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## Law Partner Expulsions

Allan W. Vestal

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# Law Partner Expulsions

Allan W. Vestal\*

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[A law] partnership, with a properly drawn partnership agreement, can expel a partner without notice, without cause, and without providing any reason. Whether this is a desirable result necessarily depends on which side of the table you happen to sit.<sup>1</sup>

### *Introduction*

Under what circumstances may a law partnership expel a partner? How should the expulsion be accomplished? These are questions of moment in many contemporary law firms.

A helpful discussion, it seems to me, breaks into two parts. First, what are the substantive circumstances under which the expulsion of a partner can be done both effectively and rightfully? Can the expulsion be simply a function of a vote of the requisite number of partners, without any grounds, or is cause required? Must the expulsion advance an interest of the firm? Against what substantive standards, if any, is the expulsion measured, and how are any applicable standards translated into norms specifically applicable to law partner expulsions?

Second, what are the processes by which the expulsion is carried out? Is the targeted partner entitled to notice of the impending expulsion? Is notification of cause required? Is a pre-expulsion hearing on the merits required? Is the expelled partner entitled to a post-expulsion review on the merits by either the partnership or a court?

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1. GEORGE H. CAIN, LAW PARTNERSHIP: ITS RIGHTS AND RESPONSIBILITIES 166 (1996).

Within both the substantive and the procedural parts of the discussion, it is important to identify the baseline statutory and common law provisions and then explore the range of permitted partnership-agreement modifications. The discussion should also address what presumptions are entertained when the partnership agreement is silent and when the burden of proof lies in establishing the various points of agreement.

The two areas of inquiry – substance and process – are united by the common thread of good faith and fairness.<sup>2</sup> By following this thread I propose both to analyze the present state of the law of law partner expulsions and to suggest a basic reform of that regime.

Partners must deal with one another fairly and in good faith. This is not, on its face, a remarkable statement. But how we derive that charge to good faith and fairness, how we define and characterize it, and how we apply it in the context of the expulsion of a partner can introduce confounding subtleties into the analysis.

The discussion is advanced by realizing that we are dealing with two concepts of good faith and fairness, not simply one.<sup>3</sup> They differ in deriva-

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2. In this discussion I use the term "good faith and fairness" instead of "good faith and fair dealing." The good faith and fairness formulation is found in relevant case law. *See, e.g.,* *Laux v. Freed*, 348 P.2d 873, 878 (Cal. 1960) (discussing "complete good faith and fairness"); *Thomas v. Schmelzer*, 796 P.2d 1026, 1032 (Idaho App. 1990) (discussing "loyalty, integrity and the utmost good faith and fairness" (quoting *Stephens v. Stephens*, 183 S.W.2d 822, 824 (Ky. 1944))); *Curtis v. Campbell*, 336 S.W.2d 355, 359 (Ky. 1960) ("[P]artners are obligated to deal with each other in utmost good faith and fairness."); *Stephens v. Stephens*, 183 S.W.2d 822, 824 (Ky. 1944) (discussing "loyalty, integrity and the utmost good faith and fairness"); *Sutton v. Fleming*, 602 So.2d 228, 230 (La. Ct. App. 1992) (commenting on "the obligation of good faith and fairness" (quoting LA. CIV. CODE ANN. art. 2809 Revision Cmt. (b) (West 1994))); *Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482, at \*2 (Tex. Jan. 22, 1998) ("We have long recognized as a matter of common law that '[t]he relationship between . . . partners . . . is fiduciary in character, and imposes upon all the participants the obligation of . . . the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.'" (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951))). The "good faith and fairness" formulation is also found in various commentaries. *See, e.g.,* ALAN R. BROMBERG & LARRY E. RIBSTEIN, 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP, § 6.07(a)(1), at 6:108 (1998) ("The main elements of the partners' fiduciary duties have been summarized as utmost good faith, fairness, and loyalty."); JUDSON A. CRANE & ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 68, at 389-90 (1968) ("The main elements [of the fiduciary duties of partners] are well recognized: utmost good faith, fairness, loyalty."); HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 188, at 278-79 (2d ed. 1990) ("The fiduciary duty of a partner . . . in general . . . is a duty to act toward his partners in good faith and fairness."). To the extent "fair dealing" is interpreted to indicate a focus on procedure to the exclusion of substance, "fairness" presents a more accurate indication of the richness of the concept.

3. Commentator Bill Callison has parsed the concept differently. *See* J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership*

tion, in description, and possibly in the power of their charges.<sup>4</sup> One concept of good faith and fairness sounds in tort, the other in contract.<sup>5</sup> One is presented as a fiduciary duty, the other as a rule of construction.

The first charge to good faith and fairness arises from the fiduciary nature of the partnership relation. It is, in some formulations, the essence of the fiduciary relationship of partners. Fiduciary good faith and fairness is status-driven. It is tort based. Simply put, partners are charged with good faith and fairness *inter se* because that is what it means to be a partner.<sup>6</sup> Thus, one commentary finds that the "main elements [of the fiduciary relations of partners] are well recognized: utmost good faith, fairness, loyalty,"<sup>7</sup> while another outlines the progression as follows: "One of the most significant aspects of the partnership relation is its fiduciary character. A fiduciary duty is a duty of loyalty. . . . The fiduciary duty of a partner has many specific aspects, but in general it is a duty to act toward his partners in good faith and

*Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 141-48 (1997).

4. The concepts also differ in their temporal application. Under the UPA and common law regime partners are charged with good faith and fair dealing during the pre-formation period of their relationship. *See* REUSCHLEIN & GREGORY, *supra* note 2, § 188, at 279 ("A partner's fiduciary duty extends to conduct prior to the formation of the partnership . . . ." (citing *Starr v. International Realty, Ltd.*, 533 P.2d 165, 165-71 (Or. 1975))). But the contract-derived charge does not extend to the pre-formation period. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1981) ("This Section . . . does not deal with good faith in the formation of a contract."). Thus, the contract-derived charge cannot be exclusive; the status-derived charge is also present under the UPA and common law regime.

5. The distinction is not as clear as it is sometimes made to appear. A contractual analysis that relies on contractual provisions implied at law from the relationship of the parties as partners may be difficult to distinguish from a tort analysis which relies on duties arising from the partner status of the parties.

6. I acknowledge that there is a popular strain of commentary that sees these matters quite differently. Professor Larry Ribstein views fiduciary duties in the partnership context as "essentially part of the standard form contract." *See* BROMBERG & RIBSTEIN, *supra* note 2, § 6.07 at 6:108-6:109.

Fiduciary duties are essentially part of the standard form contract that governs partnerships in the absence of contrary agreement. Because the parties cannot anticipate all problems that may arise during the course of their relationship, and because dealing with all of these problems contractually would be quite costly, the law supplies general terms to fill in the interstices in the parties' contract. The question, therefore, is determining what the partners would have been likely to agree to in the absence of transaction costs, in light of practical considerations and the other elements of the partnership relationship.

*Id.* (citation omitted). I find the criticisms of this strain of commentary quite convincing. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879, 885-92.

7. CRANE & BROMBERG, *supra* note 2, § 68, at 389-90.

fairness."<sup>8</sup> It is because of the fiduciary status of a partner that we are told "the main elements of the obligations owed by one partner to another have been defined as 'utmost good faith, fairness, loyalty,'"<sup>9</sup> and that "the partnership relationship is a fiduciary relationship, requiring each partner . . . to exercise the highest degree of honesty and good faith in dealings with each other."<sup>10</sup> The charge derives from the status: "The status of partnership requires of each member an obligation of good faith and fairness in their dealings with one another."<sup>11</sup>

The second charge to good faith and fairness arises from the contractual aspect of the partnership relation. A partnership agreement is, in some of its aspects under any analysis, a contract.<sup>12</sup> As a contract, it "imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."<sup>13</sup> Contractual good faith and fair dealing has no fixed content, but "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."<sup>14</sup>

Under the Uniform Partnership Act (UPA) and common law regime, the dual charges to fiduciary and contractual good faith and fairness apply to all aspects of the partners' dealings inter se. They apply to partners in a law firm as well as to partners in an auto repair shop. They apply to what is perhaps the most drastic law partnership decision: the election to expel a partner.

The following discussion first presents and synthesizes the universe of case law involving the expulsion of partners from law partnerships. The discussion next critiques the present regime on both the substance and process dimensions and proposes an alternative set of rules that, I believe, is more in line with the underlying fiduciary and contractual charges to good faith and

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8. REUSCHLEIN & GREGORY, *supra* note 2, at 278-79.

9. *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1078 (2d Cir. 1977) (citing *CRANE & BROMBERG*, *supra* note 2, § 68, at 390).

10. *Borys v. Rudd*, 566 N.E.2d 310, 316 (Ill. App. Ct. 1990).

11. *Covalt v. High*, 675 P.2d 999, 1001 (N.M. Ct. App. 1983).

12. The trend of the recent past seems to be in favor of a more contractual and less status-oriented treatment of the partnership relation. I dissent from this trend. One of the early treatises stated the distinction well: "A partnership is often called a contract, but this is inaccurate. It is the relation or status resulting from a contract, just as marriage is a status, and not a contract." WALTER A. SHUMAKER, *A TREATISE ON THE LAW OF PARTNERSHIP* § 1, at 3 (1905). The marriage analogy has been used by modern commentators, as well. See Robert W. Hillman, *Misconduct as a Basis for Excluding or Expelling a Partner: Effecting Commercial Divorce and Securing Custody of the Business*, 78 NW. U. L. REV. 527, 527-28 (1983). At the risk of being lumped in with the covenant marriage crowd, this seems to me to be a helpful analogy.

13. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

14. See *id.* § 205 cmt. a.

fairness. Finally, the discussion compares the proposed reforms with the partnership law revisions included on these points in the generally applicable provisions of the Revised Uniform Partnership Act (RUPA).

### *I. Law Partnership Expulsions: The Present State of the Law*

The universe of reported cases involving law partner expulsions is both small and of fairly recent origin. It is helpful to summarize briefly the relevant cases.

#### *A. Holman v. Coie*

*Holman v. Coie*<sup>15</sup> involves the expulsion of two brothers, Francis and William Holman, from their law partnership.<sup>16</sup> The partnership agreement in this case provided for the expulsion of partners by a majority vote of the executive committee, but did not specify whether such expulsion had to be for cause and did not provide for any procedures to be followed.<sup>17</sup>

A substantial firm client, the Boeing Company, had disputes with Francis Holman that arose from Holman's activities as a Washington state senator and informed the firm that it did not want him doing its work.<sup>18</sup> Less than a month later, the executive committee, minus members Francis and William, met in a nine and one-half hour "informal" session to discuss the fate of the Holmans.<sup>19</sup> A consensus favored expulsion, although no formal vote was taken at that time.<sup>20</sup> Immediately upon Francis Holman's arrival back in

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15. 522 P.2d 515 (Wash. Ct. App. 1974).

16. See *Holman v. Coie*, 522 P.2d 515, 517 (Wash. Ct. App. 1974); Callison, *supra* note 3, at 134-35.

17. See *Holman*, 522 P.2d at 519. The partnership agreement provided in Section 1.2 that "any member may be expelled from the Firm by a majority voted of the Executive Committee." *Id.* The court found that the "agreement does not require giving of notice, a statement of reasons, a showing of good cause, or a hearing." *Id.* The portions of the partnership agreement quoted in this section of the opinion focus on the mechanics of recording and implementing the expulsion, not the questions of cause and due process: "When any member . . . is expelled from the Firm, that fact shall be endorsed on the master copy of this agreement . . . and the person involved shall no longer be a member of the Firm and his rights and obligations shall be as hereinafter stated. . . . [The Day of Expulsion] for purposes of the calculations, computations and determinations to be made hereunder, shall mean the close of business on the day immediately preceding the effective date of the . . . expulsion . . . ." *Id.* at 519-20 (quoting §§ 1.3, 6.1 of partnership agreement).

18. *Id.* at 517-18. Boeing also had complaints about Francis Holman's billing practices. *Id.* at 518. William Holman apparently had not worked on Boeing matters for some time prior to his expulsion. *Id.* at 517-18.

19. *Id.* at 518-19.

20. *Id.* at 519.

Seattle following the end of the legislative session less than a week later, the executive committee summoned Francis and William to a formal meeting at which a resolution of expulsion was passed by a vote of seven to two.<sup>21</sup> The brothers' requests for the reasons behind the expulsion were denied.<sup>22</sup>

In the subsequent litigation, the brothers made procedural claims that their partners breached the partnership agreement by failing to give notice of the meeting, expelling the plaintiffs without stating reasons for the expulsion, and failing to give the plaintiffs an opportunity to be heard.<sup>23</sup> Francis and William also made the substantive arguments that the expulsions were not for cause and were not bona fide and in good faith.<sup>24</sup> The trial court rejected both the procedural and substantive claims, and the intermediate appellate court upheld the determinations.<sup>25</sup>

Although it appears that the plaintiffs made the argument that certain procedural protections were required by their status, the *Holman* court appeared to take a narrow contractual approach to the procedure question. The plaintiffs raised three procedural objections to the expulsions: failure to give notice of the "informal" and formal meetings, failure to state reasons for the expulsions, and failure to let the plaintiffs be heard.<sup>26</sup> The court dealt with the notice issue by observing that the partnership agreement "does not require giving of notice."<sup>27</sup>

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21. *Id.*

22. *Id.*

23. *See id.* The court identifies as elements of plaintiffs' breach of contract claims the procedural claims of failure to give notice, failure to state reasons for the expulsion, and failure to allow plaintiffs an opportunity to be heard. *Id.* The court also identifies a fourth element, defendants "expelling plaintiffs without cause." *Id.* I treat that as a substantive claim rather than a procedural claim – the court's analysis is limited to noting that the agreement does not require cause for expulsions. *See id.*

24. *See id.* at 519, 523.

25. *See id.* at 519-24.

26. *See id.* at 519.

27. *Id.* Although the court did find a minor violation of the partnership agreement notice provisions, it did not find "a sufficient violation of the partnership agreement to justify holding there was an unlawful expulsion of the plaintiffs." *Id.* at 520-21. The court found that the nine and one-half hour meeting of the executive committee was not a formal meeting of the executive committee and did not raise the contractual notice requirement. *Id.* at 520. The meeting at which the plaintiffs were expelled was a formal meeting of the executive committee. *Id.* at 520-21. The court determined that although the plaintiffs, as members of the executive committee, were not entitled to advance notice of the meeting, they were entitled to receive an agenda for the meeting. *Id.* at 521. However, because both plaintiffs had believed that their termination would be the subject of the executive committee meeting, the court did not find that the failure to provide an agenda was a sufficient violation to hold that the expulsions were unlawful. *Id.*



The court noted plaintiffs' claim "that defendants' actions [at the formal meeting during which the executive committee voted to expel the plaintiffs] violated the requirements of due process of law in that they failed to give plaintiffs notice of expulsion, state reasons therefor, and provide plaintiffs with an opportunity to be heard."<sup>28</sup> The plaintiffs apparently claimed a dual origin of the process protections, being both contractual and as a matter of law: "[Plaintiffs] contend there was substantial evidence that such requirements [of notice of expulsion, specification of reasons, and an opportunity to be heard] were within the intention of the signatory parties to the partnership agreement and can be implied, either from the circumstances, or as a matter of law."<sup>29</sup> The court treated the due process question as a matter of contract:

In this case the express language of the partnership agreement itself must be controlling; that language clearly does not contain any of the requirements plaintiffs now seek to assert as impliedly applicable. Where terms of a contract, taken as a whole, are plain and unambiguous, the meaning is to be deduced from the contract alone. . . . We find this partnership agreement to [be] unambiguous, and not to require notice, reasons, or an opportunity to be heard. To inject those issues would be to rewrite the agreement of the parties, a function we neither presume nor assume.<sup>30</sup>

As part of the discussion of the good faith requirement, the *Holman* court noted an English article in which the author argued that "the rules of natural justice" require the procedural protections of notice, specification of reasons, and a hearing prior to expulsion.<sup>31</sup> The court rejected this analysis and endorsed the partners' ability to adopt a "guillotine approach" to partner expulsions, if they desired:

These parties in writing the partnership clauses dealing with expulsion, and the defendants who carried them out, chose to adopt the guillotine approach, rather than a more diplomatic approach, to the expulsion of partners. The actions of defendants were within the contemplation of the agreement. While this course of action may shock the sensibilities of some, to others it may be that once the initial decision is made, the traumatic reaction to that decision is more quickly overcome and the end result more merciful. However that course of action may appear to the reader, the possibility of exactly such action occurring is clear from reading the agreement. None of the partners had any reason to believe the agreement

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28. *Id.*

29. *Id.*

30. *Id.* at 521-23.

31. See *id.* at 524 (citing Bernard J. Davies, *Good Faith Principle and the Expulsion Clause in Partnership Law*, 33 CONV. & PROP. LAW. 32, 32-42 (1969)).

required anything more prior to abruptly and brusquely terminating their services.<sup>32</sup>

Turning to the substantive claims, the court determined that there was no cause requirement because the partnership agreement provision on expulsions did not include one.<sup>33</sup> On the obligation of good faith, the court began by looking to the Washington enactment of UPA Section 31: "Dissolution is caused: (1) . . . (d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners . . . ."<sup>34</sup> "Bona fide," the court noted, "is defined as: 'In or with good faith; honestly, openly, and sincerely; without deceit or fraud.'"<sup>35</sup>

The *Holman* court acknowledged the general rule: "Undoubtedly, the general rule of law is that the partners in their dealings with each other must exercise good faith."<sup>36</sup> But the *Holman* court adopted a construction of "good faith" and "bona fide" that is limited to the financial aspects of the partnership relationship: "However, the personal relationships between partners to which the terms 'bona fide' and 'good faith' relate are those which have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary, from taking any personal advantage touching those subjects."<sup>37</sup> Using this tightly circumscribed conception of the duty of good faith as limited to merely the financial aspects of the partnership relationship, the *Holman* court rejected the expelled partners' good faith claims:

Plaintiffs' claims do not relate to the business aspects or property rights of this partnership. There is no evidence the purpose of the severance was to gain any business or property advantage to the remaining partners. Consequently, in that context, there has been no showing of breach of the duty of good faith toward plaintiffs.<sup>38</sup>

*Holman* is widely cited and relied upon, perhaps in excess of the reliance that is normally given a decision of a typical state intermediate appellate court. Regarding procedural issues, the case is cited as approving the "guillotine" approach to law partner expulsions<sup>39</sup> and as minimizing the importance

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32. *Id.*

33. See *id.* at 519. The court noted that "[t]he partnership agreement, § 1.2, states in part: 'any member may be expelled from the Firm by a majority vote of the Executive Committee.' The agreement does not require . . . a showing of good cause . . . ." *Id.*

34. *Id.* at 523 (quoting WASH. REV. CODE § 25.04.310 (1994)).

35. *Id.* (quoting BLACK'S LAW DICTIONARY 223 (4th ed. 1951)).

36. *Id.*

37. *Id.*

38. *Id.*

39. See ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS, 5:3-5:4 (1997).

of procedural protections.<sup>40</sup> Regarding substantive issues, *Holman* has been influential in establishing the proposition that good faith and fair dealing, in the context of law partnership expulsions, is limited to the lack of an economically predatory purpose.<sup>41</sup>

### B. Lawlis v. Kightlinger & Gray

In *Lawlis v. Kightlinger & Gray*,<sup>42</sup> the expelled partner, Lawlis, was an alcoholic.<sup>43</sup> He disclosed his alcoholism to the firm's finance committee in July 1983. The committee, in response, specified conditions for Lawlis's continued participation in the firm.<sup>44</sup> According to the court, "Lawlis was told he would be returned to full partnership status if he complied with the conditions imposed."<sup>45</sup> Lawlis apparently gave up alcohol and was ultimately successful in meeting the conditions specified by the firm.<sup>46</sup>

The firm's partnership agreement provided that the senior partners could set partner compensation and expel partners.<sup>47</sup> Exercising their power, the

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40. See HILLMAN, *supra* note 39, at 5:20. The case is cited as evidence that "[a]lthough English courts have traditionally shown some sensitivity to the importance of procedural protections in expulsions, United States decisions have minimized the importance of the process underlying expulsions." *Id.*

41. See *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974). The characterization of an economically improper purpose as "predatory" is not found in *Holman*. The range of economically improper motives in *Holman* is cast in terms of a rule that "a partner is not permitted to derive any profit or advantage from the partnership relationship except with the full knowledge and consent of the partners," and in terms of a "severance," the purpose of which "was to gain any business or property advantage to the remaining partners." *Id.* The characterization of economically improper motives as predatory is first found in *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 440 (Ind. Ct. App. 1990).

42. 562 N.E.2d 435 (Ind. Ct. App. 1990).

43. *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 437 (Ind. Ct. App. 1990). The court reports that Lawlis's alcohol problem caused him not to practice law for several months in early 1983 and in mid-1984. *Id.*

44. *Id.* at 438. The Finance Committee first met with a physician and established a "Program Outline" for Lawlis's continued participation. *Id.* at 437. One of the conditions of the program was that Lawlis cease the use of alcohol, and it was specified that he would not receive a second chance. *Id.* at 437-38. Lawlis did resume the use of alcohol, and the firm still gave him a second chance. *Id.* at 438. Following his second treatment in March of 1984, Lawlis reportedly was successful in abstaining from the use of alcohol. *Id.*

45. *Id.*

46. *Id.*

47. See *id.* The opinion is initially ambiguous about the vote required. At one point it states that: "Under the 1984 agreement, the senior partners by majority vote were to determine (a) the units each partner annually received, (b) the involuntary expulsion of partners, and (c) the involuntary retirement of partners." *Id.* Later, the opinion states: "Article X of the 1984 agreement requires a minimum two-thirds vote of the senior partners to accomplish the involun-

senior partners decreased Lawlis's compensation during the period of his alcohol abuse and recovery. In October 1986, having not consumed alcohol for two and one-half years, Lawlis met with the finance committee to ask for a "substantial restoration of [his] previous status."<sup>48</sup>

The finance committee responded to Lawlis's request for a restoration of his economic participation rights in the firm by recommending to the full senior partnership that he be expelled.<sup>49</sup> At the senior partnership meeting the partners voted, with only Lawlis in dissent, to implement the expulsion.<sup>50</sup>

Lawlis claimed in part that his expulsion violated the partners' implied duty of good faith and fair dealing because the partners had the economically predatory purpose of increasing the firm's lawyer-to-partner ratio.<sup>51</sup> Advancing an analogy between the partnership relation and employment at will, the firm claimed that it owed Lawlis no obligation of good faith and fair dealing.<sup>52</sup> The court based its rejection of the at-will analogy on the Indiana enactment of UPA Section 31(1)(d), which the court read as providing that "when a partner is involuntarily expelled from a business, his expulsion must have been 'bona fide' or in 'good faith' for a dissolution to occur without violation of the partnership agreement."<sup>53</sup> From this, the *Lawlis* court concluded: "[I]f the power to involuntarily expel partners granted by a partnership agreement is exercised in bad faith or for a 'predatory purpose,' as Lawlis phrases it, the partnership agreement is violated, giving rise to an action for damages the affected partner has suffered as a result of his expulsion."<sup>54</sup> Lawlis asserted that the partners demonstrated a predatory purpose in an internal memorandum advocating the increase of the "lawyer to partner ratio" in the firm as a means of increasing partner compensation.<sup>55</sup> The court rejected the predatory purpose claim based upon the record of the assistance the partnership gave to Lawlis after disclosure of his alcoholism problem<sup>56</sup> and upon looking at the

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tary expulsion of a partner." *Id.* Finally, the opinion quotes from the section of the partnership agreement that includes the two-thirds provision. *Id.* at 439-40. In Lawlis's case, the difference apparently is not of consequence as the expulsion vote was seven to one, with Lawlis casting the sole dissenting vote. *Id.* at 438.

48. *Id.* Lawlis asked for a fifty percent increase in his units of participation, from sixty units to ninety units. *Id.*

49. *See id.*

50. *Id.*

51. *See id.* at 440-41.

52. *See id.* at 440.

53. *Id.*

54. *Id.*

55. *See id.*

56. *See id.* at 440-41.

full text of the internal memorandum cited.<sup>57</sup>

Lawlis also claimed the expulsion was constructively fraudulent because it breached the partnership's fiduciary duty to exercise good faith and fair dealing.<sup>58</sup> The court did agree with Lawlis's assertion that partners owe each other a "fiduciary duty . . . which requires each to exercise good faith and fair dealing in partnership transactions and toward co-partners."<sup>59</sup> Having established the rule, the court explained why the fiduciary duty obligation to exercise good faith and fair dealing "has no application to the facts of this case."<sup>60</sup> The *Lawlis* court addressed both procedural and substantive aspects of good faith.<sup>61</sup> Regarding substantive issues, the *Lawlis* court cited *Holman* and narrowed the UPA Section 31 "bona fide" and "good faith" requirements to concern only "the business aspects or property of the partnership."<sup>62</sup> Regarding procedural issues, the *Lawlis* court noted the sophistication of the partners involved<sup>63</sup> and the absence of procedural protections for partners

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57. See *id.* at 441 n.2.

58. See *id.* 441-42. Lawlis also claimed the partnership breached its fiduciary duty to him by expelling him for the economically predatory purpose of increasing partner income. See *id.* at 441. The court collapsed the fiduciary duty claim into the assertion that the expulsion was constructively fraudulent. See *id.*

59. See *id.* at 441-42.

60. See *id.* at 442.

61. See *id.* at 442-43.

62. See *id.* at 442 (citing *Holman v. Coie*, 522 P.2d 515, 523-24 (Wash. Ct. App. 1974)). Acknowledging that in *Holman*, the court did not supply a business retention reason, the *Lawlis* court noted the political activities of one of the expelled partners in that case and opined that "[s]ubstantially the same consideration present in *Holman*, i.e., potential damage to partnership business, is present in this case." *Id.* The *Lawlis* court's statement is interesting because in *Holman*, there was no business retention reason given for the expulsion, and in *Lawlis*, the expulsion came after the expelled partner had resolved his substance abuse problem.

To make up for the apparent dearth of evidence that the partnership indeed discharged its fiduciary obligation by finding that there was a threat to the partnership's business, the court spent an extended paragraph explaining that a law partnership is a profit-seeking enterprise that needs to be aware of its good will and favorable reputation. See *id.* The court apparently took judicial notice of the "fact" that "[t]he lifeblood of any partnership contains two essential ingredients, cash flow and profit, and the prime generators of that lifeblood are 'good will' and a favorable reputation." *Id.* The *Lawlis* court concluded that: "[I]f a partner's propensity toward alcohol has the potential to damage his firm's good will or reputation for astuteness in the practice of law, simple prudence dictates the exercise of corrective action, as in *Holman*, since the survival of the partnership itself potentially is at stake." *Id.* Apparently, under *Lawlis*, good faith and fair dealing do not require any inquiry into the magnitude of the threat to the firm's survival and do not require a balancing of the marginal threat to the partnership with the interest of the individual partner.

63. See *id.* ("All the parties involved in this litigation were legally competent and consenting adults well educated in the law who initially dealt at arm's length while negotiating the partnership agreements here involved."). The point about dealing at arm's length is curious

being expelled.<sup>64</sup> The court then gave a new definition of good faith and fair dealing:

Where the remaining partners in a firm deem it necessary to expel a partner under a no cause expulsion clause in a partnership agreement freely negotiated and entered into, the expelling partners act in "good faith" regardless of motivation if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled.<sup>65</sup>

So narrowed, the *Lawlis* court declared, "'good faith' means '... a state of mind indicating honesty and lawfulness of purpose: belief in one's legal title or right: belief that one's conduct is not unconscionable ... absence of fraud, deceit, collusion, or gross negligence.'"<sup>66</sup>

Applied to the facts in *Lawlis*, the court found the expulsion to have been in good faith: "[t]he senior partners acted in the belief they had the legal right to do so under the partnership agreement, as they did."<sup>67</sup> Indeed, far from having a bad faith or predatory purpose, the fact that they allowed *Lawlis* to continue to have a draw for some six months after his expulsion "demonstrates a compassionate, not greedy, purpose."<sup>68</sup>

*Lawlis* is important because it stands for the proposition that, under UPA Section 31, if a partnership uses the expulsion power in bad faith or for a predatory purpose the partnership agreement is violated and the expelled partner has an action for damages suffered as a result of the expulsion.<sup>69</sup> *Lawlis* is also important because the court confirmed that law partners owe each other a fiduciary duty that requires the exercise of good faith and fair dealing in internal partnership transactions.<sup>70</sup> The problem in *Lawlis* is how the court gave substance to the obligation. The *Lawlis* court adopted the *Holman* view that for an expulsion to be wrongful, it must be undertaken for

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as the record indicates that *Lawlis* joined the firm as an associate in 1966, left in 1969 to join the in-house legal staff of a major client, and then rejoined the firm in 1971 as a partner. *See id.* at 437. The partnership agreement at issue was signed in 1984. *Id.* at 438. Whether or not *Lawlis*'s characterization as one who "dealt at arm's length" is accurate as to *Lawlis* is one question; however, it certainly is not true with respect to the many entry-level partners who make their way through an extended period of being an associate only to be offered a partnership after a number of years. The notion that such new partners "deal at arm's length" or "negotiate" in any meaningful sense is absurd.

64. *See id.* at 442.

65. *Id.* at 442-43.

66. *Id.* at 443 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976)).

67. *Id.*

68. *Id.*

69. *Id.* at 440.

70. *See id.*

improper economic reasons, to divert partnership business or property from the expelled partner to the remaining partners.<sup>71</sup>

### C. Ehrlich v. Howe

*Ehrlich v. Howe*<sup>72</sup> involves the claims of Ehrlich, who joined the Park Avenue law firm of Sann & Howe as a lateral-entry partner.<sup>73</sup> Six months after Ehrlich joined the firm, he signed the partnership agreement, which he claimed had been presented to him "on a 'take it or leave it' basis."<sup>74</sup> The partnership agreement provided that:

[A] new partner shared joint and several liability for the debts, claims and other liabilities of the Firm, but held no net asset ownership of it during his or her first three years with the Firm. Rather, a new partner's interest in the equity of the Firm vested upon the partner's third anniversary with the Firm.<sup>75</sup>

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71. See *id.* at 442. The *Lawlis* court was curiously unwilling simply to conclude that *Lawlis* had failed to prove a predatory purpose. It went out of its way to construct, apart from the record, a link between alcoholism and firm profitability. The court's decision raises two questions, neither of which is answered in the *Lawlis* opinion. First, upon which party does the burden relating to predation fall? The court was not clear, but having already found that *Lawlis* failed to prove a predatory purpose, the second discussion of potential damage to the partnership from *Lawlis*'s alcoholism was necessary only if the partnership, and not the expelled partner, had the burden of proof.

Assuming the burden is on the partnership to demonstrate its good faith, the second question raised by the alcoholism discussion is: What is the appropriate standard? The court started with the proposition that good faith is established "*regardless of motivation* if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled." See *id.* at 442-43 (emphasis added). But the court appeared to qualify this formulation: "Used in this context, 'good faith' means 'a state of mind indicating honesty and lawfulness of purpose: belief in one's legal title or right: belief that one's conduct is not unconscionable . . . : absence of fraud, deceit, collusion, or gross negligence . . .'" *Id.* at 443 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1976)). The court then selectively applied the standard. It ignored "a state of mind indicating honesty and lawfulness of purpose" and concentrated on a "belief in one's legal title or right." *Id.* Indeed, if one goes to the full text of the definition cited, the retreat from "pay him what you owe him and show him the door" becomes even more evident because the cited dictionary defines good faith as "a state of mind indicating honesty and lawfulness of purpose: belief in one's legal title or right: belief that one's conduct is not unconscionable *or that known circumstances do not require further investigation*: absence of fraud, deceit, collusion, or gross negligence . . ." WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1976) (italicized to show deletions by court). The deleted reference to the obligation to investigate indicates a substantive element to the good faith judgment not present in the court's formulation.

72. 848 F. Supp. 482 (S.D.N.Y. 1994). A prior ruling in the case, which provides some background information, is reported at: *Ehrlich v. Howe*, No. 92 Civ. 1097 (PNL), 1992 WL 373266 (S.D.N.Y. Dec. 1, 1992).

73. *Ehrlich v. Howe*, 848 F. Supp. 482, 484-85 (S.D.N.Y. 1994).

74. *Ehrlich*, 1992 WL 373266, at \*1.

75. *Ehrlich*, 848 F. Supp. at 485. The court's recital may indicate that the partnership

Two years and three months after he joined the firm, Ehrlich was expelled.<sup>76</sup> In the course of the subsequent litigation he claimed "that he was terminated for the purpose of preventing him from obtaining any rights to the equity of the Firm."<sup>77</sup> The parties agreed that Ehrlich would have been entitled to share in over \$300,000 in firm assets if he had not been expelled prior to the third anniversary of his admission to the partnership.<sup>78</sup>

Interestingly, although *Ehrlich* presents an allegedly predatory expulsion, the court did not address predation as bad faith as developed in *Holman* and *Lawlis*. Rather, the court found for the plaintiff on a very narrow, procedurally-based theory. Ehrlich raised claims based on both federal law and breach of contract. However, only the breach of contract claims are of importance to this discussion.<sup>79</sup> Ehrlich's breach of contract claims revolved around the procedures associated with his dismissal.<sup>80</sup>

The *Ehrlich* opinion begins with a finding that "[u]nder New York law, partners have no common law or statutory right to expel another partner from the partnership."<sup>81</sup> The partnership agreement under which Ehrlich was expelled provided that "[a] partner other than the senior partner may be expelled from the Firm upon the affirmative vote of all the other part-

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agreement modified the UPA provision, under which "[a] person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, *except that this liability shall be satisfied only out of partnership property.*" UNIF. PARTNERSHIP ACT § 17, 6 U.L.A. 519 (1995) (emphasis added).

76. *Ehrlich*, 848 F. Supp. at 485.

77. *Id.* Ehrlich advanced an even more predatory, if somewhat unclear claim: "Ehrlich claim[ed] that he was terminated on the first business day when all partners were in the firm after the date on which he could have withdrawn from the firm and 'locked-in' his vested right to firm equity." *Ehrlich*, 1992 WL 373266, at \*1. Judge Leval observed that "[i]t is not clear what is the source of plaintiff's claim that voluntary withdrawal on his part would have given him a right to participate in firm capital." *Id.* at \*1 n.1.

78. *See Ehrlich*, 848 F. Supp. at 485.

79. Ehrlich brought federal law claims based on alleged violations of the Employee Retirement Income and Security Act of 1974 (ERISA) and the Consolidated Omnibus Reconciliation Act of 1985 (COBRA). *See Ehrlich v. Howe*, No. 92 Civ. 1097 (PNL), 1992 WL 373266, at \*1 (S.D.N.Y. Dec. 1, 1992). The ERISA claim turned on whether Ehrlich, who was a partner in the law firm, was an employee for purposes of ERISA. *See id.* at \*4. Judge Leval, in the first *Ehrlich* opinion, found that the motion to dismiss the ERISA claim "present[ed] a close question" although he "doubt[ed] Ehrlich's] claim could survive a motion for summary judgment." *Id.* Indeed, Ehrlich's ERISA claim was subsequently dismissed upon summary judgment. *See Ehrlich v. Howe*, 848 F. Supp. 482, 486-89 (S.D.N.Y. 1994). Judge Leval then found that Ehrlich stated a valid cause of action under COBRA. *See Ehrlich*, 1992 WL 373266, at \*7. In the second reported opinion, the district court refused to grant either side summary judgment on the COBRA claim. *See Ehrlich*, 848 F. Supp. at 489-90.

80. *See Ehrlich*, 848 F. Supp. at 490.

81. *Id.*



ners."<sup>82</sup> The *Ehrlich* opinion further provides that such contractual expulsion provisions are required to be "strictly applied,"<sup>83</sup> that all partnership agreements "include 'an implied term of good faith,'"<sup>84</sup> and that the good faith obligation in the partnership context is manifest as "a duty [that] rises to one of 'finest loyalty' and 'honor most sensitive.'"<sup>85</sup>

The specific process problem alleged by the plaintiff and found by the court in *Ehrlich* was that the plaintiff was not given notice of the meeting at which he was expelled.<sup>86</sup> The partnership agreement required that the expulsion proposal be presented "before the partnership," which the court found to require passage in a forum to which all partners, including the partner about to be expelled, had notice.<sup>87</sup> The lack of notice to the plaintiff constituted a significant flaw in the expulsion process:

[I]n order for an expulsion vote to be "before the partnership," all of the partners, including any partners whose expulsion is under consideration, must be notified that the vote is taking place. This is an important right conferred by the expulsion provisions in the Agreement because . . . a partner facing expulsion only needed to garner the support of one colleague to avoid termination.<sup>88</sup>

Because the expulsion of Ehrlich without notice violated the terms of the partnership agreement, which the court determined violated the fiduciary duties owed to Ehrlich by the other partners, Ehrlich was awarded summary judgment on his contract and fiduciary duty claims.<sup>89</sup>

*Ehrlich* stands for the propositions that there is no common law right to expel a partner (and no statutory right under New York law), that any contractual right to expel must be strictly followed to be effective, that partners owe each other a duty of good faith in the expulsion context, and that the duty of good faith is manifest as an obligation of the finest loyalty and honor most sensitive, terms given substance by the provisions of the partnership agreement.

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82. *Id.* at 491 (quoting art. V, § 6 of partnership agreement). The partnership agreement actually required unanimity, as the partner being expelled was prohibited from voting on his or her own expulsion. *See id.* (quoting art. IV(b) of partnership agreement).

83. *Id.* at 490 ("A partnership agreement may provide for the expulsion of partners under prescribed conditions, but such provisions are strictly applied.") (citations omitted).

84. *Id.* at 491 (quoting *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 577 (N.Y. 1977)).

85. *Id.* (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928)).

86. *Id.* at 490-91.

87. *See id.* at 491.

88. *Id.*

89. *Id.* at 492 ("Since the issue of Ehrlich's expulsion was not 'before the partnership,' the Defendants' vote to expel Ehrlich breached the Partnership Agreement and their fiduciary duties.").

#### D. Dawson v. White & Case

The partnership agreement in *Dawson v. White & Case*<sup>90</sup> did not include an expulsion provision.<sup>91</sup> In order to oust the targeted partner, Dawson, the firm was forced to dissolve and reform without him.<sup>92</sup> The reported case involved Dawson's claims that the partnership's assets included goodwill that was distributable in an accounting<sup>93</sup> and that the firm's unfunded pension plan was not a firm liability for accounting purposes.<sup>94</sup>

#### E. Heller v. Pillsbury Madison & Sutro

In *Heller v. Pillsbury Madison & Sutro*<sup>95</sup> the California Court of Appeal upheld the expulsion of partner Philip Heller from Pillsbury Madison & Sutro.<sup>96</sup> Heller joined Pillsbury as a lateral partner in January 1990.<sup>97</sup> He was expelled from the firm on June 11, 1992.<sup>98</sup> The situation leading up to Heller's expulsion included episodes of bizarre personal behavior,<sup>99</sup> inappropriate professional behavior,<sup>100</sup> a failure to achieve projected billable

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90. 672 N.E.2d 589 (N.Y. 1996).

91. See *Dawson v. White & Case*, 672 N.E.2d 589, 592 (N.Y. 1996).

92. See *id.*

93. See *id.* at 592-93. The court rejected dictum in an earlier case and held that the goodwill of a law firm might properly be included in an accounting, but found that it was not properly included in the instant case.

94. The court found that the unfunded pension fund liability was not properly included in the accounting as a firm liability. See *id.* at 594.

95. 58 Cal. Rptr. 2d 336 (Ct. App. 1996).

96. See *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 354 (Ct. App. 1996).

97. *Id.* at 339.

98. *Id.* at 342.

99. See *id.* at 340. For some reason, presumably related to the comparatively straight-laced California lifestyle, the firm was uncomfortable with Heller's appearance in a popular magazine:

Heller appeared in the Los Angeles magazine in an article entitled "*Why L.A. Men Won't Commit*." The article described Heller as an attorney at Pillsbury, included a photograph of Heller leaning against the Porsche car he owned at the time, and quoted Heller as stating that he dates "an embarrassing number of women."

*Id.* It was reported that Heller "was 'very disappointed' when he saw the Los Angeles magazine article 'because it really doesn't reflect who I am or what I'm about.'" *Id.* at 343.

100. See *id.* at 340. The court reported that Pillsbury lost an opportunity to do work for Apple Computer because Heller attempted to bypass the firm's billing partner for Apple. See *id.* He got the firm into a conflict situation involving Reebok. See *id.* Moreover, Heller's bizarre and vaguely sexual communications with officials of Bank of America caused the firm to come close to losing that client, which with its \$6,000,000 to \$8,000,000 in annual billings was one of the firm's largest and most important. See *id.* at 341.

hours,<sup>101</sup> and a high percentage of uncollectable billings.<sup>102</sup>

However, the record of Heller's behavior and performance was not central to the case, for the Pillsbury partnership agreement did not require cause and allowed the executive committee to expel a partner.<sup>103</sup> This they did. In the subsequent litigation, Heller sought an accounting and asserted five additional causes of action: breach of contract, breach of implied-in-law contract, breach of fiduciary duty, intentional interference with prospective economic advantage, and intentional infliction of emotional distress.<sup>104</sup> Heller was unsuccessful on all six causes of action at the trial level.<sup>105</sup>

On appeal, the Court of Appeal treated Heller's bad faith claim as part of the second cause of action, for breach of the implied-in-law duty of good faith and fair dealing contract provision.<sup>106</sup> The court, citing *Holman*, focused on procedure as a proxy for good faith: "Where, as here, clear and integrated law partnership agreements contain clauses authorizing expulsions through 'the guillotine approach,' and law partners are expelled pursuant to the agreements, there is no breach of the duty of good faith."<sup>107</sup>

The Court of Appeal relied on the analysis of the Texas Court of Appeals in *Bohatch v. Butler & Binion*<sup>108</sup> when dealing with Heller's breach of fiduciary duty claim.<sup>109</sup> The *Heller* court started from the proposition that the fiduciary duty owed by partners to each other "applies only to situations where one partner could take advantage of his position to reap personal profit or act to the partnership's detriment."<sup>110</sup> The *Heller* court then cited *Bohatch*

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101. See *id.* at 340. Heller apparently had predicted that he would generate upwards of 2200 billable hours for 1991. Early in the year his actual production was at an annual rate of 1200 billable hours. See *id.*

102. See *id.* In 1991, Heller collected only \$230,522 of his \$368,715 in billings. See *id.*

103. See *id.* at 346.

104. See *id.* at 343.

105. See *id.* In phase one of the bifurcated trial, the trial court ruled that the partnership agreement in effect was "unambiguous, integrated and of full force." *Id.* The court rejected Heller's parol evidence and concluded that Heller had been expelled in accordance with the agreement. *Id.* The court dismissed with prejudice Heller's causes of action for breach of contract, breach of implied-in-law contract, breach of fiduciary duty, and intentional infliction of emotional distress. *Id.* The intentional interference with prospective economic advantage claim was dismissed as to some defendants, submitted to the jury as to others. *Id.* The jury deadlocked and the court declared a mistrial and entered judgment on defendants' motion. *Id.* The defendants were awarded costs in the amount of \$64,810.07. *Id.*

106. See *id.* at 346-47.

107. *Id.* at 347 (citing *Holman v. Coie*, 522 P.2d 515, 523-24 (Wash. Ct. App. 1974)).

108. 905 S.W.2d 597 (Tex App. 1997); see *infra* Part I.I (discussing Texas Court of Appeals' analysis and decision in *Bohatch*).

109. See *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 348 (Ct. App. 1996).

110. *Id.* at 348 (quoting *Leigh v. Crescent Square, Ltd.*, 608 N.E.2d 1166, 1170 (Ohio Ct. App. 1992)).

for the severely limited two-part formulation "that the fiduciary duty as to partner expulsions is not to expel in bad faith"<sup>111</sup> and "that the phrase 'bad faith' in the context of an expelled partner 'means only that partners cannot expel another partner for self-gain.'"<sup>112</sup>

The court determined that Heller's expulsion "increased all Pillsbury partners' profit shares."<sup>113</sup> Yet, because Pillsbury was a large firm and because "Heller was earning toward the lower end of the firm's compensation range,"<sup>114</sup> the court determined that "the increase was insubstantial"<sup>115</sup> and that "the evidence [did] not show that defendants expelled Heller to enrich themselves at Heller's expense."<sup>116</sup>

#### F. Winston & Strawn v. Nosal

In *Winston & Strawn v. Nosal*,<sup>117</sup> the expelled partner had been vocal for some years in challenging the management of the firm and had made repeated requests for access to firm financial documents in an attempt to prove self-dealing on the part of management committee members.<sup>118</sup> These attempts culminated with Nosal presenting to the managing partner "a draft complaint seeking enforcement of his right to inspect partnership records, for an accounting, for damages for breach of fiduciary duty, and for a declaratory judgment as to the partnership agreement."<sup>119</sup> The managing partner "tore up the pleading,"<sup>120</sup> and shortly thereafter, Nosal received a form memorandum informing him that he was being "outplaced" from the firm.<sup>121</sup>

In the Winston & Strawn partnership agreement,<sup>122</sup> "there was no provision calling for a hearing, formal meeting, or 'just cause' showing prior to

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111. *Id.* (citing *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 602 (Tex. App. 1995)).

112. *Id.* (quoting *Bohatch*, 905 S.W.2d at 602).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. 664 N.E.2d 239 (Ill. App. Ct. 1996); *see also* Callison, *supra* note 3, at 136 (discussing *Nosal* in detail).

118. *See* *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243-44 (Ill. App. Ct. 1996). The appellate court cited repeated unsuccessful attempts by Nosal to gain access to firm financial records over a five-year period. *Id.*

119. *Id.* at 244.

120. *Id.*

121. *Id.*

122. There was an issue as to which partnership agreement governed Nosal's termination. Nosal claimed that the 1987 agreement, upon which the firm claimed to have acted, had not been properly adopted and that the 1984 agreement governed. *See id.* at 242. The appellate court determined that the question was moot because "there were sufficient votes to expel Nosal both under the 1984 and 1987 partnership agreements." *Id.* at 246.

expulsion."<sup>123</sup> Nosal sued the firm, claiming that "his expulsion was void because it was in violation of the implicit duty of good faith that exists between partners."<sup>124</sup> The firm responded in two ways: first, by disputing Nosal's contention that he was expelled for seeking to exercise his inspection rights<sup>125</sup> and, second, by contending that the expulsion was proper because it was approved by the requisite votes.<sup>126</sup>

As to the substantive defense, the firm claimed that "Nosal was outplaced because his interest in building a two-pronged tax and international trade practice was incompatible with the interests and resources of the firm, and because he had engaged in 'disturbing' conduct."<sup>127</sup> The appellate court found that Nosal had raised a triable issue of fact. Therefore, the district court's granting of summary judgment was inappropriate:

[The managing partner's] steadfast refusal of Nosal's access to records, his role in the outplacement, and the fact that it occurred just after Nosal's threatened lawsuit, raise an inference that Nosal was expelled solely because he persisted in invoking rights belonging to him under the partnership agreement and that the reasons advanced by the firm were pretextual.<sup>128</sup>

As to the procedural defense that Nosal's expulsion comported with the procedures required under the partnership agreement, the court found that procedural compliance in the exercise of discretion to expel a partner does not alone satisfy the good faith and fair dealing obligation: "Regardless of the discretion conferred upon partners under a partnership agreement, this does not abrogate their high duty to exercise good faith and fair dealing in the execution of such discretion."<sup>129</sup> *Nosal* is important in our analysis because the court correctly differentiated between the procedural and the substantive aspects of the duty of good faith and fair dealing<sup>130</sup> and ruled that procedural compliance with the terms of a partnership expulsion provision does not end the substantive good faith and fair dealing inquiry.<sup>131</sup>

#### G. *Beasley v. Cadwalader, Wickersham & Taft*

*Beasley v. Cadwalader, Wickersham & Taft*<sup>132</sup> involves the expulsion of a partner from a branch office of a Wall Street firm who was apparently

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123. *Id.* at 243.

124. *Id.*

125. *Id.* at 244.

126. *Id.* at 242.

127. *Id.* at 244.

128. *Id.* at 246.

129. *Id.*

130. *See id.* at 245-46.

131. *See id.*

132. No. CL-94-8646-AJ, 1996 WL 438777 (Fla. Cir. Ct. July 23, 1996).

caught up in a firm-wide downsizing effort.<sup>133</sup> Beasley, a lateral-entry whose earlier practice led the court to characterize him as "an extraordinary rain-maker and a skilled litigator,"<sup>134</sup> became a partner in the firm's Palm Beach office in 1989.<sup>135</sup> In 1993, the share value of the Cadwalader firm declined, and concern among some partners resulted in a substantial change in the composition of the management committee.<sup>136</sup> Also in 1993, the Palm Beach office operated at a loss for the first time since Beasley's arrival.<sup>137</sup> The year 1994 saw an even larger decline in Cadwalader's share value. A group of some fifteen "younger, more productive partners"<sup>138</sup> became upset at the compensation situation and pressed the management committee for action.<sup>139</sup> The management committee and the insurgents cooperated in an exercise called "Project Right Size," which "was aimed at identifying less productive partners for elimination from the partnership."<sup>140</sup> The status of the Palm Beach office became part of "Project Right Size," "with the common purpose being to improve compensation to the remaining partners and retain the disgruntled more productive partners."<sup>141</sup>

The management committee voted to proceed with "Project Right Size," including the closure of the Palm Beach office.<sup>142</sup> Negotiations with the targeted partners ensued, the firm and Beasley were unable to come to terms, and Beasley initiated suit.<sup>143</sup> He advanced two substantive claims against the partnership: first, that he was expelled from the partnership in violation of the firm's partnership agreement<sup>144</sup> and, second, that the firm's actions violated its fiduciary duty owed to him.<sup>145</sup> He also advanced a claim for

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133. *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646-AJ, 1996 WL 438777, at \*1 (Fla. Cir. Ct. July 23, 1996), *rev'd in part on other grounds*, Nos. 96-3818, 97-2805, 97-0146, 97-380, 1998 WL 405919 (Fla. Dist. Ct. App. July 22, 1998) (reversing as to award of profits, attorney's fees, and costs, but affirming as to all other points raised by both parties), *opinion modified on reh'g*, Nos. 96-2805, 96-3818, 97-0146, 97-380, 1998 WL 904065 (Fla. Dist. Ct. App. Dec. 30, 1998); *see also* Callison, *supra* note 3, at 137-39 (discussing *Beasley* in detail).

134. *Id.* at \*1.

135. *Id.* at \*1; *see* Allan W. Vestal, "Assume a Rather Large Boat . . .": *The Mess We Have Made of Partnership Law*, 54 WASH. & LEE L. REV. 487, 489-92 (1997); Donald J. Weidner, *Cadwalader, RUPA and Fiduciary Duty*, 54 WASH. & LEE L. REV. 877, 878-80 (1997).

136. *Beasley*, 1996 WL 438777, at \*1.

137. *Id.*

138. *Id.* at \*2.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at \*3.

144. *Id.* at \*3-\*5.

145. *Id.* at \*5-\*6.

punitive damages.<sup>146</sup>

The firm's partnership agreement did not contain an expulsion provision.<sup>147</sup> The judge in *Beasley* had already found that applicable New York partnership law does not contain a common law or statutory provision for expulsion unless one is provided in the partnership agreement.<sup>148</sup> The court rejected the firm's defenses to the breach of contract claim and found in *Beasley's* favor.<sup>149</sup>

*Beasley's* breach of fiduciary duty claim apparently consisted of three components: (1) that the firm expelled *Beasley* in contravention of the partnership agreement, (2) that the firm failed to disclose the plans to close the Palm Beach office and terminate its partners, and (3) that the motivation for the expulsion was the financial gain of the remaining partners.<sup>150</sup> *Beasley* won on the fiduciary duty claim, apparently based on the third component of his claim:

These facts compel the conclusion that the management committee breached its fiduciary duty to *Beasley*. This was not a situation where the management committee was merely fulfilling its management function. Rather, it was participating in a clandestine plan to wrongfully expel some partners for the financial gain of other partners. Such activity cannot be said to be honorable, much less to comport with "the punctilio of an honor."<sup>151</sup>

Thus, the breach of fiduciary duty claim in *Beasley* was decided on a factual finding that the management committee was expelling *Beasley* to advantage other partners financially.<sup>152</sup>

#### *H. Ruskin v. Cadwalader, Wickersham & Taft*

*Ruskin v. Cadwalader, Wickersham & Taft*<sup>153</sup> is in a sense a companion case to *Beasley*. Like *Beasley*, *Ruskin* grew out of a partner expulsion under-

146. *Id.* at \*7.

147. *Id.* at \*3.

148. *Beasley v. Cadwalader, Wickersham & Taft*, Nos. 96-3818, 97-2805, 97-0146, 97-380, 1998 WL 405919, at \*2 (Fla. Dist. Ct. App. July 22, 1998) (reversing as to award of profits, attorney's fees, and costs, but affirming as to all other points raised by both parties), *opinion modified on reh'g*, Nos. 96-2805, 96-3818, 97-0146, 97-380, 1998 WL 904065 (Fla. Dist. Ct. App. Dec. 30, 1998).

149. *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646-AJ, 1996 WL 438777, at \*4-\*5 (Fla. Cir. Ct. July 23, 1996), *rev'd in part on other grounds*, Nos. 96-3818, 97-2805, 97-0146, 97-380, 1998 WL 405919 (Fla. Dist. Ct. App. July 22, 1998) (reversing as to award of profits, attorney's fees, and costs, but affirming as to all other points raised by both parties), *opinion modified on reh'g*, Nos. 96-2805, 96-3818, 97-0146, 97-380, 1998 WL 904065 (Fla. Dist. Ct. App. Dec. 30, 1998).

150. *See id.* at \*5.

151. *Id.* at \*6 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).

152. *See id.*

153. *Ruskin*, a jury trial, is not the subject of a reported opinion. News reports of the case

taken as part of "Project Right Size."<sup>154</sup> In this case, partner Steven A. Ruskin claimed that he was expelled from the firm in violation of the partnership agreement.<sup>155</sup> The firm countered that Ruskin elected to leave the firm voluntarily when his compensation was reduced to a fixed salary roughly half of his pre-reduction level of compensation.<sup>156</sup> Ruskin, who had been with the firm for twenty-two years, claimed that the reduction in salary was used to force him out of the firm.<sup>157</sup> Ruskin was awarded \$1,400,000 in lost past earnings and \$1,600,000 in lost future earnings.<sup>158</sup> For the second phase of the trial, the court reserved the question of what compensation, if any, Ruskin was due for his pro rata portion of the firm's assets.<sup>159</sup>

### I. Bohatch v. Butler & Binion

*Bohatch v. Butler & Binion*<sup>160</sup> is the recently decided Texas Supreme Court case that addresses whether it constitutes bad faith for a law partnership to expel a partner who reports the suspected unethical conduct of another partner to the management committee.<sup>161</sup> Bohatch was a partner in the three-attorney Washington, D.C. office of Texas-based Butler & Binion.<sup>162</sup> A former Deputy Assistant General Counsel at the Federal Energy Regulatory Commission, Bohatch worked almost exclusively for Pennzoil, as did the other attorneys in the office.<sup>163</sup>

Once a partner, Bohatch became concerned that one of the other partners in the Washington, D.C. office was over-billing Pennzoil.<sup>164</sup> She took her concerns to another Washington, D.C. partner, and the two of them reviewed and copied records relating to the time records of the suspect partner.<sup>165</sup> Following this investigation, Bohatch took her concerns to the firm's manag-

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provide some background. See Daniel Wise, *Trial Over Ousting of Firm Partner Opens*, N.Y. L.J., Dec. 17, 1997, at 1; Dean Starkman, *Cadwalader Loses Lawsuit Brought By Former Partner*, WALL ST. J., Dec. 23, 1997, at B5.

154. Wise, *supra* note 153.

155. See Starkman, *supra* note 153.

156. See Wise, *supra* note 153.

157. See *id.*

158. See Starkman, *supra* note 153.

159. See *id.*

160. No. 95-0934, 1998 WL 19482 (Tex. Jan. 22, 1998).

161. Bohatch v. Butler & Binion, No. 95-0934, 1998 WL 19482, at \*1 (Tex. Jan. 22, 1998). The Texas Court of Appeals decision is Bohatch v. Butler & Binion, 905 S.W.2d 597 (Tex. App. 1997); see also Callison, *supra* note 3, at 135-36 (discussing Bohatch in detail).

162. Bohatch, 1998 WL 19482, at \*1.

163. *Id.*

164. *Id.*

165. *Id.*



ing partner and then to other members of the management committee.<sup>166</sup> The management committee investigated her concerns, discussed the matter with the client, and concluded that there was no basis for Bohatch's contentions.<sup>167</sup>

The day following Bohatch's initial discussion with the firm's managing partner, the suspect partner "informed her that Pennzoil was not satisfied with her work and wanted her work to be supervised."<sup>168</sup> Following the management committee's investigation and conclusion that her contentions were without basis, Bohatch was told "that she should begin looking for other employment."<sup>169</sup>

Eventually, Bohatch found new employment, and the partnership formally voted to expel her.<sup>170</sup> Bohatch sued, and the trial court granted partial summary judgment for the firm on the wrongful discharge claim, the breach of fiduciary duty claim, and the breach of the duty of good faith and fair dealing claim relating to the period following the formal expulsion.<sup>171</sup> The trial court denied the firm's motion for summary judgment on the breach of fiduciary duty and breach of the duty of good faith and fair dealing claims for the period prior to Bohatch's formal expulsion.<sup>172</sup> These parts of the case went to the jury, which found in Bohatch's favor.<sup>173</sup>

The Texas Court of Appeals reversed the trial court on the critical duty of good faith and fair dealing claim.<sup>174</sup> The intermediate appellate court cited *Holman* and *Lawlis* and held that "partners have a general fiduciary duty not to expel other partners from the partnership in bad faith. 'Bad faith' in this context means only that partners cannot expel another partner for self-gain."<sup>175</sup>

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166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at \*2.

171. *See id.*

172. *See id.*

173. *See id.* The jury awarded Bohatch \$57,000 for lost wages, \$250,000 for mental anguish, \$4,000,000 in punitive damages, and attorney fees. *Id.* The court excluded the award of attorney fees and secured a remittitur in the \$4,000,000 punitive damage award to \$237,000. *Id.*

174. *See Bohatch v. Butler & Binion*, 905 S.W.2d 597, 603 (Tex. App. 1997).

175. *Id.* at 602 (citations omitted). The *Bohatch* intermediate appellate court acknowledged the jury's finding that the defendants failed to act in the utmost good faith and acted with an intent to gain an additional benefit for themselves, but the court of appeals held that the jury findings were not supported by the evidence. *See id.* at 603. Reading the instructions and the jury answers to questions on the verdict form in the light most favorable to the appellee, the court of appeals held that the jury answered the critical questions in Bohatch's favor:

Taken together, question 2A on breach of fiduciary duty (whether the defendants failed to act "in the utmost good faith") and question 5 on punitive damages

The court of appeals found that the firm did not expel Bohatch because of a fear that it would lose the Pennzoil business. In fact, the firm disclosed Bohatch's concerns about the billings to the client, and the client satisfied itself that the billings were proper and did not remove its business.<sup>176</sup> As to Bohatch's claim that the expulsion was predatory, that is, motivated by a desire to take her partnership interest, the court of appeals was dismissive: "Bohatch . . . argues that she was expelled so that the other partners could acquire her partnership interest. Bohatch's partnership share was so small, however, that the jury could not have reasonably concluded that the partners' expulsion of Bohatch was *motivated* by their desire to acquire her partnership share."<sup>177</sup>

Finally, the court of appeals used the forbearance of the firm in not expelling Bohatch *earlier* to counter the predatory purpose claim. The court noted that the firm could have expelled Bohatch when she raised her concerns<sup>178</sup> or when they found her concerns to be without foundation.<sup>179</sup>

Instead, the partners on the management committee chose the "step down" severance rather than the "guillotine" severance permitted by the partnership agreement. They allowed Bohatch to continue as a partner, paying her a monthly draw, allowing her to use firm resources, and providing her with insurance coverage until she found other employment. *Such conduct does not demonstrate a purpose of self gain.*<sup>180</sup>

The court of appeals found for Bohatch on the relatively unimportant contract claim and the lost earnings claim, for a total compensatory award of \$35,000, no punitive damages, and \$225,000 in attorney fees.<sup>181</sup>

Although the Texas Supreme Court affirmed the court of appeals's judgment, its rationale differed from that of the intermediate appellate court and is, therefore, worth examining.<sup>182</sup> The court's analysis began with a recogni-

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(whether Paine, Burns, and McDonald "acted with an intent to gain an additional benefit for [themselves]") addresses the issue of whether the firm, acting through its partners, expelled Bohatch in bad faith (for self gain). Although the jury answered these questions in Bohatch's favor, we find that the answers are not supported by the evidence.

*Id.*

176. *Id.* at 603-04.

177. *Id.* at 604. .

178. *Id.* The partnership agreement allowed for immediate expulsion of Bohatch when she made her concerns known, "without stating a reason or conducting an investigation." *Id.* Nevertheless, the firm did an investigation of Bohatch's concerns. *Id.*

179. *Id.*

180. *Id.* (emphasis added) (citation omitted).

181. *See id.* at 608.

182. *See Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482, at \*1-\*5 (Tex. Jan. 22, 1998). The Texas Supreme Court affirmed the court of appeals in a majority opinion by

tion of the common law rule "that '[t]he relationship between . . . partners . . . is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.'"<sup>183</sup> But the court then cited as a countervailing proposition the assertion that "partners have no obligation to remain partners; 'at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated.'"<sup>184</sup> The court framed the issue presented as "whether the fiduciary relationship between and among partners creates an exception to the at-will nature of partnerships; that is, in this case, whether it gives rise to a duty not to expel a partner who reports suspected overbilling by another partner."<sup>185</sup>

The Texas Supreme Court marshaled cases for the propositions that "a partnership may expel a partner for purely business reasons,"<sup>186</sup> "that a law firm can expel a partner to protect relationships both within the firm and with clients,"<sup>187</sup> and "that a partnership can expel a partner without breaching any duty in order to resolve a 'fundamental schism.'"<sup>188</sup> The court declined "to recognize that public policy requires a limited duty to remain partners — i.e., a partnership must retain a whistleblower partner,"<sup>189</sup> and held that "the firm did not owe Bohatch a duty not to expel her for reporting suspected overbilling by another partner."<sup>190</sup> Using this analysis, the court concluded that "[t]he fiduciary duty that partners owe one another does not encompass a duty to remain partners or else answer in tort damages."<sup>191</sup> This statement is at once both correct as far as it reaches and essentially irrelevant to the case at hand.<sup>192</sup>

Justice Enoch, joined by Justices Gonzalez, Owen, Baker, and Hankinson. *See id.* at \*1-\*5. Justice Hecht filed a lengthy concurring opinion. *See id.* at \*5-\*19 (Hecht, J., concurring). Justice Spector filed a dissenting opinion, in which Chief Justice Phillips joined. *See id.* at \*19-\*23 (Spector, J., dissenting).

183. *Id.* at \*2 (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951)).

184. *Id.* (quoting *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 577 (N.Y. 1977)).

185. *Id.*

186. *Id.* at \*3 (citations omitted).

187. *Id.* (citing *Lawlis v. Kightling & Gray*, 562 N.E.2d 435, 442 (Ind. Ct. App. 1990); *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974)).

188. *Id.* (citations omitted).

189. *Id.* at \*4.

190. *Id.* at \*5.

191. *Id.* at \*4.

192. In his concurrence, Justice Hecht agreed with this assessment: "The Court . . . misstates the issue when it says that '[t]he fiduciary duty that partners owe one another does not encompass a duty to remain partners.' The statement is correct, of course, but it has nothing to do with Bohatch's claim." *Id.* at \*16 (Hecht, J., concurring) (citing *Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482, at \*4 (Tex. Jan. 22, 1998)). The discussion shifts somewhat if

But what of the duty of good faith and fair dealing from which the analysis started? Properly viewed, the issue in *Bohatch* was not whether the partnership was an at-will partnership for purposes of dissolution; rather, the issue was whether the partners fulfilled the obligation of good faith and fair dealing that they owed Bohatch as a result of her status as a partner. Having started with a recognition of the common law rule "that '[t]he relationship between . . . partners . . . is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise,'" <sup>193</sup> the *Bohatch* court lost its bearings and wandered off course.

The concurrence by Justice Hecht is more helpful and significantly more nuanced than the majority opinion. Justice Hecht discussed at some length the suggestion that good faith in the expulsion context prohibits only economic predation.<sup>194</sup> He observed that economic gain of the remaining partners is present even in situations in which the expulsion is upheld:

Despite statements in these cases that partners cannot expel one of their number for personal profit, in each instance the expelling partners believed that retaining the partner would hurt the firm financially and that the firm – and thus the partners themselves – stood to benefit from the expulsion. It is therefore far too simplistic to say, as the court of appeals held, that partners cannot expel a partner for personal financial benefit; if expulsion of a partner to protect the firm's reputation or preserve its relationship with a client benefits the firm financially, it perforce benefits the members of the firm. If expulsion of a partner can be in breach of a fiduciary duty, the circumstances must be more precisely defined.<sup>195</sup>

Justice Hecht cited with apparent approval the analysis of the New York Court of Appeals in *Gelder Medical Group v. Webber*,<sup>196</sup> a physician partnership case.<sup>197</sup> Justice Hecht noted that the *Gelder* court indicated "that bad faith

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one attempts to recast the dissolution option as variation of expulsion. The problem with this approach is that the targeted partner has statutory rights in the dissolution process that, unless waived, give the target significant leverage. See UNIF. PARTNERSHIP ACT § 38(2), 6 U.L.A. 880-81 (1995). Absent an effective agreement modifying the statutory provisions, the court's statement would have to be revised for the dissolution context: *The duty that partners owe one another does encompass a duty to remain partners or else answer in damages if the dissolution is in contravention of the partnership agreement or if the dissolving partners deny the target her statutory and contractual rights in dissolution.*

193. *Bohatch*, 1998 WL 19482, at \*2 (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951)).

194. See *id.* at \*10-\*13 (Hecht, J., concurring).

195. *Id.* at \*12 (Hecht, J., concurring).

196. 363 N.E.2d 573 (N.Y. 1977).

197. *Bohatch*, 1998 WL 19482, at \*12-\*13 (Hecht, J., concurring) (citing *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 576-77 (N.Y. 1977)).

might limit the otherwise absolute language of the [partnership] agreement."<sup>198</sup> However, Justice Hecht then observed that the *Gelder* court argued, "[e]ven if bad faith on the part of the remaining partners would nullify the right to expel one of their number, it does not follow that under an agreement permitting expulsion without cause the remaining partners have the burden of establishing good faith."<sup>199</sup> The solution in *Gelder*, which Justice Hecht appeared to find persuasive, was to allow the expelled partner to establish the bad faith of the expelling partners.<sup>200</sup> What would be the test for bad faith? Using the *Gelder* analysis, Justice Hecht suggested "'bad faith going to the essence,' or an 'evil, malevolent, or predatory purpose.'"<sup>201</sup>

Justice Hecht did not suggest the answer to the ultimate question: Is a partner who alleges unethical behavior on the part of another partner without adequate proof shielded from expulsion? Like the majority, he was troubled by the suggestion that partners would be forced to remain in a partnership with a partner who has perhaps demonstrated seriously flawed judgment.<sup>202</sup> On that basis, Justice Hecht concurred in the majority's judgment.<sup>203</sup>

### *J. Synthesis: The Present State of the Law*

So what is the present state of the law of law partner expulsions? If we return to the two-part inquiry of substance and process, the present body of law can be summarized quickly.

Regarding substance, we start with the proposition that there is no common-law or statutory right of expulsion.<sup>204</sup> The cases and authorities agree that there is no common-law right to expel a partner from a law partnership.<sup>205</sup> Nor is there a statutory right to expel, although both the UPA and

198. *Id.* at \*12 (Hecht, J., concurring) (quoting *Gelder Med. Group*, 363 N.E.2d at 576-77).

199. *Id.* at \*13 (Hecht, J., concurring) (quoting *Gelder Med. Group*, 363 N.E.2d at 576-77).

200. *See id.* (Hecht, J., concurring).

201. *Id.* (Hecht, J., concurring).

202. *See id.* at \*4 (Hecht, J., concurring).

203. *Id.* at \*15 (Hecht, J., concurring).

204. There is, of course, a statutory right of dissolution. *See* UNIF. PARTNERSHIP ACT § 31, 6 U.L.A. 771 (1995). Because of the statutory protections afforded a targeted partner in a dissolution, the purpose of which is to reform the partnership without the target, what I have termed a "collusive dissolution," however, I do not include dissolutions in the term "expulsion." *See* UNIF. PARTNERSHIP ACT § 31, 38(2), 6 U.L.A. 771, 880-81 (1995).

205. *See Ehrlich v. Howe*, 848 F. Supp. 482, 490 (S.D.N.Y. 1994) (stating that New York law provides no common-law or statutory right to expel partner); *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646-AJ, 1996 WL 449247, at \*1 (Fla. Cir. Ct. Mar. 29, 1996) (finding no common law right of expulsion under New York law); *Dawson v. White & Case*, 672 N.E.2d 589, 591-92 (N.Y. 1996) (observing that in absence of termination mechanism in partnership agreement, partners can only remove partner through dissolution); *Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482, at \*2 (Tex. Jan. 22, 1998) ("We have long recognized

RUPA provide that contractual expulsion provisions will be given effect.<sup>206</sup> The right to expel arises, if at all, from the partnership agreement.<sup>207</sup>

If a right to expel is provided, it may be either with or without cause. If the agreement is silent as to cause, courts generally hold that a cause requirement is not read into the expulsion provision.<sup>208</sup> Courts will enforce contrac-

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as a matter of common law that "[t]he relationship between . . . partners . . . is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise." (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951)); *Id.* at \*9 (Hecht, J., concurring). Professor Hillman's authoritative treatise is in accord. See HILLMAN, *supra* note 39, § 5.3.2, at 5:6. S

The general authorities on partnership law are in agreement on this point. See CLEMENT BATES, 1 THE LAW OF PARTNERSHIP § 241, at 240-41 (1888) ("Like all provisions for forfeitures, [a power of expulsion] . . . does not exist unless expressly conferred."); J. WILLIAM CALLISON, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 15.06, at 15-17 to 15-18 (1997) ("[T]he UPA contemplates that partners may establish a contracted basis for removing an undesirable partner."); NATHANIEL LINDLEY ET AL., 2 A TREATISE ON THE LAW OF PARTNERSHIP 1263-64 (Marshall D. Ewell ed., 2d American ed. 1888) ("In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any other member."); SHUMAKER, *supra* note 12, § 101, at 174 ("No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.").

206. See UNIF. PARTNERSHIP ACT § 31(d), 6 U.L.A. 880 (1995) ("[T]he expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners."). UPA Section 38 refers to the "expulsion of a partner, bona fide under the partnership agreement." *Id.* § 38(1); see also REV. UNIF. PARTNERSHIP ACT §§ 601(4) - 601(5), 6 U.L.A. 73 (1995).

207. See *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646-AJ, 1996 WL 438777 (Fla. Cir. Ct. July 23, 1996), *rev'd in part on other grounds*, Nos. 96-3818, 97-2805, 97-0146, 97-380, 1998 WL 405919 (Fla. Dist. Ct. App. July 22, 1998) (reversing as to award of profits, attorney's fees, and costs, but affirming as to all other points raised by both parties), *opinion modified on reh'g*, Nos. 96-2805, 96-3818, 97-0146, 97-380, 1998 WL 904065 (Fla. Dist. Ct. App. Dec. 30, 1998); *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646-AJ, 1996 WL 449247, at \*1 (Fla. Cir. Ct. Mar. 29, 1996) (strictly construing partnership agreement when power to expel is not express); *Dawson v. White & Case*, 672 N.E.2d 589, 591-92 (N.Y. 1996) ("[W]e have held that a partnership agreement may contain a termination provision or some other mechanism by which to remove a partner. Absent such a mechanism, however, the removal of a partner can be accomplished only through dissolution of the firm, defined as a 'change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business.'" (citations omitted)).

208. See HILLMAN, *supra* note 39, § 5.3.4.1, at 5:10 to 5:11. Professor Hillman finds that "[t]he sparse authority that exists under the UPA indicates that the absence of a cause standard in the expulsion clause eliminates the need to establish cause." *Id.* Hillman also notes:

The question of whether a cause requirement should be implied when an expulsion clause does not address the subject, or is unclear, has been a source of litigation for more than a century. Invariably, courts have rejected challenges to expulsions offered on this basis and thereby have displayed a willingness to resolve ambiguities against the partner contesting the expulsion.

Hillman, *supra* note 12, at 567 (footnote omitted).

tual cause requirements.<sup>209</sup>

If a right to expel is provided, its exercise must be consistent with the duty of good faith and fair dealing.<sup>210</sup> An expulsion motivated by an economically predatory purpose does not comport with the duty of good faith and fair dealing.<sup>211</sup> Authority exists for the proposition that an expulsion motivated by

209. See *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 346 (Ct. App. 1996) (noting "partnership agreement not only contains no language requiring expulsions [be] for cause, but also states the partners' reserved powers include the right to 'expel any Partner from the partnership without cause'"); *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243 (Ill. App. Ct. 1996) (noting no "just cause" requirement under applicable partnership agreement); *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 443 (Ind. Ct. App. 1990) (refusing to "engraft[] a 'for cause' requirement upon the agreement when such was not the intent of the parties"); *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974) (noting agreement does not require cause for expulsion and declining to impose cause requirement).

210. See *Ehrlich v. Howe*, 848 F. Supp. 482, 491 (S.D.N.Y. 1994) ("[A]ll partnership agreements in New York include 'an implied term of good faith.'" (citing *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 577 (N.Y. 1977))); *Heller*, 58 Cal. Rptr. 2d at 348 ("[T]he fiduciary duty is not to expel in bad faith."); *Nosal*, 664 N.E.2d at 244-45 ("[E]ach partner is bound to exercise the utmost good faith and honesty in all matters relating to the partnership business."); *Lawlis*, 562 N.E.2d at 440, 442 (citing IND. CODE ANN. § 23-4-1-31(1)(d) (Michie 1971) for proposition that "if the power to involuntarily expel partners granted by a partnership agreement is exercised in bad faith . . . the partnership agreement is violated"); *Holman*, 522 P.2d at 523-24 ("Undoubtedly, the general rule of law is that the partners in their dealings with each other must exercise good faith. . . . In every contract, including partnership agreements, there is an implied covenant of good faith, fair dealing and cooperation by the parties to the contract." (citation omitted)). Professor Hillman refers to "the overriding standard of good-faith applicable to dealings among partners." HILLMAN, *supra* note 39, § 5.3.4, at 5:9; see also CALLISON, *supra* note 205, § 15.06, at 15-19 to 15-20 ("UPA § 31(1)(d) requires that the expulsion be bona fide under the partnership agreement, and prevents bad faith expulsions."); LINDLEY ET AL., *supra* note 205, at 984 ("The court cannot control the exercise of a power to expel if it is exercised bona fide." (citing *Russell v. Russell*, 14 Ch. D. 471 (1880); *Steuart v. Gladstone*, 10 Ch. D. 626 (1878)); *id.* at 1074 ("Powers of expulsion are always construed strictly, and, unless they are exercised with perfect good faith, the expulsion will be declared void . . .")); SHUMAKER, *supra* note 12, § 101, at 174 ("Where a power of expulsion is conferred, it can only be exercised in good faith . . .").

211. See *Heller*, 58 Cal. Rptr. 2d at 348 ("[T]he phrase 'bad faith' in the context of an expelled partner 'means only that the partners cannot expel another partner for self-gain.'"); *Beasley*, 1996 WL 438777, at \*5-6 ("[T]he management committee was participating in a clandestine plan to wrongfully expel some partners for the financial gain of other partners."); *Nosal*, 664 N.E.2d at 244-45 ("[The obligation of] utmost good faith and honesty in all matters relating to the partnership business . . . prohibits all forms of secret dealings and self-preferences in any matter 'relating to and connected with a partnership.'" (quoting *Bakalis v. Bressler*, 115 N.E.2d 323, 327 (Ill. 1953))); *Lawlis*, 562 N.E.2d at 442 (same (citing *Holman*, 522 P.2d at 523)); *Holman*, 522 P.2d at 523 ("[T]he personal relationships between partners to which the terms 'bona fide' and 'good faith' relate are those which have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary [sic], from taking any personal advantage touching those subjects."). Professor Hillman acknowledges the predatory purpose line of cases and raises questions as to their meaning and usefulness. See HILLMAN, *supra* note 39, § 5.3.4.3, at 5:12-5:17; see also SHUMAKER, *supra* note 12, § 101, at

other than an economically predatory purpose cannot be challenged on substantive grounds.<sup>212</sup> Other authority, however, suggests that good faith and fairness may be violated by motivations not immediately economically predatory, such as a motivation to thwart the exercise of partner rights.<sup>213</sup>

Regarding process, we start with the proposition that there is no common-law or statutory right to a particular procedure in the expulsion context. Process is a matter of grace, not of right, absent an agreement establishing procedural requirements.<sup>214</sup> Again, *Holman* sets the basic argument. The court in *Holman* rejected the expelled partners' argument that procedural protections should be either implied in the agreement or imposed as a matter of law.<sup>215</sup> The court noted that the agreement did not contain any procedural protections and that it had been drafted and executed by knowledgeable, experienced, and proficient lawyers. The *Holman* court did not impose any procedural requirements:

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174 ("Where a power of expulsion is conferred, it can only be exercised in good faith, with a view to the benefit of the firm, and not for the private benefit of any of the partners . . .").

212. See *Heller*, 58 Cal. Rptr. 2d at 347-48 ("Although partners owe each other a fiduciary duty, this duty applies only to situations where one partner could take advantage of his position to reap personal benefit."); *Lawlis*, 562 N.E.2d at 442-43 ("Where the remaining partners in a firm deem it necessary to expel a partner under a no cause expulsion clause in a partnership agreement freely negotiated and entered into, the expelling partners act in 'good faith' regardless of motivation if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled."); *Holman*, 522 P.2d at 523-24 ("[T]he personal relationships between partners to which 'bona fide' and 'good faith' relate are those which have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary [sic], from taking any personal advantage touching those subjects.").

213. See *Nosal*, 664 N.E.2d at 246 (finding "an inference that Nosal was expelled solely because he persisted in invoking rights belonging to him under the partnership agreement").

214. See *Heller*, 58 Cal. Rptr. 2d at 347 ("Where, as here, clear and integrated law partnership agreements contain clauses authorizing expulsions through 'the guillotine approach,' and law partners are expelled pursuant to the agreements, there is no breach of the duty of good faith."); *Nosal*, 664 N.E.2d at 245 (noting that "the partnership agreement places no restriction upon the expulsion of a partner other than approval by the requisite majority"); *Lawlis*, 562 N.E.2d at 442 ("[I]t is apparent [the partners] believed . . . the 'guillotine method' of involuntary severance, that is, no notice or hearing, only a severance vote to terminate a partner involuntarily need be taken, would be in the best interests of the partnership. Their intent was to provide a simple, practical, and above all, a speedy method of separating a partner from the firm, if that ever became necessary for any reason. We find no fault with that approach to severance."); *Holman v. Coie*, 522 P.2d 515, 521-23 (Wash. Ct. App. 1974) ("We find this partnership agreement to [be] unambiguous, and not to require notice, reasons, or an opportunity to be heard. To inject those issues would be to rewrite the agreement of the parties, a function we neither presume nor assume."). Professor Hillman finds that "United States decisions have minimized the importance of the process underlying expulsions." HILLMAN, *supra* note 39, § 5.3.5.1, at 5:20; see also CALLISON, *supra* note 205, § 15.06 at 15-21; Callison, *supra* note 3, at 142-43.

215. See *Holman*, 522 P.2d at 521.



In this case the express language of the partnership agreement itself must be controlling; that language clearly does not contain any of the requirements plaintiffs now seek to assert as impliedly applicable. Where terms of a contract, taken as a whole, are plain and unambiguous, the meaning is to be deduced from the contract alone. We note further there is no evidence of the partners' intention at the time of drafting the present partnership agreement. They merely included the word "expulsion" without setting forth any requirements for executing such a procedure other than a vote of the executive committee. . . . We find this partnership agreement to [be] unambiguous, and not to require notice, reasons, or an opportunity to be heard. To inject those issues would be to rewrite the agreement of the parties, a function we neither presume nor assume.<sup>216</sup>

The *Holman* court rejected the argument that expelled partners have a right to some procedural safeguards:

These parties in writing the partnership clauses dealing with expulsion, and the defendants who carried them out, chose to adopt the guillotine approach, rather than a more diplomatic approach, to the expulsion of partners. The actions of defendants were within the contemplation of the agreement. While this course of action may shock the sensibilities of some, to others it may be that once the initial decision is made, the traumatic reaction to that decision is more quickly overcome and the end result more merciful.<sup>217</sup>

The split on process in the present regime comes not on the question of what process is due. Rather, the split arises on the more limited question of whether, once agreed to by the partners, procedural requirements are to be strictly enforced. *Ehrlich v. Howe* stands for the proposition that procedural provisions must be strictly enforced.<sup>218</sup> Other decisions are less strict in the enforcement of procedural requirements. In *Holman*, for example, the rules of procedure for the executive committee required that the committee give members an agenda of topics to be discussed at each executive committee meeting.<sup>219</sup> The *Holmans* were members of the executive committee; however, the committee did not give them agendas listing their expulsions as a topic to be discussed.<sup>220</sup> Nevertheless, the court refused to hold the resulting expulsion unlawful.<sup>221</sup>

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216. *Id.* at 523 (citation omitted).

217. *Id.* at 524.

218. See *Ehrlich v. Howe*, 848 F. Supp. 482, 490 (S.D.N.Y. 1994) ("A partnership agreement may provide for the expulsion of partners under prescribed conditions, but such provisions are strictly applied.").

219. See *Holman v. Coie*, 522 P.2d 515, 520 (Wash. Ct. App. 1974).

220. See *id.* (finding that neither plaintiff was given notice).

221. See *id.* at 521.

It is true there was no agenda provided to plaintiffs prior to the May 13 meeting as is suggested or recommended by the supplementary rules. However, both plaintiffs

Finally, there is a useful reminder in *Nosal* that compliance with process is not alone sufficient to satisfy the good faith and fairness obligation: "Regardless of the discretion conferred upon partners under a partnership agreement, this does not abrogate their high duty to exercise good faith and fair dealing in the execution of such discretion."<sup>222</sup>

## II. A Critique of the Present Regime and a Proposal for Reform

Recent decisions in the area of law partner expulsions raise questions about our continued reliance upon *Holman* and its progeny. On the substantive side, the concurrence in *Bohatch* challenges the underlying analysis for the economic predation test.<sup>223</sup> *Nosal* suggests that there may be reasons for expulsions that are not directly economically predatory but that should nevertheless be deemed impermissible.<sup>224</sup> The *Bohatch* and *Heller* decisions raise the disturbing possibility that, under *Holman* and its progeny, junior partners in large firms have no meaningful protection under the good faith and fairness standard.<sup>225</sup> On the procedural side, *Ehrlich* challenges the more casual attitude of *Holman* toward process.<sup>226</sup> It may be time to revisit *Holman* and its progeny to see if they got the issues right. On both the substantive and procedural sides, there are reasons to think that the existing regime is in error.

### A. Substance

On the substance side, there are two questions that might profitably be revisited. The first is how the fiduciary and contractual charges to good faith and fairness get translated from general partner obligations into reasonably specific rules by which to judge law partner behavior in the expulsion context. The second question is how courts should deal with cause where the partnership agreement is silent on the question of whether cause need be shown as a predicate for the expulsion.

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testified that they believed their possible termination with the firm would be the subject of the 8 p.m. May 13 meeting; William Holman had been informed that afternoon that their relationship with the firm was to be a topic of discussion. We do not find the failure to provide an agenda was a sufficient violation of the partnership agreement to justify holding there was an unlawful expulsion of the plaintiffs.

*Id.*

222. *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 246 (Ill. App. Ct. 1996).

223. *See supra* notes 194-203 and accompanying text (discussing Justice Hecht's concurrence in *Bohatch*).

224. *See supra* notes 117-31 and accompanying text (summarizing opinion in *Nosal*).

225. *See supra* notes 95-116, 160-203 (explaining *Heller* and *Bohatch*).

226. *See supra* notes 72-89 and accompanying text (discussing *Ehrlich*).

### 1. Good Faith and Fairness

What does it mean to comport with the underlying charge of good faith and fairness in the law partner expulsion process? It is at least not obviously correct that the appropriate translation of the general fiduciary good faith and fairness injunction, to act with utmost good faith, fairness, and loyalty, is simply "do not steal money from your partners when you throw them out."<sup>227</sup> Nor is it even clear that the contractual good faith and fairness injunction could be so narrowly construed. And yet that is the essence of what the Washington Court of Appeals said in *Holman*<sup>228</sup> and what the successive decisions by the Indiana Court of Appeals in *Lawlis*,<sup>229</sup> the California Court of Appeal in *Heller*,<sup>230</sup> and the Texas Court of Appeals in *Bohatch*<sup>231</sup> have stated. Is it possible that the *Holman* court simply got it wrong? Perhaps, because the only authority cited by the *Holman* court cannot withstand closer scrutiny.

In deciding whether the *Holman* court correctly translated the "good faith and fairness" requirement, it is interesting to examine how that court arrived at the suggestion that good faith and fairness equate to a lack of economic predation and no more. The court first traced the requirement of good faith from the UPA Section 31 language that "[d]issolution is caused . . . [without violation of the agreement between the partners b]y the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners."<sup>232</sup> The court then noted "the general rule of law . . . that the partners in their dealings with each other must exercise good faith."<sup>233</sup> The court inserted the obligatory quotation from *Meinhard v. Salmon*,<sup>234</sup> and then proceeded to narrow dramatically the scope of the good faith and fair dealing charge:

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227. Professor Hillman presents a rather understated analysis on this point. Working from the "bona fide" requirement under UPA Sections 31 and 38, he correctly notes that good faith governs all aspects of the partners' relations inter se. See Hillman, *supra* note 12, at 563. After noting that it is "curious" that the bona fide requirement is added to the expulsion sections, he suggests that "[i]t is unlikely . . . that the drafters meant to suggest that courts should apply a relaxed standard to expulsions." *Id.* at 564. He suggests that the narrowing of good faith under *Holman* is incorrect. *Id.* at 564 n.158. "It is far more reasonable," he concludes, "to assume that the potential severity of expulsions prompted the drafters to emphasize that expulsions are major events that should be reviewed against a standard at least as stringent as the standard that generally governs the relations of partners." *Id.* at 564.

228. See *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974).

229. See *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442-43 (Ind. Ct. App. 1990).

230. See *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 348 (Ct. App. 1996).

231. See *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 602 (Tex. App. 1995).

232. See *Holman*, 522 P.2d at 523 (citing WASH. REV. CODE § 25.04.310 (1994) (Washington's enactment of UPA Section 31)).

233. *Id.*

234. 164 N.E. 545 (N.Y. 1928).

Likewise, a partner is not permitted to derive any profit or advantage from the partnership relationship except with the full knowledge and consent of the partners. That such is the law cannot be questioned. . . . *However, the personal relationships between partners to which the terms "bona fide" and "good faith" relate are those which have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary [sic], from taking any personal advantage touching those subjects.* Plaintiffs' claims do not relate to the business aspects or property rights of this partnership. There is no evidence the purpose of the severance was to gain any business or property advantage to the remaining partners. Consequently, in that context, there has been no showing of breach of the duty of good faith toward plaintiffs.<sup>235</sup>

The key transition in the narrowing paragraph is the assertion that "the personal relationships between partners to which the terms 'bona fide' and 'good faith' relate are those which have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary [sic], from taking any personal advantage touching those subjects."<sup>236</sup> The *Holman* court cited only one authority for this critical proposition: *Rees v. Briscoe*.<sup>237</sup> There are two problems with the *Holman* court's use of *Rees*. First, *Rees* is not a partnership expulsion case. In fact, it is not even technically a partnership case. Second, and more importantly, *Rees* does not stand fairly for the proposition for which it is cited by the *Holman* court.

As to the first point, *Rees* is an oil and gas case.<sup>238</sup> Even granting that the arcane world of oil and gas leases and participations has connections with partnership law, and remembering that good partnership law has been made in non-partnership cases – *Meinhard v. Salmon* is, after all, a joint venture case<sup>239</sup> – it seems passing strange that the Washington Court of Appeals would have felt the need to venture into Oklahoma oil and gas law to find a source of law for the critical argument in the *Holman* opinion.

As to the second point, *Rees* cannot be read fairly to stand for the proposition for which it is cited by the *Holman* court. In *Rees*, the Oklahoma Supreme Court, over a vigorous and well-reasoned dissent, established a constructive trust over an interest in a mineral lease.<sup>240</sup> *Rees*, the plaintiff, had assigned several oil and gas leases to Briscoe for no consideration except Briscoe's promise to drill on the leases and *Rees's* retention of a 1/8 of 7/8 working

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235. *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974) (emphasis added) (citations omitted).

236. *Id.*

237. 315 P.2d 758 (Okla. 1957).

238. *See Rees v. Briscoe*, 315 P.2d 758, 759 (Okla. 1957).

239. *See Meinhard v. Salmon*, 164 N.E. 545, 545 (N.Y. 1928).

240. *See Rees*, 315 P.2d at 762-63.

interest.<sup>241</sup> Briscoe drilled one producing well, but delayed drilling on the other leases.<sup>242</sup> Rees's underlying interest expired, and Briscoe received oil and gas leases on the same tracts from the mineral estate owners, without Rees's 1/8 of 7/8 working interest.<sup>243</sup> Rees sued to have a constructive trust imposed on the 1/8 of 7/8 working interest.<sup>244</sup> The Oklahoma Supreme Court reversed the trial court and imposed a constructive trust.<sup>245</sup> The court based its judgment on the finding that Rees and Briscoe had a relation of confidence because "[n]o business man would donate his leases to another under such circumstances unless he had confidence in his assignee."<sup>246</sup> The part of the opinion in *Rees* to which the *Holman* court apparently was looking – and it is difficult to discern what portion of *Rees* the *Holman* court relied on because the court did nothing more than cite to the case as a whole<sup>247</sup> – was a series of citations used by the Oklahoma court to establish the proposition that when a person grants a second person an interest in property, a fiduciary relationship is established that prohibits the second person from acquiring rights in the subject property that are antagonistic to the rights of the first person.<sup>248</sup>

It is a long stretch from the holding in *Rees* to the *Holman* court's assertion that "the personal relationships between partners to which the terms 'bona fide' and 'good faith' relate are those which have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary [sic], from taking any personal advantage touching those subjects."<sup>249</sup>

241. *Id.* at 763.

242. *Id.* at 760.

243. *Id.*

244. *Id.* at 759.

245. *Id.* at 764.

246. *Id.* at 761.

247. *See Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974).

248. The *Rees* opinion quoted the relevant language twice, in virtually identical form:

The law forbids a trustee, and all other persons occupying a fiduciary or quasi fiduciary position, from taking any personal advantage touching the thing or subject as to which such fiduciary position exists; or, as expressed by another: "Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated." If such a person acquires an interest in property as to which such a relation exists, he holds it as a trustee for the benefit of those in whose interest he was prohibited from purchasing, to the extent of the prohibition.

*Rees v. Briscoe*, 315 P.2d 758, 762 (Okla. 1957) (quoting *Clements v. Cates*, 4 S.W. 776, 777 (Ark. 1887)).

249. *Holman*, 522 P.2d at 523. Indeed, *Rees* can be read as the oil and gas counterpart to *Meinhard v. Salmon*. *Rees* played the part of the managing partner assembling a larger parcel

The *Holman* court's recourse to *Rees* to justify the narrowing of good faith and fair dealing to only economic predation was especially curious given the existing case law on point in the state of Washington when the *Holman* opinion was drafted. The Washington Supreme Court had adopted language that "[t]here is no stronger fiduciary relation known to the law than that of a copartnership."<sup>250</sup> It had held that "[t]he relation existing between co-partners is one requiring the exercise of the utmost good faith,"<sup>251</sup> "that 'partners must observe the utmost good faith towards each other in all their transactions,'"<sup>252</sup> and that "[t]he relation of partners is fiduciary in character and imposes upon the members the obligation of the utmost good faith."<sup>253</sup> As to the meaning of good faith in the partnership context, the Washington Supreme Court had stated that "[t]he requirement of the utmost good faith forbids that a partner benefit his private interest by deceiving his copartner by misrepresentations or concealments of the confidential relation."<sup>254</sup> These precedents from Washington case law easily could have replicated the holding in *Rees*. The cases could have been taken for the proposition that partners owe each other a duty not to use partnership assets or information for personal gain. What the cases could not have done – because the holdings are not so limited by their terms – and what *Rees* did not do, was limit the good faith and fair dealing obligation to *only* prohibiting the use of partnership assets or information for personal gain, as the *Holman* court found.<sup>255</sup> Indeed, in *Bank v. Nelson*,<sup>256</sup> the Washington Supreme Court had adopted language on the fiduciary duties of partners inter se that casts the duty to refrain from taking advantage as only one of three obligations, another being the obligation of the utmost good faith:

The relation of partnership is fiduciary in character, and imposes upon the members of the firm the obligation of the utmost good faith in their dealings with one another with respect to partnership affairs, of acting for the

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for development, and Briscoe played the part of the nonparticipating partner who was deemed to have trusted that even though his leasehold was about to expire, the managing partner would include him in the successor lease. As such, nothing is inconsistent with the holding and support for a broad interpretation of fiduciary duties.

250. *Kittilsby v. Vevelstad*, 173 P. 744, 745 (Wash. 1918) (quoting *Salhinger v. Salhinger*, 105 P. 236, 237 (Wash. 1909)); see also *Bank v. Nelson*, 92 P.2d 711, 712 (Wash. 1939) (same).

251. *Danich v. Culjak*, 66 P.2d 860, 863 (Wash. 1937). The *Danich* opinion continues: "Each partner is a trustee for all, and no individual or group may take an unconscionable advantage of another." *Id.*, quoted in *Bank*, 92 P.2d at 713.

252. *Karle v. Seder*, 214 P.2d 684, 687 (Wash. 1950) (quoting *Finn v. Young*, 89 P. 400, 401 (Wash. 1907)).

253. *In re Estate of Wilson*, 315 P.2d 287, 292 (Wash. 1957).

254. *Kittilsby v. Vevelstad*, 173 P. at 746.

255. See *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974).

256. 92 P.2d 711 (Wash. 1939).

common benefit of all the partners in all transactions relating to the firm business, and of refraining from taking any advantage of one another by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.<sup>257</sup>

Thus, the *Holman* court did not adequately support its narrow reading of good faith and fairness. It is not surprising that in a partnership, which is, after all, "an association of two or more persons to carry on as co-owners a business *for profit*,"<sup>258</sup> claims of a breach of good faith and fair dealing typically involve directly economically predatory actions of one party. But there is simply no reason to believe that in a partnership, in which "[t]he relation . . . is fiduciary in character and imposes upon the members the obligation of the utmost good faith,"<sup>259</sup> the obligation of good faith and fair dealing is limited to refraining from directly economically predatory actions. Other authorities existing at the time of *Holman* suggested that an expulsion for non-economically predatory "personal" reasons would not be bona fide and in good faith<sup>260</sup> and that a broader sweep was intended by good faith and fair dealing in this context.<sup>261</sup>

Justice Hecht's concurrence in *Bohatch* also held out the possibility that bad faith and unfairness may cut more broadly than economically predatory motivations and that such nonpredatory bad faith might nullify the contractual right of the remaining partners to expel the targeted partner: "[I]f an expelled partners [sic] were to allege and prove bad faith going to the essence, a different case would be presented . . . ."<sup>262</sup> Justice Hecht identified the types of bad faith that might nullify the contractual right to expel as "'bad faith going to the essence' or an 'evil, malevolent, or predatory purpose.'"<sup>263</sup> Justice Hecht cited *Nosal* as a case in which the "appellate court confronted circum-

257. *Bank v. Nelson*, 92 P.2d 711, 713 (Wash. 1939) (quoting 47 C.J. *Partnership* § 209 (1929)).

258. UNIF. PARTNERSHIP ACT § 6, 6 U.L.A. 256 (1995) (emphasis added).

259. *In re Estate of Wilson*, 315 P.2d 287, 292 (Wash. 1957).

260. See BATES, *supra* note 205, § 242, at 241 ("The [expulsion] power must be exercised *bona fide*, . . . and not for the benefit of individual partners or on personal grounds.").

261. See LINDLEY ET AL., *supra* note 205, at 984.

[T]he court will never allow a partner to be expelled if he can show that his copartners, though justified by the wording of the expulsion clause, have, in fact, taken advantage of it for base and unworthy purposes of their own, and contrary to that truth and honor which every partner has a right to demand on the part of his copartners.

*Id.*

262. *Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482, at \*13 (Tex. Jan. 22, 1998) (Hecht, J., concurring) (citing *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 576-77 (N.Y. 1977)).

263. *Id.* (Hecht, J., concurring) (citing *Gelder Med. Group*, 363 N.E.2d at 576-77).

stances which it believed might give rise to liability for a breach of fiduciary duty in expelling a partner.<sup>264</sup> Yet in the end, Justice Hecht was not forced to confront the question of what constitutes nonpredatory bad faith, because he found that Bohatch's good faith, but mistaken, allegations of partner misconduct were insufficient as a matter of law to ground protections.<sup>265</sup>

*Nosal* also may be read as suggesting that merely equating good faith and fairness with a lack of economic predation is too narrow a definition of good faith and fairness.<sup>266</sup> In that case, the expelled partner maintained "that he was expelled solely because of his persistent requests to inspect the firm's books and records, which he contend[ed] would have revealed secretive self-dealing on the part of the executive committee and fraudulent conduct by [the managing partner]."<sup>267</sup> The appellate court found that the expulsion of *Nosal* was procedurally regular.<sup>268</sup> *Nosal* alleged that he was expelled in retaliation for his efforts to examine partnership books and records.<sup>269</sup> Although the inference is that an inspection would have allowed him to uncover evidence of economic mismanagement and worse, raising the specter of predation, that the claim is not directly one of economic predation. In the face of a procedurally-correct expulsion,<sup>270</sup> the appellate court reversed the trial court's award of summary judgment in favor of the firm and held that *Nosal* presented a triable issue in his claim that the retaliatory expulsion violated the partnership's duty of good faith.<sup>271</sup>

Of course, the Texas Supreme Court in *Bohatch* rejected such a broadened conception of good faith and fairness. *Bohatch* and a number of distinguished academics asserted that good faith and fair dealing required that a partner be protected from expulsion motivated solely by a desire to retaliate for the reporting of unethical or illegal conduct.<sup>272</sup> The majority rejected the claim, having cast the question in terms of an obligation to remain partners:

The fiduciary duty that partners owe one another does not encompass a duty to remain partners or else answer in tort damages. Nonetheless, *Bohatch* and several distinguished legal scholars urge this Court to recog-

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264. *Id.* (Hecht, J., concurring) (citing *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243 (Ill. App. Ct. 1996)).

265. *See id.* at \*14-\*15 (Hecht, J., concurring).

266. *See Nosal*, 664 N.E.2d at 246.

267. *Id.* at 243.

268. *Id.* ("[T]he expulsion was in conformance with the procedural requirements of both the 1984 and 1987 agreements.").

269. *Id.*

270. *See id.*

271. *See id.* at 246.

272. *See Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482, at \*4-\*5 (Tex. Jan. 22, 1998).



nize that public policy requires a limited duty to remain partners – i.e., a partnership must retain a whistleblower partner.<sup>273</sup>

In his concurrence in *Bohatch*, Justice Hecht admitted his doubts regarding both the position of the majority – that retaliatory expulsion could not violate the charge for good faith and fairness – and the amici position – that such a retaliatory expulsion should always be held to violate the charge.<sup>274</sup> He was right to harbor such doubts.

Indeed, authority exists for the proposition that good faith and fairness in the partner expulsion situation are not limited to merely cases of economic predation. Partnership treatises cite the British case of *Blisset v. Daniel*<sup>275</sup> as being on point.<sup>276</sup> In *Blisset*, the partnership agreement allowed for the expulsion of a partner on the two-thirds vote of the remaining partners.<sup>277</sup> The managing partner wanted to expel a partner who had opposed the appointment of the managing partner's son as an assistant.<sup>278</sup> The managing partner, operating without the knowledge of the targeted partner and in part by threatening to resign, obtained the requisite signatures on an expulsion notice.<sup>279</sup> The court held that process was not required, as none was provided in the partnership agreement.<sup>280</sup> It held that the defendant did not need to show cause, as none was required under the partnership agreement.<sup>281</sup> The court did not find any noncompliance with the partnership agreement provisions. There was no finding of a directly economically predatory purpose on the part of the managing partner, and certainly not on the part of the other partners who acquiesced in the expulsion, and yet the *Blisset* court found the expulsion fraudulent and void and ordered reinstatement.<sup>282</sup>

It may be that the economic predation standard is at once too narrow and too broad. As we have seen, the first error in *Holman* was to define the

273. *Id.* at \*4.

274. *Id.* at \*14 (Hecht, J., concurring).

275. 68 Eng. Rep. 1022 (V.C. 1853).

276. See BATES, *supra* note 205, § 242, at 242 ("It was held . . . that the literal construction of the articles would not be enforced, and that the power could not be used for private benefit, and on such grounds; and its exercise in this case was fraudulent and void, and the complainant was decreed to be reinstated."); LINDLEY ET AL., *supra* note 205, at 984-85 ("[I]t appeared that they desired to get rid of their copartner, not because so to do was in any sense for the benefit of the firm in a mercantile point of view, but because he objected to the appointment of one of his copartner's sons as co-manager with his father."). Bates's work is an American treatise, and Lindley's book is the American edition of the famous British treatise.

277. *Blisset v. Daniel*, 68 Eng. Rep. 1022 (V.C. 1853).

278. *Id.* at 1035-36.

279. *Id.* at 1036.

280. *Id.* at 1022.

281. *Id.*

282. See *id.* at 1041; see also BATES, *supra* note 205, § 243, at 242 (discussing *Blisset*).

obligation of good faith and fairness too narrowly. Justice Hecht's concurrence in *Bohatch* pointed to another flaw in *Holman*, in that the *Holman* formulation may also be too broad.<sup>283</sup>

When the *Holman* court narrowed the obligation of good faith and fairness to "the personal relationships between partners . . . which have a bearing upon the business aspects or property of the partnership"<sup>284</sup> it was unclear as to what actions with respect to those business aspects would constitute bad faith. The *Holman* court spoke in terms of the rule that "a partner is not permitted to derive any profit or advantage from the partnership relationship except with the full knowledge and consent of the partners."<sup>285</sup> In finding that the *Holmans* did not claim what would amount to a breach of the duty of good faith, the court found that "[t]here is no evidence the purpose of the severance was to gain any business or property advantage to the remaining partners."<sup>286</sup> The suggestion was that any purpose to gain any business or property advantage for the remaining partners would have constituted bad faith and been unfair. In his concurring opinion in *Bohatch*, Justice Hecht took a more nuanced approach to the question of economic predation and argued that a strict equation between the pursuit of economic self interest and a lack of good faith and fairness is inappropriate.<sup>287</sup> He acknowledged the line of cases, beginning with *Holman*, which equate bad faith with economic predation in the partnership expulsion context.<sup>288</sup> But he then suggested the need to differentiate between proper and improper self-interest:

Despite statements in these cases that partners cannot expel one of their number for personal profit, in each instance the expelling partners believed that retaining the partner would hurt the firm financially and that the firm – and thus the partners themselves – stood to benefit from the expulsion. It is therefore far too simplistic to say . . . that partners cannot expel a partner for personal financial benefit; if expulsion of a partner to protect the firm's reputation or preserve its relationship with a client benefits the firm financially, it perforce benefits the members of the firm. If expulsion of a partner can be in breach of a fiduciary duty, the circumstances must be more precisely defined.<sup>289</sup>

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283. See *Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482, at \*16 (Tex. Jan. 22, 1998) (Hecht, J., concurring).

284. *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974).

285. *Id.*

286. *Id.*

287. See *Bohatch*, 1998 WL 19482, at \*10-\*14 (Hecht, J., concurring).

288. *Id.* at \*10-\*11 (Hecht, J., concurring) (citing *Holman*, 522 P.2d at 523-24; *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 348 (Ct. App. 1996)).

289. *Id.* at \*12 (Hecht, J., concurring).

How should good faith and fairness be defined in the partnership expulsion context? An appropriate formulation starts with the proposition that both the underlying fiduciary and contractual calls to good faith and fairness apply to the expulsion of a partner from a law partnership. This is not a departure from *Holman* and its progeny.

The second part of the formulation is the proposition that the call to good faith and fairness is not simply a prohibition on economic predation, but is a call to utmost good faith, fairness, and honesty. This is the critical rejection of *Holman*'s too narrow good faith and fair dealing definition.

The third part of the formulation is that the pursuit of self-interest is not always in bad faith or unfair. A pursuit of individual self-interest by some of the partners, but not the collective of the partnership, is inconsistent with the call to good faith and fairness. A pursuit of the collective self-interest of the partnership, if not otherwise in violation of the justified expectations of the expelled partner, might be consistent with the call to good faith and fairness.

The fourth part of the formulation is that what constitutes good faith and fairness depends on the faithfulness of the partners to an agreed common purpose and the consistency of the partnership's actions with the justified expectations of the expelled party.<sup>290</sup>

## 2. Cause

The second question that might profitably be revisited with the review of substantive requirements for expulsions from law partnerships is the issue of how courts should deal with cause where the partnership agreement is silent on the question of whether cause need be shown as a predicate for the expulsion.

It is helpful to narrow what is at issue here. I doubt that anyone disputes the proposition that courts should enforce affirmative cause requirements in partnership agreements, and I am willing to concede the proposition that courts should also enforce clear provisions in partnership agreements allowing expulsion without a showing of cause, assuming of course that there are no otherwise applicable contract-based defenses.<sup>291</sup> The issue is what the court

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290. This is intended to be compatible with the Restatement conception of contractual good faith and fair dealing. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

291. Thus, for example, I would not change the outcome on this point in *Heller*, in which the court rejected an argument for imposition of a for-cause requirement: "[T]his contention lacks merit, since the partnership agreement not only contains no language requiring expulsions for cause, but also states the partners' reserved powers include the right to 'expel any Partner from the partnership without cause . . . .' *Heller*, 58 Cal. Rptr. 2d at 346.

One treatise suggests that the quid pro quo for enforcing no-cause expulsion provisions is a heightened good faith analysis: "If the expulsion is made in good faith in pursuance of an

should do where there is no indication one way or the other in the partnership agreement. Apparently, this is not a rare situation. Speaking of partnerships generally, Professor Hillman has stated:

[A]n expulsion clause should set forth in some detail the grounds for removing a partner. A surprising number of agreements fail, however, to address this rather basic issue, rest upon a single standard permitting an expulsion for the "good" of the partnership, or dispense with a cause requirement altogether.<sup>292</sup>

The law firm expulsion cases are consistent with this observation. In *Holman*, the expulsion clause apparently simply provided that "any member may be expelled from the Firm by a majority vote of the Executive Committee."<sup>293</sup> Also, the partnership agreement in *Lawlis* was apparently silent on cause.<sup>294</sup> *Beasley* and *Ruskin* involve expulsions under a partnership agreement that did not even have an expulsion provision, much less a provision on cause.<sup>295</sup> Although perhaps not a model of precise drafting, the partnership agreement in *Heller* did provide that "the Regular Partners reserve the right to . . . expel any Partner from the partnership without cause."<sup>296</sup>

Professor Hillman correctly sees the issue of cause as a subset of the good faith and fairness test:

A threshold question involving the meaning of good faith is whether cause must be shown to support an expulsion . . . . Rejecting cause as a component of good faith, of course, weakens significantly the standards under which the expulsion of partners may be assessed and greatly facilitates partner removal for good reasons or for none.<sup>297</sup>

Professor Hillman's treatise captures the present limited and somewhat equivocal state of the record: "[T]he sparse authority that exists under the UPA indicates that the absence of a cause standard in the expulsion clause eliminates

express power, no reason therefor need be assigned; but if cause be not shown, then it must be very clearly made out that the exercise of the power has been in good faith." SHUMAKER, *supra* note 12, § 101, at 175 (citing *Blisset v. Daniel*, 68 Eng. Rep. 1022, 1035 (V.C. 1853)).

292. Hillman, *supra* note 12, at 560-61 (citations omitted).

293. *Holman v. Coie*, 522 P.2d 515, 519 (Wash. Ct. App. 1974).

294. See *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442-43 (Ind. Ct. App. 1990).

295. See *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646-AJ, 1996 WL 438777, at \*7 (Fla. Cir. Ct. July 23, 1996), *rev'd in part on other grounds*, Nos. 96-3818, 97-2805, 97-0146, 97-380, 1998 WL 405919 (Fla. Dist. Ct. App. July 22, 1998) (reversing as to award of profits, attorney's fees, and costs, but affirming as to all other points raised by both parties), *opinion modified on reh'g*, Nos. 96-2805, 96-3818, 97-0146, 97-380, 1998 WL 904065 (Fla. Dist. Ct. App. Dec. 30, 1998); Starkman, *supra* note 153.

296. *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 345 (Ct. App. 1996).

297. HILLMAN, *supra* note 39, § 5.3.4.1, at 5:10-5:11.

the need to establish cause.<sup>298</sup> Certainly *Holman* appears consistent with the rule that a cause requirement is not present if one is not specified in the partnership agreement.<sup>299</sup> *Lawlis*, however, is somewhat less supportive of a flat rule.<sup>300</sup> In *Lawlis*, the court declined to impose a for-cause requirement because to do so would be inconsistent with the intent of the parties.<sup>301</sup> This takes the analysis back to contractual good faith and fair dealing. Rather than looking to the four corners of the partnership agreement, the question should be: Is the imposition of a cause requirement faithful to an agreed upon purpose and consistent with the justified expectations of the partners at formation?<sup>302</sup>

The fiduciary duty of good faith and fairness leads us to the same conclusion as the contractual duty of good faith and fairness. If the underlying standard is utmost good faith, fairness, and loyalty, then it is reasonable to impose a for-cause requirement on expulsions where the circumstances make such a requirement a tool of achieving fairness, even when the partnership agreement is silent.

Clearly this type of contextual determination regarding the imposition of a for-cause requirement in the expulsion context is a more complicated

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298. *Id.* § 5.3.4.1, at 5:11 (citing Robert W. Hillman, *Misconduct as a Basis for Excluding or Expelling a Partner*, 78 Nw. U. L. REV. 527, 569-73 (1983)).

299. *See Holman v. Coie*, 522 P.2d 515, 519, 524 (Wash. Ct. App. 1974). The *Holman* position that no specification of cause translates into no cause requirement finds support elsewhere. *See BATES*, *supra* note 205, § 242, at 241-42 ("The obligation to exercise good faith towards each other imposes these limitations [that the expulsion power be exercised *bona fide*, and for the benefit of the firm, and not for the benefit of individual partners or on personal grounds], even though the power is granted in general terms to the majority, without requiring the existence of any specific grounds.").

300. *See Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 439-40, 442 (Ind. Ct. App. 1990). The partnership agreement in *Lawlis* was apparently silent on the question of cause. The opinion quoted only the language in article X that "A two-thirds (2/3) majority of the Senior Partners, at any time, may expel any partner from the partnership upon such terms and conditions as set by said Senior Partners." *Id.* at 439-40. The opinion later appears to characterize this as "a no cause expulsion clause in a partnership agreement." *Id.* at 442. Finally, the court declines to expand the narrow definition of good faith from *Holman*, because "[i]f we were to hold otherwise, we would be engrafting a 'for cause' requirement upon this agreement when such was not the intent of the parties at the time they entered into their agreement." *Id.* at 443.

301. *See id.* (declining to expand *Holman's* narrow definition of good faith because "[i]f we were to hold otherwise, we would be engrafting a 'for cause' requirement upon this agreement when such was not the intent of the parties at the time they entered into their agreement") *Id.* Presumably, the *Lawlis* court would have been willing to engraft a for-cause requirement, even in the absence of one in the partnership agreement, had that comported with the intent of the parties at the time they formed the partnership.

302. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party . . .").

process than that required under the *Holman* rule. But with the contemporary practice of law so widely varied in terms of the size, organization, and gestalt of firms, such a rule is appropriate. We might imagine that a lateral-entrant rainmaker coming into a five-hundred-lawyer Wall Street firm that has a history of voluntary and involuntary "lawyer mobility" might have no justified expectation that good faith and fairness would include a for-cause requirement for expulsion when the partnership agreement is silent on that point. On the other hand, a newly minted partner who came up through the associate ranks to make partner at a small, historically stable, five-lawyer, county seat law firm in southwestern Virginia might very well have a justified expectation that good faith and fairness would include a for-cause requirement for expulsion, even in the absence of such a provision in the partnership agreement.

What should be the rule when the partnership agreement is silent or unclear as to cause? When the partnership agreement is silent on cause, courts should impose a cause requirement if such a test is either faithful to an agreed upon purpose and consistent with the justified expectations of the partners at formation, or if the circumstances make such a requirement a tool for achieving fairness. Professor Hillman correctly observes that "[t]he challenge in interpreting expulsion agreements is to develop sensible presumptions concerning the parties' intent on the question of cause."<sup>303</sup> He suggests that "[a] presumption in favor of requiring cause unless it has been waived explicitly and a constructional preference that resolves doubts in this regard in favor of the expelled partner" is more theoretically justifiable.<sup>304</sup> I agree. Professor Hillman states that such a default rule would lead to greater precision in drafting expulsion provisions.<sup>305</sup> "All that is required of the partners," he notes in speaking of the general population of partners, "is that they express their intent with precision."<sup>306</sup> The requirement of precision is even more reasonable, and the proposed rule is even more justified, when dealing with partners who are lawyers. .

### 3. Collective Purpose

There is authority for the proposition that an expulsion of a partner must be for the collective benefit of the partnership.<sup>307</sup> This obligation has been

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303. Hillman, *supra* note 12, at 570.

304. *Id.* at 571.

305. *Id.*

306. *Id.* at 573.

307. See, e.g., BATES, *supra* note 205, § 242, at 241 ("The [expulsion] power must be exercised *bona fide*, and for the benefit of the firm, and not for the benefit of individual partners or on personal grounds."); SHUMAKER, *supra* note 12, § 101, at 174 ("Where a power of expulsion is conferred, it can only be exercised in good faith, with a view to the benefit of the firm . . .").

described as an element of the charge to good faith.<sup>308</sup> It can also profitably be conceived of as a component of the classic duty of loyalty. Using such a collective purpose test, courts could differentiate between cases in which the expulsion advances the interests of the partnership, such as those cases in which the expelled partner's actions threaten to incur liability for the firm or in which the expelled partner is unable to maintain a productive working relationship with the other members of the firm, and cases in which the partner is being expelled for personal and not collective reasons.

In the collective purpose group, we might put *Heller*, the case in which the expelled partner had engaged in bizarre personal behavior,<sup>309</sup> inappropriate professional behavior,<sup>310</sup> a failure to achieve projected billable hours,<sup>311</sup> and had a high percentage of uncollectable billings.<sup>312</sup> On the record presented in the opinion, it seems beyond question that the firm in *Heller* met a collective purpose in expelling Heller.

In the personal purpose group, we might put *Nosal*, the case in which the partner was expelled because of his repeated attempts to prove self-dealing on the part of management committee members<sup>313</sup> and his threats of litigation to vindicate his rights.<sup>314</sup> The *Nosal* court found that the facts of the case raised an inference that the firm's justification for Nosal's expulsion was pretextual.<sup>315</sup> In this case, it appeared from the opinion that the expulsion was done to facilitate the malfeasance of a small clique of partners.<sup>316</sup> As such, the expulsion would fail any collective purpose test.

But what of *Holman*, *Lawlis*, *Beasley*, and *Bohatch*? These cases illustrate the difficulty of the rule and suggest a range of procedural mechanisms to allow courts to decide between or balance the interests of the collective and of the expelled partner. In each of the four cases, the firm could have asserted a plausible collective purpose for the expulsion.<sup>317</sup> In several of the cases,

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308. See BATES, *supra* note 205, § 242, at 241 ("The obligation to exercise good faith towards each other imposes these limitations [that the expulsion power must be exercised *bona fide*, and for the benefit of the firm, and not for the benefit of individual partners or on personal grounds.]")

309. See *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 340 (Ct. App. 1996).

310. See *id.* at 340-41.

311. See *id.* at 340.

312. See *id.*

313. See *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243-44 (Ill. App. Ct. 1996). The appellate court cited repeated unsuccessful attempts by Nosal to gain access to firm financial records over a five-year period. *Id.*

314. See *id.* at 244.

315. See *id.* at 246.

316. See *id.*

317. See *infra* notes 320-28 and accompanying text (discussing *Holman*, *Lawlis*, *Beasley*, and *Bohatch*).

there were factual issues, the resolution of which was critical for a determination of the business necessity of the expulsion.<sup>318</sup> And, in each of the four, the expelled partner might plausibly have suggested a remedial action to meet the legitimate collective purpose for the expulsion without requiring the drastic step of expulsion.<sup>319</sup>

In *Holman*, partner Francis Holman had engaged in political activities that displeased Boeing, a major client of the firm, had a billing dispute with Boeing, was alleged to have exploited his lawyer-client relation with Boeing, and misused confidential client information.<sup>320</sup> It has never been clear what the substantive grounds were to expel the other Holman brother, William. He had not done any legal work for Boeing for many years.<sup>321</sup> The opinion noted that William had "raised questions with the executive committee regarding the inadequacy of the legal rates which the firm charged the Boeing Company."<sup>322</sup> It also noted evidence that prior to William's admission to the executive committee "the committee's meetings had been pleasant, friendly, and characterized by a spirit of unselfishness and devotion to the best interests of the firm,"<sup>323</sup> but that "after admission of the Holmans, there appeared to develop a polarization among the committee, with the Holmans on one side and the remainder of the committee on the other."<sup>324</sup> It would have been reasonable in *Holman* to resolve the factual issues of the content of Francis's political speech and his claimed misuse of confidential client information before evaluating the business justification for the expulsions. As a set of remedial measures short of expulsion that would have met the firm's legitimate collective purpose for the expulsion, the Holmans might have suggested that Francis cease doing work for Boeing and that Francis make it clear that his political speeches were not made as a member of the firm or a representative of Boeing.

In *Lawlis*, the expelled partner had an alcoholism problem.<sup>325</sup> The court found that the alcoholism of a partner could reflect badly on the firm, making the retention of old clients and the attraction of new clients more difficult.<sup>326</sup>

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318. See *infra* notes 320-26 and accompanying text (discussing *Holman* and *Lawlis* and noting factual issues that were not resolved).

319. See *infra* notes 320-28 and accompanying text (discussing *Holman*, *Lawlis*, *Beasley*, and *Bohatch* and noting possible remedies expelled partner could have suggested in each case).

320. *Holman v. Coie*, 522 P.2d 515, 518 (Wash. Ct. App. 1974).

321. See *id.* at 517.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 437 (Ind. Ct. App. 1990).

326. See *id.* at 442.

Any condition which has the potential to adversely affect the good will or favorable reputation of a law partnership is one which potentially involves the partnership's



It would have been reasonable in *Lawlis* to resolve the factual issues of Lawlis's medical condition before evaluating the business justification for the expulsion. As a set of remedial measures short of expulsion that would have met the firm's legitimate collective purpose for the expulsion, Lawlis might have suggested that his alcoholism be monitored and that his activities be refocused on work for existing clients who were comfortable with his condition and the remedial efforts he had undertaken.

In *Beasley*, the defendants claimed that the expelled partner was "less productive" and that overall firm profitability could be improved through the closing of the Palm Beach office, at which Beasley was resident.<sup>327</sup> As a remedial measure short of expulsion that would have met the firm's legitimate collective purpose for the expulsion, Beasley might have suggested that the Palm Beach office be treated as a self-contained profit center within the firm, making its profitability a matter of concern to its partners and not the partnership as a whole.

In *Bohatch*, the firm's rationale for the partner's expulsion presumably would have been that her good faith, but mistaken, allegation of over-billing by another partner had so irretrievably disrupted the working relationships within the Washington, D.C. office as to require her expulsion.<sup>328</sup> As a remedial measure short of expulsion that would have met the firm's legitimate collective purpose for the expulsion, Bohatch might have suggested that she be assigned to a different client, or that she be relocated from the Washington, D.C. office.

How should courts decide collective purpose cases? One possible rule would place the burden on the firm to simply show a collective purpose advanced by the expulsion. A more rigorous variation of the test would require the firm to establish that the collective purpose was in fact the dominant purpose of the expulsion, not simply a post hoc rationale. If the firm could demonstrate such a collective purpose, the expulsion would not be subject to attack on the collective purpose test. Presumably, in all four of our difficult

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economic survival. Thus, if a partner's propensity toward alcohol has the potential to damage the firm's good will or reputation for astuteness in the practice of law, simple prudence dictates the exercise of corrective action . . . since the survival of the partnership itself is potentially at stake.

*Id.*

327. *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646-AJ, 1996 WL 438777, at \*2 (Fla. Cir. Ct. July 23, 1996), *rev'd in part on other grounds*, Nos. 96-3818, 97-2805, 97-0146, 97-380, 1998 WL 405919 (Fla. Dist. Ct. App. July 22, 1998) (reversing as to award of profits, attorney's fees, and costs, but affirming as to all other points raised by both parties), *opinion modified on reh'g*, Nos. 96-2805, 96-3818, 97-0146, 97-380, 1998 WL 904065 (Fla. Dist. Ct. App. Dec. 30, 1998).

328. See *Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482, at \*4 (Tex. Jan. 22, 1998).

cases, the expulsion would withstand this analysis. In *Holman*, the disruption of client relations would have sufficed. In *Lawlis*, the potential threat to the firm from Lawlis's alcoholism, either in terms of increased malpractice exposure or the disruption of client relations, would have satisfied the collective purpose test. In *Beasley*, the collective purpose test would have been satisfied by the attempt to make the firm more profitable by closing the marginal Palm Beach office, and in *Bohatch*, the disruption of relations within the firm's Washington, D.C. office would have been sufficient to satisfy the test.

Another possible rule would take a further step and seek to test the fit of the expulsion with the collective purpose asserted. Under such a test, the firm would have the initial burden to demonstrate the collective purpose advanced by the expulsion. The expelled partner would then be able to attempt to demonstrate how the collective purpose could have been reasonably advanced by a measure less injurious to the partner than expulsion. This rule is evocative of two landmark Massachusetts cases:<sup>329</sup> *Donahue v. Rodd Electrottype Co.*<sup>330</sup> and *Wilkes v. Springside Nursing Home, Inc.*<sup>331</sup> In *Donahue*, the Supreme Judicial Court of Massachusetts held that shareholders in close corporations owe one another substantially the same fiduciary duty as partners in a partnership, "utmost good faith and loyalty," rather than the somewhat less demanding standard for corporate directors and majority shareholders, which is "good faith and inherent fairness."<sup>332</sup> In *Wilkes*, the court faced a situation in which a shareholder in a closely held corporation was eliminated from a salaried position with the firm and denied positions as a director and officer.<sup>333</sup> The court applied the *Donahue* standard of "utmost good faith and loyalty" in evaluating the ejected members claims.<sup>334</sup> However, the *Wilkes* court did craft a two-step test to meet concerns:

[T]hat untempered application of the strict good faith standard enunciated in *Donahue* to cases such as the one before us will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned.<sup>335</sup>

The first step of the *Wilkes* test places the burden on the firm to demonstrate a legitimate business purpose for its action:

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329. Commentator Bill Callison also makes reference to this line of cases in construing good faith in the partnership context. Callison, *supra* note 3, at 149-53.

330. 328 N.E.2d 505 (Mass. 1975).

331. 353 N.E.2d 657 (Mass. 1976).

332. See *Donahue v. Rodd Electrottype Co.*, 328 N.E.2d 505, 515-16 (Mass. 1975).

333. See *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 661 (Mass. 1976).

334. See *id.* (citations omitted).

335. *Id.* at 663.

[W]hen minority stockholders in a close corporation bring suit against the majority alleging a breach of the strict good faith duty owed to them by the majority, we must carefully analyze the action taken by the controlling stockholders in the individual case. It must be asked whether the controlling group can demonstrate a legitimate business purpose for its action.<sup>336</sup>

The second step in the *Wilkes* test shifts the burden to the individual shareholder to demonstrate that the action proposed by the majority is excessively burdensome to meet the legitimate business purpose: "When an asserted business purpose for their action is advanced by the majority . . . we think it is open to minority stockholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest."<sup>337</sup> If those in control of the firm had made the initial showing, and the minority had attempted the second showing, the court would have had to "weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative."<sup>338</sup>

I acknowledge the force of the argument that the collective purpose prong of both the obligation of good faith and fairness and the obligation of loyalty is better tested using the rule adapted from *Wilkes* than by using a simple threshold business purpose test.<sup>339</sup> The opportunity for the targeted partner to demonstrate a less injurious way to achieve the collective purpose is actually a way of raising an inference that the asserted purpose is pretextual and thus

336. *Id.* The court intended to grant the majority a fair degree of latitude in making policy for the firm:

In asking this question, we acknowledge the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation. It must have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees.

*Id.*

337. *Id.*

338. *Id.* Professor Hillman appears to endorse the movement toward a linkage between good faith and the election of less drastic alternatives in some cases. *See* HILLMAN, *supra* note 39, § 5.3.4.4, at 5:19.

Although the consequences of an expulsion may be severe, there is little authority in case law for measuring good faith by reference to the harsh consequences or the availability of less drastic alternatives. Nevertheless, attempts by a firm to soften the blow of an expulsion may in appropriate cases support a finding that it has acted in good faith.

*Id.*

339. The fact that thoughtful and influential commentator Bill Callison advances this argument requires its careful consideration. *See* Callison, *supra* note 3, at 153 ("I think the *Wilkes* standard should be incorporated into the analysis used by courts to determine whether a partner acted in good faith.").

raises questions as to the good faith and fairness of the other partners. The argument would be that if the other partners are charged with complete fairness, the two-step process does not seem unreasonable. Indeed, this was my initial view in the symposium presentations from which this article evolved. But I have become convinced by the arguments of those who favor the more rigorous version of the first formulation: If the firm can demonstrate that the expulsion was motivated in fact by a collective purpose, then the expulsion should be beyond challenge on a collective purpose ground. This now seems to me a reasonable synthesis. It recognizes the theoretical correctness of the collective purpose requirement and puts the firm to the test without subjecting parties and courts to the protracted and complex litigation required to determine the least harmful alternative open to the firm. It also avoids the unfortunate (if incorrect) appearance of a court seeming to force unwilling parties to be law partners.<sup>340</sup>

But does this mean that in every law partner expulsion the firm will end up litigating the justification for the expulsion decision no matter what the partnership agreement provides? No – the rule could provide for an exception. The requirement that the expulsion advance a collective purpose of the partnership is distinct from the requirement that cause be shown. Both are, however, subsets of the good faith and fairness question. As I would allow the partnership agreement to permit expulsions without a showing of cause, so too would I allow the partnership agreement to permit expulsions without meeting a collective purpose test. But when the partnership agreement does not clearly and specifically provide for expulsions without meeting the collective purpose test, the targeted partner should be able to put the firm to the proof of a collective purpose.

#### *4. Substance: A Recapitulation*

In the area of substance, the appropriate rule for law partner expulsions has three components: good faith and fairness, cause, and collective purpose. As to good faith and fairness, both the underlying fiduciary and contractual calls to good faith and fairness apply to the expulsion of a partner from a law partnership. The call to good faith and fairness is not simply a prohibition on economic predation; it is a call to utmost good faith, fairness and honesty. The pursuit of self-interest is not always in bad faith or unfair. Although a pursuit of individual (but not collective) self-interest would be inconsistent with the call to good faith and fairness, a pursuit of the collective self-interest of the

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340. The appearance is incorrect because the unwilling partners always have the power, if not always the right, to dissolve the partnership under the UPA or disassociate under RUPA. See UNIF. PARTNERSHIP ACT § 31(1)(b), 6 U.L.A. 771 (1995); REV. UNIF. PARTNERSHIP ACT § 602(a), 6 U.L.A. 77 (1995).

partnership, if not otherwise in violation of the justified expectations of the expelled partner, might be consistent with the call to good faith and fairness.<sup>341</sup> What constitutes good faith and fairness depends on the faithfulness of the partners to an agreed upon common purpose and the consistency of the partnership's actions with the justified expectations of the expelled party.

As to cause, courts should enforce both affirmative cause requirements in partnership agreements and clear provisions in partnership agreements allowing expulsion without a showing of cause, assuming, of course, that there are no otherwise applicable contract-based defenses. When there is no indication one way or the other of a cause requirement in the partnership agreement, courts should impose a cause requirement when such a test is either faithful to an agreed upon purpose and consistent with the justified expectations of the partners at formation, or when the circumstances make such a requirement a tool for achieving fairness. As to collective purpose, courts should require the firm to demonstrate a legitimate collective purpose that motivated the expulsion.

### *B. Process*

On the process side, we are confronted with two questions. First, in the absence of specific provisions in the partnership agreement granting process protections to the targeted partner, is any process required? Second, should compliance with such process as required either by law or by agreement be strictly construed?

#### *1. What Process Is Due?*

"Given the sensitivity of lawyers to questions of process," observes noted authority on law firm breakups, Professor Robert W. Hillman, "a further issue is whether procedural protections, such as notice and a right to hearing, are required either as part of or supplementary to the good-faith standard as applied to expulsions."<sup>342</sup> Professor Hillman has the initial question right: Absent any agreement provisions on expulsion process, does the target get any procedural protections as a matter of law?

Having framed the initial question correctly, Professor Hillman observes quite correctly that English courts have been more willing to find a requirement for procedural protections in the partnership context than American

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341. Professor Don Weidner makes a related point in his discussion of *Beasley*: The focus of the analysis belongs "on the reasonable expectations under the partnership agreement," and not "to the motivation behind the decision" as to which the partner complains. Weidner, *supra* note 135, at 892. "The reasonable expectations of the partners should control," Professor Weidner suggests, "whether a dissolution is in bad faith." *Id.* at 896.

342. HILLMAN, *supra* note 39, § 5.3.5.1, at 5:20.

courts.<sup>343</sup> Indeed, there are English cases, cited as authoritative by American treatises, that stand for the propositions that the targeted partner must be afforded "an opportunity to explain and be heard"<sup>344</sup> and "must have notice and an opportunity of being heard,"<sup>345</sup> although there is also authority that seems to limit the right to be heard to expulsions for cause.<sup>346</sup> But counter to these authorities are the American law firm expulsion cases, starting with *Holman*, that adopt the rule that there is no common-law or statutory right to a particular process in the expulsion context – that process is a matter of grace, not of right, absent an agreement establishing procedural requirements.<sup>347</sup>

At this point, Professor Hillman sets up *Ehrlich* as "[s]tanding in marked contrast to *Holman*:"

To the extent that *Ehrlich* may be read as emphasizing the importance of process in expulsions, *Holman* represents a more sensible approach than *Ehrlich* to notice and hearing issues. Expelling partners do not in practice act as an adjudicatory body. The decision to expel typically is a response to a breakdown in the relationship among partners, rather than a decision to be reached only after a dispassionate review of facts at a hearing on the subject. For good reason, notice and hearing rights do not form essential components of the good faith standard applicable to expulsions . . .<sup>348</sup>

Professor Hillman's arguments that procedural hurdles to law partner expulsions are a bad idea are quite reasonable. Partners are not an adjudicatory body in this case; the remaining partners are, to a greater or lesser degree, self-interested. It makes sense, as the *Holman* court observed, that partners ought to be able to contract for a quick method of separation.<sup>349</sup> But the question is not what law partners ought to contract for; the question is what courts should

343. See *id.*

344. Russell v. Russell, 14 Ch. D. 471 (1880)); Wood v. Woad, 9 L.R.-Ex. 190 (1874), Blisset v. Daniel, 68 Eng. Rep. 1022 (V.C. 1853); BATES, *supra* note 205, § 241, at 241 (citing Steuart v. Gladstone, 10 Ch. D. 626 (1875)).

345. SHUMAKER, *supra* note 12, § 101 at 175 (citing Wood v. Woad, 9 L.R.-Ex. 190 (1880); Blisset v. Daniel 68 Eng. Rep. 1022 (V.C. 1853)).

346. See LINDLEY ET AL., *supra* note 205, at 985 ("[I]t is conceived that a power to expel for misconduct cannot be safely acted upon until the delinquent partner has had an opportunity of explaining his conduct.") (citing Blisset v. Daniel, 68 Eng. Rep. 1022 (V.C. 1853); Cooper v. Board of Works for the Wandsworth Dist., 143 Eng. Rep. 414 (C.P. 1863)). Lindley's work is the American edition of the famous British treatise.

347. See *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 347 (Ct. App. 1996); *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 245 (Ill. App. Ct. 1996); *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442 (Ind. Ct. App. 1990); *Holman v. Coie*, 522 P.2d 515, 521-23 (Wash. Ct. App. 1974); see also HILLMAN, *supra* note 39, § 5.3.5, at 5:20.

348. HILLMAN, *supra* note 39, at 5:23.

349. See *Holman v. Coie*, 522 P.2d 515, 524 (Wash. Ct. App. 1974).

do in the absence of agreement. Here, the process required should depend on the faithfulness of the partners to an agreed-upon common purpose and the consistency of the partnership's actions with the justified expectations of the expelled party.

## 2. *Are Applicable Process Requirements to Be Strictly Construed?*

The problem is that by collapsing the question of what process is due under the law with the question of whether that process is to be strictly construed, Professor Hillman finesses the second question. As we shall see, the general authority on the second point is not compatible with the *Holman* analysis. The Hillman analysis ends with the observation that "[i]f partners desire procedural protections applicable to expulsions, they should include appropriate provisions in their partnership agreements."<sup>350</sup> But of course that is precisely what *Ehrlich* is all about: Whether the denial of Ehrlich's procedural rights, *as set forth in the partnership agreement*, rendered the expulsion ineffective.<sup>351</sup> What *Ehrlich* does address, and the point at which *Ehrlich* importantly diverges from *Holman*, is the question of whether the process due should be strictly construed. Here, *Ehrlich* is unambiguous: "[E]xpulsion provisions must be applied strictly, and these provisions define the fiduciary duties owed among the partners."<sup>352</sup>

Should procedure be strictly construed? There is ample precedent in the early authorities to strictly construe what process is available.<sup>353</sup> There is something of a split in the modern law firm expulsion cases on the question

350. HILLMAN, *supra* note 39, at 5:23.

351. *Ehrlich v. Howe*, 848 F. Supp. 482, 491 (S.D.N.Y. 1994). The court stated: The expulsion and voting provisions in the Partnership Agreement require that the issue of the expulsion of a partner be "before the partnership," i.e., before all of the partners. Thus, in order for an expulsion vote to be "before the partnership," all of the partners, including any partners whose expulsion is under consideration, must be notified that the vote is taking place. . . .

Certain of the Defendants concede that all partners had the right to participate in partnership meetings . . . and that Ehrlich was intentionally "excluded from two meetings which addressed his termination from the firm . . . ."

....

An unambiguous partnership agreement should not be rewritten by the court.

*Id.*

352. *Id.*

353. See BATES, *supra* note 205, at 240-41 ("Like all provisions for forfeitures, [a power of expulsion] is strictly construed . . ." (citation omitted)); LINDLEY ET AL., *supra* note 205, at 984 ("[A]ll clauses conferring such a power [of expulsion] are construed strictly, on account of the abuse which may be made of them, and of the hardship of expulsion . . ."); SHUMAKER, *supra* note 12, § 101, at 175 ("A power of expulsion will be construed with very great strictness.") (citing *Blisset v. Daniel*, 68 Eng. Rep. 1022 (V.C. 1853)).

of whether, once agreed to by the partners, process requirements are to be strictly enforced. *Ehrlich* stands for the proposition that process provisions must be strictly enforced.<sup>354</sup> Other decisions are less strict in their enforcement of process requirements. In *Holman*, for example, the rules of procedure for the executive committee required that members be given an agenda of topics to be discussed at each executive committee meeting.<sup>355</sup> The Holmans were members of the executive committee, yet they were not given agendas listing their expulsion as a topic to be discussed.<sup>356</sup> Nevertheless, the court refused to hold that the resulting expulsion was unlawful.<sup>357</sup>

### 3. Process: A Recapitulation

Courts should enforce partnership agreements as to process in the expulsion context. Both agreements creating procedural protections and agreements limiting or eliminating procedural protections should be respected by the courts. When there is no partnership agreement on process, the courts should impose process based on the faithfulness of the partners to an agreed common purpose and the consistency of the partnership's actions with the justified expectations of the expelled party.

Finally, there is a useful reminder in *Nosal* that compliance with process is not alone sufficient to satisfy the good faith and fairness obligation: "Regardless of the discretion conferred upon partners under a partnership agreement, this does not abrogate their high duty to exercise good faith and fair dealing in the execution of such discretion."<sup>358</sup> Process is not, in the end, a substitute for substantive good faith and fairness.

### C. A Proposal for Reform

What should be the law of law partner expulsions? It can be distilled to seven propositions:

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354. See *Ehrlich*, 848 F. Supp. at 490 ("A partnership agreement may provide for the expulsion of partners under prescribed conditions, but such provisions are strictly applied.").

355. See *Holman v. Coie*, 522 P.2d 515, 520 (Wash. Ct. App. 1974).

356. See *id.* at 517-19.

357. See *id.* at 521.

It is true there was no agenda provided to plaintiffs prior to the May 13 meeting as is suggested or recommended by the supplementary rules. However, both plaintiffs testified that they believed their possible termination with the firm would be the subject of the 8 p.m. May 13 meeting; William Holman had been informed that afternoon that their relationship with the firm was to be a topic of discussion. We do not find the failure to provide an agenda was a sufficient violation of the partnership agreement to justify holding there was an unlawful expulsion of the plaintiffs.

*Id.*

358. *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 246 (Ill. App. Ct. 1996).



(1) Both the fiduciary and contractual calls to good faith and fairness apply to the expulsion of a partner from a law partnership.

(2) The call to good faith and fairness is not simply a prohibition on economic predation; it is a call to utmost good faith, fairness, and honesty.

(3) The pursuit of collective self-interest using proportionate measures is not in bad faith or unfair if not otherwise in violation of the justified expectations of the expelled partner.

(4) What constitutes good faith and fairness depends on the faithfulness of the partners to an agreed common purpose and the consistency of the partnership's actions with the justified expectations of the expelled party.

(5) Cause is a component of good faith and fairness. Courts should enforce both affirmative cause requirements in partnership agreements and clear provisions in partnership agreements allowing expulsion without a showing of cause. When the partnership agreement is silent on cause, courts should impose a cause requirement where such a test is either faithful to an agreed upon purpose and consistent with the justified expectations of the partners at formation, or where the circumstances make such a requirement a tool of achieving fairness.

(6) Pursuit of a collective purpose is a component of good faith and fairness. Courts should place the burden on the firm to demonstrate that a legitimate collective purpose motivated the expulsion.

(7) Process is a component of good faith and fairness. Courts should enforce both agreements creating procedural protections and agreements limiting or eliminating procedural protections. When the partnership agreement is silent on process, courts should impose process based on the faithfulness of the partners to an agreed upon common purpose and the consistency of the partnership's actions with the justified expectations of the expelled party.

These seven propositions of reform have several common themes. The first one is a reliance on fiduciary duty, specifically the fiduciary duty of good faith and fairness, and on contractual good faith and fairness. The second common theme is an emphasis on substance and process based on the context of individual situations rather than on rigid rules of general application. Finally, the propositions enforce clear partnership agreements on both substance and process but resort to individualized substance and process gap-fillers in the absence of a clear partnership agreement.

By emphasizing the full range of good faith and fairness considerations, and not simply the narrow concept of economic predation, by requiring that process be strictly construed, and by making contextual determinations on

substance and process when the partnership agreement is silent, this reform agenda is more attentive to the positions of expelled partners than the present regime.

However, the proposed system allows the law firm to redress that shift, if that is the desire of the partners. A clear path is provided for law firms that wish to adopt a guillotine method of partner expulsion that allows expulsions without cause, without a collective purpose, and without any procedural protections. Law firms must simply adopt an appropriately drawn partnership agreement with such provisions. That is not such a large step away from the present system in which the right to expel exists only when the partnership agreement so provides. It is essentially the difference between the well-written agreement of Pillsbury Madison & Sutro in *Heller*<sup>359</sup> and the poorly-written agreement of Cadwalader, Wickersham & Taft in *Beasley*<sup>360</sup> and *Ruskin*.<sup>361</sup> Frankly, it does not seem to be too much to ask of law firms to have well-crafted partnership agreements if they wish to expel a partner without cause, collective purpose, or procedural protections.

### III. RUPA and Law Partner Expulsions

We have seen the first significant revision of general partnership law since World War I. With the promulgation of the Revised Uniform Partnership Act (RUPA) by the National Conference of Commissioners on Uniform State Laws, and its adoption by a significant number of states, the momentum of change in partnership law has grown.<sup>362</sup> How does the current of change in partnership law match the common themes of our proposed reform of the law of law partner expulsions? Not particularly well, it turns out, on some central points. Let us discuss the points of misalignment and leave to the reader the conclusion as to whether the fault is in the proposed expulsion reforms or the proposed general partnership law reforms.<sup>363</sup>

#### A. Reliance on Fiduciary Duties

The first common theme of the seven reform propositions is a reliance on fiduciary duty, specifically the fiduciary duty of good faith and fairness, and on contractual good faith and fairness. RUPA, in contrast, weakens the fiduciary duties of partners inter se and seeks to eliminate the fiduciary good

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359. See *supra* notes 95-116 and accompanying text (discussing *Heller*).

360. See *supra* notes 132-52 and accompanying text (discussing *Beasley*).

361. See *supra* notes 153-59 and accompanying text (discussing *Ruskin*).

362. For a general discussion of RUPA, see ROBERT W. HILLMAN, ALLAN W. VESTAL, AND DONALD J. WEIDNER, *THE REVISED UNIFORM PARTNERSHIP ACT* (1998).

363. Commentator Bill Callison has discussed the law partner expulsion cases and RUPA. See Callison, *supra* note 3, at 139-51.

faith and fairness in favor of a strictly contractual conception of good faith and fair dealing *inter se*.<sup>364</sup>

### 1. Good Faith and Fairness

RUPA defines fiduciary duties narrowly, including only the duty of care and the duty of loyalty.<sup>365</sup> It downgrades good faith and fair dealing from its traditional role as a fiduciary duty to the status of a nonfiduciary "obligation." Section 404 of RUPA states that "[a] partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing."<sup>366</sup>

The drafters intended the characterization of good faith and fair dealing as a nonfiduciary obligation, rather than as a fiduciary duty, to have substantive effect.<sup>367</sup> That is because they viewed good faith and fair dealing as a contract concept, not a fiduciary concept defined by the status of the partners as partners.<sup>368</sup> Such a formulation is a fundamental departure from existing concepts under the UPA and the common law<sup>369</sup> and was motivated by a desire to thwart plaintiffs' recoveries and judicial innovation.<sup>370</sup>

Although the drafters of RUPA intended to abandon fiduciary good faith and fairness, they left open the prospect of an expansive definition of good faith and fairness by the courts. Unlike the duty of loyalty and the duty of care, which are defined in the statute, RUPA does not define the obligation of good faith and fair dealing.<sup>371</sup> The drafters declined to define the term, choosing instead to leave the development of a definition to the courts: "The

364. See HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 185-97.

365. See REV. UNIF. PARTNERSHIP ACT § 404(a), 6 U.L.A. 58 (1995) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c)."). It may help in understanding the obligation of good faith and fair dealing to look to the path by which the provision reached its final form. See HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 186; Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523, 542-45, 558 n.154 (1993).

366. REV. UNIF. PARTNERSHIP ACT § 404(d), 6 U.L.A. 58 (1995).

367. See *id.* § 404 cmt. 4, 6 U.L.A. 60-61. Commentator Bill Callison provides a helpful overview of the debate on this point. See Callison, *supra* note 3, at 120-21.

368. See REV. UNIF. PARTNERSHIP ACT § 404 cmt. 4, 6 U.L.A. 60-61 (1995).

369. See Vestal, *supra* note 365, at 548-49; HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 188.

370. See Vestal, *supra* note 365, at 542-44; HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 188-89.

371. Compare REV. UNIF. PARTNERSHIP ACT § 404(b), (c), 6 U.L.A. 58 (1995) (defining duty of loyalty and duty of care) with REV. UNIF. PARTNERSHIP ACT § 404 (d), 6 U.L.A. 58 (1995) (using, but not defining, obligation of good faith and fair dealing).

meaning of 'good faith and fair dealing' is not firmly fixed under present law. . . . It was decided to leave the terms undefined in the Act and allow the courts to develop their meaning based on the experience of real cases."<sup>372</sup>

There are some indications, however, of how the terms ought to be construed.<sup>373</sup> The UCC definitions of good faith, "honesty in fact and, in the case of a merchant, the observance of reasonable commercial standards of fair dealing in the trade . . . were rejected as too narrow or not applicable."<sup>374</sup> The obligation of good faith and fair dealing is intended, in some circumstances, to include a disclosure component beyond the disclosures required under section 403(c).<sup>375</sup> The obligation of good faith has been seen as incorporating general loyalty concepts beyond those included in the statute.<sup>376</sup>

The treatment of good faith and fairness in RUPA is troublesome. But the combination of a broad reading of contractual good faith and fair dealing and the unwillingness of the RUPA drafters to include a narrow, statutory definition of the concept leaves the way open for courts to adopt a reading of good faith and fairness in the law partner expulsion context that is compatible with the reform agenda proposed in this article.

## 2. Loyalty

RUPA also adopts an exclusive and narrow definition of the duty of loyalty, including only a duty to account, a duty to refrain from adverse dealings, and a duty to refrain from competition.<sup>377</sup> The RUPA formulation

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372. REV. UNIF. PARTNERSHIP ACT § 404 cmt. 4, 6 U.L.A. 60-61 (1995).

373. In part, analysis should be informed by the nature of the relationship, being one of great interdependence. See HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 188-90; Donald J. Weidner, *RUPA and Fiduciary Duty: The Texture of Relationship*, 58 LAW & CONTEMP. PROBS. 81, 84 (1995).

374. REV. UNIF. PARTNERSHIP ACT § 404 cmt. 4, 6 U.L.A. 60-61 (1995).

375. See *id.* ("In some situations the obligation of good faith includes a disclosure component. Depending on the circumstances, a partner may have an affirmative disclosure obligation that supplements the Section 403 duty to render information."). This nexus between the obligation to disclose and the obligation of good faith and fair dealing was noted early in the drafting process. See Memorandum from Lauris G.L. Rall to Gerald V. Niesar, Chairman, Ad Hoc Subcommittee on RUPA, "Meeting of National Conference of Commissioners on Uniform State Laws: Naples, Florida, August 5-6, 1991," (Aug. 19, 1991), in 1 UNIFORM PARTNERSHIP ACT, DRAFTS, 1992 (1992) ("[S]ome felt that the duty of disclosure was probably also contained in the duty of good faith and fair dealing."); see also HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 189.

376. See R.U.P.A. JANUARY 4, 1989 DRAFT § 20x ("One argument in favor of the new 'good faith' provision is that it will include general loyalty obligations in addition to those now specifically provided in section 20Y."); see also HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 189.

377. See REV. UNIF. PARTNERSHIP ACT § 404(b), 6 U.L.A. 58 (1995).

excludes the collective purpose obligation as a component of the duty of loyalty, except insofar as the noncollective purpose would constitute a diversion of a partnership opportunity, be adversarial, or be in competition with the partnership.

### 3. *The Elimination of "Bona Fide"*

RUPA does make one change in the statutory language relating directly to the expulsion of partners. The UPA provides that dissolution is caused "[b]y the expulsion of any partner from the business bona fide in accordance with such power conferred."<sup>378</sup> RUPA, in contrast, provides that "[a] partner is dissociated from a partnership upon . . . the partner's expulsion pursuant to the partnership agreement."<sup>379</sup>

The official commentary indicates that the elimination of the "bona fide" language from the UPA was not intended to change "the basic rule of UPA Section 31(1)(d)."<sup>380</sup> The official comment continues, citing *Holman* for the proposition that "[a]s under existing law, the obligation of good faith under Section 404(d) does not require prior notice, specification of cause, or an opportunity to be heard."<sup>381</sup>

If the narrow, economic-predation reading of good faith by the *Holman* court is incorrect, then there will be an issue of substantial importance as to how the RUPA obligation of good faith and fair dealing should be interpreted. Courts deciding that issue should take at face value the commentary's assertion that the deletion of "bona fide" was not intended to work a change in the law and should not conclude that the removal of "bona fide" was intended to ossify the incorrect *Holman* rule.

### B. *Individualized Decisions Not Rigid Rules of General Application*

The second common theme of the seven reform propositions is an emphasis on substance and process based on the context of individual situations, rather than on rigid rules of general application. Some commentators, in contrast, argue that RUPA should be structured to maximize the predictability of outcome, thus necessarily reducing the consideration of individual situations in favor of reliance on rules of general application.<sup>382</sup> This represents a

378. UNIF. PARTNERSHIP ACT § 31(1)(d), 6 U.L.A. 771 (1995).

379. REV. UNIF. PARTNERSHIP ACT § 601(3), 6 U.L.A. 72 (1995).

380. *Id.* at cmt. 4, 6 U.L.A. 60-61.

381. *Id.* (citing *Holman v. Coie*, 522 P.2d 515 (Wash. Ct. App. 1974)).

382. Professor Dennis Hynes nicely articulates the argument that RUPA should be oriented toward predictable outcomes. See J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry Into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29, 44-46 (1995); J. Dennis Hynes,

policy choice that is at odds with the policy underlying the reforms proposed in this article.

### C. Enforcement of Partner Agreements

The third common theme of the seven reform propositions is to enforce clear partner agreements on both substance and process but to resort to individualized substance and process determinations in the absence of a clear partner agreement. RUPA is in one sense consistent with this approach, clearly favoring the enforcement of partner-agreement variations of statutory provisions. The general rule under RUPA is that provisions of the partnership agreement control over statutory provisions.<sup>383</sup> The provision that implements the new policy under RUPA is section 103(a): "Except as otherwise provided in subsection (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement."<sup>384</sup> As an exception to the general rule, partners have restricted the right to modify some statutory provisions because RUPA specifically and affirmatively limits the partners' rights.<sup>385</sup> The obligation of good faith and fair dealing is subject to such a restriction on partner-agreement amendments: "The partnership agreement may not . . . eliminate the obligation of good faith and fair dealing under Section 404(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable."<sup>386</sup> The limits of permitted variations of the obligation of good faith and fair dealing are unclear.<sup>387</sup> It is, however, a reasonable assumption that, given the support of case law for the guillotine method of law partner expulsion, any clear partnership-agreement modifications of the obligation of good faith and fair dealing that eliminate cause, collective purpose, and process would be within the range of modifications not manifestly unreasonable.

If RUPA is incompatible on this point with the proposed reforms in any respect, and if it holds a trap for the unwary in this regard, it is in the way

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*Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 463 (1997). I have attempted to set forth the opposing view. See generally Allan W. Vestal, *Advancing the Search for Compromise: A Response to Professor Hynes*, 58 LAW & CONTEMP. PROBS. 55 (1995).

383. See HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 37.

384. REV. UNIF. PARTNERSHIP ACT § 103(a), 6 U.L.A. 25 (1998).

385. See *id.* § 103(b), 6 U.L.A. 25; HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 38-49.

386. REV. UNIF. PARTNERSHIP ACT § 103(b)(5), 6 U.L.A. 25 (1998).

387. See HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 44-49; Callison, *supra* note 3, at 141-48.

RUPA conceptualizes the partnership agreement. RUPA defines the term "partnership agreement" to mean "the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement."<sup>388</sup> The official comments confirm that the drafters intended the definition to be quite broad and include oral agreements as well as agreements "inferred from the conduct of the parties."<sup>389</sup> The RUPA definition has been the subject of general criticisms.<sup>390</sup>

In relation to the law partner expulsion issue, the RUPA definition of a partnership agreement is subject to criticism on the partner-agreed modification issue. There is a case to be made for the enforcement of oral, or even implied, partnership expulsion agreements.<sup>391</sup> Yet the better policy would require partner-agreed modifications of the cause requirement, the collective purpose requirement, and any agreements regarding process to be in writing and not be a "partner agreement" only within the RUPA inclusion of oral, implied, or inferred agreements.<sup>392</sup> Note that this cuts both ways: Firms will benefit because findings of cause and collective purpose in prior cases, and the grant of process in prior cases, will not be construed to be part of the partnership agreement binding the partnership on the next case.<sup>393</sup> But, expelled partners will not be without rights because of a denial of such rights – without the benefit of any writing – in past cases.

388. REV. UNIF. PARTNERSHIP ACT § 101(7), 6 U.L.A. 20 (1998).

389. *Id.* at cmt., 6 U.L.A. 20.

The definition of "partnership agreement" is adapted from Section 101(9) of RUPA. The RUPA definition is intended to include the agreement among the partners, including amendments, concerning either the affairs of the partnership or the conduct of its business. It does not include other agreements between some or all of the partners, such as a lease or loan agreement. The partnership agreement need not be written; it may be oral or inferred from the conduct of the parties.

*Id.*

390. See HILLMAN, VESTAL, AND WEIDNER, *supra* note 362, at 23-26.

391. See Hillman, *supra* note 12, at 565-66. Professor Hillman is less skeptical about enforcing such agreements: "While the unwritten expulsion agreement is probably a rarity, and claims seeking to establish such an understanding should be viewed skeptically, it nevertheless is reasonable to assume that some partners have reached oral agreements on this issue."  
*Id.*

392. Professor Don Weidner, the Reporter for RUPA, appears unconcerned on this point. He states that "[i]n examining the reasonable expectations in a particular firm, the behavior of the partners is as important as their written agreement." Weidner, *supra* note 135, at 896. I acknowledge the benefits of such a inclusive view of the partnership agreement, but, in this case, I think Professor Hynes's predictability virtue may provide the stronger argument.

393. Although, of course, such past practices may inform the reasonable expectations of partners as to future practices.

### Conclusion

Expulsions lack nothing in subtlety . . . .<sup>394</sup>

The law of law partner expulsions is unsatisfying in several respects. It is unsatisfying because it springs in very large measure from a single, badly articulated and poorly supported case. It is unsatisfying because it establishes a seemingly unassailable rule, that bad faith and unfair dealing in the law partner expulsion context is limited to economic predation, that is not logically well connected with the call to good faith and fairness from which it is claimed to be derived. It is unsatisfying because it is dismissive of procedural protections.

It is time to reexamine *Holman* and its progeny and to replace the economic predation test with a more contextual inquiry into whether the substance and process of the expulsion meet the underlying standard of good faith and fairness. It is time to adopt rules that when the partnership agreement is silent or confusing as to cause and collective purpose, courts will impose cause and collective purpose requirements unless the firm can demonstrate that such tests are not consistent with good faith and fairness. It is time to adopt a more flexible approach that will allow courts to adapt process requirements to the justified expectations of the expelled partner. It certainly is time to give law firms incentives to be more precise in their expulsion agreements.

Reforming our treatment of law partner expulsions does not end the necessary discussion. Beyond expulsion lies the topic of dissolution. This discussion has focused on the right of a firm to expel a partner. It has not considered the right to dissolve, except insofar as reference has been made to *Dawson*.<sup>395</sup> Professors Robert W. Hillman and Donald J. Weidner both have explored the dissolution option as, in effect, an expulsion by other means.<sup>396</sup> Professor Hillman explains that "[t]he 'firing' of a partner unsupported by an underlying expulsion agreement is not an expulsion but is a dissolution by express will of the partners initiating the 'removal' of one of their colleagues."<sup>397</sup> As both Professors Hillman and Weidner observe, there is a critical distinction between an expulsion under an enabling provision of the partnership agreement and a de facto expulsion accomplished through a collusive dissolution caused by the exclusion of one partner and a subsequent

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394. Robert W. Hillman, *Terminating Law Partners Can Be a Risky Venture: Courts Will Determine Whether the Firing, When Challenged, Was Done in Good Faith or for a "Predatory Purpose,"* NAT'L L.J., Nov. 10, 1997, at D1.

395. See *Dawson v. White & Case*, 672 N.E.2d 589 (N.Y. 1996).

396. See Hillman, *supra* note 12, at 531-36; Weidner, *supra* note 135, at 885-99.

397. See HILLMAN, *supra* note 39, § 5.3.2, at 5:7-5:8; Weidner, *supra* note 135, at 885 n.32.



reformation of the partnership without the excluded partner. That distinction has to do with the post-dissolution rights of the excluded partner.<sup>398</sup> Simply put, an excluded (but not expelled) partner in a partnership at will has, absent an effective agreement to the contrary, a right to an accounting of firm assets, a right to liquidate the partnership, a right to apply the proceeds to satisfy partnership liabilities, a right to participate in the winding up of the partnership, a right to a cash distribution of any surplus, and a right to be dealt with in good faith and fairly.<sup>399</sup> These are, as commentators point out, powerful rights that the excluded partner is given.<sup>400</sup> In at least one case, *Beasley*, the de facto expulsion analysis leads to the conclusion that the firm did not act in accordance with its obligations and the excluded partner's rights.<sup>401</sup> More discussion is required to explore how the collusive dissolution option fits the reform model proposed in this article for the expulsion situation.

With the changing nature of legal practice, we can be assured that there will be an increasing tempo of cases such as *Holman*, *Lawlis*, *Ehrlich*, *Dawson*, *Heller*, *Nosal*, *Bohatch*, and even, one fears, *Beasley* and *Ruskin*. The time to get the law right is now, and the way to begin is by returning to a concentration on good faith and fairness.

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398. See Hillman, *supra* note 12, at 531-36; Weidner, *supra* note 135, at 887-99.

399. See Weidner, *supra* note 135, at 889. Professor Hillman states it in somewhat different terms. See Hillman, *supra* note 12, at 531-36.

400. See Hillman, *supra* note 12, at 532-34; Weidner, *supra* note 135, at 889-99.

401. See Weidner, *supra* note 135, at 888.

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# ARTICLES

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