding of why the Delaware courts focus on loyalty underscores the problem Professor Velasco recognizes through his conclusion that good faith need not be a subset of loyalty. Professor Velasco notes that the “legal definition [of good faith and loyalty] must ultimately be based on functional considerations.”⁶⁴ This Article agrees and posits that the functional consideration at play is using language that best conveys to directors the values the courts wish to exalt.

E. CONCLUSION

This Article has argued that the Delaware courts express certain values regarding fiduciary duties. They express those values in ways that allow lawyers to explain and directors to understand them. Professor Velasco’s enunciation of five fiduciary duties creates a list that loses much of the impact of the simpler, more easily understood duties of care and loyalty. He is rightfully concerned about losing the nuanced nature of fiduciary duties, but his proposal strips the expressive function from the law. In many instances this would result in replacing the “idea” of being careful or loyal with the less clear idea of being rational, objective, or acting in good faith.

This Article in no way intends to imply that directors are incapable of understanding the intricate details of fiduciary duty law. Rather, the intricate details are better left to lawyers, while the fundamental “idea” of being careful and loyal is intended for the director, who should focus on the myriad of complex details associated with the business side of corporate decision making. The Delaware judiciary believes care and loyalty are the

perspective of the duty of care or of the duty of loyalty is just a difference in approach. To put it another way, the fundamental question underlying both duties really is good faith.”).

62. Holland, *supra* note 14, at 700.

63. Leo E. Strine, Jr., et. al., *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L. J. 629, 634 (2010).

64. Velasco, *supra* note 1, at 1277.

messages most likely to be understood by directors in that decision making process. That is why we should answer that there are, and should be, two, and only two, fiduciary duties in corporate law.