Should the Uniform Partnership Act Be Revised?

*By the UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations*

**INTRODUCTION**

The Uniform Partnership Act ("UPA"), approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1914, has been adopted in every state but Louisiana. The UPA governs general partnerships and also governs many important aspects of limited partnerships.¹

At the end of 1981, there were over 1.4 million partnerships in the United States.² This represents approximately 9% of the total business enterprises operating in this country.³ The largest concentration of partnerships is in agriculture and related fields of fishing and forestry, wholesale and retail trade, finance, insurance and real estate, and professional and general service businesses.⁴ As a general rule, partnerships tend to be slightly larger in terms of revenues than proprietorships but are usually considerably smaller than corporations. For example, based on 1981 tax statistics, 51.2% of partnerships had

¹Harry J. Haynsworth IV, subcommittee chairman; members: Joel S. Adelman, Allan G. Donn, Donald R. Harkleroad, and Gerald V. Niesar. This report has not been submitted to the American Bar Association for approval and is not intended to express the views of either the Association itself or its Section of Corporation, Banking and Business Law.


¹Corporations accounted for 17% of the total enterprises and proprietorships accounted for 40% of the total enterprises. ⁴Corporations accounted for 17% of the total enterprises and proprietorships accounted for 40% of the total enterprises.

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¹Editor's note: This report has been submitted to the National Conference of Commissioners on Uniform State Laws, which in August 1986 decided to undertake a complete revision of the Uniform Partnership Act. It is being reprinted in The Business Lawyer because it represents a significant work product produced by a committee of the Section of Corporation, Banking and Business Law that will be useful to practitioners who represent partnerships. Because of space limitations, the report has been edited to eliminate the variations in the Uniform Partnership Act made by the various states. The unedited version of the report is available from ABA Order Fulfillment Department, 750 North Lake Shore Drive, Chicago, Illinois 60611, Order No. 507-0071.


³Id. Corporations accounted for 17% of the total enterprises and proprietorships accounted for 74% of the total number of enterprises at the end of 1981.

⁴Id., Table 871 at 517.
revenues of $25,000 or less, 19% had revenues of between $100,000 and $500,000, and 2.7% had revenues of over $1 million. The equivalent figures for proprietorships are 70%, 8.5%, and .3 of 1% and for corporations, 20.8%, 34.8%, and 15.7%. Given the importance of partnerships in our economic system and the widespread changes in other business statutes in recent years, it is surprising that no movement to revise the UPA has been made until this point in time. More than anything else, the long life of the 1914 UPA is a tribute to the foresight of the original drafting committee, which, although split on philosophical grounds over whether the UPA should follow the separate entity theory or the aggregate theory, nevertheless managed to produce a statute that has stood the test of time.

After seventy-one years, however, it is appropriate to consider very carefully whether any statute requires revision. Assuming some changes would be desirable, the key determination is whether the desired changes are sufficiently important to justify a complete revision or whether relatively minor, “patching up” amendments would be sufficient. With this question in mind, the Committee on Partnerships and Unincorporated Business Organizations (the “Committee”) in April 1984 established a special subcommittee to review the UPA and to report its recommendations for changes to NCCUSL. The UPA Revision Subcommittee has spent one and one-half years on this project. It reviewed the changes made by the various states, case law, and the available treatises and law review articles. In addition, all Committee members received a questionnaire in July 1984, and they suggested several changes. Copies of the questionnaire were

5. Id., Table 869 at 516.
6. The Uniform Limited Partnership Act (“ULPA”), 6 U.L.A. 1561 (1916), was revised in 1976 and extensively amended in 1985. The Model Business Corporation Act (“MBCA”), which is the most influential corporate code model used by states, was originally approved in 1950, extensively revised in 1969, and completely rewritten in 1984. Several major amendments to the MBCA were approved between 1969 and 1984.
also mailed to the chairmen of other ABA committees that deal with partnership issues.

A copy of this report has been circulated to all members of the Committee and to other ABA committees that regularly deal with the legal problems of partnerships, and it has been discussed at two Committee meetings. This final draft reflects written and oral comments made by various recipients of the report.

This report summarizes the Committee’s findings, and as the conclusion states, it recommends that a complete revision of the UPA be undertaken. Although it is by no means an exhaustive study of partnership law and potential changes in the UPA, this report represents the collective judgment of the subcommittee based on a careful study of available sources and the members’ experience as practitioners and teachers. They hope that it will be useful to NCCUSL in deciding whether to revise the UPA.

**UNDERLYING PRINCIPLES**

The assignment was to outline proposed changes in the UPA and include the rationale for the recommendations; the approval and drafting of any changes are, however, the prerogative of NCCUSL should it decide to undertake a revision of the UPA. In some cases the report recommends that any revision of the UPA should incorporate variations in the UPA adopted by one or more states and provisions from other model or uniform acts such as the Uniform Commercial Code ("UCC"). These recommendations are intended to be mere suggestions as to the direction or approach that might help the NCCUSL drafting committee in its consideration of revisions to the UPA.

Recommendations for changes in the existing language in the UPA should not be made unless a compelling case for a change could be made. In other words, the study should focus on major substantive changes rather than on stylistic or minor technical amendments. However, the report recommends a number of what some might term technical amendments to deal with issues found to have caused practical problems and which should be dealt with in any revision. Clarification of the status and potential liability of an executor or trustee of a deceased general partner is one example. 9

With respect to inter sese rights and obligations between partners and the partnership, the UPA should contain rules that provide a reasonable and equitable framework for resolving the basic problems that are encountered in a hypothetical "typical" partnership, with the right of the partners to vary the statutory rules in the partnership agreement. These basic principles are now incorporated into the UPA, and the subcommittee sought to recommend changes that would strengthen them. In some cases the report recommends that the statutory rule be changed because it seemed to produce an unexpected and

entitled *An Analysis of Georgia’s New Partnership Law* and published in 36 Mercer L. Rev. 443 (1985) ("Ribstein") was also quite helpful.

9. See *infra* p. 129, Section 2—Other Comments.
inequitable result in a partnership that operated without any partnership agreement (many such partnerships exist) or that operated under a partnership agreement whose language did not cover the particular issue. It also recommends that a general override provision be incorporated into the revision, except for instances when the statute specifically states that a provision cannot be varied by agreement of the partners, rather than the piecemeal and sometimes incomplete and inconsistent variation provisions in the 1914 UPA.

Because the "entity theory" avoids a number of technical problems, such as the authority of a general partnership to sue or be sued in its partnership name, the subcommittee determined that it should be incorporated into any revision of the UPA whenever possible and that the "aggregate theory" should be retained only where it appears to be essential, e.g., because of tax considerations.

In the subcommittee's deliberations, attention was given to the potential tax consequences of any proposed changes recommended, particularly those that might affect the tax status of limited partnerships. Based on the current classification regulations\textsuperscript{10} and recent Revenue Rulings with respect to state variations in RULPA, the subcommittee's recommendations are not believed to be tax sensitive. Nevertheless, as was the case with RULPA, negotiations with the Internal Revenue Service over the status of partnerships formed under the revised UPA will be necessary.

Except where a compelling argument in favor of a different approach had been made, the recommendations incorporate provisions consistent with those in RULPA that relate to the treatment of general partners.

**SUMMARY OF RECOMMENDATIONS**

The subcommittee has made approximately 150 recommended changes in the UPA. This total includes recommendations for 12 new provisions. The changes are described in detail in the next section of this report. This section briefly describes the most significant changes.

(i) **Increased emphasis on the entity theory.** This is reflected in a number of sections. The two most significant are the proposed revisions to section 25 limiting a partner's rights in specific partnership property to the right to use such property in the conduct of the partnership business and a new short form partnership filing requirement similar to that required for limited partnerships under the 1985 RULPA amendments. A similar filing requirement for foreign general partnerships doing business in the state will also have to be drafted. To minimize the danger that the filing requirement will be a trap for the unwary, the only penalty for failure to file is the inability to use the courts to enforce claims until the filing, which supersedes any trade name filing requirement, is made. A third important recommendation is specific authorization for a partnership agreement to contain a provision that prevents a technical dissolution if the remaining partners agree to buy out the interest of a withdrawing partner. A fourth related change is a recommendation for a new section that will

\textsuperscript{10} See Treas. Reg. § 301.7701-1 through 301.7701-3 (1986).
specifically authorize a partnership to sue and be sued in its own name. It is also recommended that language be included which makes it clear that a partner who steals money from a partnership can be guilty of embezzlement, fraud, and related crimes. Finally, the recommendation that a creditor with a judgment against the partnership must exhaust his collection remedies against the partners before seeking to enforce the judgment against the individual assets of the partners also reflects the increased emphasis on the entity theory.

(ii) Ten changes are recommended in section 18, which is the basic section defining the inter sese rights of the partners. The three most significant recommended changes in section 18 are:

(a) making it clearer that a partner's obligation to contribute to any losses means actual unpaid fixed obligations owed to creditors or actual cash losses, and that non-cash losses such as those caused by intangible drilling costs, depreciation, and accounting losses (e.g., asset write downs) are excluded;

(b) revising subsection (f) to provide specific authorization for a court to award compensation to a partner who devotes substantially more time to the partnership than the other partners (As presently worded section 18(f) only authorizes compensation to a surviving winding-up partner unless the partnership agreement otherwise provides.);

(c) clarifying the management and voting rights of partners in subsections (e) and (h), and the relationship of these rights to section 9(3), which contains a laundry list of issues where unanimous approval is required.

(iii) There are 66 recommended changes in the dissolution provisions in Part VI (sections 29-42). In addition to specific authorization for a partnership agreement to prevent a technical dissolution by authorizing a buyout of a withdrawing partner's interest, the most significant recommendations are:

(a) delete bankruptcy of a partner as a cause of dissolution or, alternatively, clarify whether there should be a distinction for dissolution purposes between a liquidation proceeding and a rehabilitation or reorganization proceeding;

(b) specifically state that the admission of an additional partner (as opposed to the admission of a replacement partner) does not cause a dissolution;

(c) eliminate losses as an independent ground for court ordered dissolution (A court would still have discretionary authority to dissolve a partnership on this basis, however.);

(d) eliminate any right of an assignee of a partner to obtain a court ordered dissolution;

(e) specifically authorize a court in a dissolution suit to order remedies other than dissolution (e.g., damages, attorneys' fees, etc.).
(f) authorize the non-withdrawing partners to continue the partnership after dissolution and, if they agree to do so within ninety days of a partner's withdrawal, limit the withdrawing partner's rights to receiving the fair value of his capital and his share of undistributed profits less any provable damages;

(g) specifically authorize a cause of action for breach of fiduciary duty by the remaining partners against a wrongfully dissolving or expelled partner;

(h) eliminate the mandatory exclusion of goodwill from the value to be paid to a wrongfully dissolving partner; and

(i) specifically authorize for the liquidating partners to take appropriate action to preserve the going concern value of the partnership for a reasonable time.

(iv) Broader authorization for a partnership agreement to vary the statutory rules relating to the inter sese rights of the partners. A general override provision similar to UCC section 1-102(3) is recommended. Several other complementary provisions are also recommended. In addition to authorizing the partnership agreement to override the effect of withdrawal mentioned in paragraph (iii), other recommendations include specific authorization to vary by agreement a partner's right to inspect and copy the partnership books and records and a partner's fiduciary duty to his fellow partners.

(v) Elimination of several ambiguities in section 8 relating to the nature of partnership property.

(vi) The imposition of joint and several liability of the partners for all partnership liabilities and obligations. Under section 15 as presently worded, partners have joint and several liability for their torts and breaches of trust but only joint liability for other debts and liabilities. This change will eliminate a number of procedural problems that affect the rights of creditors to enforce claims against a partnership.

(vii) The rights of an assignee of a partner's interest in profits and other distributions, including the rights of a creditor with a charging order and the rights of a creditor seeking to foreclose a perfected security interest in a partnership interest under UPA sections 27 and 28, are clarified in several important respects.

(viii) The obligation of a partner to render information about the partnership business to his fellow partners under UPA section 20 is made unqualified, and the requirement that the information be made available only "upon demand" is eliminated.

(ix) The fiduciary duties of partners to each other and the partnership should be made more explicit, similar to the formulation in the 1984 Model Business Corporation Act.

(x) The remedies in UPA section 22 should specifically authorize suits by partners against other partners and the partnership without the necessity of either a formal accounting or a dissolution.
(xi) The priorities rules governing rights of creditors in the event of bankruptcy of a partnership should be made by reference to the Bankruptcy Code.

(xii) Transitional provisions determining the effect of the revised UPA on existing general partnerships will have to be drafted.

**SUBSTANTIVE REVIEW OF THE UPA AND RECOMMENDATIONS FOR CHANGES**

**UNIFORM PARTNERSHIP ACT**

*Part I—Preliminary Provisions*

**Section 1. Name of Act**

This act may be cited as Uniform Partnership Act.

**Section 2. Definition of Terms**

In this act, “Court” includes every court and judge having jurisdiction in the case.

“Business” includes every trade, occupation, or profession.

“Person” includes individuals, partnerships, corporations, and other associations.

“Bankrupt” includes bankrupt under the Federal Bankruptcy Act or insolvency under any state insolvency act.

“Conveyance” includes every assignment, lease, mortgage, or encumbrance.

“Real property” includes land and any interest or estate in land.

**Recommendations for Changes:**

(a) The definition of “business” should be expanded to include any type of activity intended to generate a profit. This would make it clear that the existence of a partnership, which is defined in section 6(1) of the UPA as “an association of two or more persons to carry on as co-owners a business for profit,” does not depend on the type of profit making activity, and that any type of profit making activity is sufficient to cause the relationship to be treated as a partnership and therefore covered by the UPA.

(b) The definition of “person,” which is also used in the definition of “partnership” in section 6(1), should be expanded by adopting the definition in the Georgia UPA, which is based on section 101(11) of RULPA, so as to specifically include trusts and estates.\(^\text{11}\)

(c) The definitions of the remaining terms should be changed to the parallel definitions in the Georgia UPA, except that (i) if the UPA continues to include

\(^{11}\) The definition of “person” in the Georgia UPA, Ga. Code Ann. § 14-8-2(6) (1982 & 1987 Supp.), is as follows:

“Person” includes a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association or corporation. Any person may be a partner unless the person lacks capacity apart from this chapter.
bankruptcy as a cause of dissolution, then a narrower definition of "bankrupt" should be used, i.e., a definition that refers only to a person who is the subject of an order under the liquidation provisions of the bankruptcy code or any successor statute or code of general application, or an equivalent order or petition under any state insolvency act, and (ii) the reference in the Georgia UPA to a "usufruct" should not be included. 12

(d) A new definition of the term "business of the partnership," defined as the scope of business activity set forth in the partnership agreement or actually being conducted by the partnership, should be added. The term "business of the partnership" is used several times in the UPA.

(e) A definition of "contributions" to a partnership, similar to section 101(2) of RULPA, should be added to the revised UPA.

(f) A definition of "interest," as in "interest on a loan" (as opposed to "partnership interest"), similar to the definition in the Georgia UPA, should be included, allowing for reference to the applicable statute of each jurisdiction. 13

There are several sections of the UPA that refer to "interest," e.g., sections 18(d), 28(1), and 42. Including a definition of "interest" would make clear the applicable rate of interest in the absence of a rate determined by an agreement among the partners.

(g) A definition of a "partner" as a person who has been admitted to a partnership in accordance with the partnership agreement or pursuant to section 18(g) of the UPA should be added. 14

12. The definitions of "bankrupt," "conveyance," and "real property" in the Georgia UPA, Ga. Code Ann. § 14-8-2(1), -2(3), and -2(7) (1982 & 1987 Supp.), respectively, are as follows:

  "Bankrupt" means a person who is the subject of:
  (A) The entry of an order for relief under Section 303(h) of the Bankruptcy Code (11 U.S.C. Section 303(h)) or the filing of a petition for voluntary bankruptcy under Section 301 of the Bankruptcy Code (11 U.S.C. Section 301) as these provisions may be now or hereafter amended; or
  (B) An equivalent order or petition under any successor statute or code of general application; or
  (C) An equivalent order or petition under any state insolvency act.

  "Conveyance" includes every assignment, deed, transfer, lease (including the creation of a usufruct), mortgage or pledge of tangible, intangible or real property, and also the creation or cancellation of any lien, encumbrance, or security title.

  "Real property" includes any estate or interest, including usufructory interests, in, over or under land, including minerals, structures, fixtures and other things which by custom, usage, or law pass with a conveyance of land though not described or mentioned in an instrument of conveyance or in a contract to make such conveyance.

13. The definition of "interest" in the Georgia UPA, Ga. Code Ann. § 14-8-2(5), is as follows:

  "Interest" means interest at the legal rate which applies where the rate percent is not named in the contract as provided by Code Section 7-4-2 or any successor statute.

(h) A definition of "partnership agreement," similar to the definition in section 101(9) of RULPA, should be included. Section 101(9) of RULPA provides as follows:

(9) "Partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.

(i) A definition of "partnership interest," similar to section 101(10) of RULPA, should be added to the revised UPA.

Other Comments:
In connection with the discussion of the expansion of the definition of "person" to include trusts and estates, the Committee noted that in some jurisdictions a trustee of a trust or the administrator of an estate that is a general or administrator, in his individual capacity, should not be personally liable to creditors of the partnership. The Committee agreed that, as a matter of policy, a trustee or administrator, in his individual capacity, should not be personally liable to creditors of the partnership. The Committee discussed the desirability of including language in the UPA reflecting this policy and concluded that this issue should more appropriately be dealt with in the state probate and trust laws statutes. Since not all states have dealt with this problem in a satisfactory manner, it is recommended that a cautionary note discussing this issue be included in the revised UPA.

Section 3. Interpretation of Knowledge and Notice

(1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice:

(a) States the fact to such person, or

(b) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

Recommendations for Changes:
The definitions of "notice," "knowledge," and related terms in section 1-201(25) to -201(27) of the UCC should replace the parallel definitions in section 3 of the UPA. The definitions in section 1-201(25) to -201(27) are more comprehensive and precise and more reflective of modern business practice than, and are probably at least equally familiar to practitioners as, the parallel definitions in UPA section 3. Section 1-201(25) to -201(27) of the UCC provides as follows:

(25) A person has "notice" of a fact when

(a) he has actual knowledge of it; or
(b) he has received a notice or notification of it; or
(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Act.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know it. A person "receives" a notice or notification when

(a) it comes to his attention; or
(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

Section 4. Rules of Construction

(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) The law of estoppel shall apply under this act.

(3) The law of agency shall apply under this act.

(4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

Recommendations for Changes:

(a) Sections 4 and 5 should be combined and revised by (i) replacing subsections (2) and (3) of UPA section 4 and all of UPA section 5 with section 1-103 of the UCC, (ii) adding, as subsection (5), subsection (f) of section 4 of
Accordingly, combined and revised UPA sections 4 and 5 would read as follows:

**Section 4. Rules of Construction; Supplementary General Principles of Law Applicable**

(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agents, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

(3) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(4) This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceeding begun or right accrued before this act takes effect.

(5) This act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

(6) In this act unless the context otherwise requires:

(a) words in the singular number include the plural and in the plural include the singular;

(b) words of the masculine gender include the feminine and neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

(b) The Committee concluded that it would be desirable to include a general override provision in the UPA, i.e., language making it clear that the provisions of the UPA may be varied by agreement. Section 1-102(3) of the UCC contains language to this effect. In addition, it may be appropriate to include in the UPA language similar to the language in section 1-102(4) of the UCC. Section 1-102 of the UCC reads as follows:

**§ 1-102. Purposes; Rules of Construction; Variation by Agreement**

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;


This chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.
(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires
(a) words in the singular number include the plural, and in the plural include the singular;
(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

Other Comments:
The Committee discussed whether subsection (g) of section 4 of the Georgia UPA should be added to section 4 of the UPA.\textsuperscript{17} The comment to section 4 of the Georgia UPA indicates that subsection (g) was included to limit the effect of the "equal dignity" rule, which requires an act creating an agency to be executed with the same formality as the act for which the agency was created. The sense of the Committee discussions on this issue is that the problem addressed by subsection (g) of section 4 of the Georgia UPA is a problem which, more likely than not, is peculiar to Georgia or, in any event, does not appear to be a widespread problem.

Section 5. Rules for Cases Not Provided for in This Act

In any case not provided for in this Act the rules of law and equity, including the law merchant, shall govern.

Recommendations for Changes:
See "Recommendations for Changes" in section 4.

Additional Comments on Part I of the UPA:
(a) Sections 1–5 comprise Part I of the UPA, which is entitled "Preliminary Provisions." We suggest that Part I of the UPA be expanded to include a section, which might be entitled "Actions and Proceedings in the Name of the Partnership," which provides that (i) a partnership may sue and be sued in the partnership name, and (ii) service of process on any partner (or on the agent for

\textsuperscript{17} Subsection (g) of § 4 of the Georgia UPA, Ga. Code Ann. § 14-8-4)(g) (1982 & 1987 Supp.), provides as follows:
The validity of an instrument executed on behalf of the partnership by a partner shall not be affected by the formality with which the partnership contract was executed.
service of process, if a provision requiring the appointment of an agent for service of process is added to the UPA) constitutes service of process on the partnership. This would eliminate the problem that exists in some jurisdictions where a partnership may sue or be sued only if every partner is named in the action.

(b) See also the recommendations for changes to section 6.

Part II—Nature of a Partnership

Section 6. Partnership Defined

(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

Recommendations for Changes:

No changes are recommended with respect to this section, except the removal of the last clause in subsection (2) and the transfer of this clause to another place in the UPA. We would suggest that part I of the UPA, which is entitled “Preliminary Provisions” and contains sections 1-5, be expanded by adding a new section, which might be entitled “Application of Act to Limited Partnerships” and would contain the substance of the last clause in subsection (2). We would also suggest that the comment to section 6 point out that a business relationship which is characterized by the parties or is otherwise described as a “joint venture,” rather than a partnership, may nevertheless be a partnership, as defined in section 6.

Section 7. Rules for Determining the Existence of a Partnership

In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
Recommendations for Changes:

It is recommended that subsection (4) be replaced by subsection (4) of section 7 of the Georgia UPA. Subsection (4) of section 7 of the Georgia UPA does not differ substantively from subsection (4) of section 7 of the UPA; however, it is somewhat broader and employs more modern language.

Section 8. Partnership Property

(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without word of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

Recommendations for Changes:

It is recommended that this section be replaced with section 8 of the Georgia UPA in order to eliminate the ambiguities in, and make more comprehensive, the language of section 8. For example, (i) in subsection (1) (which, together with subsection (2), deals with the question of what constitutes "partnership


The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business; provided, however, that no such inference shall be drawn if profits were received in payment of the following, even though the amount of payment varies with the profits of the business:

(A) A debt, whether by installments or otherwise;
(B) Wages, salary, or other compensation to an employee or independent contractor;
(C) Rent to a landlord;
(D) An annuity or other payment to a surviving spouse or representative of a deceased partner;
(E) Interest or other payment or charge on a loan;
(F) Consideration for the sale of goodwill of a business or other property, whether by installments or otherwise.

19. Section 8 of the Georgia UPA, Ga. Code Ann. § 14-8-8, provides as follows:

(a) Subject to subsection (d) of this Code section, property, whether real or personal, is presumed to be partnership property where:
property"), the references to "partnership stock" and "on account of the partnership" are ambiguous, and (ii) although subsection (2) declares that property acquired with partnership funds is presumptively partnership property, no mention is made of the other factors which might affect the determination of what constitutes partnership property, e.g., the terms of the partnership agreement.

Additional Comments:

Section 8 should be read together with section 10, which deals with real property of a partnership and conveyance of title to real property. The Committee discussed several problems with section 10, in particular title problems caused by dissolution, e.g., break in record chain of title, trigger of due on sale provisions, etc. These issues should be addressed in connection with the possible revision of section 10.

Part III—Relations of Partners to Persons
Dealing With the Partnership

Section 9. Partner Agent of Partnership as to Partnership Business

(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act

(1) It is included as such in the agreement of partnership or described in any recorded statement of partnership under Code Section 14-8-10A; or
(2) It is acquired in the partnership name.
(b) Subject to subsection (d) of this Code section, property is presumed to be partnership property if it is purchased with partnership funds even though the title or other interest is acquired in the name of an individual partner or partners.
(c) Subject to paragraph (1) of subsection (a) and subsection (d) of this Code section, where property is acquired in the name of an individual partner or partners without use of partnership funds the property shall be presumed to be the separate property of that partner or partners even though the property was used for partnership purposes.
(d) Real property and other property held of public record otherwise than in the partnership name, the ownership of which is customarily publicly recorded, shall not be deemed to be partnership property to the prejudice of a person who is not a partner and who did not have actual knowledge to the contrary.
(e) Where property was partnership property under a predecessor partnership, the business of which was continued under a new or reconstituted partnership, the presumption of subsection (c) of this Code section shall not be applicable and whether such property is to be considered partnership property of the new partnership or the separate property of the surviving members of the predecessor partnership shall be determined on the basis of the intention of the parties.
(f) Any estate in real property may be acquired in the partnership name and title to any estate so acquired shall vest in the partnership itself rather than in the partners individually. Title may be conveyed in accordance with Code Section 14-8-10.
(g) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.
Recommendations for Changes:

Recommendations for Changes:

(a) Subsection (2) should be deleted since the concept embodied in it is included in subsection (3). Both subsections (2) and (3) of section 9 specify circumstances in which fewer than all of the partners cannot bind the partnership. The withholding of authority from less than all partners to bind the partnership to a transaction that is not "usual" for the partnership should be included in the subsection (3) "laundry list" of other restrictions on such partners' authority to bind the partnership.

(b) Assuming subsections (2) and (3) are combined into one, the new subsection should make clear that the authority of fewer than all partners to take any of the restricted actions may be conferred in the partnership agreement (and Statement of Partnership if that concept is adopted—see the discussion of the Statement of Partnership following the Additional Comment to section 10 below), as well as at any other time.

(c) The list of actions for which individual partners have no apparent authority should be revised to reflect modern business practices. The list considered appropriate for a modern UPA is as follows:

(i) filing bankruptcy or assignment for the benefit of creditors;
(ii) pledging assets for money borrowed;
(iii) pledging substantially all of the assets of the partnership;
(iv) sale of all or substantially all of the assets of the partnership unless contemplated by the purpose of the partnership;
(v) merger or joint venture with another entity;
(vi) relinquishment of a partnership opportunity;
(vii) change of name;
(viii) sale of partnership goodwill; and
(ix) any action which is not apparently for carrying on the business of the partnership.

The phrase "in the usual way" above should be deleted as ambiguous. Leaving such phrase in the catch-all restrictions may create unnecessary questions as to when an active business partnership requires all of the partners to execute documents which may be routine.\footnote{Commentary to § 14-8-9 of the Georgia UPA, which notes that the “apparently . . . usual” phraseology is less objective than prior Georgia law which had been found to prohibit a single partner in a farm tool business from committing the partnership to the purchase of a phaeton. Georgia Report, supra note 8, at 21–22.}

Other Comments:

(a) Subsection 3(c) of the current UPA prohibits less than all partners from doing an act "which would make it impossible to carry on the ordinary business of a partnership." In the ULPA, section 9(1)(b), the phrase is "ordinary business of the partnership." If this subsection is retained, the ULPA language should be adopted.

(b) Section 9 deals with questions of apparent authority. In section 18, the general rules regarding rights and duties of partners among themselves, some of the same concepts are addressed.\footnote{See, e.g., UPA § 18(e) and (h).} Perhaps the two sections should be combined as to any matters where there may be a possible overlap; at the very least there should be cross references.

Section 10. Conveyance of Real Property of the Partnership

(1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee, is a holder for value, without knowledge.
(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

Recommendations for Changes:

(a) The section should be broadened to apply to all property. While section 10 originally was included in the UPA to clear up questions regarding conveyancing of real property, there appears to be no logical reason why its provisions should be restricted to real property. Today partnerships and joint ventures may own very significant personal property, e.g., aircraft, boats, costly computers and other equipment. Thus, the scope of the detailed provisions of section 10 should be expanded specifically to cover all property in order to erase any implication that different rules should apply to personal property transactions.

(b) Subsection (2) should be deleted. This was done in Georgia's recent enactment of the UPA, following Florida's earlier lead. The limitation covered in subsection 10(2) is entirely governed by section 9(1), so section 10(2) is redundant and potentially confusing.

(c) The burden of proving lack of authority of a transfer or conveyance should be on the partnership; it should not be the burden of the transferee or purchaser to show that the executing partners(s) had authority. This is the approach adopted in Georgia for subsections (1), (3), and (4) (note that in the Georgia statute these are subsections (1), (2), and (3) due to Georgia's deletion of subsection (2)). This allocation of burden becomes all the more appropriate if the “Statement of Partnership” concept, a discussion of which follows this section, is adopted.

(d) The section should also specifically relate to pledges and mortgages since these may be a mere prelude to an actual transfer or conveyance.

(e) Florida adopted a variation which affords the partnership a method of establishing who can convey property on behalf of the partnership. This affidavit approach might well be considered for a revised UPA even if a “Statement of Partnership” is included since the latter would apply only to real property, unless our recommendation (d) in the discussion of a Statement of Partnership is adopted.

22. When title is held in the partnership name and it is necessary to identify the partners at the time of a conveyance, encumbrance or other instrument affecting partnership real property, one of the partners may execute an affidavit stating the names of the partners and that they are the partners then existing. The affidavit shall be conclusive as to the facts therein stated as to purchasers without notice.

Additional Comment:

Prior to adoption of any final changes to section 10 the changes should be reviewed by real estate title experts, including an appropriate committee of the Real Property Section of the American Bar Association.

Statement of Partnership

There is no official UPA section on Statement of Partnership. Three states, California,23 Florida,24 and Georgia,25 have in recent years adopted statutory provisions incorporating this concept. These statutes are based on the certificate of limited partnership provisions in RULPA and are used primarily as a means of providing information on general partnerships for real property record title purposes.

Recommendations for Changes:

We recommend that a Statement of Partnership concept be included in the revised UPA. Our recommendations concerning the scope and intent of such provision are:

(a) A Statement of Partnership should be required of each partnership formed under the UPA but should not be a condition of the existence of a partnership. Such condition would nullify the concept of the partnership as a de facto business formed, often unknowingly, by persons who meet the definitional requirements of a partnership. The only penalty we would recommend for failure to file the Statement of Partnership would be inability to use the state's courts until the statement is filed. Filing a Statement of Partnership would eliminate the necessity of a Fictitious Business Name filing in a situation where a partnership does business in its partnership name.

(b) The consensus was that the Statement of Partnership should be filed centrally, i.e., with a state official, rather than recorded in the appropriate county or counties. While this may create some name conflicts in the larger and more populous states, such problems are generally soluble and less troublesome than trying to find a partnership filing by searching records of numerous counties.

(c) The following is a list of the purposes and objectives that should be achieved through a Statement of Partnership filing:

I. Name: Identify the name of the partnership.

II. Address: Specify a street address (as opposed to a P.O. box) for the principal place of business.

III. Members: Specify either (i) the name and business address of all the general partners (kept current with a thirty-day grace period; rebuttable presumption that liable as a partner if name listed, but any partner has the right to file to have his name removed and removal will be effective for limiting liability under, e.g., section 34) or (ii) the name and address of the agent for service of process (if this alternna-

tive is chosen, the agent would be required to retain at all times a current list of names and addresses of all the partners, and service on the agent would give a court in personam jurisdiction over every partner, including nonresident partners and partners not on the list).

IV. Term: Specify the term of the partnership, which may be indefinite (i.e., relating to an event of dissolution provided by law or the agreement).

V. Authority of Partners: Specify which partner(s), if fewer than all partners, have the authority to execute documents on behalf of the partnership; likewise specify if there are any partner(s) whose agency powers are more restricted than those specified in the UPA. This provision of the statement would be optional for any partnership.

VI. Other Matters: Permit the partnership to give notice of other matters as it may desire or believe appropriate.

VII. Amendments: Amendments should be made by such number of partners as may be specified in the Statement of Partnership, or by all partners if no lesser number is specified. However, any partner should have the power at any time to file an amendment to a Statement of Partnership to the extent that it grants to fewer than all partners authority in excess of the authority such partners would have under the UPA in the absence of an agreement to the contrary. This is considered important to protect the partner from becoming an unwilling guarantor to transactions which otherwise could continue indefinitely. It should be clear that the power to file such an amendment unilaterally is not intended to grant the filing partner immunity from responsibility for breach of contract damages if his or her action violates the partnership agreement.

(d) The three states that currently provide for Statements of Partnership limit their applicability to real estate matters. We would recommend the statement be an all-encompassing notice to the world of its contents.

(e) The grant or conferring of authority on fewer than all partners should be binding on the partnership and be relied upon by persons dealing with the partnership since it could confirm a grant of actual authority. However, persons contracting with a partnership on routine matters and without knowledge of restrictions contained in the Statement of Partnership should not be bound by a restriction contained in the statement since this result would make conduct of business in a partnership form subject to too many uncertainties.

(f) If a Statement of Partnership provision is adopted, then provisions for registration of foreign general partnerships doing business in the state will also have to be incorporated into the revised UPA. At the present time only Hawaii and New Hampshire have registration statutes that apply to general partnerships. The basic format used in article 9 of RULPA could be used as a model. We recommend that a laundry list of activities that will not constitute doing

business similar to section 15.01(b) of the 1984 Model Business Corporation Act be included in the foreign partnership registration requirement. We further recommend that a foreign general partnership be required to disclose in the application for registration the same information as is required for a domestic general partnership Statement of Partnership. Any different or additional disclosure requirements could raise serious constitutional issues under article IV section 2 of the United States Constitution,

**Section 11. Partnership Bound by Admission of Partner**

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.

**Recommendations for Changes:**

(a) Section 11 should be deleted since the states cover its subject matter in their respective rules of evidence and civil procedure.

(b) If the section is to be retained the term “statement” should replace the phrase “admission or representation,” and the phrase “within the scope of his authority as conferred by this act” should be eliminated. The scope of authority of a partner is conferred both by the act and by the agreement, and it may be expanded or contracted by actual practice (and/or a Statement of Partnership, see above).

**Section 12. Partnership Charged With Knowledge of or Notice to Partner**

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

**Recommendations for Changes:**

The language in this section is cumbersome and, in some respects, unclear. We believe the section should be rewritten with the following objectives:

(a) Define notice the same as notice is defined in the Uniform Commercial Code section 1-201(27); or cross-reference the term to the UCC.

(b) The statement of what constitutes “notice” to the partnership should be in one sentence; likewise the statement of what constitutes “knowledge” of the partnership should be in a separate sentence.

(c) The last clause of existing section 12, concerning “a fraud on the partnership committed by or with the consent of that partner,” should be clarified. It is unclear whether the intent is to deal only with knowledge questions or whether it is also intended to apply to notice. Crane & Bromberg
discusses this section but does not clarify it, and no cases have been found on point.

Additional Comments:
Applicability of this section to limited partnership situations should be clarified, either here or in RULPA. As to notice to and knowledge of general partners, one would believe section 12 should govern in limited partnership cases. But there is no indication that the section may not be held to govern notice to or knowledge of limited partners who are, after all, partners.

Section 13. Partnership Bound by Partner's Wrongful Act
Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Recommendations for Changes:
(a) There should be no reason why a partner should not be able to sue the partnership on a tort or other theory. As section 13 is written, the right to sue the partnership is restricted to a “person, not being a partner in the partnership . . . .” Presumably this could also prohibit a limited partner from suing the partnership on a tort or other “wrongful act” theory. Thus, partners are limited to seeking dissolution and an accounting, hardly a satisfactory situation for one partner injured by another during the course of partnership business.
(b) The term “wrongful act or omission” should be broadened to cover no-fault torts. Undoubtedly this is more a matter of using modern language than effecting a change in what the law was intended to be.

Section 14. Partnership Bound by Partner's Breach of Trust
The partnership is bound to make good the loss:
(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and
(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

Recommendation for Changes:
(a) There seems no reason why a partner's breach of trust with regard to money or property of a non-partner should be treated as subject matter separate from the general tort liability covered in section 13. The recommendation is to delete this section with an official comment stating that the section is redundant since its subject matter is part of section 13 and no change in the law is intended by the deletion.

27. See Crane & Bromberg, supra note 8, at 325.
(b) If section 14 is retained, it should be revised to make clear that it covers breaches of trust after a partner receives money on behalf of the partnership with either actual or apparent authority. As now written it may be argued that receipt of money or property with actual authority could not lead to recovery against the partnership for breach of trust by the receiving partner, surely an unintended result.

Section 15. Nature of Partner’s Liability

All partners are liable

(a) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

Recommendations for Changes:

(a) Section 15 should impose joint and several liability on partners for all partnership obligations. The current UPA provides for only joint liability for obligations not arising under sections 13 and 14; i.e., the partners are jointly and severally liable only for tort type liabilities. About ten states, including Georgia under its recently enacted UPA, provide joint and several liability for all partnership obligations. We believe this rule should be made the rule in a revised UPA. If partners are not severally liable (as well as jointly), in most cases they will have a procedural defense if fewer than all partners are named and served in an action on the liability. Thus, the joint-only feature places the burden on the plaintiff to find all of the partners. In large partnerships, such as accounting firms with hundreds of partners, such a burden can be tantamount to denial of the plaintiff’s right to sue. On the other hand, even when there is several liability and only one partner is named and served in the action, that partner can bring all other partners in by cross-complaining against them or seeking a contribution remedy. Thus, the burden of ensuring equitable distribution of the impact of the liability is on the partners, who are in the best position to know how to find each other and to know whether several parties should be named and served in the action.

(b) We also believe section 15 should be amended to make clear that a judgment creditor does not have the right to proceed against one or more partners to collect on a judgment based on a partnership liability until the partnership assets have been exhausted. This rule would respect the concept of the partnership as an entity and would provide that the partners are more in the nature of guarantors than principal debtors on every partnership debt. We believe that this result would be most consistent with general business expectations today.

Presently it is unclear whether the judgment creditor must exhaust partnership assets before proceeding against individual partners. Crane & Bromberg at section 58(e) states that the “generally prevailing common law rule” allows the judgment creditor to execute against the partnership and one or more partners
simultaneously. However, other authorities differ. A widely used practice guide in California notes that in some states the judgment creditor must exhaust his remedies against the partnership before going against the personal estates of the partners and concludes, "This appears to be the rule in California."29 No matter how the issue is resolved, the resolution should be clearly stated in a revised UPA.

**Additional Comments:**

It is not clear whether the UPA presently requires that in an action against a partnership at least one partner must be individually named in addition to the partnership. If that is the rule, it may be appropriate to add language to section 15 which would make clear that a partnership may be sued as an entity and there is no necessity to name or serve any individual partner. In cases of small claims where there are known to be significant partnership assets such a rule would simplify and reduce the cost of litigation. An alternative method of dealing with this problem would be to include the right to sue a partnership without naming or serving a partner in the proposed new section authorizing suits by or against a partnership in the partnership name.30

**Section 16. Partner by Estoppel**

(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act

30. See supra pp. 132–33, Additional Comments on Part I of the UPA following the Recommended Changes to § 5 supra.
or obligation of the person acting and the persons consenting to the representation.

**Recommendations for Changes:**

(a) The section appears to be mislabeled in the UPA. Section 16 does not create a "partner by estoppel" as the title of the section implies; it merely imposes liability on specific persons based upon an estoppel theory where an individual has permitted himself to appear to be a partner to that person. However, the person who has the liability does not thereby become a partner in the partnership with all of the rights and other liabilities of the other partners. If such were the case, the matter would actually be governed by section 6(1), containing the definition of a partnership, and section 7, which contains rules for determining the existence of a partnership. California corrected this problem by giving section 16 the title "Liability for Misrepresentation of a Person as a Partner."31

(b) Subsection (1)(b) of section 16 is particularly abstruse. At the very least the language should be simplified and clarified. The subsection intends to set up an order of creditor priority where A consents to being held out as B's partner but there is no partnership and everybody goes bankrupt. Prior to the new Bankruptcy Code, the partnership creditors had priority over individual partner creditors with respect to partnership assets. This rule resulted in some cases in a holding that creditors of A and B had priority over the "partnership" assets (presumably only B's assets) which placed them ahead of those creditors who did not know of, and therefore did not rely on, the holding out of A as B's partner. Subsection (1)(b) was intended to obviate this result and put all creditors of B (and A and B) on an equal footing regarding B's business assets. The new Bankruptcy Code has enacted that result by doing away with the "jingle rule." Thus, subsection 1(b) probably could be eliminated in a revised UPA.

**Section 17. Liability of Incoming Partner**

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.

**Recommendations for Changes:**

We recommend that section 17 be eliminated as a separate section since it is part of the subject matter covered in section 41, and in particular section 41(7). It should be noted that section 41(7) addresses both dissolved and reconstituted partnerships as well as those partnerships where a new member has been added without a dissolution.

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Additional Comments:
The Official Comment to the UPA explains the problems under prior case law that section 17 was designed to solve. Essentially the problems involved partnerships that technically were dissolved by the admission of a new partner where there was no winding up and liquidation but the business continued as if no dissolution had occurred. All of the partnership assets, on the basis of which prior creditors had extended credit, now belonged to a new partnership. Under rules established for priority of creditors, the creditors of a partnership had access to its assets first. Creditors of the partners, i.e., all of the old partnership’s creditors, then got their bite. This ranking produced an inequitable result which caused courts to find some reason to hold that the “new partnership” assumed all the liabilities of the old partnership. The result of this holding was that the new partner had unlimited liability for all of the old partnership’s obligations. Section 41 of the UPA enacted the holding of these liability assumption cases. Section 17 then was designed to prevent the inequitable result that the new partner had full liability for all the old debts. The net result was a logical scheme that most people would expect and find reasonable: (i) pre-existing and subsequent creditors get equal access to the business assets; (ii) creditors subsequent to the date of the new partner’s admission can also look to that partner’s personal estate if their share of the business assets is insufficient to satisfy all of their claims; and (iii) prior creditors do not get a windfall access to the new partner’s personal estate.

Part IV—Relations of Partners to One Another

Section 18. Rules Determining Rights and Duties of Partners

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.
Recommendations for Changes:

(a) This section (or alternatively the Official Comment) should be redrafted to make clear that it is concerned with three different types of relationships which should be dealt with separately: (i) the duties of the partners to each other, (ii) the duties of the partners to the partnership, and (iii) the duties of the partnership to the partners.

(b) Section 18(a) needs to be revised in several respects:

(i) A distinction needs to be made between a partner’s rights to profits and obligation to contribute to losses prior to dissolution and a partner’s right to the return of contributions and surplus and the obligation to contribute to losses at the time of liquidation. This might be accomplished either by drafting a new subsection dealing with a partner’s post-dissolution/liquidation rights or moving the language relating to post-dissolution/liquidation rights to part VI with appropriate cross-reference in section 18(a) or in the Official Comment to section 18.

(ii) The phrase “whether by way of capital or advances” should be eliminated. The term “contributions,” assuming it is adequately defined, will be more accurate and less confusing. However, the revision should make it clear that for repayment purposes (but not contribution purposes), services should not be counted as “contributions” in order to eliminate the possibility of double payment for any services. This proposed change would also eliminate a potential conflict with subsection (f).

(iii) The obligation of a general partner to make contributions to eliminate losses needs to be carefully structured so that it is clear the losses which trigger the contribution obligation are actual unpaid fixed obligations owed to creditors or actual cash losses and that non-cash losses such as those caused by depreciation deductions and accounting losses (e.g., asset write-downs, intangible drilling costs) are excluded. Cross-references between section 18(a), which deals with losses while the partnership is an

32. See § 101(2) of RULPA, which is one of the recommended additional definitions to § 2 of the UPA made by this report.

active going concern, and section 40(d), which deals with loss contributions at the time of liquidation, should be made.

(c) Section 18(b), dealing with indemnification, should be tightened by adding the qualifying term "reasonably" between "payments" and "made." This will create parallelism with the second part of subsection (b), which already allows indemnification for "personal liabilities reasonably incurred." Two other changes discussed but rejected were: (i) to require that an expense be ordinary and necessary as well as reasonable (using as an analogy section 162 of the Internal Revenue Code) and (ii) to eliminate the last phrase ("or for the preservation of its business or property") on the grounds that it is too broad and open-ended.

(d) Subsection (f) should be revised to authorize compensation for services by a partner pursuant to court order. Some cases have allowed such compensation in situations where one or more of the partners devote substantial time to the management of the partnership business and the remaining partners are inactive or have abandoned the business. In addition to being justified on equitable grounds, the authority to award compensation to the managing partners can affect the monetary rights and obligations of the partners while the business is ongoing and at the time of liquidation. The Committee considered the possibility of amending subsection (d) to allow interest on capital contributions by court order but decided against any change on the grounds that the present rule does not create the same degree of potential unfairness and unexpectedness as does the no compensation for services rule in subsection (f).

(e) Subsection (f) should also be amended to allow compensation for winding up services after a dissolution. As presently worded the subsection appears to allow post-dissolution compensation only when the dissolution is caused by the death of a partner. The present wording has been a particular problem in law firm partnerships.

(f) The difference between section 18(e), which says that "all partners have equal rights in the management and conduct of the partnership business," and section 18(h), which says that all differences as to ordinary matters will be decided by a majority of the partners, should be made clear in the Official Comment to section 18. Section 18(e) gives all general partners a right to participate in the management (i.e., every general partner is entitled to be employed actively by the partnership) but has nothing to do with voting or dispute resolution, issues that are dealt with in section 18(h). Section 18(e) can


be viewed as being the corollary of the principle that a partner is liable for all debts and obligations of the partnership.

(g) Subsection (h) would be greatly improved by deleting the phrase “in contravention of the agreement” and redrafting the subsection in terms of distinguishing between the ordinary course of business and not in the ordinary course of business of the partnership. The term “in contravention of the agreement” is not defined and has caused interpretive problems. 36 For a discussion of the term “business of the partnership” see the Recommendations for Changes to section 2.

(h) There should be a cross-reference in subsection (h) to existing section 9(3) so that it is clear that the items in existing section 9(3) as well as other proposed acts not in the ordinary course of business of the partnership require unanimous consent of the partners unless the partnership agreement otherwise provides.

Section 19. Partnership Books

The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

Recommendations for Changes:

(a) On the assumption that “partnership books” refers only to financial records, this section should be expanded to cover other records as well. The other records would include any documents required to be maintained by the revised statutes (e.g., the list of names and addresses of all the general partners required pursuant to the proposed section requiring a Statement of Partnership). The possibility of specifying a laundry list of books and records that must be maintained similar to section 105 of RULPA or section 16.01 of the 1984 Model Business Corporation Act was rejected on the grounds that: (i) Many general partnerships operate on a very informal basis and have inadequate accounting and other records, (ii) the Committee could not determine an appropriate penalty for failure to keep all the required books and records, and (iii) the procedural requirements and allocation of the burden of proof in accounting actions between partners provide adequate remedies in the event inadequate records are kept. 37

(b) Wording clearly stating that whatever books and records are maintained by a partnership must be maintained in perpetuity and cannot be destroyed without consent of all the partners should be added to this section.

(c) The last phrase dealing with the right of inspection and copying should be moved to section 20.


Section 20. Duty of Partners to Render Information

Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

Recommendations for Changes:

(a) The title should be changed to "Rights of Partners to Obtain Information."

(b) As per recommendation (c) to section 19, the right to inspect and to copy the partnership records should be in new subsection (a) of this section. The present provision, as amended (see (c) through (g)), would become subsection (b).

(c) The right to inspect and to copy should be subject to an "ordinary business hours" limitation. Making the inspection right subject to a "good faith and proper purpose" test as is the case in most corporate statutes was rejected by the Committee on the grounds that since a general partner is unlimitedly liable, he needs to have an unqualified right of access to the partnership books and records. Any abuse of the inspection and copying right would be a breach of fiduciary duty for which the other partners would have a remedy.

(d) The section should state that agents and attorneys of a partner will have the same rights of access to the partnership books and records as the partner.

(e) The section should specifically provide that former partners will have access to books and records pertaining to the time they were partners.

(f) A sentence stating that the partner requesting information should pay the expenses of producing and/or copying as per section 105 of RULPA and section 16.03(c) of the 1984 Model Business Corporation Act should also be included in new subsection (b).

(g) Subsection (b) should include the language in existing section 20 requiring partners to provide information about the partnership business; however, the "on demand" requirement should be replaced by the phrase "to the extent the circumstances render it just and reasonable," which is used in the Georgia Partnership Act and more accurately encompasses a partner's fiduciary duty of complete and continuous disclosure established by case law. Consideration should also be given to the possibility of combining the duty to render information into section 21, which deals more fully with the fiduciary obligations of a partner.

(h) Subsection (a) dealing with the right to inspect and to copy partnership books and records should be subject to statutory restrictions (e.g., a good faith and proper purpose standard or a provision restricting access to certain technical and confidential research data) by agreement among the partners; and a majority of the Committee believed that the duty to render information about the partnership business should also be subject to reasonable restrictions by agreement. The Committee did not feel that it would be appropriate to allow

38. See § 16.02(c) of the 1984 Model Business Corporation Act.
39. See Crane & Bromberg, supra note 8, § 67, at 388.
40. See ¶ (a) of the Recommendations for Changes to § 21.
the partners to agree to a complete elimination of any right of inspection and rendering of information. One member of the Committee felt that the duty to render information was so fundamental that it should not be subject to any restriction. It is unclear under existing sections 19 and 20 whether either right is subject to contrary agreement by the partners. 41

Section 21. Partner Accountable as a Fiduciary

(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

Recommendations for Changes:

(a) This section, which is often cited as establishing a broad fiduciary duty, in fact, as presently worded, is basically merely an anti-theft provision. The section should be revised to incorporate the full range of fiduciary duties developed by the cases (due care, good faith, loyalty, and full disclosure of all material facts). 42 In addition, the business judgment doctrine and rule should apply to action by partners on behalf of the partnership and this concept should be incorporated into the statute. This position is supported by existing case law. 43 Section 8.30 of the 1984 Model Business Corporation Act, which sets out the fiduciary duties of corporate directors, can be used as a model but needs to be modified to take into account the fact that a partner has the rights of both a corporate shareholder and a director but is entitled to act more out of self-interest than a director.

(b) The section should explicitly state that the partnership fiduciary duty has three dimensions: (i) a partner to the partnership, (ii) the partnership to the partners, and (iii) the partners inter se.

(c) The right to delegate management authority and the effect on potential liability of such delegation should be made explicit. 44


(d) The extent of the fiduciary duty of a particular partner should be able to be limited (or expanded) by agreement between the partners. This right is partially incorporated into existing section 21, which prohibits a partner from engaging in conflict of interest transactions “without the consent of the other partners.”

Section 22. Right to an Account

Any partner shall have the right to a formal account as to partnership affairs:

(a) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners,
(b) If the right exists under the terms of any agreement,
(c) As provided by section 21,
(d) Whenever other circumstances render it just and reasonable.

Recommendations for Changes:

This section should be retitled “Remedies” and should authorize a direct suit by a partner against the partnership and one partner against another partner for any cause of action arising out of the conduct of the partnership business. In addition to a formal account, the judge should specifically be authorized to grant any equitable or legal remedy he thinks is appropriate, including damages and attorneys’ fees. These changes will eliminate many of the case law procedural barriers to suits between partners that are filed independent of an accounting action.\(^\text{45}\) In addition, the proposed changes will increase the likelihood that a judge will be willing to grant relief other than dissolution and/or an accounting.\(^\text{46}\)

Additional Comments:

The Committee discussed the possibility of authorizing derivative actions and class actions by partners but concluded that the expanded direct action authority being recommended made a derivative action unnecessary and that class action authorization is a procedural issue that should be governed by the applicable civil procedure statutes and rules.

Section 23. Continuation of Partnership Beyond Fixed Term

(1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.

\(^{45}\) See Crane & Bromberg, supra note 8, §§ 69–72.

Recommendation for Changes:
Since this section deals with the continuation of a partnership, it more properly belongs in part VI, which should be retitled "Dissolution, Continuation and Winding Up." No substantive change is recommended.

Part V—Property Rights of a Partner

Section 24. Extent of Property Rights of a Partner
The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

Recommendations for Changes:
The Committee concluded that no changes to section 24 were necessary. However, the Committee concluded, as a general proposition, that the "entity theory" should be incorporated into the UPA wherever possible and that the "aggregate theory" should be retained only to the extent necessary, i.e., on account of federal income tax considerations. Because the entity theory is to be incorporated wherever possible, it is recommended that section 25, which deals with the nature of a partner's right in specific partnership property, and which follows from clause (1) of section 24, be changed substantially (see the recommendations for changes to section 25, below). If the recommendations for changes to section 25 are adopted, then consideration should be given to deleting clause (1) of section 24.

Section 25. Nature of a Partner's Right in Specific Partnership Property
(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal
representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

**Recommendations for Changes:**

Section 25 assumes that the partners have rights in specific partnership property, i.e., section 25 is a reflection of the "aggregate theory." However, in describing the nature of their rights in specific partnership property, section 25 reaches the result that would be reached if the "entity theory" were applied—that the partnership, as an entity, has virtually all of the rights, and the individual partners comprising the entity have virtually no rights, with respect to the partnership property. Since the Committee has concluded that the "entity theory" should be incorporated in the UPA wherever possible, it recommends that section 25 be revised to provide that a partner has no rights in specific partnership property, other than the right to use such property in the conduct of the partnership's business.

**Additional Comments:**

*Embezzlement by a Partner:* The general rule is that a partner cannot be guilty of embezzlement or larceny of partnership property, obtaining partnership property under false pretenses, or allied criminal fraud. The general rule is based on the view that: (i) for a person to be guilty of the offense of embezzlement or related offenses, it must be established that the property taken by the person was property "of another"; (ii) a partnership is not a separate entity, but merely an aggregate of individuals; (iii) therefore, partnership assets belong to all the partners, including the converting partner; and (iv) therefore, the converting partner has not taken property "of another" and cannot be guilty of embezzlement. The Committee believes that, as a policy matter, the fact that, conceptually, a partner is part owner of partnership property should be no defense to the charge of misappropriation of partnership property. In any event, if, as the Committee recommends, the UPA is revised to reflect the entity theory, then the conceptual basis for the general rule that a partner cannot be guilty of embezzlement of partnership property, i.e., that a partner is part owner of the partnership property and one cannot be guilty of embezzling his own property, will cease to exist. Whether or not the entity theory is adopted, the Committee recommends that the UPA be revised to the extent necessary to make it clear that a partner who misappropriates partnership property is guilty of embezzlement in the same manner and to the same extent that he would be guilty of embezzlement if he misappropriated the property of a corporation, or any other kind of entity, in which he had an ownership interest.

47. See Annotation, Embezzlement, Larceny, False Pretenses, or Allied Criminal Fraud by a Partner, 82 A.L.R.3d 822 (1978).
Section 26. Nature of Partner's Interest in the Partnership

A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

Recommendations for Changes:

It is recommended that a partner's interest in the partnership, which is defined in section 26 as "his share of the profits and surplus," be redefined in the way the term "partnership interest" is defined in section 101(10) of RULPA, i.e., A partner's interest in the partnership is his "share of the profits and losses" of the partnership and his "right to receive distributions of partnership assets," and the same is personal property. This change is recommended because the terms "profits" and "surplus" do not adequately encompass the full bundle of economic rights of a partner with respect to the partnership: (i) The right to "profits" does not necessarily include the right to receive a distribution that is made out of or on account of such profits; (ii) the rights to "profits" and "surplus" do not necessarily include the right to receive partnership distributions which do not derive from profits (and which, in fact, may be made at a time where there are losses, for accounting and/or federal income tax purposes) or "surplus" (and which, in fact, may be made at a time when, for accounting purposes, the partnership has a deficit); and (iii) neither term covers a partner's share of partnership losses.

Section 27. Assignment of Partner's Interest

(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

Recommendations for Changes:

(a) Subsection (1) should be changed as follows:

(i) Language should be added making it clear that partners may, by agreement, restrict the assignability of their partnership interests, i.e., that except as otherwise provided in the partnership agreement, a partner's interest in a partnership is assignable in whole or in part.

(ii) The use of the term "profits" in the last clause in subsection (1) is troublesome in two respects. First, "profits" is merely an accounting concept and the word "distributions" would be more accurate and comprehensive. Second, if the recommendation to replace section 26 with language similar to the language of section 101(10) of RULPA is adopted, an interest in a partnership
the assignment of which is covered by section 27 will be defined to mean a partner's share of the profits and losses of a partnership and his right to receive distributions of partnership assets. Accordingly, although in the absence of applicable provisions in the partnership agreement to the contrary an assignment should entitle the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled, the partners should have the right, in the partnership agreement, to permit the assignment of the entire bundle of rights that make up a partnership interest, i.e., the assignor partner's share of the profits and losses of the partnership and his right to receive distributions of partnership assets.

(iii) On the basis of (i) and (ii) above, it is suggested that subsection (1) be revised to read as follows:

Except as provided in the partnership agreement, (i) a partner's interest in a partnership is assignable, in whole or in part, (ii) an assignment of a partner's interest in a partnership does not dissolve the partnership or entitle the assignee to become, or to exercise any rights of, a partner, and (iii) an assignment of a partner's interest in a partnership entitles the assignee to receive, to the extent assigned, only the distributions to which the assigning partner would otherwise be entitled.

(b) The expression "his assignor's interest" in subsection (2) is ambiguous. It is recommended that subsection (2) be revised to read as follows:

Except as otherwise provided in the partnership agreement, in the case of a dissolution of the partnership, an assignee of a partner's interest in the partnership is entitled to receive, to the extent assigned, the distribution which the assigning partner would be entitled to receive upon the dissolution of the partnership, and may require an account from the date only of the last account agreed to by all the partners.

Section 28. Partner's Interest Subject to Charging Order

(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and may make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or
Recommendations for Changes:

(a) This section is unclear in several respects. Crane & Bromberg has an interesting discussion of the charging order device provided by section 28 and the ambiguities of that section, in which it is pointed out that:

(i) The charging order is a judicial proceeding leading to "a sort of lien" on the partnership interest and that, accordingly, payments—distributions of earnings or withdrawals of capital—which would otherwise be made to the debtor partner "should" be made to the creditor; however, the act "is not quite so explicit."

(ii) While the charging order is in effect, the debtor partner "presumably" continues to be a partner in all respects, except with respect to distributions by, and withdrawals from, the partnership.

(iii) The charging creditor is not the owner of the interest, but he may become the owner of the interest by foreclosing. However, "[t]he Act is vague about this, too, not explicitly authorizing foreclosure sale, much less setting standards for it, but only recognizing it obliquely. But there can be no doubt that the Act gives the court enough general power to cover foreclosure."

(iv) The Act's "general concern for the partnership as a going business and as a group of associates suggests that foreclosure should be decreed only if the charged interest is not likely to pay off the debt within a reasonable time."

(v) Although section 28(2) establishes a right of redemption, there is no express statutory procedure for determining the price at which the interest may be redeemed.

(vi) The courts have generally interpreted the charging order as the exclusive process whereby a partner's individual creditor may satisfy its claim out of the partner's partnership interest.

(vii) Although section 28 seems to provide that the charging order device is only available to a judgment creditor of a partner, a charging order has also been granted claimants who are not strictly judgment creditors, such as spouses seeking alimony or child support. 48

(b) It is recommended that section 28 be revised to the extent necessary to make it clear that:

(i) A charging order should not be limited to a judgment creditor, but should be available to any creditor who has the right, under local law, to satisfy his claim out of the assets of the debtor partner (or the debtor assignee of a partnership interest, as provided in paragraph (ii) below).

(ii) A charging order should be available against an assignee of a partnership interest as well as a partner.

48. Crane & Bromberg, supra note 8, at 246-49.
(iii) A charging order should be the exclusive means whereby an unsecured creditor of a partner (or an unsecured creditor of an assignee of a partnership interest) satisfies his claim against the debtor out of the debtor's partnership interest. In this regard, execution against a partnership interest should not be available. See paragraph (a) under Additional Comments, below.

(iv) Neither the entry of a charging order nor any proceeding pursuant thereto, e.g., a foreclosure sale of the charged partnership interest, should, in itself, cause the dissolution of the partnership or confer upon the creditor the status of, or the right to become, a partner (or confer upon the creditor right to cause any other person to become a partner) in respect of the charged partnership interest. See paragraphs (b) and (c) under Additional Comments, below.

(v) The status of the creditor (or any purchaser of the charged partnership interest at a foreclosure sale) with respect to the charged partnership interest should be similar to the status of an assignee. Accordingly, the creditor (or any purchaser of the charged partnership interest at a foreclosure sale) should only have the right to receive whatever distributions of money or other property that would otherwise be distributable to the debtor in respect of his partnership interest. See paragraph (b) under Additional Comments, below.

(vi) Although the creditor should have the right, pursuant to the charging order and under court supervision, to have a foreclosure sale of the charged partnership interest, as indicated in paragraphs (iv) and (v) above, the foreclosure sale should not, in and of itself, cause the dissolution of the partnership or result in the purchaser of the charged partnership interest becoming a partner, but should merely confer upon the purchaser a status similar to that of an assignee. 49

Additional Comments:

(a) A creditor who has a perfected security interest in a partnership interest would, of course, have the remedies with respect thereto that are provided under the UCC, including the right to have the partnership interest sold at a foreclosure sale. To some extent, the ambiguity that surrounds the nature and scope of, and the consequences of the use of, a charging order also surrounds the nature of the secured party's interest in, and the scope of his rights and the consequences of the exercise of his rights with respect to, a partnership interest. For example, the consequences to the partnership and the partners of a foreclosure sale of a partnership interest pursuant to the UCC, the existence and nature of any continuing relationship between the debtor and the partnership after the foreclosure sale, and the existence and nature of the rights acquired by the purchaser of the debtor's partnership interest at the foreclosure sale are all somewhat unclear. The Committee believes that as a policy matter: (i) the consequences to the partnership and the partners of a foreclosure sale of a partnership interest pursuant to the UCC should be the same as the consequences to the partnership and the partners of a foreclosure sale of a partnership interest pursuant to a charging order; (ii) the nature of the continuing.

49. See infra p. 159, paras. (b) and (c) under Additional Comments.
relationship between the debtor and the partnership after a foreclosure sale of a partnership interest pursuant to the UCC should be the same as it is after a foreclosure sale of a partnership interest pursuant to a charging order; and (iii) the nature of the rights acquired by the purchaser of the debtor's partnership interest at a foreclosure sale pursuant to the UCC should be the same as the nature of the rights acquired by a purchaser of a partnership interest at a foreclosure sale pursuant to a charging order. The question of whether this should be addressed by changes to the UPA should be discussed further.

(b) The principle that should be reflected in section 28 is that a creditor who obtains a charging order should not, by so doing, or by the taking of any action pursuant thereto, acquire (or confer upon any other person, e.g., a purchaser at a foreclosure sale pursuant to the charging order) any rights with respect to the debtor's partnership interest that are greater than the debtor's right to receive distributions of money or other property from the partnership. Notwithstanding the foregoing, if there is a partnership agreement, then the debtor partner's rights with respect to the partnership and his partnership interest will be defined, in large measure, by the terms of the partnership agreement. If, for example, the partnership agreement gives the debtor partner the right to freely assign his partnership interest, i.e., his share of partnership profits and losses and his right to receive distributions of partnership assets (and possibly also the right to have an assignee admitted to the partnership, as a partner, in respect of the debtor partner's partnership interest), then, presumably, a foreclosure sale of the debtor partner's partnership interest pursuant to a charging order (or, for that matter, pursuant to the exercise of the remedies of a secured party under the UCC) should result in the transfer of the entire bundle of rights comprising the partnership interest, and not merely the right to receive distributions. Similarly if the partnership agreement gives the debtor partner the right to have an assignee admitted to the partnership, as a partner, in respect of his partnership interest, then, presumably, a foreclosure sale of the partnership interest should result in the admission of the purchaser of the partnership interest at the foreclosure sale to the partnership, as a partner, in respect of the debtor partner's partnership interest.

(c) Note that section 32(2) of the UPA, although somewhat unclear, suggests that the draftsmen of the UPA did not intend to confer upon a court the power to decree a dissolution of the partnership on the application of a purchaser of a partnership interest at a foreclosure sale pursuant to a charging order, unless the partnership "was a partnership at will . . . when the charging order was issued."

(d) The Committee discussed the question of whether a spouse in a divorce action should have the right, enforceable by a charging order or otherwise, to acquire the other spouse's partnership interest and to become a partner in respect thereof.60 The Committee believes that, as a policy matter, a spouse

50. See Warren v. Warren, 12 Ark. App. 260, 675 S.W.2d 371 (1984), in which the court, in reversing the property settlement provisions of a divorce decree awarding the wife one half of her husband's interest in a partnership and the partnership assets, stated:
should not have the right to become a partner in respect of the other spouse's partnership interest, without the consent of the other partners; that, at most, the spouse should merely have the rights and status of an assignee. The Committee believes that this should be made clear, either by adding appropriate language to section 28 or by including a strong statement to this effect in the Comment to section 28.

Part VI—Dissolution and Winding Up

Under the UPA, the partnership relationship ends upon the completion of the three stages of (i) dissolution, (ii) winding up, and (iii) termination. Dissolution is a change in the relationship of the partners caused by any partner ceasing to be associated in the carrying on of the partnership's business. Following a dissolution, the parties may either liquidate the partnership assets and distribute the proceeds, or continue the business of the partnership.51 In the latter case, Professor Bromberg, one of the leading partnership authorities, is "inclined[d] to the view" that the old firm continues if the agreement so provides, as distinguished from a new partnership being formed.52 However, the effect of business continuation following dissolution is more commonly stated as follows:

While it is sometimes said that a partnership agreement may prevent dissolution of the firm by the death or dissociation of a member, the better view of the effect of such an agreement is that it simply sanctions the continuity of the business and the authority and liability of the surviving partners as members of a new legal entity.53

Bromberg states that the operative significance of dissolution is that it may require the business to be wound up and liquidated, but that result may be

We agree with appellant that the chancellor erred in awarding the appellee an undivided one-sixth interest in the partnership. However, the chancellor was correct in determining that the partnership was marital property subject to being divided equally between the parties.

...

The appellant contends the chancellor should have awarded the appellee a sum in cash equal to one-half of appellant's net interest in the partnership. We agree. Under the Uniform Partnership Act, a partner's rights in specific partnership assets are those of a tenant in partnership. ... In determining at divorce the rights of a husband or wife to a spouse's partnership interest, the court cannot make specific awards of partnership assets. The court must first determine the value of the spouse's interest in the partnership ..., and then award the husband or wife a monetary decree equal to one-half that amount, the same to be enforced if necessary by a charging order on the partnership interest.

675 S.W.2d at 372. See also § 18(g) of the UPA, which provides that, subject to any agreement among the partners, "No person can become a member of a partnership without the consent of all partners."

51. Bromberg, Partnership Dissolution—Causes, Consequences, and Cures, 43 Tex. L. Rev. 631, 647 (1965) ("Bromberg, Dissolution").
52. Id. at 647 & n.98.
avoided by a business continuation agreement. However, there are a number of other significant effects of dissolution which may not be avoided by a continuation agreement, including the following:

(i) If a business continuation agreement is deemed to result in the formation of a new partnership, a conveyance of assets from the old to the new partnership may be necessary.

(ii) The dissolution may result in the acceleration of a partnership's debts under a "due on sale" provision or the termination of other agreements, such as leases, licenses or franchises.

(iii) Coverage under an insurance policy may be terminated on the theory that the "new" partnership is not the insured under the policy.

Section 29. Dissolution Defined

The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

Recommendations for Changes:

(a) Revise the section in its entirety to read: "Dissolution is caused in accordance with sections 31 and 32."

Professor Bromberg has criticized the lack of coordination between the general definition of dissolution under section 29 and the specific causes of dissolution under sections 31 and 32. There may be dissolutions not covered by specific causes, e.g., retirement or withdrawal. On the other hand, there may be dissociations of partners which do not result in dissolution, e.g., death of a partner in those states which permit agreement to the contrary. Moreover, he points out, the definition confuses the causes and effects in that a partner expressing his will to dissolve is dissociating himself and causing a dissolution, but the dissociation results from the dissolution when it is caused by judicial decree under sections 32(1)(c) and (f) and 32(2), and perhaps by illegality or bankruptcy under sections 31(3) and 31(5).

He has suggested either eliminating the general definition or tying it more closely to the specific causes of dissolution. The Committee recommends this latter alternative.

Georgia revised section 29 to state the effect of dissolution, that is, the partners cease to be associated in the carrying on of the partnership and instead are associated in the winding up of the partnership.

54. Crane & Bromberg, supra note 8, at 419.
55. See infra p. 182, Additional Comments on Part VI.
58. Crane & Bromberg, supra note 8, at 417 n.5.
59. Bromberg, Dissolution, supra note 51, at 646 n.92.
Both the suggested change and the Georgia version are consistent with the intent reflected in the Official Comment to section 29, that is, to eliminate the confusion between “dissolution” and “termination,” rather than to add a cause of dissolution to those specified in sections 31 and 32.61

(b) Add a provision specifying that the partnership is not either dissolved or required to be wound up by reason of events specified in sections 31 and 32 if the partnership agreement contains a continuation agreement, or in the absence of a written continuation agreement, the remaining partners agree within ninety days of the event to continue the business of the partnership and to purchase the withdrawing partner’s interest.

The proposal would be the analogue of ULPA section 20 and RULPA section 801(3).

As noted in the Introduction to this part VI, while the requirement that a dissolved partnership be wound up may be avoided by a continuation agreement, other significant consequences of dissolution may not be avoided even by agreement of all partners.

According to Bromberg the concept of inevitable dissolution on a change in personnel was derived from the common law view of a partnership as a unique aggregate of individuals.62 He points out that the UPA departed from that view and recognizes the continuity of a partnership in circumstances in which the aggregate theory would not, such as an assignment of a partner’s interest. In addition, events which would automatically cause dissolution under a pure aggregate theory are merely grounds for a court to decree dissolution under the UPA.63

The Internal Revenue Service has approved the analogous provisions of ULPA and RULPA under the tax classification regulations,64 and the suggested provision should similarly be acceptable.

(c) Change the title of part VI to “Dissolution, Continuation and Winding Up.” This change will more accurately reflect the scope of sections 29 through 42.

**Section 30. Partnership not Terminated by Dissolution**

On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

**Recommendations for Changes:**

None.

This section further reflects the Official Comment to section 29 that dissolution and termination are the first and third stages of the process of concluding the partnership relationship, separated and connected by “winding up.” If the
partnership business is continued without liquidation, the formation of the new partnership constitutes the automatic winding up of its predecessor. 65

**Section 31. Causes of Dissolution**

Dissolution is caused:

1. Without violation of the agreement between the partners,
   a. By the termination of the definite term or particular undertaking specified in the agreement,
   b. By the express will of any partner when no definite term or particular undertaking is specified,
   c. By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,
   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;
2. In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;
3. By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;
4. By the death of any partner;
5. By the bankruptcy of any partner or the partnership;
6. By decree of court under section 32.

**Recommendations for Changes:**

(a) Add "withdrawal" to sections 31(1)(b) and (2). This addition is required by the recommended change to section 29 eliminating dissociation as a cause of dissolution. 66

(b)(i) Expand "death" in section 31(4) to include death of a partner who is not a natural person. Since a "person" who may be a partner is not restricted to natural persons, then it is necessary to extend the concept of death to the broader class of partners, such as a trustee, partnership, corporation, or executor, as in RULPA sections 402(7)–(10).

(b)(ii) If a general override provision is not added, then permit the partners to "provide otherwise," that is, to agree that death does not cause dissolution. Eight states have adopted that proposed change. 67

(c)(i) Delete section 31(5) (bankruptcy) as a cause of dissolution. Georgia deleted bankruptcy as a cause because no reason appeared why bankruptcy

67. See, e.g., Ga. Code Ann. § 14-8-31(a)(5); Ribstein, supra note 8, at 496; Crane & Bromberg, supra note 8, at 433.
should necessarily result in dissolution. The bankruptcy trustee is merely an assignee of the bankrupt partner’s interest in profits. The bankrupt partner, however, retains his voting and other management rights. Moreover, if bankruptcy resulted in an automatic dissolution so that the bankrupt partner could not bind the partnership, ignorant and innocent creditors dealing with the bankrupt partner would be left without a remedy.

Even if bankruptcy is not a cause under section 31, it could be a ground for judicial dissolution under section 32(1)(b), that is, a partner’s becoming incapable of performing his part of the partnership agreement.

RULPA section 402(5) reflects a contrary view, that is “unless the limited partners agree otherwise, they ought to have the power to rid themselves of a general partner who is in such financial straits that he is the subject of proceedings under the National Bankruptcy Code . . ..” If the recommendation to delete bankruptcy as a cause of dissolution is adopted, RULPA should be amended so that the two acts are consistent. The UPA and RULPA are now inconsistent on this issue. Under RULPA, the partners have the right to delete bankruptcy of a general partner as a cause of dissolution by written consent. No such opt out right exists under the current wording of the UPA.

(c)(ii) If bankruptcy is not deleted, the UPA needs to clarify whether “bankruptcy” in section 31(5) is limited to the filing of a petition by or against the partner or partnership for relief under chapter 7, or extends to the filing of a petition for relief under chapter 11. Professor Kennedy, a prominent bankruptcy authority, has expressed the view that section 31(5) does not extend to chapter 11. One case, however, has held to the contrary.

(c)(3) If bankruptcy is not deleted, then the partners should be permitted to agree that bankruptcy will not be a cause.

(d) Add “rescission” by a defrauded partner as a cause of dissolution. According to Bromberg, “dissolution necessarily results.” For that proposition, he relies on section 29 (which would not create the same result if modified as suggested) or the judicial causes, sections 32(1)(c) or (f).

(e) Add “In other circumstances as provided in the agreement between the partners.”

68. See Georgia Report, supra note 8, at 100.
69. Ribstein, supra note 8, at 500.
70. Crane & Bromberg, supra note 8, at 435 n.22.
71. Comment to RULPA § 402.
74. See Bromberg, Dissolution, supra note 51, at 646 n.93. See also English Partnership Act 1890, § 33(1).
75. Crane & Bromberg, supra note 8, at 487 & n.20.
(f) Add "Unless otherwise provided in the partnership agreement, dissolution is not caused solely by the admission of a new partner." Present law is unclear on this point. 77

**Discussed But No Changes Recommended:**

UPA section 31(1)(b) permits a partner to dissolve a partnership by express will when no definite term of undertaking is specified. While the language of section 31(1)(b) imposes no limit on the right of a partner to terminate at will, there is some support in California cases for an implied duty to exercise the power in good faith. 79 This implied limitation has, however, been criticized. 80

**Section 32. Dissolution by Decree of Court**

(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner’s interest under sections 28 or 29: 81

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

**Recommendations for Changes:**

(a) Replace “lunatic” in section 32(1)(A) with “incompetent to manage his person or his estate” as in RULPA section 402(6)(iii). The suggested change will modernize the terminology and conform with RULPA. Other states have substituted such terms as “mentally incompetent,” “adjudged mentally disabled,” and “mentally incapacitated.” The condition warranting dissolution should be “permanent,” rather than partial or temporary. 82

77. See id. § 14-8-31(b).
78. Bromberg, Dissolution, supra note 51, at 636–37; Ribstein, supra note 8, at 499 n.316.
81. So in original. Probably should read "sections 27 or 28."
82. Crane & Bromberg, supra note 8, at 437–38.
If a general override provision is not added, then permit the partners to “provide otherwise,” that is, to agree that incompetency does not cause dissolution.

It may be unfair to an incapacitated partner and a windfall to the other partners to permit them to force him out of a profitable venture when he has made his agreed upon capital contribution and has no significant obligation to render services.83 Arguably, the same injustice would not be mandated under section 32(1)(b) because there the ground for dissolution is the partner’s other incapacity to perform his part of the partnership contract. Presumably, the inactive partner who has made his capital contribution may have no further obligation to perform.

An alternative would be to combine sections 32(1)(a) and (b) by deleting subsection (a) and “other” from subsection (b).

(b) Amend sections 32(1)(c) and (d) to clarify that misconduct is a cause of dissolution by the innocent, not the party guilty of the misconduct.84 Sections 35(c) and (d) of the English Partnership Act 1890 expressly so provide.85

(c) Amend sections 32(c) and (d) to provide relief other than dissolution in squeeze out situations. See section 41 of the Model Close Corporation Supplement to the Revised Model Business Corporation Act, providing a list of types of relief available to grant the court broad discretion to fashion the most appropriate remedy.86 These remedies should be in addition to the right of a partner to withdraw from a partnership at any time, whether or not the withdrawal causes a dissolution.

(d) Delete section 32(1)(e) (“The business of the partnership can only be carried on at a loss”) as an independent ground of dissolution. Georgia followed that approach.87 It was deleted because of the concern that the section could result in dissolution contrary to the partners’ expectations in a start-up or tax shelter situation.88

The theory underlying section 32(1)(c) is that the purpose of a partnership is to make a profit and when it is determined that the business can be carried on only at a loss, then the purpose is impossible of attainment and dissolution is warranted.89

83. Id. at 437.
84. Id. at 439.
85. But see Stark v. Reingold, 18 N.J. 251, 113 A.2d 679, 685 (1955) (both partners violated the fiduciary duty owed to each other).
87. See Georgia Report, supra note 8, at 101.
89. Crane & Bromberg, supra note 8, at 441; N. Lindley, The Law of Partnership 706 (15th ed. 1984) (“Lindley”) (§ 35(e) of the English Partnership Act 1890 is the same as UPA § 32(1)(e)).
Poor performance of the business can justify dissolution under section 32(1)(f), that is, "other circumstances render a dissolution equitable."\textsuperscript{90}

(e) Add to the introductory phrase of section 32(2) "The Court shall decree a dissolution." This would correct an obvious inadvertent omission from the present text.\textsuperscript{91}

(f) Correct the cross-reference in section 32(2) to "sections 27 or 28" from "sections 28 or 29." This would correct an error in the original.\textsuperscript{92}

(g) Delete section 32(2), which authorizes the purchaser of a partner's interest to apply for judicial dissolution and specify in the Official Comment that the assignee is not entitled to compel dissolution. This would be an extension of the theory reflected in section 31(1)(c) that only partners control dissolution.

\textbf{Discussed But No Changes Recommended:}

(a) Replace section 32(1)(f) ("Other circumstances render a dissolution equitable") with "Whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement," which is RULPA section 802. Section 35(f) of the English Partnership Act 1890 includes language similar to present section 32(1)(f) and Lindley's interpretation of that section is comparable to RULPA section 802: "no longer reasonably practicable to attain the object with a view to which the partnership was entered into or to carry out the partnership contract according to its terms."\textsuperscript{93}

\textbf{Section 33. General Effect of Dissolution on Authority of Partner}

Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 34 so requires.

(2) With respect to persons not partners, as declared in section 35.

\textbf{Recommendations for Changes:}

(a) Revise to state affirmatively that after dissolution the authority of each partner to bind the partnership to third persons and to obtain contribution from co-partners continues so far as may be necessary to wind up partnership affairs and to complete transactions begun but unfinished at dissolution, but, except as provided in sections 34 or 35, otherwise terminates; and combine section 33(1) with section 34 and section 33(2) with section 35.

\textsuperscript{90} Georgia Report, \textit{supra} note 8, at 101.
\textsuperscript{92} See 6 U.L.A. at 394.
\textsuperscript{93} Lindley, \textit{supra} note 89, at 707.
Present section 33 awkwardly states the general rule in the obverse form, that is, that dissolution terminates all authority, with that general rule being preceded by exceptions for winding up and completing unfinished transactions and followed by references to exceptions in sections 34 and 35. The suggested statement of the general rule that actual authority continues is similar to section 38 of the English Partnership Act 1890. The 1985 amendment to Georgia Code section 14-8-33 reflects the second part of this recommendation.

(b) Extend post-dissolution authority to act on behalf of the dissolved partnership to include preservation of the partnership business or property as a going concern (compare section 18(1)(b)(ii)) as well as winding up and completing unfinished transactions. Bromberg has observed that “the liquidation right will be injurious to the business in many, perhaps in most cases,” resulting in the loss of going concern value.94

In the case of assets with respect to which there is no ready market, the actual authority of the partners should extend to conducting the business for a reasonable time after dissolution. For example, a business could be conducted in order to preserve its “going concern” value while seeking a customer for the entire business as distinguished from liquidating the individual assets. In addition, an illiquid asset, such as real estate, would not have to be sold at auction. The suggested power to act on behalf of the dissolved partnership is different from the right of partners to continue the business by agreement.

There is some authority for the proposition that the liquidating partner has the power to incur obligations necessary for the reasonable preservation of partnership assets or in procuring a favorable market for their disposition.95

The suggested change would give a statutory basis for certain actions of the partners sanctioned through a broad definition of “winding up” as reflected in certain cases.96

Section 34. Right of Partner to Contribution from Co-partners after Dissolution

Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

94. Bromberg, Dissolution, supra note 51, at 647.
95. See Annotation, Powers of Liquidating Partner with Respect to Incurring of Obligations, 60 A.L.R.2d 826, 847 (1958).
96. See Hurley v. Hurley, 91 A.2d 674 (Del. 1952) (2½ years to wind up retail building supply business to liquidate at a better price than would have been produced by an immediate liquidation); McGee v. Russell's Ex's, 150 Va. 155, 142 S.E. 524 (1928) (wagon manufacturing business with large stock of unassembled parts which could be marketed to best advantage only after assembled and manufactured into wagons).
Recommendations for Changes:

(a) Make the application of the section subject to contrary agreement of the partners. 97

(b) Modify so that in the case of dissolution by the act, death, or bankruptcy of a partner, the partner who did not act for the partnership in the transaction would be entitled to contribution despite the acting partner’s knowledge of the act causing dissolution or his knowledge or notice of death or bankruptcy. It is only the acting partner who should be denied contribution. 98

(c) Expressly provide that the right to contribution extends to all acts properly incident to winding up and completion of transactions as authorized by section 33, without regard to the cause of dissolution. This is certainly implicit in the existing UPA. 99

(d) Clarify the meaning of “act” when used in the sense of a cause of dissolution as being the express will or withdrawal of a partner.

(e) The section should be expanded to cover post-dissolution rights to dissolution by termination of the term or undertaking, illegality of the business and all of the judicial causes. Bromberg states that it is doubtful that the draftsmen intended to deny contribution rights in all those instances and that rights should be recognized by analogy to the cases which are covered. 100

Section 35. Power of Partner to Bind Partnership to Third Persons after Dissolution

(1) After dissolution a partner can bind the partnership except as provided in Paragraph (3).

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under Paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

98. Id.; Georgia Report, supra note 8, at 109; Ribstein, supra note 8, at 515, 521.
99. See Crane & Bromberg, supra note 8, at 468 & n.9 (exception in the case of wrongfully dissolving partner who is specifically denied authority to wind up).
100. Id. at 468.
Recommendations for Changes:

Modify sections 35(1)(b)(I) and 35(3)(c)(I) to limit the power of a partner to bind the partnership to third parties for post-dissolution debts to persons who were creditors at the time of dissolution or who had extended credit to the partnership within two years before dissolution, and who had no knowledge or notice of his want of authority.

UPA section 35 has been criticized as being unrealistic and burdensome in failing to prescribe a time limit on the obligation to give notice of dissolution.\textsuperscript{101}

Section 36. Effect of Dissolution on Partner's Existing Liability

(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

Recommendations for Changes:

(a) Change "knowing" in section 36(3) to "having knowledge." Bromberg notes that although section 36(3) refers to "knowing" while section 36(2) refers to "knowledge," the terms are presumably equivalent and governed by section 3(1), which defines "knowledge" to include not only actual knowledge of a fact, but also knowledge of such other facts as in the circumstances shows bad faith.¹⁰²

(b) Delete the "dual priorities" rule of section 36(4) for consistency with the Bankruptcy Code.¹⁰³

Section 37. Right to Wind Up

Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.

Recommendations for Changes:

(a) Authorize the surviving partners to purchase partnership assets in a court-supervised winding up. It is unclear that the surviving partners have that authority under the existing UPA.¹⁰⁴

(b) Authorize the remaining partners to elect within ninety days of dissolution to continue the business of the partnership and purchase the interest of the withdrawn partner for its fair market value on the date of dissolution. In the case of wrongful withdrawal, the price would be the value of the interest less damages. If the withdrawn partner or representative of the deceased or bankrupt partner and the remaining partners do not agree upon the purchase price, then the price should be determined by the court.

It has been argued that the UPA authorizes a surviving partner to purchase the interest of a deceased partner under court supervision and avoid liquidation.¹⁰⁵ However, that argument has been rejected by at least two courts.¹⁰⁶

¹⁰². Crane & Bromberg, supra note 8, at 453 n.28.
¹⁰³. See infra p. 177, supra note 8, at 491. But see Comment, Right of a Surviving Partner to Purchase a Deceased Partner's Interest Under the Uniform Partnership Act, 62 Mich. L. Rev. 106, 115 (1963) (contending that they do have such authority).
¹⁰⁴. See Comment, supra note 104, at 116.
The suggested procedure may be analogized to that for dissenters' rights under sections 13.28 through 13.31 of the Model Business Corporation Act. The court's equitable powers are available to remedy cases of fraud, overreaching, and similar misconduct. 107

Discussed But Not Recommended:
(a) Authorization for a surviving partner to purchase the interest of a deceased partner at appraised value with consent of personal representative of deceased and court as in section 59-81 of the General Statutes of North Carolina.
(b) Authorization for the surviving partners of partnership dissolved by death of a partner to elect to purchase the interest of the deceased partner upon court approval, as in section 1779.04 of the Ohio Revised Code and section 11.64.030 of the Washington Revised Code.

Section 38. Rights of Partners to Application of Partnership Property
(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36(2), he shall receive in cash only the net amount due him from the partnership.
(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:
(a) Each partner who has not caused dissolution wrongfully shall have,
I. All the rights specified in paragraph (1) of this section, and
II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.
(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2aII) of this section, and in like manner indemnify him against all present or future partnership liabilities.
(c) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2aII), of this section, 

II. If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

Recommendations for Changes:

(a) Clarify that “wrongful” dissolution in sections 38(1) and (2) includes dissolution resulting from wrongful conduct under sections 32(1)(c) and (d) as well as dissolution in contravention of the agreement under section 31(2).

The UPA refers to dissolution in contravention of the partnership agreement in section 38(1) and dissolution wrongfully caused in section 38(2). Under a literal reading of the existing UPA, “wrongful” would be limited to a dissolution in contravention of the agreement and not extend to dissolution resulting from wrongful conduct under sections 32(1)(c) and (d). However, there is no reason the concept of wrongful dissolution should be so limited.108

(b) Make the provisions in section 38(1) for the requirements for business continuation in the event of expulsion subject to the contrary agreement of the partners.109

(c) Expressly provide that the partners other than the expelled partner have the power to continue the business of the partnership and that the expelled partner does not have the power to compel liquidation. The power in the remaining partners is implied under the UPA.110

(d) Delete the requirement that the expelled partner must be paid in cash.111

(e) Add to section 38(1) the “holding harmless” of the expelled partner as an alternative to the existing requirement that he be "discharged" from partnership liabilities in order for the other partners to continue the business of the partnership. The UPA provides an expelled partner with greater protection as a condition to continuing the business than is provided to a wrongfully dissolving partner. An expelled partner must be given a “discharge” while a wrongfully dissolving partner need only be indemnified against the partnership liabilities.

108. See Crane & Bromberg, supra note 8, at 430; 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, 537-38 (1983) (“Hillman, Misconduct”); Hillman, Dissatisfied Participant, supra note 80, at 15, n.49. Georgia Code §§ 14-8-36(a) and -36(b) refer to “wrongfully either in contravention of the partnership agreement or as a result of other wrongful conduct of a partner.”


110. See Crane & Bromberg, supra note 8, at 475.

It has been suggested that the reason for providing the expelled partner with greater protection from liability is that some expulsions may not be due to serious misconduct and may occur, if the agreement so provides, without any cause. 112 Nevertheless, where a partner has been expelled pursuant to the agreement, the expelled partner should not be entitled to compel a liquidation of the partnership to discharge the partnership liabilities. 113

(f) If the suggestion to modify section 37 to allow the surviving partners to buy out the estate of a deceased partner is not adopted or if it is but the surviving partners do not exercise the right, then specify in section 38(1) that the legal representatives of a deceased or incompetent partner have the same rights as their predecessor in interest to compel liquidation. Since section 38(1) gives the liquidation right to “each partner,” and is silent as to the rights of the successor in interest of a partner, it is not clear that the successor in interest of a deceased or incompetent partner may compel liquidation. 114 Without that right, the estate would remain exposed under section 36 to the claims of pre-dissolution creditors, and under section 35 to the claims of post-dissolution creditors. Furthermore, the estate would not have the protection afforded to expelled and wrongfully withdrawing partners to be discharged or held harmless from those claims. 115 The right may be implicit in the UPA in that section 37 grants the estate the right to obtain winding up by a court and section 38(2) grants the partners the right to continue only in the case of wrongful dissolution. 116

(g) Make consistent the references throughout the section to the partnership “liabilities” against which the former partner is to be protected, and use the term “present and future partnership liabilities.” Section 38(1) refers to discharging an expelled partner from “all partnership liabilities.” Section 38(2)(b) refers to indemnifying the wrongfully dissolving partner against “all present or future partnership liabilities.” Section 38(c)(II) refers to the wrongfully dissolving partner being released from “all existing liabilities of the partnership.” There is no justification for these differences. 117

(h) Make the provision in section 38(2) for the requirements for business continuation in the event of wrongful discharge subject to the contrary agreement of the partners. 118

(i) Change the statement of amount to which an expelled partner is entitled under section 38(1) from “the net amount due him” to “the value of his interest in the partnership at dissolution.” The latter term is used in sections 38(2)(b) and (c)(II), and there is no reason for the terms to be different. Moreover,

114. See Bromberg, Dissolution, supra note 51, at 648 & n.106.
115. See Georgia Report, supra note 8, at 118.
118. See id. § 14-8-38(a).
Bromberg points out that there is no apparent reason for the present language in section 38(1) in view of the reference in section 42 to "the value of his interest at dissolution." He concludes that it is unlikely that a different measure was intended, particularly since section 42 applies to expulsion through its cross-reference to section 41(6).119

(j) Consider whether to change the present requirement in section 38(2)(b) that all non-wrongfully dissolving ("innocent") partners must agree to continue the business of the wrongfully dissolved partnership. The present section gives an "innocent" partner the ability to withdraw and compel a liquidation sooner than would otherwise be the case, solely because of the act of the wrongfully dissolving partner.120

(k) Delete the limitation in section 38(2)(b) on the duration of continuation to "the agreed term for the partnership."121

(l) Delete the requirement in section 38(2)(b) that the business be continued "in the same name." That requirement may cause problems for professional service partnerships under a state law which permits the inclusion of the names of current partners only.122

(m) In addition to the provision in section 38(2)(a)(II) allowing the innocent partners the right against the wrongful dissolver to damages for breach of the agreement, add a provision for damages against a wrongfully dissolving or expelled partner for breach of fiduciary duty or other liability in addition to a separate accounting action.

(n) Add to section 38(2)(a)(II) authority for the partners to provide in the partnership agreement for other rights or remedies, including the right to liquidated damages.123

(o) Change the requirement for "release" from liabilities in section 38(2)(c)(II) to "indemnify against" as in section 38(2)(b).124

(p) Delete the mandatory exclusion under section 38(2)(c)(II) of the value of the goodwill of the business in ascertaining the value of the partner's interest.125

Section 39. Rights Where Partnership Is Dissolved for Fraud or Misrepresentation

Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other rights, entitled,

119. Crane & Bromberg, supra note 8, at 476 n.54.
120. See Hillman, Misconduct, supra note 108, at 558 n.122.
122. Hillman, Misconduct, supra note 108, at 558 n.122.
124. See Hillman, Misconduct, supra note 108, at 556.
125. For an analysis of the arguments in favor of the present rule and the conclusion that the rule cannot be justified, see Hillman, Misconduct, supra note 108, at 552-55.
(a) To a lien on, or a right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

Recommendations for Changes:

(a) Replace “contract” in the introductory clause with “agreement.” The term “agreement” is used elsewhere in the UPA.126

(b) Clarify section 39(a) so that the defrauded partner is provided: (i) a lien on the surplus assets of the partnership with priority over the fraudulent partners; and (ii) a lien on the surplus assets with priority over the creditors of the fraudulent partners. There appears to be no reason why the defrauded partner should be entitled to priority over the other innocent partners. It has been suggested that section 39 was drawn with two-man partnerships in mind and may not work well when there are more partners, some of whom are innocent.127

Section 40. Rules for Distribution

In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:

I. The partnership property,

II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

I. Those owing to creditors other than partners,

II. Those owing to partners other than for capital and profits,

III. Those owing to partners in respect of capital,

IV. Those owing to partners in respect of profits.

(c) The assets shall be applied in order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18(a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

I. Those owing to separate creditors,
II. Those owing to partnership creditors,
III. Those owing to partners by way of contribution.

Recommendations for Changes:

(a) Substitute for "capital" and "profits" in section 40(b) the RULPA section 804(3) provision "first for the return of their contributions and secondly respecting their partnership interests, in the proportion in which the partners share in distributions" (emphasis added). It has been pointed out that since simple accounting normally closes the profit and loss accounts to capital accounts at the end of the year, there is a telescoping of the concepts of profit and capital. What would ordinarily be intended is that the partners first receive the previously unreturned amount contributed by each.

(b) Delete the "dual priority" or "jingle" rule of sections 40(h) and (i). The jingle rule has been repealed by the Bankruptcy Code, expressly as to chapter 7 partnership liquidation proceedings. While the application of the jingle rule to other bankruptcy proceedings has not been conclusively resolved, Professor Kennedy states that the result follows by compelling implication. While the UPA jingle rule may remain applicable to non-bankruptcy creditor proceedings, the UPA will be preempted in the more usual case by the Bankruptcy Code.

Georgia did retain the jingle rule of the UPA notwithstanding the change in federal bankruptcy law. The reasons advanced were (i) that the rule is supported by strong policy, and (ii) that Georgia's adoption of the rule would bring it into line with the partnership law of virtually every other state. Professor Kennedy has pointed out that the jingle rule was incorporated in section 40

128. See Crane & Bromberg, supra note 8, at 370.
131. See Georgia Report, supra note 8, at 124; Ribstein, supra note 8, at 516–17.
largely in deference to the provision for it in the Bankruptcy Act. The desirability of deferring to the federal bankruptcy rule continues, and the jingle rule should therefore be deleted from the UPA.

Section 41. Liability of Persons Continuing the Business in Certain Cases

(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38(2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

132. See Kennedy, supra note 130, at 56-57 & n.5.
(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

Recommendations for Changes:

(a) Clarify section 41(1) and delete the language of the Comment to paragraph (1) indicating that the admission of a new partner dissolves the partnership. This would be consistent with the suggested change to section 31.133

(b) Substitute "withdraws" for "retires" in its various forms in sections 41(1), (2), and (3). The suggested term is more consistent with modern usage.134

(c) Delete the reference in section 41(3) to the "consent of the retired partners or the representative of the deceased partner." The significant facts should be whether the business of the dissolved partnership is, in fact, continued by one or more of the original partners, not whether there was consent by the withdrawing partner or representative of the deceased partner.135

(d) Simplify and consolidate sections 41(1), (2), (3), (5), and (6) by having one subsection providing that when any partner withdraws, is expelled, or dies, and the business of the dissolved partnership is continued by one or more of the partners, either alone or with others, without liquidation of the partnership affairs, then creditors of the first or dissolved partnership are also creditors of the person or partnership continuing the business.136

Discussed But No Change Recommended:

Consolidation of sections 17 with 41(7), on the grounds that section 41(7) "merely reiterates the principle of section 17 ... which is that an incoming partner should be liable for the existing debts of the partnership, but that this liability should be limited to his right in partnership property." Section 41 Official Comment, subdivision (7). However, section 17 deals with an incoming partner of a partnership which has not been dissolved and section 41(7) deals with an incoming partner of a partnership continuing the business of the

135. Ribstein, supra note 8, at 523.
dissolved partnership. The Committee decided to maintain the separation unless a new section is added dealing with new partners in general.

Section 42. Rights of Retiring or Estate of Deceased Partner When the Business Is Continued

When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41(1, 2, 3, 5, 6), or section 38(2b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41(8) of this act.

Recommendations for Changes:

(a) Substitute “withdraws” for “retires.”

(b) Specify that “incapacity” is included within “withdraws” for purposes of section 42.

(c) Clarify that the availability of the election does not depend on consent of the withdrawn partner or representative of a deceased partner. The significant fact should be that the withdrawing partner allowed the business to continue or accepted the fact that it continued. One way to deal with this situation would be to delete the requirement for consent under section 41(3), as recommended. One commentator has suggested that merely eliminating the consent requirement for the application of section 42 creates another problem due to the reference to the status of the former partners as an “ordinary creditor.” The suggested solution was to revise section 42 to parallel section 39 of the English Partnership Act 1890.

(d) Specify that the “value of his interest” means the fair market value, not book value or some other accounting convention.

(e) Provide rightfully withdrawing partners and estates of deceased partners with the same protection from partnership liabilities as is provided expelled and wrongfully withdrawing partners under section 38. See section 14-8-42(1) of the Georgia Code.

137. See Crane & Bromberg, supra note 8, at 439 n.47.


139. See Note, Profit Rights and Creditors’ Priorities After a Partner’s Death or Retirement: Section 42 of the UPA, 63 Yale L.J. 709, 716 n.36 (1954).

140. See Ribstein, supra note 8, at 509.
(f) Clarify that the right to profits or interest runs from the date of dissolution to the date of payment, whether by cash, property or note.\(^{141}\)

(g) Clarify the meaning of "profits attributable to the use of his right in the property of the dissolved partnership." Among the alternatives are: (i) based on the pre-dissolution profit sharing ratios (this would be inconsistent with the theory for the option);\(^{142}\) (ii) based on the respective capital accounts of the partners; (iii) based on the fair market value of the interest in the partnership; or (iv) cost to the partnership to borrow amount equal to the value of the capital retained in the business (this would essentially be an "interest" option).\(^{143}\)

(h) Clarify that partners whose efforts produce profits on property are entitled to compensation.\(^{144}\)

(i) Specify the rate of interest referred to in the section. Under current law it is probably the "legal rate."\(^{145}\) That is also the result under the Georgia statute, which added a definition of "interest" in section 14-8-2(5). However, in view of the purpose of section 42, another alternative to consider is the definition of "interest" payable to dissenters under section 13.01(4) of the 1984 Model Business Corporation Act.

(j) Clarify that the option may be made only once and may not be for profits for part of the time and interest for balance.\(^{146}\)

**Discussed But No Change Recommended:**

(a) Repeal the profits-interest option. The principles justifying the option were recognized at common law.\(^{147}\) UPA section 42 resembles the option in English Partnership Act 1890 section 42, but the latter precludes the option to take profits where the surviving partners have and exercise an option to purchase the interest of the former partner.

(b) Provide a time limit within which the option must be made. Exercise is not now required before the final accounting discloses which is more favorable.\(^{148}\)

**Section 43. Accrual of Actions**

The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

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\(^{141}\) See Bromberg, *Dissolution*, supra note 51, at 656; Crane & Bromberg, *supra* note 8, 497.

\(^{142}\) See Crane & Bromberg, *supra* note 8, at 497.

\(^{143}\) See Annotation, *Rights in Profits Earned by a Partnership or Joint Adventure After Death or Dissolution*, 55 A.L.R.2d 1391 (1957); 80 A.L.R. 12 (1932).

\(^{144}\) Timmerman v. Timmerman, 272 Or. 613, 538 P.2d 1354 (1975) (partner entitled to proportion of profits based on relative fair value of interests in the partnership, with profits determined after compensation to the continuing partners for their services to the partnership after dissolution).

\(^{145}\) See Crane & Bromberg, *supra* note 8, at 496.

\(^{146}\) See id. at 497.

\(^{147}\) See Lindley, *supra* note 89, at 720-22; Crane & Bromberg, *supra* note 8, at 497.

\(^{148}\) Crane & Bromberg, *supra* note 8, at 497.
Recommendations for Changes:
(a) Add "assignee" of a partner to the list of persons entitled to an accounting upon dissolution. The addition is consistent with section 27(2), which gives an assignee the limited right to an accounting from the date of the last account agreed to by the partners, and with section 37, which gives the assignee the right to have a winding up by the court upon cause shown.149

(b) Clarify that section 43 precludes the statute of limitations from beginning before dissolution but does not preclude the right to an accounting before dissolution.150

Section 22 changed the common law general rule that an accounting was not available before dissolution by specifying certain circumstances in which an accounting action is available without requiring a partner to dissolve the partnership.151 While generally the statute of limitations begins to run from the date a cause of action accrues, there was no indication of an intent to subject the partners to being barred by failing to bring suit before dissolution.152

(c) Clarify when a cause of action accrues in circumstances not specified in section 43. The section does not specify when a cause of action by a surviving partner accrues against the estate of a deceased partner, and there is some authority that the statute will never begin to run in that situation.153

(d) Consider whether the statute of limitations should begin to run later than dissolution, e.g., "the cessation of dealings in which [the partners] are interested together."154 The winding up of a partnership might extend from dissolution for a period greater than the statute of limitations.

Additional Comments on Part VI:
Either add a new section in part VI (sections 29-43) dealing with the automatic transfer of property by operation of law when the partnership is continued, or include such a provision in a new section. A significant question arises out of the continuation of partnership business following a dissolution without liquidation as to the status of title to property. The Official Comment to existing section 41(1) states that "on any change of personnel the property of the dissolved partnership becomes the property of the partnership continuing the business." However, the UPA does not contain a provision transferring title from the dissolved to the successor partnership. Moreover, even if there is an agreement permitting continuation without liquidation which may be treated as

150. See Crane & Bromberg, supra note 8, at 413 n.95, 499 n.92.
151. UPA § 22, Official Comment.
152. For discussion of the circumstances in which the statute of limitations has been held to begin before and after dissolution, see Annotation, When Statute of Limitations Commences to Run on Right of Partnership Accounting, 44 A.L.R.4th 678 (1986).
153. Id. at 755.
assigning personal property, a transfer of real property generally requires a deed. 155

The Committee recommends a provision comparable to section 11.06(a)(2) of the 1984 Model Business Corporation Act, which vests title to property owned by the parties to a merger in the survivor. Virginia has dealt with the problem by providing that when a partnership is dissolved under certain specified sections or in accordance with any of the events set out in section 50-41(1) of the Virginia Code, and the remaining partners agree or have agreed to continue the business either alone or with others without liquidation of the partnership affairs, the title to any real estate or interest therein in the dissolved partnership is deemed transferred to and vested in such new partnership as may be created by the remaining partners without further act or deed. 156 The certificate of partnership for the new partnership may be admitted to record in any jurisdiction in which the dissolved partnership owned property in order to maintain continuity of title records. 157

Part VII—Miscellaneous Provisions

Section 44. When Act Takes Effect
This act shall take effect on the —— day of —— one thousand nine hundred and ——.

Section 45. Legislation Repealed
All acts or parts of acts inconsistent with this act are hereby repealed.

Recommendations for Changes:
The repealer should require a specific list of each act that is repealed by title and code section.

Provisions dealing with the application of the revised UPA to partnerships formed prior to the effective date of the revised UPA should be included. It is the consensus of the Committee that the revised UPA should apply to existing partnerships in the same manner and to the same extent that it applies to partnerships formed after the effective date of the revised UPA, except as indicated below.

Considerations Involving the Constitutional Prohibition Against Impairment of Contracts

(a) The revised UPA should include language to the effect that it does not apply, and the prior law continues to apply, to the extent that the application of the revised UPA to a partnership in existence on the effective date of the revised UPA would impair any contract existing, or adversely affect any rights that

157. Id. § 50-74(b).
accrued, prior to the effective date of the revised UPA. Suggested language to this effect is set forth above, under the Recommendations for Changes with respect to section 4 of the UPA.

(b) In addition, consideration should be given to (i) identifying those specific provisions of the UPA which create substantive rights that are changed by the revised UPA, and (ii) providing in the revised UPA that such provisions will continue to apply to partnerships in existence on the effective date of the revised UPA.

Practical Transition Problems

(a) If the revised UPA imposes filing requirements, then provisions should be included in the revised UPA that phase in the filing requirements with respect to existing partnerships. For example, if the revised UPA provides for central filing, the central filing requirements should not apply to existing partnerships immediately upon the effective date of the revised UPA. Instead, provisions should be included in the revised UPA allowing existing partnerships an appropriate period of time within which to comply with the filing requirement.

(b) If the revised UPA imposes other procedural requirements, e.g., a requirement for the appointment of an agent for service of process, these requirements should not apply to existing partnerships immediately upon the effective date of the revised UPA. Instead, an appropriate period of time should be allowed for existing partnerships to comply with such procedural requirements.

CONCLUSIONS

The Committee's basic conclusion is that the number, substantive importance, and pervasive nature of the changes needed to be made justify a complete substantive and stylistic revision of the UPA. The revision should focus on resolving the practical problems that have arisen under the existing statute, many of which are due to the dichotomy between the entity and the aggregate theories that divided the original drafting committee. If the revision lasts as long as the 1914 UPA, it will certainly be recognized as a highly successful undertaking.

The Partnership Committee and this subcommittee are willing and anxious to participate in the revision project in any capacity NCCUSL wishes.