II. August 1989 Partial Draft – Revised Uniform Partnership Act (RUPA)

A. Edited Transcript of the first reading of the August Partial Draft of RUPA by the National Conference of Commissioners on Uniform State Laws (NCCUSL) at its Meeting in Kauai, Hawaii on August 3, 1989. Topics addressed by the Commissioners and pages where the discussions are found are as follows:

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The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the National Conference of Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated final law.
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The National Conference of Commissioners on Uniform State Laws first took up the topic of a Uniform Law of partnership in 1902. Although early drafts had proceeded along the mercantile or "entity" theory of partnerships, later drafts were designed to move the law closer to the common law or "aggregate" theory. The Uniform Partnership Act ("UPA"), which embodies some aspects of each theory, was finally approved by the Conference in 1914. The UPA governs general partnerships, and also governs limited partnerships except where the statute governing limited partnerships is inconsistent. The UPA has been adopted in every state other than Louisiana and has been the subject of remarkably few amendments in those states over the past 75 years.

In 1984, Georgia enacted substantial revisions to its partnership statute. In January of 1986, an American Bar Association Subcommittee issued a detailed report that recommended an extensive number of revisions to the Uniform Partnership Act, many of them along the lines of the recent Georgia changes. See UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, Section of Business Law, American Bar Association, "Should the Uniform Partnership Act be Revised?," 43 Bus. Law 121 (1987) ("ABA Report") (page references to this report in the section Comments are to the report as it appears in the Business Lawyer). The ABA Report recommended that the entity theory "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," Id. at 124.

In the Fall of 1987, the Conference appointed a Drafting Committee to Revise the Uniform Partnership Act and named a Reporter. The committee held its initial meeting in January of 1988, although a severe snowstorm left a number of the committee unable to attend. Three subsequent full Drafting Committee meetings have been held, followed by meetings of four subcommittees held by conference call.

The Drafting Committee has recommended a Revised Uniform Partnership Act ("RUPA") that moves the law of partnership closer to an entity model. RUPA does not...
adopt, however, a "strict" entity approach. Although the entity approach is frequently adopted for the sake of simplicity, the aggregate approach is retained in other cases. The aggregate approach at times seems particularly well suited to the small partnership, and the Drafting Committee has determined that the primary focus of the statute should be the small partnership, including the inadvertent partnership, since larger partnerships generally have a partnership agreement addressing, and often modifying, many of the provisions of the partnership statute. That is, RUPA should be, in effect, a "default statute" and focus on those situations where the parties have not addressed their partnership relationship, or a part of that relationship, in a partnership agreement.

In preparing this draft of RUPA for a first reading by the Conference, the Drafting Committee spent the bulk of its time and energy considering the rules on partnership breakups. Under the UPA, the rules on breakups are couched in terms of "dissolution," which is defined in terms of any partner ceasing to be associated in the carrying on of the partnership business. The Drafting Committee believes that this aggregate term has led to considerable confusion and is incompatible with RUPA's move closer to an entity theory. Although RUPA eliminates the term "dissolution" and reorganizes the provisions on partnership breakups, much of the substance is unchanged. There are now three central provisions. The first section (Section 31) identifies those ways in which one can cease to be a partner. The second section (Section 31Y) describes those departures that result in a winding up of the partnership business. The third section (Section 32) provides that the partnership will buy out the interest of the departing partner if no event has caused the winding up of the partnership business.

In addition to the provisions adopting more of an entity model and the new provisions on partnership breakups, RUPA includes a new "statement of partnership" provision (Section 10X) and expanded provisions addressing the fiduciary duties and remedies of partners (Sections 21 and 22).

For simplicity purposes, since so many persons -- and in particular members of the Conference -- are familiar with the section numbers of the UPA itself, the Drafting Committee decided to keep the same section numbers in this "first reading" draft of RUPA as in the UPA itself, indicating where a particular section was deleted altogether, and using a number and a letter
(e.g., Sections 4X, 31X, 31Y, and 31Z) for new sections. A new numbering system will be used for the next draft (e.g., Sections 101, 201, etc.).

Finally, the Drafting Committee wishes to express its deep appreciation for the extraordinary time and effort that has been devoted to this project by its Reporter, Professor Donald J. Weidner of the Florida State University College of Law, by its American Bar Association Advisor, Professor Harry J. Haynsworth of the University of South Carolina Law School, by ABA Real Property, Probate and Trust Law Section Advisor, S. Stacy Eastland of Houston, Texas, and by four individuals who have been appointed as Official Advisors to the Drafting Committee: Joel S. Adelman of Detroit, Michigan, Professor Robert W. Hillman of the University of California at Davis Law School, Allan G. Donn of Norfolk, Virginia, and Professor Larry E. Ribstein of the George Mason University Law School. Each of these individuals has added immeasurably to the Drafting Committee's discussion of the various policy issues raised by the Act and to the wording of the draft itself.
PART I
PRELIMINARY PROVISIONS

SECTION 1. NAME OF ACT [ACT]. This act [Act] may be cited as the Revised Uniform Partnership Act.

SECTION 2. DEFINITION OF TERMS. As used in this act, "Court" includes every court and judge having jurisdiction in the case, [Act], unless the context otherwise requires:

(1) "bankrupt" means a person who is the subject of:

(a) the entry of an order for relief under the involuntary bankrupt provisions of the federal Bankruptcy Code or the filing for voluntary bankruptcy under the Bankruptcy Code; 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.

(2) "Business" "business" includes every trade, occupation, or profession.

(3) "Contribution" means any cash, property, services rendered, or a promissory note or other binding
obligation to contribute cash or property or to perform services, which a partner contributes to a partnership in his [or her] capacity as a partner.

(4) "conveyance" includes every assignment, lease, mortgage, deed, transfer, or encumbrance.

(5) "court" includes every court having jurisdiction in the case.

(6) "interest" means interest charged at the legal rate that applies if the rate is not named in the contract as provided in [the locally applicable statute] or any successor statute.

(7) "partner" means any person who has been admitted to a partnership in accordance with the partnership agreement or pursuant to Section 18(h).

(8) "partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of the partnership.

(9) "partnership business" or "business of the partnership" means the scope of business activity set forth in the partnership agreement or actually being conducted by the partnership.

(10) "Person" "person" includes individuals, partnerships, corporations, and other associations an individual or an organization.
"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

(11) "Real "real property" includes land all property, real, personal and mixed, tangible or intangible, and any interest or estate in land therein.

COMMENT

All numbering is new. New Sections 2(3), 2(7), and 2(8) are based on the Revised Uniform Limited Partnership Act (RULPA) §§ 101(2), 101(5), and 101(9).

New Sections 2(1) and 2(6) are based on the new Georgia act. The new Section 2(1)(a) differs from the Georgia version by eliminating the references in the Georgia act to specific sections of the bankruptcy act. The Georgia act provides:

(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;

The elimination of the citations was not intended to alter substance.

Section 2(1) must be considered at the same time as Section 31(5), which presently states that dissolution is caused by the bankruptcy of any partner or the partnership. The ABA Report suggests the new Section 2(1) definition of "bankruptcy" only if bankruptcy is no longer a cause of dissolution. If bankruptcy remains a cause for dissolution, the ABA Report suggests a more narrow definition of bankruptcy that refers only to a person who is a subject of an order under the liquidation provisions of the bankruptcy code or other equivalent statutes or codes.

Section 2(3) is based on RUPA § 101(2). It is not clear that contribution should be defined the same way
under RUPA. See the Comment to Section 18(a), which
discusses the different role that the concept
"contribution" plays under RULPA.

Section 2(9) reflects the Committee endorsement of
the ABA Report at 128 that the term "business of the
partnership" be defined.

New Section 2(10) is drawn from UCC § 1-201(30).
A subcommittee rejected a longer version based on RULPA
§ 101(11).

SECTION 3. INTERPRETATION OF KNOWLEDGE AND NOTICE.

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

(2) A person has "notice" of a fact within the
meaning of this act [Act] when the person who claims the
benefit of the notice he [or she]:

(a) States the fact to such person has actual
knowledge of it, 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 has received a notice or
notification of it, or

(c) has reason to know it exists from all the
facts known at the time in question.

The time and circumstances under which a notice or
notification may cease to be effective are not determined by this [Act].

(3) 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 the ordinary course whether or not the other person actually comes to know it. A person "receives" a notice or notification when:

(a) it comes to his [or her] 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 such person as the place for receipt of such communications.

(4) Notice, knowledge, or a notice or notification received by a partnership 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 that individual's attention if the partnership had exercised due diligence. A partnership 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 partnership to communicate information unless the
communication is part of the individual's regular duties or unless the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

COMMENT

The proposed new Section 3 implements the ABA Report suggestion that the Revised Uniform Partnership Act § 3 draw heavily from the definition and amplification of "knowledge" and "notice" in UCC §§ 1-201(25) to 1-201(27). Other than format, there is no significant change in wording of Section 3(3)(b).

Except for neutralizing gender-specific terms, subsection (4) retains the wording of UCC § 1-201(27). The only other change is that the term "organization" has been replaced with the word "partnership."

Section 12 concerns when notice to a partner is notice to the partnership.

SECTION 4. RULES OF CONSTRUCTION AND SUPPLEMENTAL PRINCIPLES OF LAW.

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

(2) The law of estoppel shall apply under this Act. Unless displaced by the particular provisions of this Act, the principles of law and equity, including 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) The law of agency shall apply under this Act.
\{(3)\} This act \{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 \{Act\} shall not be construed so as to impair the obligations of any contract existing when the act \{Act\} goes into effect, nor to affect any action or proceedings begun or right accrued before this act \{Act\} takes effect.

COMMENT

New Section 4 combines old Sections 4 and 5, as suggested by the ABA Report. The title is shorter than the new heading recommended by the ABA Report, which suggested "Rules of Construction; Supplementary General Principles of Law Applicable."

Section 4(1) is unchanged. A subcommittee has suggested consideration of the deletion of Section 4(1).

New Section 4(2) combines the principles of old Sections 4(2), 4(3), and 5. The language is drawn from the ABA Report at 131, which is in turn based on UCC § 1-103. The one difference is that reference to "the law merchant" is deleted.

Old Section 4(3) is deleted because its substance is now in expanded Section 4(2). Additional language suggested in the ABA Report at 131 appears in new Section 43X.

RUPA §§ 4(3) and 4(4) are present Sections 4(4) and 4(5).

SECTION 4X. EFFECT OF PARTNERSHIP AGREEMENT. The provisions of this \{Act\} govern the relations among the partners unless there is a partnership agreement to the contrary. The following provisions, however, may not be varied by agreement:
(1) the partners' duty of good faith to the partnership under Section 20X 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;

(2) the requirement to wind up the partnership business in the events specified in Sections 31Y(5), 31Y(6), and 31Y(9).

COMMENT

RUPA § 4X(1) states that "the partners' duty of good faith to the partnership under Section 20X 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."

RUPA § 4X(2) states that "the requirement to wind up the partnership business in the events specified in Sections 31Y(5), 31Y(6), and 31Y(9)" may not be varied by agreement.

Section 31Y(5) provides that the partnership shall be wound up pursuant to court order upon application by the purchaser of a partnership interest under Section 27 or Section 28 if the partnership is at will.

Section 31Y(6) provides that the partnership shall be wound upon an event that makes it unlawful for all or substantially all of the business to be continued.

A subcommittee decided to add a Section 4X reference to Section 31Y(9), which provides that a winding up is caused "upon the application by a partner, when a court decrees that the economic purpose of the partnership is likely to be unreasonably frustrated, or that it is not reasonably practicable to carry on the partnership business in conformity with the partnership agreement."

A subcommittee declined to add a reference in Section 4X to the Section 31(1) rule that any person
ceases to be a partner by giving notice of express will
to cease to be a partner. Should an agreement to remain
a partner for a fixed term be specifically enforced?

A subcommittee declined to add a Section 4X
reference to the Section 31(2)(ii)(B) rule that a person
ceases to be a partner upon expulsion pursuant to a
judicial determination that "he [or she] has willfully
or persistently committed a breach of the partnership
agreement or otherwise breached his [or her] duty to the
other partners or the partnership such that it is not
reasonably practicable to carry on the business in
partnership with him [or her]." See Ribstein, A
Statutory Approach to Partner Dissociation, 65 Wash.
U.L.Q. 357, 416 (1987), which suggests a statute under
which
dissociation is subject to contrary agreement except
with respect to expulsion of a wrongful partner
. . . . Also, the power to compel liquidation of the
partnership . . . is subject to contrary agreement
except as to the court's power to liquidate if the
partnership has become unlawful . . ., the business
cannot be carried on profitably . . ., or it is not
practicable to carry on the partnership because the
partners are deadlocked or because of partner
misconduct . . . .

SECTION 5. RULES FOR CASES NOT PROVIDED FOR IN THIS
ACT ACTIONS AND PROCEEDINGS IN THE NAME OF THE
PARTNERSHIP. In any case not provided for in this act
the rules of law and equity, including the law merchant,
shall govern.

(1) A partnership may sue and be sued in the
partnership name.

(2) Service of process on any partner or on any
managing or general agent, or on any other agent
authorized by appointment or by law to receive service
of process, constitutes service of process on the
partnership.

COMMENT

The rule in UPA § 5, that the rules of law and
equity shall govern cases not governed by the Act, is
moved to RUPA § 4(2). The reference to the law merchant
is deleted on the assumption that the law of the English
mercantile courts is not currently consulted in this
country.

Section 5(1) provides that "a partnership may sue
and be sued in the partnership name." This entity
approach is designed to simplify suits against a
partnership. The problem to be avoided is set out in
Richardson, Creditors' Rights and the Partnership, 40
Ky.L.J. 243, 255 (1951): "First, a partnership, in the
absence of an enabling statute, cannot sue or be sued in
the firm name, not being a legal entity. All the
partners should be joined in an action against the
partnership." The generally accepted styling of a case
for, or against, a partnership composed of A, B, C, and
D is "A, B, C & D, doing business as partners under the
firm name of A B & Co." The new language in Section 5
is based on the ABA Report, which states at 133 that it
"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."

RUPA § 5 is also intended to clarify that, in an
action against a partnership, it is not necessary to
name individually at least one partner in addition to
the partnership. This responds to the concern expressed
in the ABA Report at 144:

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.
New Section 5(2) implements the basic decision in Section 5(1). Language concerning the "managing or general agent" is borrowed from Federal Rule of Civil Procedure 4(d)(3), which provides that service shall be made:

Upon a ... partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Crane & Bromberg state, at 357: "There appears to be no reason why statutes could not provide for personal jurisdiction over all partners by service on one partner as fully as by service on an agent."

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. A joint venture is a partnership and is subject to the provisions of this [Act].

(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 This
[Act] shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

COMMENT

RUPA includes a number of steps that move partnership law more toward an entity approach. In general, an entity approach is adopted for its simplicity. RUPA does not, however, take an extreme entity position. If it did, Section 6(1) would provide that a partnership is "a legal person formed by an association of" two or more people. RUPA adopts a more pragmatic, issue-oriented approach in part to preserve the vitality of the aggregate approach for situations in which a court will find it useful. In general, those will be situations involving small partnerships, especially small partnerships for a particular purpose.

Section 6(1) is amended to expressly provide that a joint venture is a partnership and is subject to the provisions of this Act. The committee called for explicit inclusion at its initial meeting. This change makes the explicit state definition of partnership more like the explicit tax definition of partnership in Internal Revenue Code § 7701(a)(2):

Partnership and partner.--The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member is such a syndicate, group, pool, joint venture, or organization.

The ABA Report provides at 133: "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."

It is generally assumed that joint ventures are partnerships for particular purposes or limited terms. See W. Sell, Agency, 18 (1975): "A joint adventure is an association of two or more persons to carry out a single business transaction for profit, wherein each member acts for himself as principal and as agent for the other
members of the enterprise in the scope of the enterprise. It differs from a partnership only in that it usually relates only to a single transaction." There are, however, decisions that distinguish joint ventures from partnerships.

The great bulk of the decisions that make a distinction say simply that there is one but that it is irrelevant for present purposes. On the other hand, there does seem to be the possibility that at least some kinds of joint ventures will be found to be outside the Uniform Act. See, for example, Eastern Elec. Co. v. Taylor Woodrow Blitman Constr. Corp., 11 Mass. App. 192, 414 N.E.2d 1023, 1027 (1981):

We are of the opinion that the Uniform [Partnership] Act . . . should not be interpreted as having direct statutory and mandatory application to at least joint ventures which include corporate participants, in the absence of some explicit legislative extension of the act's coverage to such joint ventures . . . . Accordingly, we treat the uniform act as having relevance to joint ventures with corporate participants only by way of analogy and only when the use of the analogy in particular circumstances will achieve a just result.

This language was cited with approval in Infusaid Corp. v. Intermedics Infusaid, Inc., 739 F.2d 661, 662 (1st Cir. 1984), which involved a "joint venture" between two corporations. The court stated that there are "some minor distinctions between a partnership and a joint venture" and questioned whether the Uniform Act should even be applied by analogy:

We note that at least one commentary states that even when a joint venture is merely analogized to a partnership the UPA applies to the results of its wrongful dissolution, although we do not necessarily endorse this viewpoint. See Crane and Bromberg on Partnership § 35, at 192 (1968). In any case, we believe that this appeal presents "particular circumstances" such that application of the UPA will achieve a just result. This conclusion is based upon our inference that the parties intended for partnership law to govern their joint venture agreement.

said that "there was no real attempt by the Massachusetts courts to distinguish a partnership from a joint venture before the Eastern Electrical decision."

739 F.2d at 663.

The situation is summarized as follows by M. Eisenberg, *An Introduction to Agency and Partnership* 88 (1987):

Some authorities take the position that joint ventures are governed by partnership law. ** In contrast, other commentators argue that joint ventures are not merely a form of partnership, and not entirely subject to partnership rules. ** The same split is found in the cases. Some cases suggest that it makes no legal difference whether an enterprise is characterized as a partnership or a joint venture, while others suggest that special rules apply to joint ventures.

As a realistic matters, what seems to be involved is this: Certain rules of the Uniform Partnership Act, such as Section 18(a), produce unsatisfactory results in certain kinds of cases. Courts that want to avoid these results will sometimes do so, if they plausibly can, by holding that a "special rule" applies to joint ventures, and that the enterprise in the case at hand falls within the special rule. In many or most such cases, the desired result could probably be reached, without applying special rules to joint ventures, by finding that the parties had an implied agreement that overrides the relevant rule of the U.P.A.

Continuing controversy during a subcommittee meeting suggests that the full committee may want to revisit the express inclusion of joint ventures.

The committee at its initial meeting asked whether the first part of UPA § 6(2) could be deleted without adverse consequences. To do so appears to eliminate unnecessary language and at the same time give greater prominence to the rule that Uniform Act governs limited partnerships as well as general partnerships. The ABA Report also wanted this latter point emphasized, although it suggested a separate section entitled "Application of Act to Limited Partnerships."

The committee questioned the extent to which contingent payments cause lending or leasing arrangements to be classified as partnerships. There is considerable ambiguity but remarkably little law. As
indicated in the Comment to Section 7, the most
important factors will be profit sharing (as opposed to
a mere sharing of gross receipts) and control sharing
(control beyond that asserted in some other capacity,
for example, control beyond the veto power typically
exercised by a lender). Similar issues exist for tax
purposes. On the one hand, there is authority that
contingent arrangements can trigger a finding of
partnership. See Farley Realty Corp. v. Commissioner,
279 F.2d 701 (2d Cir. 1960). More recently, however,
the Internal Revenue Service has ruled that shared
appreciation mortgages do not give the residential
48. More research can be done on this point.

SECTION 7. RULES FOR DETERMINING THE EXISTENCE OF A
PARTNERSHIP. In determining whether a partnership
exists, these the rules shall in this section 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 (1) Mere passive co-ownership, whether
in the form of joint tenancy, tenancy in common, tenancy
by the entireties, joint property, common property, or
part ownership does not of itself establish a
partnership, whether even if such co-owners do or do not
share any profits made by the use of the property.
Shared control of an active business indicates
partnership.

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

(4) (3) 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 a
stronger indication of partnership than the receipt of a
share of gross receipts. A finding of partnership shall
not automatically follow from a finding of shared
profits if the profit share is more properly
categorized:

(a) As as a repayment of a debt by
installments or otherwise,

(b) As as a payment of wages of or other
compensation to an employee or rent to a landlord
independent contractor,

(c) As as rent to a landlord,

(d) As a payment of an annuity to a widow
surviving spouse or representative of a deceased
partner,

(e) As a payment of interest or other
charge on a loan, though the amount of payment vary with
the profits of the business, or

(f) As the as a payment of consideration
for the sale of a good-will of a business or other
property by installments or otherwise.
At its initial meeting the Drafting Committee suggested changes to Section 7 beyond those recommended in the ABA Report, which essentially suggested that Section 7(4) of the Uniform Act be replaced with Section 7(4) of the Georgia act.

Committee members wanted more guidance in the statute concerning when co-ownership would rise to the level of partnership. Two changes to Section 7(1) attempt to provide some guidance. First, new language excludes "mere passive co-ownership" that does not rise to the level of business activity. This language is drawn from that in Treas. Reg. § 1.761-1(a) (1972): "Mere co-ownership of property which is maintained, kept in repair, and rented or leased does not constitute a partnership." Second, new language provides that shared control of a business is the essence of partnership.

The factors of business activity and control sharing have sometimes been obscured under the term "co-ownership." See Weidner, The Existence of State and Tax Partnerships: A Primer, 11 Fla.St.L.Rev. 1 (1983):

If the requisite level of business activity is present, the question is whether it is being carried on by the parties "as co-owners." Co-ownership, also referred to as "community of interest," has been said to be the most important element of partnership and consists of several components: capital or property sharing; loss sharing; profit sharing and control sharing. Of these, profit sharing and control sharing are the most important. It has been noted that capital or property sharing is not necessary to partnership and it is clear that partners may agree among themselves whether and how to share losses. Profit sharing is at the essence of partnership and is prima facie evidence of partnership unless one of several special relationships is present. Profit sharing is also a relatively easily identifiable factor, much more so than control sharing.

The proposed changes give more guidance, but not a great deal more. Should other changes be considered?
Professor Lewis thought it essential that a partnership statute avoid an attempt to identify in every case whether a partnership exists. Is there an undesirable level of uncertainty in new Section 7?

Committee members also reacted with disfavor to the present language in Section 7(4) stating that a profits share in a business "is prima facie evidence . . . but no such inference shall be drawn," ect. It was felt to be inconsistent with present statements of the law of evidence. The offensive language is removed in the proposed new Section 7(3). Revised Section 7(3) does not attempt to answer whether a relationship is more properly characterized as a loan or wage rather than a partnership. Should the statute do more than what I read it to say: the more you share profits and control an active business the more likely you are to be held partners?

The Comment can contain a cross-reference to Section 16 for liability resulting from the holding out of a person as a partner.

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.

(a) Subject to Section 8(d), property is presumed to be partnership property if:

(1) it is included as such in the agreement of partnership or described in any recorded statement of partnership under Section 10X; or

(2) it is acquired in the partnership name.
(b) Subject to Section 8(d), property is presumed to be partnership property if it is purchased with partnership funds, even if it is acquired in the name of an individual partner or partners.

(c) Subject to Sections 8(a)(1) and 8(d), if property is acquired in the name of an individual partner or partners without use of partnership funds, it shall be presumed to be the separate property of that partner or those partners even if it has been used for partnership purposes.

(d) Property held of public record other 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 nonpartner who did not have actual knowledge to the contrary.

(e) Any estate or interest in real property may be acquired in the partnership name and title to any estate or interest so acquired shall vest in the partnership itself rather than in the partners individually. Title so acquired can to property may be conveyed only in the partnership name in accordance with Section 10.

(f) 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.
COMMENT

UPA § 8(1) presently provides: "All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property."

Describing original Section 8 as a "feeble attempt," Bromberg & Ribstein at 3:4 critique Section 8(1) as follows:

U.P.A. § 8(1) provides little guidance, because it depends critically on two vague terms. In the first place, it is not clear whether "stock" has the older meaning of all assets used in the business or is limited to the more modern meaning of inventory. Also, the property must be brought into the firm "on account of" the partnership. This may refer to ownership, in which case it is redundant. If it means that property used in the partnership business must be contributed to the partnership . . . , the phrase raises the same questions of intent that would exist without the statutory provision. A third possible meaning refers to the books of account, but requiring the property to be listed in the partnership books would do little for the many firms that lack adequate accounting systems.

New Section 8 draws heavily upon the Georgia statute. The ABA Report recommended the Georgia statute as a model for the new Section 8. The language has been somewhat simplified, but the basic structure and substance of the Georgia act are incorporated.

New Section 8(a)(2) provides that any property acquired in the partnership name shall be presumed to be partnership property. New Section 8(a)(1) also presumes that partnership property includes property described as partnership property in the partnership agreement or in a Statement of Partnership under new Section 10X.

Subsection (b) contains the general rule that property purchased with partnership funds is presumed to be partnership property. New Section 8(b) also provides that the presumption does not apply if property is held of record other than in the partnership name, if it is property the ownership of which is customarily recorded, to the prejudice of a nonpartner who did not have actual notice of partnership ownership. This qualification is spelled out in Section 8(d), which is incorporated into Section 8(b) by reference.
Subsection (c) presumes that property purchased in
the name of an individual partner without the use of
partnership funds is separate property. This rule is
expressly made subject to Sections 8(a)(1) and 8(d).
Section 8(a)(1) appears to operate as an exception that
applies if the property is nevertheless described as
partnership property in the partnership agreement or a
recorded Statement of Partnership. Section 8(d) seems
to reinforce the basic rule of subsection (c) by
providing that if record title is held in the name of a
nonpartner, there will be no finding of partnership
property to the prejudice of persons without knowledge
it was partnership property.

A subcommittee deleted the following subsection
(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 Section 8(c) 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.

New Section 8(e) is based on present Section 8(3)
but has been expanded to include personal property.
This change simply reflects settled law that personal
property may be held in the partnership name. The first
sentence of Section 8(e) has been amended to strengthen
the entity theory by providing that title vests in the
entity rather than in an aggregation of partners. The
second sentence has been amended to include a cross-
reference to Section 10, which governs partnership
transfers of property.

New Section 8(f) is identical to present Section
8(4).

See Ribstein, An Analysis of Georgia's New
Partnership Law, 36 Mercer L.Rev. 443, 481-82 (1985),
for an explanation of the new Georgia law:

New section [8] has been substantially changed
from the official version to add clarity and
predictability to the determination of partnership
property. New subsections [8(a)] through (c), which
are modeled on the Alabama version of . . . section
8, provide that, subject to subsection (d), property
is presumed to be partnership property if it is
included in the partnership agreement or statement of
partnership (subsection [8(a)(1)]), acquired in the
partnership name (subsection [8(a)(2)]), or purchased
with partnership funds (subsection [8(b)]). It is
presumed not to be partnership property if it was
purchased in an individual's name with individual
funds unless the property is described in the
partnership agreement or in a statement of
partnership (subsection [8(c)]). New subsection
[8(d)] . . . provides that property shall not be
deemed to be partnership property to the prejudice of
any nonpartner if the property is not held in the
partnership name and the property is a type the
ownership of which is customarily publicly recorded.
New subsection [8(d)] clarifies a point that was not
addressed in the Georgia cases by adding the
qualification that the third party is not protected
if he had knowledge contrary to the public record.

In general, under new section [8], partners and
third parties dealing with partnerships will be able
to rely on the written record to determine whether
property is owned by the partnership. The exception
to this concerns property that is not customarily
recorded and that was purchased with partnership
funds. The inference concerning the partners' intent
from use of partnership funds outweighs any inference
from the paperwork, and there is no overriding
reliance interest as there is in the case of real
property held in individual name. Although the
courts will be less able under new section [8] than
under either prior Georgia law or official section 8
to look to the particular facts of each case to
determine what property is owned by the partnership,
this loss of flexibility is more than compensated for
by the addition of greater clarity and
predictability. Under new section [8], the parties
to an informal partnership, who have not specified
the ownership of property, and third parties dealing
with the partnership are more likely to know their
rights and, therefore, to forgo wasteful litigation
in the event of a dispute than under prior Georgia
law or official section 8.

It is unclear whether there is a need for detailed
codification in this area. The Georgia statute is both
long and awkward. Is it, nevertheless, an improvement?
Is the loss of judicial flexibility "more than
compensated for by the addition of greater clarity and
predictability?" Bromberg and Ribstein state at 3:4
that "no statute can provide precise guidance in this
area without leading to unfair results in some cases."
Commenting on the Alabama and Georgia statutes, they say at 3:21: "strict application of the statutes may sometimes lead to results that are not wholly consistent with the partners' intent." Similarly: "The principal problem with the Georgia-Alabama approach in this respect is that such a rule, by placing a premium on advance planning, is inconsistent with the informal nature of general partnerships and may even discourage parties from entering into such relationships, for fear of unintended consequences." Id. at 3:22.

Whether a piece of property used in the partnership business has become partnership property is a question that also arises for federal income tax purposes. Tax law essentially leaves the matter to case law. See Long v. United States, 76-2 U.S.T.C. Pará. 9669 (W.D.Tex. 1976), in which a partner was found to have loaned an apartment complex to his partnership.

PART III
RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

SECTION 9. PARTNER AGENT OF PARTNERSHIP AS TO PARTNERSHIP BUSINESS. Subject to the statement of partnership provisions of Section 10X, the rules in this section apply to all partnerships.

(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 kind carried on by the partnership of which he [or she] is a member binds the partnership, unless the partner so acting has in fact no
authority to act for the partnership in the particular
matter, and the person with whom he [or she] is dealing
has knowledge of the fact that he [or she] has no such
authority.

(2) An act of a partner which is not apparently
for the carrying on of the business of the partnership
in the usual way does not bind the partnership unless
authorized by the other partners.

(3) Unless authorized by the other partners or
unless they have abandoned the business, one or more but
less than all the partners have no authority to:

(a) Assign file for bankruptcy of the
partnership, or assign the partnership property in trust
for the benefit of creditors or on the assignee's
promise to pay the debts of the partnership;

(b) Dispose of the goodwill of the business;

(c) Do any other act which would make it
impossible to carry on the ordinary business of a
partnership;

(b) change the name of the partnership;

(d) Confess a judgment that would
cumber all or substantially all of the assets of the
partnership;

(e) Submit a partnership claim or liability to
arbitration or reference.
(d) pledge all or substantially all of the assets of the partnership;

(e) sell all or substantially all of the assets of the partnership unless contemplated by the purpose of the partnership;

(f) merge the partnership with or enter the partnership into a joint venture with another person; or

(g) do any act which is not apparently for carrying on in the usual way the business of the kind carried on by the partnership.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

COMMENT

The added qualification at the beginning of Section 9 is necessary if a "Statement of Partnership" provision of the type proposed in Section 10X is adopted.

Section 9(1) reflects that power to bind the partnership to third parties exists by virtue of actual authority, apparent authority, or inherent agency power. Bromberg & Ribstein summarize Section 9(1) at 4:4:

If §9(1) went no further than providing that the partner is an agent of the partnership, it would be left to general agency law to determine the consequences of the partner's status. A principal is bound by the acts of an agent who has authority, apparent authority, or inherent agency power. Authority is based on the principal's manifestation of consent to the agent. The principal's manifestation of consent may be specific and express, or merely implied from the dealings between the principal and agent. Apparent authority exists when the principal manifests to third persons that a purported agent has authority to act for the principal. The manifestations of consent or
authority that support both actual and apparent 
authority may be based on the general powers or  
position the principal has conferred on the agent. 
Such powers or position may also be the basis of 
inherent agency power.

U.P.A. §9(1) not only declares that a partner is 
agent of the partnership but also states that, by 
virtue of partner status, a partner has the power to 
bind the firm by any act that is "for apparently 
carrying on in the usual way the business of the 
partnership of which he is a member," unless the 
third party knew of a restriction on that power. The 
effect of § 9(1) is to characterize a partner as a 
particular type of agent, at least in the absence of 
contrary evidence. A partner's actual or apparent 
authority, or inherent agency power, is equivalent in 
scope to the authority that can be implied from the 
position of a general managerial agent, as 
distinguished from one who engages in merely 
ministerial acts or acts only in connection with a 
particular phase of the business.

The ABA Report at 137 suggested that the phrase 
"in the usual way" be "deleted [from § 9(1)] as 
ambiguous." Crane & Bromberg addresses the point:

The business of similar partnerships is emphasized 
by the English Partnership Act, stating that 
authorized acts include "any act for carrying on in 
the usual way business of the kind carried on by the 
firm of which he is a member." Many American cases 
approve the inclusion of this class of evidence. The 
U.P.A. in using the phrase "for apparently carrying 
on in the usual way the business of the partnership 
of which he is a member," is ambiguous. "Usual way" 
can be interpreted as meaning usual for the 
particular partnership, or usual for similar 
partnerships. The draftsman of the Act, Dean Lewis, 
has correctly maintained that the former should be 
included. The latter may also be included under the 
usual rule of construction in accordance with the 
common law.

This draft adopts the English solution rather than that 
of the ABA Report: it specifies that reference can be 
had to business "of the kind" carried on by the 
partnership, and not merely to the carrying on of the 
business of the partnership in question. Any remaining 
ambiguity can be resolved by the appropriate Official 
Comment. It seems that the ambiguity would not end 
simply by deleting the phrase "in the usual way." The
basic question of apparent authority would remain: is
the focus on the business of the particular partnership
or similar partnerships? Moreover, brief investigation
indicates that the terms "usual" or "usual and ordinary
course of business" are used commonly in matters of
agency and corporate law. See 60 Am.Jur.2d on
Partnerships, § 162: "The authority for each transaction
may be implied from the nature of the business according
to the usual and ordinary course in which it is carried
on by those engaged in it in the locality where it
operates, but the scope may be broadened by the actual
conduct of the business as carried on with the
knowledge, actual or presumed, of the partners sought to
be charged." The Official Comment could embrace the
interpretation of Section 9(1) expressed in Burns v.
interpret Sec. 9(1), the act of a partner binds the
firm, absent an express limitation of authority known to
the party dealing with such partner, if such act is for
the purpose of 'apparently carrying on' the business of
the partnership in the way in which other firms engaged
in the same business in the locality usually transact
business, or in the way in which the particular
partnership usually transacts its business."

Present UPA § 9(2) is retained. An earlier draft
deleted Section 9(2), as recommended by the ABA Report
at 136:

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.

However, reviewing Section 9 without this language, a
subcommittee felt we had obscured the idea that partners
can be bound by actual authority even if there is not
apparent authority. See Bromberg & Ribstein at 4:47:

Even if a transaction is not "apparently . . . usual"
and therefore not within a partner's "partner
authority," the transaction may nevertheless bind the
partnership if it was authorized or ratified by the
partnership. Binding by authorized transactions is
explicitly provided for in U.P.A. §§9(2) and (3), and
ratification is provided for by the general law of
agency, made applicable to partnerships by U.P.A. §4(3). U.P.A. §9(2) and (3), by providing that an act that is not "apparently . . . usual" is not binding "unless authorized by the other partners" places the burden of proving authority in this situation on the third party.

With respect to new subsection (3), Crane & Bromberg at 296 suggests the dangers in a list of things that cannot be done without unanimous consent being given in advance:

The Uniform Partnership Act has departed from general statement of principle and gone into detail in enumerating certain acts which are generally held to be outside the implied power of a partner. It might better be subject to variation according to local usage or changing methods of doing business. What is within the ordinary course of business may vary with the time and place; the attempt to crystallize it is one of the defects of codification. The corresponding advantage is the constructive notice to the business community that certain extraordinary acts require unanimous authorization. A particular firm hindered by these rules can avoid them by express agreement, in the articles of partnership or elsewhere.

Nevertheless, this first draft retains a list and adopts the basic suggestion of the ABA Report that the list be revised to reflect modern business practice. It differs in several respects in execution. New Sections 9(3)(a), 9(3)(b), 9(3)(d), 9(3)(e), 9(3)(f), and 9(3)(g) conform to the suggestions in the ABA Report at 136. New Section 9(3)(g) differs from the ABA Report in that it reflects the English language of business "of the kind" carried on by the partnership. This is consistent with the change in Section 9(1) to incorporate that language.

Other changes are new. Old Section 9(3)(b) is eliminated on the ground that good will can be treated under more general provisions governing other assets and decisions, such as Section 9(3)(e). See Bromberg & Ribstein at § 4.03(c)(2):

[I]t is clear that U.P.A. § 9(3)(b) cannot be interpreted literally to render unenforceable all dispositions of goodwill, because this would quite generally affect even routine sales of assets used in the partnership. Interpreted consistently with the thrust of the other subsections of § 9(3), § 9(3)(b)
would refer only to dispositions, such as a sale of
the partnership name, that substantially affect the
revenue-production capability of the partnership.
Such a transaction is outside the scope business
[sic] even if it directly involves only tangible
assets, such as the partnership's place of business.
However, a sale of only a part of the goodwill of the
business, either directly or via a sale of tangible
assets, might bind the partnership, depending on the
circumstances. Under this approach, U.P.A. § 9(3)(b)
would blend with transactions in the next category.

This draft eliminates old Section 9(3)(c), which
required unanimous consent to do "any other act which
would make it impossible to carry on the ordinary
business of the partnership." See Bromberg & Ribstein
at § 4.03(c)(3):

Some situations may present a close question as to
whether the disputed act made it impossible to carry
on the ordinary business of the partnership. In the
first place, it is not clear whether this phrase
refers to the entire business or to any part of it.
Thus, disposition of a branch or a department of the
business would not necessarily prevent carrying on of
the remainder of the business in the ordinary way,
although the act may nevertheless be nonbinding under
U.P.A. § 9(3)(b), or under § 9(2) if the
circumstances warrant this classification.

It is also not clear whether the disputed act is
within § 9(3)(c) if the transaction disrupted the
ordinary business of the partnership but did not make
it "impossible" to carry on the business, as when the
act involved the dropping of a product line that the
partnership could later pick up again. The act is
more clearly within either this subsection or
§ 9(3)(b) . . . if it involves an agreement not to
engage in the line of business.

New Section 9(3)(c) states that there must be
unanimous consent to "confess a judgment that would
encumber all or substantially all of the assets of the
partnership." This changes present law, which requires
unanimous consent for any confession of judgment. The
change is an attempt to conform more closely to modern
business practice. A subcommittee suggested the full
committee take a second look at this provision. Should
it be narrowed further or eliminated entirely and be
left to more general provisions?
Old Section 9(3)(e), which required unanimous consent to submit "a partnership claim or liability to arbitration or reference," is eliminated because arbitration has become so common. See Bromberg & Ribstein at § 4.03(c)(5): "Because arbitration is now looked on with greater favor and is being used more frequently as a substitute for litigation, it is unfortunate that the old attitude was crystallized by adoption in the U.P.A."

This draft does not adopt the ABA Report inclusion of a pledge of partnership assets for money borrowed. That seems to cover too many transactions and be inconsistent with the spirit of new Section 9(3)(d). The ABA Report suggestion to include the relinquishment of a partnership opportunity seemed to cover too many small transactions and be too vague.

New Section 9(3)(g) requires unanimous consent to "do any act which is not apparently for carrying on in the usual way the business of the kind carried on by the partnership." A subcommittee has suggested that the Comment include a cross-reference to Section 18, which treats the rights of partners among themselves.

SECTION 10. CONVEYANCE OF REAL PROPERTY OF THE PARTNERSHIP.

(1) Where if title to real property is in the partnership name, any partner may convey title to such property it by a conveyance executed in the partnership name; but the partnership, however, may recover such the property unless if it proves that the partner's act binds did not bind the partnership under the provisions of paragraph (1) of section 9, or unless such the property has been conveyed by the grantee or a person claiming through such the grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his [or her]
authority. For purposes of this subsection, "knowledge" includes constructive notice pursuant to Section 10X.

(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 (2) If 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 the property, but the partnership, however, may recover such the property if it proves that the partners' act did not bind the partnership under the provisions of paragraph (1) of section Section 9, unless the purchaser or his assignee is a holder for value, without knowledge that the conveyance was unauthorized.

(4) Where (3) If 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 unless the partnership proves that the act was not one within the authority of the
partner under the provisions of paragraph (1) of section
Section 9.

(5) Where (4) If the title to real property is
in the names of all the partners, a conveyance executed
by all the partners passes all their rights the interest
in such property it.

COMMENT

Two broad changes suggested by the ABA Report at
138 have been incorporated into RUPA § 10:

(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. ** *

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

The first suggestion is implemented by the deletion of
the word "real" before the word "property," which is
defined in Section 2(11) to include both real and
personal property. The second sentence is implemented
by the Section 2(4) statement that "conveyance"
includes every assignment, lease, mortgage, deed,
transfer, or encumbrance."

RUPA §§ 10(1) and 10(3) incorporate the
recommendation of the ABA Report at 138 that the burden
of proving lack of authority be placed on the
partnership:

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 partner(s) had
authority. ** ** This allocation of burden becomes
all the more appropriate if the "Statement of
Partnership" concept . . . is adopted.

The language used is a simplified version of Georgia
§ 14-8-10. The burden was already on the partnership
under Section 10(2).
RUPA §§ 10(1), 10(2), and 10(3) are all amended to refer to any authority under Section 9, rather than merely to authority under Section 9(1):

It is not clear why §10(1) permits recovery with reference only to subsection (1) of U.P.A. § 9. Even a conveyance outside the scope of business should be binding if it was otherwise actually or apparently authorized, and the broader "authority" is used as to subsequent grantees. In any event, the general law of agency would apply through U.P.A. §4(3).

Bromberg & Ribstein at 4:58. This change implements the intent of a subcommittee that actual authority cannot be revoked by the provisions of Section 10.

RUPA § 10(1) ends with the statement: "For purposes of this subsection, 'knowledge' includes constructive notice pursuant to Section 10X." This sentence is part of the California Statement of Partnership provisions incorporated in this draft. Cal. Stat. § 15010(1). See Section 10X for the principal provision.

UPA § 10(2) has been deleted, in accordance with the recommendation in the ABA Report at 138:

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.

See also Bromberg & Ribstein at 4:58:

In this situation, the conveyance is clearly outside the chain of title and so should not pass legal title. U.P.A. §10(2) nevertheless provides that the conveyance is effective to pass "the equitable interest of the partnership" if the act was authorized under U.P.A. §9(1). ** ** ** In taking the "equitable interest of the partnership," the grantee would appear to have rights only against the partnership, not against grantees in the chain of title. However, because U.P.A. §10(2) does not define "equitable interest of the partnership," it does not completely preclude rights of the holder outside the chain of title against the holder in the chain of title. This at least slightly dilutes the effect of record title. Accordingly, it would be
better either to clarify that the holder in this
situation has no rights against those other than the
partnership, or to eliminate the subsection entirely,
as has been done in some states.

The authors note that deletion of this provision "does
not take away any rights the grantee outside the chain
of title may have against the partnership arising out of
an authorized conveyance."

One final change recommended by the ABA Report at
138 has not been incorporated in this draft:

(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 [that the
Certificate of Partnership be "an all-encompassing
notice to the world of its contents"] is adopted.

See Section 10X, the new Statement of Partnership
provision.

The Official Comment should contain a cross-
reference to new Section 8(f), which provides that any
interest in partnership property may be acquired in the
partnership name and that title so acquired shall vest
in the partnership as an entity.

SECTION 10X. RECORDING STATEMENT OF PARTNERSHIP.

(1) A statement of partnership, in the name of
the partnership, signed, acknowledged, and verified by
two or more of the partners, or such a statement signed
by two or more of the partners as individuals,
acknowledged and verified by each signing partner, may
be recorded in the office of the county recorder of any
county. Such recorded statement, or a copy thereof
certified by any recorder in whose office it or a copy
thereof so certified is recorded, may be recorded in any
other county or counties. The statement shall set forth
the name of the partnership and the name of each of the
partners, and shall state that the partners named are
all of the partners. If a partnership is not wound up
by the death or by the withdrawal of a partner, the
statement or amended statement may state the name and
date of death or withdrawal of such deceased or
withdrawing (whether voluntarily or involuntarily
according to the terms of the agreement) partner and
that the partnership will not be wound up by reason of
such death or withdrawal.

(2) It shall be conclusively presumed in favor of
any bona fide purchaser for value of the partnership
real property located in a county in which such
statement or such certified copy thereof has been
recorded, that the persons named as partners therein are
members of the partnership named and that they are all
of the members of the partnership, and that any partner
stated to be dead is deceased, and any partner stated to
have withdrawn has withdrawn therefrom, and that the
partnership was not wound up by reason of such death or
withdrawal, unless there is recorded by anyone claiming
to be a partner, or a personal representative, whether
executor, administrator, guardian, or conservator, of
such partner, a statement of partnership, verified and
acknowledged by the person executing it, which shall set
forth the name of the partnership, a statement that such
person claims to be a member of such partnership, or a
personal representative of such member, or a statement
that any of the persons named in a previously recorded
statement of partnership are not members of such
partnership.

COMMENT

RUPA § 10X is based on the California Statement of
Partnership provision, Cal. Stat. § 15010.5. This
language has not yet been reviewed by the Drafting
Committee. An earlier draft of Section 10X contained a
more lengthy Statement of Partnership provision based on
the Georgia statute. A subcommittee rejected the
Georgia provision as too lengthy and complex.

Section 10X(1) provides that a Statement of
Partnership can be recorded in the county. The
statement is to name all the partners. Section 10X(2)
provides that it shall be conclusively presumed in favor
of a bona fide purchaser for value of the partnership
real property located in the county that the persons
named as partners in the recorded statement are partners
and all of the partners. This is the type of basic
provision described in Bromberg & Ribstein at 4:65:

A few state versions of the U.P.A. have provided
for the filing by the partnership of a statement
setting forth information about the partnership. The
primary purpose of these statutes is to notify the
third party of the identity of the partners so that
the third party can obtain a conveyance joined by all
the partners. The statements are binding against
third parties only in connection with real property
transactions, in which it is reasonable to require
the third party to check the record at the same time
as checking title.

RUPA § 10X provides for a county filing, whereas the ABA
Report recommended a central filing.

The last sentence of Section 10X(1) differs from
the California provision, which refers to the situation
in which the partnership "is not dissolved" by the death
or withdrawal of a partner. California's version of UPA § 4(1) provides that dissolution is caused: "By the death of any partner unless otherwise provided in an agreement in writing signed by all the partners before such death or in a court order made pursuant to Section 9672 of the Probate Code." Under RUPA, the term dissolution is not used. Death or withdrawal cause the cessation of partner status but do not automatically result in a winding up of the partnership. The last sentence of Section 10X refers, then, to situations in which the partnership is not wound up after the death or withdrawal of a partner. Is this the best approach? Interestingly, California § 15010.6 contains a special provision for the filing of a statement of partnership after the death of a partner:

Where no statement of partnership as provided in Section 15010.5 has been recorded prior to the death of one or more of the partners, such statement may be signed, acknowledged and verified by two or more of the surviving partners, in the form and manner specified in said section; provided that if all of the partners except one are deceased, the statement may be signed, acknowledged and verified by the last survivor of the partners only; and provided further that such statement shall specify the date of creation of the partnership, which of the partners are deceased and the date of the death of each deceased partner.

Nothing in this section shall be construed to affect the provision of Section 15031 [causes of dissolution] of this code.

Should RUPA include such a provision?

Finally, the California statute provides that the statement may be used to put third parties on notice of restrictions on the authority of individual partners to convey interests in real property. Cal. Stat. § 15010.7 provides:

A statement of partnership, as authorized in Section 15010.5, may also contain restrictions upon the authority of individual partners to convey, encumber, or transfer interest in partnership real property, so long as it is otherwise valid under the law, and it is signed, acknowledged, and verified by all of the partners.

Such a statement, provided that it is signed, acknowledged, and verified by all of the partners
and so long as title to the real property
appears in the partnership name or otherwise
indicates ownership by the partnership, shall
constitute constructive notice of the contents of the
restrictions and shall be conclusive as to any real
property located in each county in which such a
statement, or certified copy thereof, is duly
recorded. Such a statement shall remain effective
until there is recorded, with respect to the same
partnership, a subsequent statement of partnership,
signed, acknowledged, and verified by all the
existing partners, as provided in Section 15010.5.

Should RUPA § 10X be expanded to provide constructive
notice of limitations on the authority of partners?

New Section 10X is not the mandatory provision
recommended by the ABA Report at 139:

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.

In addition, the ABA Report concluded at 140-41:

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.

A subcommittee also concluded that the Drafting Committee should consider a possible provision on partnership mergers when it considers the Statement of Partnership provision.

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.

COMMENT

This draft adopts the ABA Report recommendation that Section 11 be deleted. The ABA Report explains at 141 that "the states cover its subject matter in their respective rules of evidence and civil procedure."

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 [or her] 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.
"Knowledge" is now defined in new Section 3(1) and "notice" is now defined in Sections 3(2), 3(3), and 3(4). Should Section 12 contain a cross-reference to Section 3?

SECTION 13. PARTNERSHIP BOUND BY PARTNER'S WRONGFUL ACT ACTIONABLE CONDUCT. Where, by any wrongful act actionable conduct or omission of any partner acting in the ordinary course of the business of the partnership or with the actual or apparent authority of his [or her] 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.

COMMENT

The deletion of the language "to any person, not being a partner in the partnership," is intended to permit a partner to sue the partnership on a tort or other theory rather than be limited to seeking dissolution and an accounting. This is in accord with the ABA Report. See also Crane, Liability of Unincorporated Association for Tortious Injury to a Member, 16 Vand.L.Rev. 319, 324-25 (1963):

A partner who risks the safety of his person, or of his separate property, while participating in carrying on the partnership business should be as much entitled to protection as he is as regards his financial investment in the business. If he suffers harm while having some dealings or contact with the firm as a member of the public, he should be entitled to compensation as well. The Uniform Partnership Act should be amended by deleting from section 13 the phrase "not being a partner in the partnership."

The ABA Report also suggested that the term "wrongful act or omission" be broadened to cover no-fault torts. I invite other suggestions than "actionable conduct or omission."
The words "actual or apparent authority" were added in light of the deletion of Section 14, which specifically refers to the partner acting "within the scope of his apparent authority."

A subcommittee suggested deletion of the words "in the ordinary course of."

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.

COMMENT

This draft adopts the ABA Report recommendation that Section 14 be deleted. "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." ABA Report at 142. The one step of this draft beyond the ABA Report is to take the reference to "apparent authority" in Section 14(a) and include it in revised Section 13.

SECTION 15. NATURE OF PARTNER'S LIABILITY.

(1) A creditor has the right to proceed against one or more partners to satisfy a judgment based on a
partnership debt or obligation, but only after partnership assets have been exhausted.

(2) 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, except as otherwise provided by law. Any partner, however, may enter into a separate obligation to perform a partnership contract.

COMMENT

RUPA § 15(1) is an attempt to incorporate the following suggestion from the ABA Report at 143:

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.

The rule in RUPA § 15(1) is presently the law in some states, according to Crane & Bromberg at 342:

The generally prevailing common law rule is that the partnership creditor having obtained a judgment may at his option proceed against joint or separate property or both simultaneously in his efforts to collect by means of execution. In some states the judgment creditor is not permitted to proceed against separate property until he has exhausted his remedies against partnership property, or shown that such remedies are non-existent.

RUPA § 15(2) is based on Alabama § 10-8-52(2), which provides that all partners are liable "jointly and severally for all debts and obligations of the partnership, except as may be otherwise provided by
law." This language implements the ABA Report recommendation at 143 that Section 15 impose joint and several liability on partners for all partnership obligations:

About ten states . . . 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.

A subcommittee suggested that the Comment point out that there must be personal service on a partner to enforce a judgment against him.

One question that might be discussed is whether the partnership statute should in any way respond to "tort reform," which includes in some states eliminating the joint liability of tortfeasors and replacing it with liability limited to comparative fault. See Fla.Stat. § 768.81. See also, W. Prosser, J. Wade, and V. Schwartz, Cases and Materials on Torts 360 (8th ed. 1988):

All of this is being very hotly debated at the present time. A fully organized campaign has been vigorously pushing for statutory abolition of joint and several liability by the state legislatures, and it has attained considerable success.

Many of the statutes have categorically abolished joint and several liability, and substituted several liability. Some legislatures, however, have adopted compromise provisions. Thus, joint and several liability may be eliminated (1) only for noneconomic damages (e.g., pain and suffering, emotional
distress, etc.); or (2) for defendants whose percentage of fault is below a certain threshold, or (3) for certain types of defendants, such as municipal corporations. There are other variables.

For example, suppose it is argued that A and B have committed a tort together. They are in a state in which there is liability limited to comparative fault such that the risk of the insolvency of a co-tortfeasor falls on the plaintiff. A is 99 percent at fault and B is one percent at fault. Should B be liable for the entire obligation whenever A and B can be classified as partners? Does it bear on the decision to classify "joint venturers" as partners?

SECTION 16. PARTNER BY ESTOPPEL PERSONS WHO APPEAR AS PARTNERS.

(1) When a person any persons, by words spoken or written or by conduct, represents himself represent themselves, or consents consent to another representing him them to any one, as a partner partners in an existing partnership or with one or more persons not actual partners, he is such persons held out as partners are 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, if such representation or consented to its being has, either by the apparent partner or with the apparent partner's consent, been made in a public manner he is, the apparent partner may be 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 one who relies on the apparent partnership even though the apparent partner is not aware of being held out as a partner to the individual seeking recovery.

(a) When a partnership liability results, he the apparent partner is liable as though he the apparent partner 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 such apparent partner 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 the apparent partner were a partner in fact, with respect to persons who rely upon the representation. Where If 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 or obligation of the person acting and the persons consenting to the representation.

COMMENT

Section 16's new title more accurately reflects its substance. As the ABA Report puts it at 145:
"Section 16 does not create a 'partner by estoppel' as the title . . . 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 . . . . 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." The title "Persons Who Appear as Partners" seems to accurately describe the scope of the section. Another possibility is "Liability for Misrepresentation of a Person as a Partner," which is used in California. A shorter possibility is that of the English statute: "Persons liable by 'holding out.'"

Section 16(1) is divided into two sentences to make it easier to read. The modification to the second sentence is a gender-neutral version of the proposal made in Painter, Partnership by Estoppel, 16 Vand.L.Rev. 327, 338 (1963). Professor Painter criticized the present language as follows:

This awkward clause is apparently little more than an attempt to codify what may have been the law in America and what in England was the law by statute; namely that, if there is a holding out "in a public manner" either by the defendant or by another with the defendant's consent, then the defendant need not consent specifically to the particular form of holding out upon which the plaintiff has relied. Why this relatively simple concept required such complex terminology is an enigma. * * *

Aside from these niceties of draftsmanship, however, the result achieved seems correct for, if the defendant has consented to a public holding out, why should he complain if he is unaware of the manner in which the plaintiff acquired his knowledge of the apparent partnership?

The elimination of Section 16(1)(b) is based in part on the following recommendation of the ABA Report at 145:

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 [or her] admission as though he [or she] had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of the new partner's interest in the partnership property.

COMMENT

The ABA Report at 145-46 recommended that Section 17 be eliminated:

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.

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 the 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.

This draft hesitates to adopt the ABA Report for the following reasons. First, Section 17 is a nice clear answer to a basic and common question concerning the rights of a creditor toward a new partner. Second, this draft removes the redundant language from Section 41 rather than from Section 17. Under this draft, Section 41 assumes much less importance. Third, even if the redundancy were reinstated, it is tolerable. The Official Comment to the Uniform Act contains a cross-reference to Section 41 and the following explanation:

Both sections are based on the principle that where there has been one continuous business the fact that A has been admitted to the business, or C ceased to be connected with it, should not be allowed to cause, as at present, endless confusion as to the claims of the creditors on the property employed in the business; but that all creditors of the business, irrespective of the times when they became creditors and the exact combinations of persons then owning the business, should have equal rights in such property. The recognition of this principle solves one of the most perplexing problems of present partnership law.

6 ULA at 209. The section might be seen as setting out an entity theory as to partnership asset liability and an aggregate theory as to personal liability. More
direct recognition of an entity theory will narrow the need for the fictional "liability assumption" by the new partnership. The ABA Report suggestion that present Section 17 be eliminated entirely should be reconsidered in light of the revisions to Section 41 proposed in this draft. The final Comment should contain a cross-reference to Section 41 for further rules on the liability of persons continuing the business in certain cases.

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 an amount equal to the cash plus the value of any property contributed to the partnership property and

(b) Each partner shall share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied, and must contribute towards of the partnership. Each partner shall share in the losses, whether of capital or otherwise, sustained by of the partnership according to in accordance with his [or her] share in the profits.

(c) The partnership must indemnify every partner in respect of payments reasonably 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.

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

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

(e) (f) All partners have equal rights in the management and conduct of the partnership business.

(f) (g) No partner is entitled to remuneration for acting in services performed for the partnership business, except that a surviving partner, however, is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) (h) No person can become a member of a partnership without the consent of all the partners.

(h) (i) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners outside the ordinary course of partnership business and no amendment of the partnership agreement may be done
undertaken rightfully without the consent of all the partners. Section 18(i) does not limit the partnership's obligations to third parties under Section 9(2).

**COMMENT**

The first draft of RUPA § 18 did not treat both "Rights and Duties" of partners. It treated "Rights of Partners" but transferred "Duties of Partners" to a new Section 18A. There was some sense at our initial meeting that a separation of rights and duties sections might be helpful, although we did not specifically discuss Section 18. In a sense, every right is the flip side of a duty, but it was felt that the distinction can be useful, especially if the statute is to educate the public by clear statement. Upon separating the "rights" from the "duties" subsections of Section 18, it became clear that the present Section 18 contains far more on "rights" than on "duties." Section 18A became primarily a "switchboard" to other provisions. At its October 1988 meeting, the committee decided to eliminate Section 18A as a separate section.

The committee first decided that there is no need for language at the beginning of Section 18 concerning the role of the partnership agreement. Instead, it decided there should be a new section that provides that, with certain exceptions, provisions in the Act that govern the relations among partners are subject to contrary agreement. This new section, tentatively numbered "4X," lists the provisions of RUPA that cannot be varied by agreement.

New Section 18(a) considers the right of a partner to be repaid his or her contributions. Assume a two-person partnership consisting of Service and Property. Service contributes services agreed to be worth $100 and Property contributes a machine worth $100. No money is ever earned or distributed, and the machine depreciates in value to $20. On liquidation of the partnership, is Property owed not just the $20 but the $80 deficiency? If the partnership is presumed to be a 50/50 partnership, must Service pay Property $40? Under present law, the answer apparently is yes, and the Commissioners should consider whether they want this rule to continue. Does it not seem unfair that Service is unrecompensed his opportunity cost and must also
Contribute to absorb part of Property's loss? See Crane & Bromberg at 367-68:

For example, suppose A, B, and C have contributed respectively $10,000, $5,000 and $2,000 to the firm's capital of $17,000, and share profits equally. On dissolution, after paying debts there remains $5,000, reflecting a loss of $12,000. Sharing this loss equally means a debit to each of $4,000. A would receive $6,000, B would receive $10,000, and C would pay in $2,000 to meet the deficiency. This rule has been applied where one or more partners have contributed no capital, but only their services. Prior to the U.P.A. there was considerable authority to the contrary, based on the ground that the contributor of capital contributes its use merely, and it should not be presumed that the other partners intended not only to risk receiving nothing as compensation for services, but also to assume a duty of indemnifying another against capital losses. It may be answered that such a partnership, in which some partners contribute nothing to capital, is an unusual situation in a partnership where a substantial amount of capital is employed. In entering an association with unusual features, the associates should foresee that application of the usual rules may bring about unusual results, and take advantage of their power to vary by agreement the rules which in the absence of agreement are implied. It doubtless appears to be a hardship that the contributor of services and a relatively small amount of capital, or none at all, should be obligated to contribute toward the loss of the large contributor, who according to the agreement of association contributed no services. As a practical matter the obligation to contribute anything beyond the working partner's original investment, if any, is probably in most cases a nominal one. The partner who contributes little or no capital is generally without resources wherewith to share losses. He may be execution proof.

The committee decided at its October 1988 meeting that Section 18(a) should not be amended to include the term "contribution." Proposed Section 2(3) presently provides:

"Contribution" means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes to a partnership in his [or her] capacity as a partner.
The committee did not want to state that partners "shall be repaid" the value of the services they contribute to the partnership. To this extent, keeping services out of Section 18(a) is consistent with the basic rule of Section 18(g) that, absent agreement, no partner is entitled to compensation for services. The sense of the committee was that Section 18(a) concerns the distribution of partnership assets on liquidation and should be considered again in that context. See Section 40.

The preceding raises whether the proposed Section 2(3) definition of contribution is needed. The definition is based on RULPA, which gives the concept of contribution a much larger role than it has under UPA. RULPA has only recently been changed to provide that a limited partnership interest can be obtained for services, indeed, for a mere promise of services. More basically, whereas the UPA provides for equality as a default setting (as to management rights, profits, losses), RULPA provides unreturned contribution as the default setting. RULPA § 105 provides that, unless contained in the partnership agreement, each limited partnership must keep a written record of the agreed value of any property or services contributed to the partnership. RULPA § 503 provides that profits and losses are allocated "on the basis of the value, as stated in the partnership records . . . of the contributions made by each partner to the extent they have been received by the partnership and have not been returned." Similarly, RULPA § 504 provides that distributions "shall be made on the basis of the value . . . of the contributions made by each partner to the extent they have been received by the partnership and have not been returned." Return of contribution is defined in RULPA § 608(c):

(c) A partner receives a return of his [or her] contribution to the extent that a distribution to him [or her] reduces his [or her] share of the fair value of the net assets of the limited partnership below the value, as set forth in the partnership records required to be kept pursuant to section 105, of his contribution which has not been distributed to him [or her].

Interestingly, RULPA § 604 provides that the partner who withdraws is entitled to the "fair value" of his interest in the partnership, with no mention made of unreturned contribution:
§ 604. Distribution Upon Withdrawal

Except as provided in this Article, upon withdrawal any withdrawing partner is entitled to receive any distribution to which he [or she] is entitled under the partnership agreement and, if not otherwise provided in the agreement, he [or she] is entitled to receive, within a reasonable time after withdrawal, the fair value of his [or her] interest in the limited partnership as of the date of withdrawal based upon his [or her] right to share in distributions from the limited partnership.

On the other hand, RULPA § 804 provides that unreturned contribution is taken into account on "winding up" the partnership:

§ 804. Distribution of Assets

Upon the winding up of a limited partnership, the assets shall be distributed as follows:

1. to creditors . . . in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners . . . ;
2. except as provided in the partnership agreement, to partners and former partners in satisfaction for liabilities for distributions . . . ; and
3. except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in distributions.

Similarly, the committee felt that Section 18(a) does not come into play until winding up. See Section 40, establishing rules for liquidating distributions. Should Section 26, defining a partner's interest in the partnership, be amended to include a reference to the Section 18(a) right to be repaid one's contribution?

New Section 18(b) now provides that partners must "share" in losses rather than "contribute" to losses. The committee did not want the provision to create an obligation to contribute to losses prior to withdrawal or liquidation. See Bromberg & Ribstein at 6:14:

Pursuant to U.P.A. §18(a), subject to contrary agreement, losses are shared in the same proportion
as profits. Thus, if there is no agreement on profit and loss sharing, losses, like profits, are shared equally. U.P.A. § 18 refers to contribution toward losses. This is apparently a reference to contribution toward liabilities on dissolution pursuant to §40(d) . . . , since §40(d) cross-references §18(a). Thus, §18(a) does not require the partners to contribute toward the net losses (the excess of expenses over revenues during a given accounting period of a going firm. However, losses during a given accounting period are properly charged (debited) against partners' individual capital, drawing, or income accounts in their loss-sharing ratios . . . .

The committee suggested that the Comment to §18(c) specify that it applies in a liquidation context.

New Section 18(f), which states that all partners have equal rights in the management and conduct of the business, is present Section 18(e) without change. This section has been interpreted to mean that, absent contrary agreement, each partner has a continuing right to be informed about the partnership business. See M. Eisenberg, An Introduction to Agency and Partnership 42 (1987):

Since U.P.A. Section 18(h) provides that partnership action requires a majority vote, what is added by U.P.A. Section 18(e), which provides that all partners have equal rights in the management and conduct of the partnership business? Presumably, the effect of this Section is to require that, absent contrary agreement, every partner be provided on an ongoing basis with information concerning the partnership business, and be consulted in partnership decisions. * * * Thus a majority of partners who made decisions without consulting a minority partner would violate §18(e), absent contrary agreement.

Perhaps the Official Comment should contain at least a cross-reference to Section 20(b), which states more directly the duty of partners to provide each other with information.

New Section 18(g) continues the basic rule expressed in Crane & Bromberg at 375: "Without an agreement, a partner's services in carrying on the firm's business entitle him to no compensation other than his share of the profits. 'The reason is that the partner is but attending to his own affairs.'" Although
noting that an agreement that varies the basic rule may be either express or implied, Crane & Bromberg at 378 caution:

With monotonous regularity, partners in disputed dissolutions pad their demands with claims for compensation. While it is important that equity be done, the courts should insist on convincing evidence to overcome the no-compensation rule. Otherwise a basic principle is violated when a partner, by a dubious salary claim, is permitted double compensation (once in profits and once in salary) or insulation from loss (by offset of the salary claim). The frequency of this kind of litigation emphasizes the importance of explicit, written agreement on compensation.

At its October 1988 meeting, the committee deleted proposed language that would permit a court to award compensation "in other appropriate circumstances." The sense was that such a rule would be too much of an invitation to litigation. On the other hand, the deletion of the word "surviving" indicates that any partner winding up, and not merely a partner winding up after the death of another member, may be entitled to compensation.

Section 18(h) continues the present rule that no person can become a member of a partnership without the consent of all the partners.

The committee wanted commentary that Section 18(i) would not embrace a claim for an objection that was not discovered until after the fact. It did not want to support a cause of action based on "after the fact second guessing."

The committee declined to amend Section 18 to include provisions that expressly authorize different classes of partners.

SECTION 18X. DISTRIBUTIONS IN KIND.

(1) No partner has a right to receive a distribution in kind.

(2) No partner can be forced to take a disproportionate distribution in kind.
At its October 1988 meeting the committee expressed a desire for "a separate section" on distributions. Two rules the committee wanted could be incorporated as Sections 18X(1) and 18X(2). These two rules concerning "in kind" distributions echo those in RULPA § 605:

§ 605. Distribution in Kind

Except as provided in writing in the partnership agreement, a partner, regardless of the nature of his [or her] contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. Except as provided in writing in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him [or her] exceeds a percentage of that asset which is equal to the percentage in which he [or she] shares in distributions from the partnership.

The Drafting Committee will address this provision directly in the fall. A separate distributions section could also contain a norm for allocating distributions. Profits seem a better norm than unreturned contribution, the norm in RULPA § 504:

§ 504. Sharing of Distributions

Distributions of cash or other assets of a limited partnership shall be allocated among the partners and among classes of partners in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, distributions shall be made on the basis of the value, as stated in the partnership records required to be kept pursuant to Section 105, of the contributions made by each partner to the extent they have been received by the partnership and have not been returned. (emphasis added)

Profits seems more appropriate than unreturned contributions in part because UPA does not place the importance on the term "contributions" that RULPA does. See the Comment to Section 18(a). Nor has the committee expressed any desire to replace equality with contribution as the default setting.
Note that the committee has decided to retain but relocate the rule in UPA § 38(1) that a partner at will has the right to a liquidating distribution "in cash." This rule is now in new Section 31Z, which describes what happens when a winding up is caused.

SECTION 19. PARTNERSHIP BOOKS AND RECORDS. Each partnership shall keep complete and correct books and records of account. The partnership books and records 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.

COMMENT

The first line of RUPA § 19 was added to clarify that partnership law requires that books be kept. Crane & Bromberg at 383 fn. 13 points out that present law is "oblique" in its statement of the rule that requires that books be kept, "since the statement is primarily where they shall be kept, and only secondarily that they shall be kept." The new sentence states that the duty is a partnership duty. Crane & Bromberg states that "If a partner undertakes to keep books, it is his duty to do so accurately and adequately, according to his ability," (at 384) and that "If there is a managing partner, the duty to keep books falls on him" (at 385). The committee should consider whether the Comment should include language to this effect.

New Section 19 has been expanded to include "records" other than "books." This conforms to the recommendation of the ABA Report, which the committee endorsed at its initial meeting. The phrase "complete and correct books of account" comes from former Model Business Corporations Act. The problem with using more recent MBCA language is that it contains a "laundry list" of books and records. The committee at its initial meeting embraced the suggestion of the ABA Report that such a list is inappropriate because many partnerships operate on an informal basis, there is no clear penalty for failure to keep certain books and records, and accounting actions provide an adequate remedy in the event inadequate records are kept. The
committee was aware that a "laundry list" approach has been provided in RULPA § 105. A limited partnership does not come into existence unless a certificate has been filed, whereas the RUPA must continue to deal with inadvertent and completely informal partnerships.

The Comment might nonetheless include some discussion of the books and records that are required. For example, the partnership must maintain the books and records that are required to be kept by the Internal Revenue Code. More generally, the Comment might include a statement that the partnership must keep such books and records as are necessary to enable a partner to determine his share of the profits and losses of the partnership and his rights on withdrawal.

The committee at its initial meeting suggested that the right of partners to inspect and copy be moved to Section 20. This suggestion endorses the ABA Report recommendation to that effect. On the other hand, the committee rejected the ABA Report suggestion that the books and records must be kept "in perpetuity."

SECTION 20. DUTY RIGHTS OF PARTNERS TO RENDER OBTAIN INFORMATION.

(a) Partners, their agents, and attorneys shall have access to partnership books and records. Former partners shall have access to books and records pertaining to the time when they were partners. Subject to reasonable restrictions by agreement, partnership books and records may be inspected and copied during ordinary business hours. The partnership may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to a partner.

(b) Partners shall render on demand have the right, to the extent just and reasonable, to true and
full information of all things affecting the partnership to any partner or. This is also the right of the legal representative of any deceased partner or partner under legal disability. By agreement, partners can reasonably restrict the right to information about the partnership business.

COMMENT

The ABA Report suggested that Section 20 be stated as a "rights" section rather than a duty section, and the new title and statutory language adopt that suggestion.

New Section 20(a) adopts the suggestion of the ABA Report and the committee that the right to inspect and copy partnership books and records be moved from present Section 19 to Section 20.

The first substantive change from the present Section 19 is that new Section 20(a) no longer gives partners the right to inspect and copy "at all times." The new rule limiting inspection and copying to "ordinary business hours" is drawn from the ABA Report. What is the problem with the present right to inspect and copy "at all times?" New Section 20(a) makes it express that the agents and attorneys of partners may inspect and copy books and records. Former partners are also given the express right, although limited to books and records "pertaining to" the time when they were partners.

Section 20(a) does not limit the right to inspect and copy according to the purpose or motive of the copier. Section 16.02(c)(1) of the Revised MBCA, for example, provides that a shareholder may inspect and copy only if his demand "is made in good faith and for a proper purpose" and Section 16.02(c)(3) further provides only if the records "are directly connected with his purpose." The ABA Report at 150 stated 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." On the other hand, Section 20(a) permits restrictions to be included in the partnership agreement.
The rule in Section 20(a) that the partnership may impose a reasonable charge for documents is similar to the rule in RULPA § 105(b) that records "are subject to inspection and copying at the . . . expense of any partner during normal business hours."

The committee should consider the extent to which the assignee of a partnership interest gets the same right to inspect and copy as a partner. Section 27 covers the rights of assignees.

Turning to new Section 20(b), it should be read in light of present Section 18(e) (proposed new Section 18(f)), which provides that, absent agreement to the contrary, all partners have equal rights in the management and conduct of partnership business. The effect of Section 18(e) "is to require that, absent contrary agreement, every partner be provided on an ongoing basis with information concerning the partnership business, and be consulted in partnership decisions." M. Eisenberg, An Introduction to Agency and Partnership 42 (1987). Present Section 20 arguably limits the thrust of the Section 18(e) information right by suggesting that it be honored on "demand" rather than volunteered as appropriate. The ABA Report at 150 recommended that the "demand" requirement for information be eliminated and replaced with a "just and reasonable" limit, like that recently established in Georgia. The Official Comment should give some guidance on the extent to which information must be provided whether requested or not. To some extent, the new duty of loyalty provisions state more specific guidance on when there must be disclosure of information.

SECTION 21. PARTNER ACCOUNTABLE AS A FIDUCIARY.

(a) A partner must act in good faith and in a manner he [or she] believes to be in the best interests of the partnership and the other partners in his [or her] conduct in relation to the partnership. The general duty of good faith set forth in Section 21(a) may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the
performance of the obligation is to be measured if such
standards are not manifestly unreasonable.

(b) A partner must act solely on behalf of the
partnership in all matters connected with that partner's
position as a partner. Pursuant to this duty of loyalty
to the partnership, a partner:

(1) Every partner must account to the
partnership for any benefit, and hold as trustee for it
any profits derived by him [or her] 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 [or her] of its
property.~

(2) must not deal with the partnership as, or
on behalf of, an adverse party without disclosure to the
partnership of all material facts concerning the adverse
interest; and

(3) must not compete with the partnership.

(c) 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.

COMMENT

The American Law Institute Corporate Governance
Project notes the traditional separate statement of
duties of loyalty and care:

The accepted analysis of the duties of corporate
officers and directors differentiates between [the
duty of loyalty] and the duty of due care. * * * 

Both analytically and normatively the principle of loyalty precedes that of due care. Analytically, the principle of loyalty has primacy in that the duty of care entails the principle of loyalty. As stated in §4.01(a) of Tentative Draft No.4, the conduct of an officer or director conforms to the duty of care when it is "in good faith, in a manner he reasonably believes to be in the best interest of the corporation . . . ." Normatively, the principle of loyalty to the corporation specifies the direction in which the efforts are to be made that are regulated by the due care requirement. That is, the officers and directors are to direct their efforts in favor of the corporation's interest.

RUPA § 21 is an expanded duty of loyalty provision. RUPA contains no separate duty of care provision.

The Foreword to the American Law Institute Corporate Governance Project Report on Duty of Loyalty provides a useful perspective on the duty of loyalty:

The problem can arise as to where the interest of the corporation does lie in transactions where the corporation's interest and that of an officer or director may diverge. This is the problem addressed by the duty of loyalty. A classic example is the sale of property by an officer or director to the corporation. Considering only the fact that in such a transaction the corporation parts with something of value, it can be said that the corporation suffers a detriment, for by avoiding the transaction it would have parted with nothing. On this basis, any transaction with the corporation by an officer or director entails a risk that the officer or director will act in derogation of the corporation's interest. Such indeed was the dominating concern of the common law in the early stages of its development. In that earlier era, the duty of the officer or director was assimilated to that of a trustee, with the consequence that any transaction between an officer or director and the corporation was prima facie suspect.

But this approach did not take into account the entire structure of such transactions and the incentives they entail. An officer or director often may have something to exchange that would be advantageous for the corporation to have. An example is unique property, the ownership of which would facilitate the development of the corporation's
business. More obviously, all officers and directors who receive compensation are providing services that the corporation requires from someone at some price. If the duty of loyalty precluded such sales of goods or services by an officer or director, the corporation would be the loser and its interest would suffer. Hence, the law came to recognize that such transactions should be permitted if they were in a proper sense "fair."

Once this step is taken, and the law has long since taken it, then the ensuing task is to define the concept of "fairness." Like all concepts of "fairness," the duty of loyalty on the part of corporate officers and directors can be considered to have both procedural and substantive elements. That is, a transaction may be considered fair or not according to the procedure by which it is conducted, and also so considered according to its substantive terms. Familiar procedures aimed at assuring fairness to the corporations include disclosure to and approval by a disinterested decisionmaker. Various formulations are used to express gradations of the substantive criterion. Both procedural and substantive elements have been expressed in decisional law and in typical statutes, and both have been employed in this Draft. Thus, §§5.02 and 5.03 specify certain approval procedures, compliance with which has effects on the substantive standard to be applied in determining whether the transaction is inconsistent with the corporation's interest.


RUPA § 21(a) begins with the statement of a general duty of good faith: "A partner must act in good faith and in a manner he [or she] believes to be in the best interests of the partnership and the other partners in his [or her] conduct in relation to the partnership." The committee was strong in its belief that a general duty of good faith should be stated, even though it felt that good faith cannot be defined. A subcommittee felt that the duty should run not only to the partnership, but also to the other partners as individuals. Thus, the duty could be breached if three of four partners conspired to squeeze out the fourth.

The second sentence in RUPA § 21(a) provides that the general duty of good faith may be modified but not disclaimed: "The general duty of good faith set forth in
Section 21(a) may not be disclaimed by agreement but the
parties may be agreement determine the standards by
which the performance of the obligation is to be
measured if such standards are not manifestly
unreasonable." This language is taken from UCC § 1-
102(3) and inserted on instruction from a subcommittee.
It is also included in Section 4X(1).

The committee intended the specific duties in
Section 21(b) to be subject to contrary agreement by the
parties, unlike the general duty of good faith in
Section 21(a). The first sentence in Section 21(b)
provides: "A partner must act solely on behalf of the
partnership in all matters connected with that partner's
position as a partner." This is a general principle
drawn from Restatement, Second Agency § 387: "Unless
otherwise agreed, an agent is subject to a duty to his
principal to act solely for the benefit of the principal
in all matters connected with his agency."

Section 21(b) (1) is UPA § 21(1) and still serves
its original purpose to declare a usurped asset held by
a partner as held in trust. That is, the partnership's
claim is more than that of an ordinary creditor. See
the Official Comment to UPA § 21:

At present it is not clear whether the obligation to
account where the partner has money or other property
in his hands, is or is not an obligation in the
nature of a trust. For instance: A, B, and C are
partners; A, as a result of a transaction connected
with the conduct of the partnership, has in his
hands, so that they may be traced, a specific sum of
money or other property. A is insolvent. Is the
claim of the partnership against A a claim against
him as an ordinary creditor, or is it a claim to the
specific property or money in his hands? The words
"and hold as trustee for the partnership any profits"
indicate clearly that the partnership can claim as
their own any property or money that can be traced.

RUPA § 21(b)(2) provides that, pursuant to his
duty of loyalty to the partnership, a partner "must not
deal with the partnership as, or on behalf of, an
adverse party without disclosure to the partnership of
all material facts concerning the adverse interest."
This language is based on Restatement, Second Agency
§ 389, which provides: "Unless otherwise agreed, an
agent is subject to a duty not to deal with his
principal as an adverse party in a transaction connected
with his agency without the principal's knowledge."
This is stated to be an application of the general duty
to act solely on behalf of the principal. The Comment to this language explains:

The rule stated in this Section is not based upon the existence of harm to the principal in the particular case. It exists to prevent a conflict of opposing interests in the minds of agents whose duty it is to act solely for the benefit of their principals. The rule applies, therefore, even though the transaction between the principal and the agent is beneficial to the principal. Thus, in the absence of a known custom or an agreement, an agent employed to sell at the market price cannot, without disclosure to the principal, properly buy the goods on his own account, even though he pays a higher price for them than the principal could obtain elsewhere. * * *

RUPA § 21(b)(3) provides that, pursuant to his duty of loyalty to the partnership, a partner "must not compete with the partnership." This language is drawn from Restatement, Second Agency § 393, which provides: "Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." This is stated to be an application of the general duty to act solely on behalf of the principal. The Comment to § 393 provides, in part:

There is no violation of the agent's duty if the principal understands that the agent is to compete; a course of dealing between the parties may indicate that this is understood. Likewise, an agent can properly act freely on his own account in matters not within the field of his agency and in matters in which his interests are not antagonistic to those of the principal, except that he can not properly use confidential information.

Is Section 21(b)(3) too simplistic? Should we state that it is proper to compete upon withdrawal from the partnership? What of a withdrawal for the purpose of entering into competition? Should we define "compete?" In the Norquist case, the debtor-general partner rejected his partnership agreement as an executory contract to avoid a covenant not to compete.

RUPA § 21(c) provides: "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." This is UPA § 21(2), without change.
RUPA § 21 continues the term "fiduciary" in its title. There are those who feel that the term "fiduciary" is misleading when used to describe the duties of a partner because a partner by definition is someone in pursuit of his own self-interest and not a detached and disinterested trustee. See Hillman, Private Ordering within Partnerships, 41 U.Miami L.Rev. 425, 455 (1987):

One of the problems of evaluating the role of fiduciary standards is the marked absence of reasoning on this subject in case law. Too often, reported cases begin with a proclamation of the status of partners as fiduciaries, continue with rather colorful and exaggerated rhetoric intended to buttress this conclusion, and conclude with a finding that a partner has, or has not, fulfilled his responsibilities. What is missing is a refinement of the meaning of, and reason for, enforcement of an imposed code of conduct on partners, and, more importantly, an explicit recognition of limitations on the use of fiduciary standards to preclude all attempts at private advantage within partnerships.

One major problem of the duty of loyalty in partnerships can be examined by considering the "Rule Against Pursuit of Private Advantage," which Professor Hillman sets out in his piece on Private Ordering: "No partner may without the consent of all other partners secure gain, arising from his position as a partner, not shared with other partners." He states that the "Rule, which is suggested by some of the more extreme statements in opinions concerning fiduciary responsibilities, is offered only for the purposes of testing the limits of applying strict fiduciary standards to partners." His thesis is that "broad application of the Rule is unworkable, and the principle it enunciates controls only certain types of abusive conduct by partners." He then gives a series of three examples to take the rule from its easy application to the limits of application. The examples have been very useful to me and might be useful to the committee and perhaps in the Official Comment.

Assume Avaricious and Hapless have formed a partnership. They agreed only to divide profits equally. Because they did not agree to any fixed term, their partnership is terminable at will.

Example #1: Avaricious learns of an opportunity within the scope of the partnership's business. Without
telling Hapless, Avaricious pursues the opportunity alone and diverts a number of the partnership's customers to his new business. As a result, partnership income drops substantially.

Hillman concludes that Example #1 is a "simple 'misappropriation'" case that involves a clear breach of duty. Hapless "presumably has an incentive to seek recompense in the final partnership accounting."

At the other extreme is Example #2: Avaricious realizes that Hapless, through no fault of her own, is dispensable. At some point, Avaricious has a price at which he is willing to forego a squeeze out of B. Assume that Avaricious and Hapless negotiate, each pursuing self-interest, and agree that Avaricious may increase his interest in profits from 50% to 80%.

Hillman concludes that the Rule Against Pursuit of Private Advantage "will not be applied to this type of situation; fiduciary principles never have and never will preclude all attempts at private advantage by a partner. The threat of dissolution is indeed "adverse pressure," but it is the type of pressure that necessarily prompts bargaining and re-ordering within partnerships."

In between these two situations is Example #3: Upon realizing Hapless is excess baggage, Avaricious dissolves the partnership. After dissolution, the assets are liquidated and purchased by Avaricious. As in the corporate setting, asset liquidations do not always attract outside bidders. Prior to the liquidation, Avaricious "refrains from taking any actions designed to benefit himself at the expense of [Hapless]. Accordingly, [Hapless] cannot complain of [Avaricious'] lack of candor or, with the possible exception of the squeeze out and its consequences, compliance with fiduciary responsibilities."

Hillman calls this a "close question." Id. at 468:

Is this a misappropriation of partnership assets, and do fiduciary standards provide a check on the use of dissolution as a squeeze out technique? Opinions are both confused and split on the issue, although for the most part they provide more support than discouragement for the dissolving partner. In our scenario, one factor mitigating against finding a breach is the terminable at will nature of the partnership. [Hapless] could have bargained for a
fixed term, but she did not. [Hapless] therefore accepted from the outset that this type of development might occur. Stated another way, [Hapless] impliedly consented in advance to her ouster from the business. Such an inference of consent, of course, will come as a surprise to [Hapless], and extension of bargaining theory to this type of situation seems fanciful.

From [Hapless'] perspective, [Avaricious] hardly resembles a fiduciary who has acted with the "punctilio of honor most sensitive," the "utmost good faith," the "finest loyalty," or with collective rather than self-interests in mind. A quite different question, however, is whether [Avaricious] has acted rationally. The elimination of [Hapless] from the venture seems sensible and may result in economic efficiencies the law perhaps should encourage. But is this sufficient to satisfy [Avaricious'] fiduciary responsibility to [Hapless]? What should the answer be in this situation? No recovery by Hapless because the lost value seems clearly in the services of Avaricious? Is the rule nevertheless an improvement under present law because there is some clear statement of the basic principle? How much could the principle be clarified or qualified, either in its statement or in commentary? Hillman concludes at 471:

Rather than attempting to force partners to conform to a standard that is neither realistic nor desirable, emphasis should be placed on developing predictable and systematic standards to define unacceptable pursuit of private advantage within partnerships. Existing standards are impossible to define, arbitrary in application, ineffective in the achievement of their stated goals, and premature in their canonization of participants in partnerships.

Duty of Care

The committee considered the possibility of a separate provision on duty of care. It discussed and rejected the following provision.

Section 20A. A partner managing or conducting the affairs of the partnership has a duty to the partnership to act:

(1) in good faith;
(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner he [or she] reasonably believes to be in the best interests of the partnership.

The committee decided that a "prudent person" liability rule should not apply among the partners. "Reasonable care" was offered as a lesser standard and also rejected by the group. The group seemed to feel that a "gross negligence" standard was appropriate, but decided to avoid that term. The committee also declined to fashion a rule directly addressing the managing partner.

The committee was informed that there are statements in the law that partners owe one another a duty of care. Had the committee decided to state a duty of care, an integrated statement of loyalty and care could have been considered. See, for example, Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988):

The presiding justice set forth the following four specific fiduciary duties owed by the business associates to each other:

(1) To act with that degree of diligence, care and skill which ordinarily prudent persons would exercise under similar circumstances in like positions;

(2) To discharge the duties affecting their relationship in good faith with a view to furthering the interests of one another as to the matters within the scope of the relationship;

(3) To disclose and not withhold from one another relevant information affecting the status and affairs of the relationship;

(4) To not use their position, influence or knowledge respecting the affairs and organization that are subject to the relationship to gain any special privilege or advantage over the other person or persons involved in the relationship.

This delineation of fiduciary obligations reflects accurately the duties of care and loyalty owed under Maine law by a corporate director to the corporation and its shareholders, as well as the duties of a partner to the partnership and his fellow partners.
Rosenthal rejected the objection to the definition of
the scope of the partner's duties "as including
'furthering the interests of one another,' rather than
being restricted to furthering the interests of the
business enterprise." The general fiduciary standards
must be qualified by the business judgment rule. "Thus
the business judgment rule will insulate from a finding
of liability the informed business decisions made by"
the partners. "In the absence of a showing that
defendants acted primarily through bad faith or fraud,
the business judgment rule prevents a finding that
defendants violated their fiduciary obligations . . . ."
This last statement was made in the context of a case
involving an alleged squeeze-out and therefore does not
suggest that the business judgment rule insulates
partners from the basic due care standard when no
business judgment is involved.

The committee has not taken a position on the
application of the business judgment rule in the
partnership context. O'Neal and Thompson, 2 \textit{Oppression}
of Minority Shareholders § 10.04 (2d ed. 1986) (emphasis
added), state that the business judgment rule is less
appropriate in the context of the close corporation than
in the context of the publicly traded corporation. The
following comments seem applicable to partnerships:

The indiscriminate application of the business
judgment rule to sustain action of directors is also
subject to criticism. That rule seems to be grounded
on the following ideas: (1) shareholders have
selected the directors to manage the business, and
the courts are not justified in substituting their
judgment for that of managers selected by the owners
of the business; (2) directors' decisions are based
on complex business considerations and courts are
simply not qualified to make those decisions or to
pass on their propriety in the absence of a clear
abuse of discretion; and (3) a heavy burden should be
placed on complaining shareholders to discourage
"strike suits" and frivolous litigation.

These justifications for the business judgment
rule, however, do not apply in all their vigor to a
close corporation; courts may well consider
intervention to protect minority shareholders in a
close corporation against oppressive action by the
directors (unfair dividend policies, for example),
even though fraud, bad faith or, for that matter,
clear unreasonableness on the part of the directors
cannot be shown. Participants in a close corporation
do not usually think of themselves as delegating
management of their corporation to an independent board of directors; a board is often viewed only as a legal formality. Owners and managers, insofar as the participants look into the future, are to be the same. Minority shareholders often expect to share in management.

It hardly seems necessary in all cases to say, as the courts so often have said in effect, that when a person becomes a shareholder in a corporation, he assumes a status with all of its legally built-in liabilities, irrespective of his and his associates' intentions and expectations. Further, in a close corporation, where the business considerations on which directors' decisions are based are likely to be somewhat less intricate than in public-issue corporations and the directors making the decisions are likely to be somewhat less astute, there is less reason for judges to show an unquestioning deference to decisions of a directorate. Finally, the great practical danger of a too-ready judicial interference with public-issue corporations, the danger of encouraging "strike suits," is not present, at least not in the same degree.

Perhaps the courts' concern about usurping functions of the board of directors is misplaced for an additional reason in cases passing on the reasonableness of executives' compensation or, for that matter, on the legality of any corporate transaction in which the directors or controlling shareholders have a personal interest. Close corporations seldom have independent and disinterested directors making the decision on the size of salaries or in fixing the terms of corporate contracts in which majority shareholders are personally interested; the directors are almost always both shareholders and officers or they are closely controlled by majority shareholders.

* * *

In spite of the principles of majority rule and the business judgment rule, many courts in this country are moving steadily, though slowly and often clumsily and gropingly, to provide a remedy for oppressed minority shareholders. This they are doing principally by imposing a fiduciary duty on controlling shareholders and corporate directors for the benefit of minority interests, and by gradually expanding the scope of that fiduciary duty. Furthermore, some courts have made clear that they
will not apply the business judgment rule unless the directors not only have acted in good faith but also have exercised proper care, skill and diligence.

SECTION 22. RIGHT TO AN ACCOUNT REMEDIES OF PARTNERS. 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.

(1) Each partner shall have the right to judicial relief:

(a) to enforce any of the rights of partners specified in Section 18;

(b) to enforce the right to the fair market value of his [or her] interest in the partnership as provided in Section 32(a);

(c) to compel a winding up of the partnership as provided in Section 31Y; and

(d) whenever justice requires.

(2) A court may order an accounting whenever appropriate.
The committee at its initial meeting decided to expand Section 22 from a section treating only the right to an accounting to a broad remedies section. The consensus was that the statute should provide ready access to the court and leave great discretion in the court to fashion remedies. In this respect, the committee is in agreement the ABA Report recommendation concerning Section 22 at 152:

"This section should be entitled "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. 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."

The ABA Report "Additional Comments" on Section 22 stated "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." Id. In addition, certain ABA Report Comments concerning Section 32, on dissolution by court decree, are relevant here:

"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. 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." ABA Report at 166.

RUPA § 22(2) provides that a court may order an accounting "whenever appropriate." Courts have often denied a partner the right to seek damages without
bringing an action for a formal accounting. This so-called "exclusivity rule" is not dead. See Bromberg & Ribstein at 6:100:

The fact that the exclusivity rule has survived both the merger of law and equity and the general trend toward entity characterization of the partnership indicates that there is something more than legal formalism underlying the exclusivity rule. The practical reasons for the exclusivity rule focus on the type of claim involved and the necessity of resolving it together with all other claims of the partners in a single proceeding. First, no rights of the partners can be accurately determined until a balance is struck. * * * [I]n a partnership, unlike a corporation, the participants are likely to have not only claims but also liabilities arising out of their duty to contribute toward the losses of the business. . . . Second, without regard to the need for a balance, it is most efficient to resolve multiple claims dealing with related facts in a single proceeding.

Nevertheless, the authors summarize ten broad exceptions to the exclusivity rule and conclude at 6:109: "In general, the proliferation of exceptions to the exclusivity rule indicates some judicial hostility to the accounting remedy. The courts are increasingly taking the approach that plaintiff will not be denied relief unless an accounting is really necessary in the given case." The changes to Section 22 reflect the increased willingness to grant relief without the requirement of an accounting.

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.

COMMENT

No substantive change to Section 23 is recommended. The ABA Report at 153 recommends only that Section 23 be moved to Part VI.

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 limited to his [or her] interest in the partnership, and (3) his right to participate in the management.

COMMENT

RUPA § 24 provides: "The property rights of a partner are limited to his [or her] interest in the partnership." RUPA § 24 eliminates the reference to a partner's rights in specific partnership property. This deletion implements the change in Section 25 that puts title to partnership property directly in the partnership. The purpose is to state more directly and accurately the consequences of present law. The ABA Report suggested consideration be given to deleting subsection (1) in the event of the mentioned change to Section 25.
The committee at its initial meeting deleted the reference to a partner's right to participate in management. See Section 18 for the rules determining the management rights of partners. Section 24 thus states that a partner's financial interest in the partnership is his or her partnership interest. As thus conceived, is Section 24 necessary? Section 25 states that the partnership holds partnership property, Section 26 defines a partner's interest in the partnership, and Section 18 defines the partner's rights in management. Section 24 does not seem to add anything.

SECTION 25. NATURE OF A PARTNER'S RIGHT IN SPECIFIC PROPERTY BECOMES PARTNERSHIP PROPERTY.

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership. Property transferred to or otherwise acquired by a partnership becomes partnership property.

(2) The incidents of this tenancy are such that consequences of property becoming partnership property are set out in this subsection.

(a) A partner, subject to the provisions of this act [Act] and to any agreement between the partners, has an equal right with his other 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.

(b) A partner's partner thus has no right in specific partnership property. 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.

(c) On the death of a partner his right in specific partnership property vests in the surviving partners, except where it continues to won the partnership property. If the deceased was the last surviving partner, when his the right in such to control partnership property vests in his [or her] 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.

(d) A partner's partner has no right in specific partnership property that is not subject to dower, curtesy, or allowances to widows a surviving spouse, heirs, or next of kin.

COMMENT

The consensus of the committee at its initial meeting was that Section 25 should be amended to state
1 more directly the substance it expresses. Although
2 Sections 24 and 25 both refer to the partner's "right in
3 specific partnership property," Section 25 defines away
4 such a right. Our sense was that we should more
5 directly state the entity theory embodied in the rules
6 of Section 25. In this regard, we are in accord with
7 the ABA Report. The various changes to Section 25 are
8 all intended to advance the entity theory by more
9 directly stating the substance of present law: it is the
10 entity that owns the asset, not the individual partners
11 pro rata.

12 This more direct statement of the entity theory
13 also addresses a matter raised by the "Additional
14 Comments" in the ABA Report. The ABA Report wanted it
15 made clear "that a partner who misappropriates
16 partnership property is guilty of embezzlement in the
17 same manner and to the same extent that he would be
18 guilty of embezzlement if he misappropriated the
19 property of a corporation, or any other kind of entity,
20 in which he had an ownership interest." May I include
21 an Official Comment to this effect?

22 One question that might be raised is whether this
23 direct adoption of the entity theory would prejudice
24 optional adjustments to basis under the Internal Revenue
25 Code. Optional adjustments to basis permit a
26 partnership to elect that certain transfers of
27 partnership interests and certain distributions be
28 treated according to an aggregate rather than an entity
29 model. At present, the Section 754 election is
30 available as a matter of statute and is not subject to
31 the discretion of the Service. Nor does its
32 availability appear to depend upon the dominant theory
33 under state law. All the Code asks is that the
34 partnership consistently apply one theory or the other.
35 See Int. Rev. Code of 1986, § 754, which provides in
36 part: "Such an election shall apply with respect to all
37 distributions of property by the partnership and to all
38 transfers of interests in the partnership during the
39 taxable year with respect to which such election was
40 filed and all subsequent taxable years."

41 SECTION 26. NATURE OF PARTNER'S INTEREST IN THE
42 PARTNERSHIP. A partner's interest in the partnership is
43 his [or her] share of the profits and surplus losses and
right to receive distributions, and the same is personal property.

COMMENT

RUPA § 26 defines a partner's interest in the partnership as "his [or her] share of the profits and losses and right to receive distributions," and declares that interest personal property. This language executes the ABA Report recommendation that the substance of Section 26 be modified slightly to conform more closely to RULPA § 101(10), which provides: "'Partnership interest' means a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets." RUPA does not specify that the interest in the partnership is personal property.

An earlier draft of this memorandum also executed the ABA Report recommendation to move the substance of Section 26 to Section 2, the definitions section. This draft reflects discomfort with moving such an important definition to the end of a long list of unrelated definitions. This basic definition seems appropriate where it is, in the midst of the provisions on assignment and creditors' rights, where it assumes great importance.

Should Section 26 include a partner's Section 18(a) right to "be repaid an amount equal to the cash plus the value of any property contributed to the partnership?"

SECTION 27. ASSIGNMENT OF PARTNER'S INTEREST.

(1) A conveyance by The assignment of a partner of his partner's interest in the partnership:

(a) is permissible, in whole or in part;

(b) does not of itself dissolve cause a winding up of the partnership;

(c) does not, 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

(d) merely entitles the assignee to receive, in
accordance with his contract the assignment, the profits
allocations and distributions to which the assigning
partner would otherwise be entitled.

(2) In case of a dissolution an event that causes
the winding up of the partnership under Section 31V, the
assignee is entitled to receive his assignor's interest
and the net amount that would have been distributable to
the assignor. The assignee may require an account from
the date only of the last account agreed to by all the
partners.

(3) Upon receipt of notice of an assignment that
is not prohibited by the partnership agreement, the
partnership shall take such steps as necessary to
implement the assignee's rights under this section.

COMMENT

RUPA § 27(1)(a) provides that the assignment of a
partner's interest in the partnership "is permissible,
in whole or in part." Pursuant to Section 4X, the
partners may agree to the contrary. Thus, the new rule
conforms to the suggestion in the ABA Report at 155:

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.

RUPA § 27(1)(b) provides that the assignment of a
partner's interest in the partnership "does not of
itself cause a winding up of the partnership." UPA § 27
presently provides that the assignment "does not of
itself dissolve the partnership." RUPA § 31(11) makes a
related change. RUPA § 31(11) states that a person
ceases to be a partner on "the assignment of a partner's
entire interest in the partnership." This alters
slightly the UPA § 27(1) rule that a conveyance of a
partner's interest in the partnership "does not of
itself dissolve the partnership."

RUPA § 27(1)(c) continues the rule of UPA § 27(1)
that an assignment "does not, as against the other
partners, 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." No
interest was expressed in giving assignees a right to
participate in management. Nevertheless, or perhaps
therefore, should assignees be given greater access to
information and to the remedy of an accounting? Texas
has long provided greater rights for assignees in Art.
6132b, § 27(1), which provides that an assignee is
entitled "for any proper purpose, to require reasonable
information or account of partnership transactions and
to make reasonable inspection of the partnership books."
Recall, also, that new Section 22, on remedies of
partners, provides: "A court may order an accounting
whenever appropriate." A subcommittee recommended no
accounting rights for assignees. It did, however,
suggest full committee consideration of expanded
inspection rights.

RUPA § 27(1)(d) states that an assignment "merely
entitles the assignee to receive, in accordance with the
assignment, the allocations and distributions to which
the assigning partner would otherwise be entitled."
This language is based on UPA § 27(1) but refers to
"allocations and distributions" rather than "profits."
The ABA Report at 155 recommended use of the word
"distribution" rather than the word "profits." The term
"allocation" as been added used to refer to tax
consequences and accruals that may occur without
concurrent distributions.

RUPA § 27(2) states: "In case of an event that
causes the winding up of the partnership under Section
31Y, the assignee is entitled to receive the net amount that would have been distributable to the assignor. The assignee may require an account from the date only of the last account agreed to by all the partners." This rule is drawn from UPA § 27(2). Should the assignee's right to an account be expanded, given that RUPA § 22(2) states that a court "may order an accounting whenever appropriate?"

RUPA § 27(3) provides: "Upon receipt of notice of an assignment that is not prohibited by the partnership agreement, the partnership shall take such steps as necessary to implement the assignee's rights under this section." It was thought useful to insert in the "black letter" the partnership obligation to honor the rights of assignees.

RUPA § 27 governs generally the status of assignees. The Comment might include reference to other rules that apply in the case of assignments. For example, RUPA § 31Y(4) provides that the nonassigning partners may unanimously agree to a winding up. RUPA § 31Y(5) gives assignees the right to a court-ordered winding up in certain cases, most basically, in the case of at-will partnerships.

The subcommittee also recommended consideration of a provision that deems estates and divorced spouses assignees. See Texas Art. 6132b, § 28-B:

Sec. 28-B. (1)(A) On the divorce of a partner, the partner's spouse shall, to the extent of such spouse's interest in the partnership, be regarded for purposes of this Act as an assignee and purchaser of such interest from such partner.

(B) On the death of a partner, such partner's surviving spouse (if any) and such partner's heirs, legatees or personal representative, shall to the extent of their respective interests in the partnership, be regarded for purposes of this Act as assignees and purchasers of such interests from such partner.

(C) On the death of a partner's spouse, such spouse's heirs, legatees or personal representative shall, to the extent of their respective interests in the partnership, be regarded for purposes of this Act as assignees and purchasers of such interest from such partner.
(2) A partnership is not dissolved by the death of a partner's spouse unless the agreement between the partners provides otherwise.

(3) Nothing in this Act shall impair any agreement for the purchase or sale of an interest in a partnership at the death of the owner thereof or at any other time.

The RUPA provisions on assignment are thus remarkably similar to those in RULPA. RULPA § 702 provides:

Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his [or her] partnership interest.

Section 704(a) of RULPA further provides that an assignee of a partnership interest may become a limited partner if the assignor gives the assignee that right in accordance with the partnership agreement, or of all other partners' consent. Finally, Section 401 of RULPA provides that additional general partners may be admitted as provided in a written partnership agreement, presumably without causing dissolution. The Comment to RULPA § 401 states:

Section 401 is derived from, but represents a significant departure from, Section 9(1)(e) of the 1916 Act and Section 401 of the 1976 Act, which required, as a condition to the admission of an additional general partner, that all limited partners consent and that such consent specifically identify the general partner involved. Section 401 of the 1985 Act provides that the written partnership agreement determines the procedure for authorizing the admission of additional general partners, and that the written consent of all partners is required only when the partnership agreement fails to address the question.
SECTION 28. PARTNER'S INTEREST SUBJECT TO CHARGING ORDER.

(1) On due application to a competent court by any judgment creditor of a partner or partner's assignee, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner or assignee with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his the debtor's share of the profits, and distributions of any other money or other property due or to fall due to him the debtor in respect of the partnership, and 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 by the judgment debtor or:

(a) With with separate property, by any one or more of the partners, or

(b) With with partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act [Act] shall be held to deprive a partner of his any right, if any, under the
exemption laws, as regards his [or her] interest in the partnership.

[(4) This section contains the exclusive remedy by which the judgment creditor of a partner or partner's assignee may satisfy a judgment out of the judgment debtor's interest in the partnership.]

COMMENT

Section 28(1) is amended to clarify that a charging order is available against an assignee of a partnership interest as well as against a partner. This change conforms to the ABA Report at 157. As elsewhere in RUPA, reference is made to "distributions" rather than "profits." RUPA has not embraced the ABA Report recommendation at 157 to expand the charging order beyond judgment creditors:

(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).

How, if at all, should Section 28 be expanded? See Bromberg & Ribstein at § 3.05(d) (3):

As to the scope of the charging order remedy, it is available under U.P.A. §28(1) to "any judgment creditor of a partner." Thus, the charging order is not a pre-judgment remedy. Nevertheless, a charging order has been granted to claimants who are not strictly judgment creditors, such as spouses seeking alimony or child support.

Section 28(2) continues to give other partners a right to redeem.

Section 28(3) is essentially the same as UPA § 28(3).

Section 28(4) provides that the charging order is the judgment creditor's exclusive remedy against the interest in the partnership. This exclusivity rule is consistent with the recommendation in the ABA Report at 158:
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 Bromberg & Ribstein at 3:69: "Although the U.P.A. nowhere says that a charging order is the exclusive process for a partner's individual creditor, the courts have generally so interpreted it." A different policy choice could be made. Georgia § 14-8-28(f) expressly makes the charging order remedy nonexclusive. Georgia § 14-8-28(e) specifies garnishment as a supplemental remedy. Another different policy choice is indicated in Bromberg & Ribstein at § 3.05(d)(3) n. 105: "Because of the threat posed by foreclosure to the continuity of the firm, Georgia has modified its version of U.P.A. § 28 to prohibit foreclosure." The subcommittee asked that the exclusivity rule be placed in brackets and discussed by the full committee.

A subcommittee deleted the following language, which was an attempt to describe more directly the charging order remedy:

The charging order constitutes a lien on the judgment debtor's interest in the partnership. The court may order a foreclosure of the charging order at any time and under such conditions as it deems appropriate. The purchaser at the foreclosure sale has the rights of an assignee. Neither the charging order nor its foreclosure gives the judgment creditor or purchaser at the foreclosure sale rights greater than those the judgment debtor had under the partnership agreement.

This language was in part an attempt to reflect the basic policy expressed in the Additional Comments to the ABA Report at 158:

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.

The subcommittee's concern was fear of a secret lien.
It asks the committee to consider the proposed language.
Should the charging order become a lien only if it is
recorded?

PART VI

DISSOLUTION CONTINUATION, CESSATION OF
PARTNER STATUS, AND WINDING UP

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.

COMMENT

The UPA provisions concerning dissolution are most
complex and troublesome. In short, under the present
dissolution provisions, there is at least a technical
dissolution almost every time the composition of a
partnership changes. Continuation of the business is by
what is theoretically a new partnership. The ABA Report
recommends 66 specific changes to the dissolution
provisions, many of which are designed to prevent a
technical dissolution or its consequences. The basic
thrust of the ABA Report is to move closer to an entity
model and give the partnership greater stability. So,
too, does the approach taken in an article by Professor
Larry Ribstein, A Statutory Approach to Partner
Partner Dissociation). In many ways, the ABA Report is
compatible with Professor Ribstein's approach in Partner
Dissociation. One major contribution of Partner
Dissociation is the proposal of six new statutory
provisions to form the core of what have been referred
to in the past as the dissolution provisions. The first
draft of the new provisions on partnership breakups
included an attempt to integrate most of the six Partner
Dissociation sections into the Uniform Act. The first draft went somewhat further in that it eliminated the term "dissolution" and incorporated certain changes suggested by the ABA Report, Professor Hillman, and others.

Near the end of its October 1988 meeting, the Drafting Committee began its review of the first draft of the provisions on partnership breakups. The committee gave me two instructions. First, abandon the Partner Dissociation approach insofar as it drastically curtails the right to force a liquidation of the partnership. The committee instructed me to reinstate the rule that, unless there is an agreement to continue for a stated term or undertaking, every partner has the right to force a liquidation of partnership assets. This is the rule of UPA § 38(1). Second, consider the impact of this decision on the first draft and continue to attempt to draft a statute that is clearer than the present statute, preferably without using "the D word."

A second draft attempting to execute both instructions was prepared and circulated. The second draft also eliminated the word "dissociation" and replaced it with "withdrawal." The term withdrawal was inserted because of two perceived advantages. First, it responds to the significant negative comment generated by the words "dissociation" and "disassociation." Second, it is used in RULPA.

At its December 1988 and January 1989 meetings, the Drafting Committee concentrated entirely on partnership breakups. The committee first decided to defer whether to reinstate the term "dissolution." The committee eliminated the term "withdrawal" as too imprecise. It replaced the term "events of withdrawal" with the term "events causing cessation of partner status." The committee considered three major provisions in the following order: first, Section 31, which lists the ways in which one ceases to be a partner; second, Section 31Y, the events that cause a winding up of the partnership; and third, Section 32, the events that cause only a buyout of a partner rather than a winding up of the business of the partnership.

This draft goes one step further than Partner Dissociation because it eliminates entirely the term dissolution. In general, under this draft, any partner may cease to be a partner at any time. The mere departure of a partner, however, does not cause a winding up of the partnership. Stated differently, the partnership continues even though a partner withdraws. In many cases, the departing partner has the right to
demand that the partnership assets be sold so that its liabilities can be satisfied and its partners given liquidating distributions of cash. This is the rule, for example, when the partnership is at will. When the winding up is complete, the partnership is terminated. In other situations, the person who ceases to be a partner has the right to be paid the value of his or her partnership interest, but does not have the right to have the partnership liquidated. This is the rule, for example, if his or her voluntary departure violates the partnership agreement.

As thus summarized, there does not appear to be need for two separate terminal concepts: dissolution and termination. The provisions in this draft proceed on the assumption that there is not a need for both concepts. Termination is selected rather than dissolution in part because the term "dissolution" has caused so much confusion for so long. It has had its chance and it has failed. It can be done without. It can be seen as a concept too deeply rooted in the aggregate tradition to be readily useful in a more entity-oriented era.

Differences at the margin should not obscure the basic consensus that the role of the concept of dissolution must at the very least be significantly reformed. At a minimum, the Uniform Act should take an approach more like that presently found in RULPA. RULPA provides that limited partnerships dissolve far less readily than partnerships presently do under the Uniform Act. A limited partnership does not dissolve on the withdrawal of a limited partner, nor does it necessarily dissolve on the withdrawal of a general partner. RULPA § 101(3) states that "event of withdrawal of a general partner" is "an event that causes a person to cease to be a general partner as provided in" RULPA § 402. RULPA § 402 contains a long list of events that cause a person to cease to be a general partner. RULPA § 801(4) provides that a limited partnership is dissolved and its affairs shall be wound up on an event of withdrawal of a general partner unless at the time there is at least one other general partner and the written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partner and that partner does so, but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal, if, within 90 days after the withdrawal, all partners agree in writing to continue the business of the
limited partnership and to the appointment of one or
more additional general partners if necessary or
desired . . . .

The new provisions in this draft, based in part on
Professor Ribstein's pioneering suggestions in Partner
Dissociation, provide even greater partnership stability
than those in RULPA.

Contrast the approach to termination in Internal
Revenue Code §§ 708(a) and 708(b)(1):

§ 708. Continuation of partnership

(a) General rule.--For purposes of this
subchapter, an existing partnership shall be
considered as continuing if it is not terminated.

(b) Termination.--

(1) General rule.--For purposes of subsection
(a), a partnership shall be considered as terminated
only if--

(A) no part of any business, financial operation,
or venture of the partnership continues to be carried
on by any of its partners in a partnership, or

(B) within a 12-month period there is a sale or
exchange of 50 percent or more of the total interest
in partnership capital and profits.

SECTION 30. PARTNERSHIP NOT TERMINATED BY

DISSOLUTION CONTINUES UNTIL WINDING UP COMPLETE. On
dissolution the When an event causes a winding up of the
partnership under Section 31Y, the partners shall cease
to be associated in the carrying on of the partnership
business. The partnership is not terminated, but,
however, continues until for the limited purpose of
winding up and terminates when the winding up of
partnership affairs is completed. Until termination.

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the partners are associated in the winding up of the partnership.

COMMENT

Partner Dissociation summarizes the idea behind this new section as follows:

Whether the partnership is engaged in winding up is particularly important with regard to the partners' power to bind the partnership during the winding up period. This section clarifies that the partnership enters the winding up period not upon any partner dissociation, as under current U.P.A. §§ 29 and 30, but only upon occurrence of one of the events that justifies sale of the partnership business. This is, in effect, consistent with current law.

Although the U.P.A. now provides for winding up even if there is only a technical dissolution and the partnership business continues as before, in fact the winding up affects only the "old" partnership—i.e., the one that included the dissociated partner—while the remaining partners are engaged in "carrying on" the new, post-dissolution partnership. Providing for winding up only when the partnership is, in fact, to be sold, eliminates this confusing state of affairs.

It is true that the business of the partnership might, in fact, continue after a sale of assets under this Section. But because it will not usually be possible to predict with certainty the future of a business that is about to be sold in the absence of an agreement providing for this situation, it is appropriate to regard the "carrying on" of the business as suspended during the presale period.

The following section was added but deleted by a subcommittee:

If the cessation of a partner's status does not cause a winding up of the partnership under Section 31Y, he [or she] shall have a continuing relationship with the remaining partners for the limited purpose of completing business undertaken while he was a member of the partnership.

This section was an attempt to reflect that, even if the partnership itself is not wound up, it may take time to "close the books" on the interest of the departing partner. For example, it may take time to complete
business undertaken during the tenure of, and thus
obliterating, the departing partner.

One problem that remains to be addressed is the
departure of one member from a two-person partnership.
Sections 31 and 41 both seem likely places to consider
the problem.

SECTION 31. CAUSES OF DISSOLUTION. Dissolution is
eased:

(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.

SECTION 31. EVENTS CAUSING CESSIONATION OF PARTNER STATUS. A person ceases to be a partner upon the occurrence of any of the following:

(1) notice of one partner to another partner of the first partner's express will to cease being a partner;

(2) the expulsion of any partner

   (i) bona fide in accordance with the partnership agreement; or

   (ii) pursuant to a judicial determination that:

      (A) he [or she] has been guilty of such conduct as tends to affect prejudicially the carrying on of the business of the partnership; or

      (B) he [or she] has willfully or persistently committed a breach of the partnership agreement or otherwise breached his [or her] duty to the other partners or the partnership such that it is not reasonably practicable to carry on the business in partnership with him [or her]; or
(C) it is unlawful to carry on the partnership with him [or her];

(3) the partner becomes bankrupt within the meaning of Section 2(1);

(4) in the case of a partner who is an individual:

(i) death of the partner;

(ii) the appointment of a general [conservator] for the partner; or

(iii) a judicial determination that the partner has become in any other way incapable of performing his duties as a partner.

(5) in the case of a partner who is a trust or is acting as a partner by virtue of being a trustee of a trust, the distribution of the entire interest in the partnership of the trust, but not merely the substitution of a successor trustee;

(6) in the case of a partner that is a separate partnership, an event that causes the winding up of the separate partnership;

(7) in the case of a partner that is a corporation, the filing of a certificate of its dissolution or the equivalent for the corporation or the revocation of its charter, provided that any cure that relates back for purposes of other laws shall also relate back for purposes of this section:
(8) in the case of a partner who is an estate or who is acting as a partner by virtue of being a [personal representative] of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership, but not merely the substitution of a new representative;

(9) any event expressly agreed to in the partnership agreement as resulting in a person ceasing to be a partner;

(10) the assignment of a partner's entire interest in the partnership;

(11) in the case of any other interest or entity, the termination or extinguishment of that interest or entity; or

(12) the rescission of the partnership agreement in accordance with Section 39.

COMMENT

RUPA § 31 attempts to list all the events that cause cessation of a partner's status. RUPA § 31 is drawn from RULPA § 402, which is entitled "Events of Withdrawal" and which lists the ways in which one ceases to be a general partner. Present UPA § 31 takes a different approach. It contains a partial list of the events that cause a dissolution of the partnership. Most basically, UPA § 31 lists the events that cause a dissolution without a court decree. Although RUPA § 31 is based on RULPA § 402, it does not use the term "Events of Withdrawal" because the committee found the word "withdrawal" too narrow to summarize all the ways in which one can cease to be a partner. For example, it was felt that the word "withdrawal" did not fit the expulsion of a partner.

Under RUPA, the mere cessation of partner status neither causes a dissolution nor triggers a winding up.
Section 35X provides for the termination of the continuing liability and agency authority of the person who ceases to be a partner. Section 31Y identifies the situations in which the cessation of a partner's status causes a winding up of the partnership. Section 32 sets out the situations in which the cessation of partner status causes a buyout of a partner rather than the winding up of the partnership. Section 31X states that a person who ceases to be a partner wrongfully must pay damages.

RUPA § 31(1) provides that a person ceases to be a partner on "notice of one partner to another partner of the first partner's express will to cease being a partner." This provision continues the idea of present law that a partner has the power, even if not the right, to withdraw at will. See UPA § 31(1)(b). The new language provides that notice must be given to terminate partner status, which reflects the law of UPA § 31(1)(b)'s "express will" concept. Notice is to be interpreted under new Section 3, "Interpretation of Knowledge and Notice." The committee rejected the idea of requiring written notice. The committee consensus was that if there is no requirement of a writing to create partner status, there should be none to end it.

One advisor asks whether we want to permit a withdrawing partner to specify an effective date in his notice so that the effective date would be that specified in the notice, or, if none is specified, on the date of communication of notice. Further, even if all of Section 31 is not to be couched in terms of "events of withdrawal," is not "withdrawal" the appropriate term for Section 31(1)? See the reference in Section 31X to a partner's "withdrawal" by express will and the reference in Section 31Y(1) to the "withdrawing" partner.

The committee was aware that the basic rule that a partner has the power to be bought out at any time has been criticized. See, for example, Hillman, *Indissoluble Partnerships*, 37 U.Fla.L.Rev. 691, 731 (1985):

Because an agreement concerning duration is normally reached as a method of stabilizing a partnership, it should be given just that effect. If permitted to bargain effectively on this issue, partners, most concerned with the adverse consequences of an early dissolution could pay the price for, and enjoy the benefits of, stability. Partnership law can facilitate this objective by denying a partner the
unilateral power to dissolve a partnership by express
will prior to the expiration of the term previously
accepted by that partner. An agreement concerning
duration, in short, should effectively deny a partner
the power to unilaterally cause a premature
dissolution through an expression of will. If cause
exists, the dissatisfied partner may seek a decree of
dissolution.

The basic notion in the Hillman piece is that the
present rule is far too harsh on the other partners when
one partner decides to leave prematurely. Should
Section 4X include Section 31(1) in the list of rules
that partners may not draft away? The committee has not
yet directly addressed the related question whether the
statute should provide standards for the enforceability
of covenants not to compete on the departure of a
partner.

RUPA § 31(2)(i) provides that a person ceases to
be a partner when he is expelled "bona fide in
accordance with the partnership agreement." This
reflects the rule in UPA § 31(1)(d), which provides that
dissolution is caused without violation of the agreement
between the partners "by the expulsion of any partner
from the business bona fide in accordance with such a
power conferred by the agreement between the partners."
Discussing UPA § 31(1)(d), Bromberg & Ribstein at 7:28
state:

It has been held that the expelling partners need not
prove that the expulsion was in good faith or for
good cause shown, and that the duty of good faith
does not require that expulsion be conditioned on any
particular procedures, such as notice, a
specification of charges, or an opportunity to be
heard.

Should the Comment reflect that the nonwaivable duty of
good faith in new Section 21(a) applies to the expulsion
situation?

RUPA § 31(2)(ii) is new insofar as it expressly
refers to expulsion pursuant to court order. The
causes, however, are not new.

RUPA § 31(2)(ii)(A) provides that a person ceases
to be a partner upon expulsion pursuant to a judicial
determination that "he [or she] has been guilty of such
conduct as tends to affect prejudicially the carrying on
of the business." This language is drawn from UPA
§ 32(1)(c), which provides that, on application by a
partner, the court shall decree dissolution whenever
"[a] partner has been guilty of such conduct as tends to
affect prejudicially the carrying on of the business."

RUPA § 31(2)(ii)(B) provides that a person ceases
to be a partner upon expulsion pursuant to a judicial
determination that "he [or she] has willfully or
persistently committed a breach of the partnership
agreement or otherwise breached his [or her] duty to the
other partners or the partnership such that it is not
reasonably practicable to carry on the business in
partnership with him [or her]." This provision is based
on UPA § 32(1)(d), which provides that, on application
by a partner, the court shall decree a dissolution
whenever "[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." What did the
committee intend by the change from "so conducting
himself in matters relating to the partnership business"
to "breached his duty to the other partners or the
partnership?"

Section 31(2)(ii)(C) provides that a person ceases
to be a partner upon expulsion pursuant to a judicial
determination that "it is unlawful to carry on the
partnership with him [or her]." The provision is based
on UPA § 31(3), which provides that dissolution is
caused 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 the partnership." What change
is intended by moving the "unlawful" rule from automatic
dissolution under UPA § 31(3) to cessation of partner
status by judicial decree under RUPA § 31(2)(ii)(C)?
Note that RUPA § 31Y(6) does not require a judicial
determination. RUPA § 31Y(6) provides that a winding up
of the partnership is caused "on the occurrence of an
event that makes it unlawful for all or substantially
all of the business of the partnership to be continued,
provided that any cure of illegality within 90 days of
notice thereof shall be effective retroactively for
purposes of this section." Should we eliminate the
requirement of a judicial determination in Section
31(2)(ii)(C)? One advisor asks, in a case in which the
illegality is inadvertent, such as a medical practice
with a psychologist, is expulsion the appropriate
remedy?

Note that the misconduct that forms the basis for
expulsion by decree under Sections 31(2)(ii)(A) and
31(2)(ii)(B) may also support a decree of winding up under Section 31Y(9):

Partner Dissociation explains at 419-20:

Expulsion of a partner is permitted not only pursuant to agreement, but also by court order under Section [31(2)(ii)]. A similar result may be reached under the current version of the Uniform Partnership Act if Section 38(2) is deemed to be triggered by misconduct other than premature withdrawal, because the partners would be able to buy out the misbehaving partner at book value (i.e., not including goodwill) less damages caused by the misconduct. Section [31(2)(ii)] states the grounds of expulsion for misconduct in terms similar to those for dissolution under current U.P.A. Section 32(1)(c) and (d), and so invokes the standards currently applied under those U.P.A. subsections, except that the proposed statute makes clear that expulsion is justified only when it is impracticable to continue the business with the expellee.

RUPA § 31(3) provides that a person ceases to be a partner when "the partner becomes bankrupt within the meaning of Section 2(1)." UPA § 31(5) provides that dissolution is caused "[b]y the bankruptcy of any partner or the partnership." The UPA says nothing about a partner who files a voluntary petition for reorganization under Chapter 11, a partner who files for an adjustment of his debts under Chapter 13, or the appointment of a trustee or receiver. See Kaster & Cymbler The Impact of a General Partner's Bankruptcy upon The Remaining Partners, 21 R.Prop.,Prob.& Trust J. 539 (1986). RUPA § 2(1)(a) includes the filing for voluntary bankruptcy under the Bankruptcy Code and Section 2(1)(c) includes an equivalent petition under any state insolvency act. See generally Bromberg & Ribstein at 7:51 et seq:

Bankruptcy of a partner or of the partnership is generally also a cause of dissolution. The U.P.A. defines "bankrupt" to encompass both federal and state law proceedings but does not specify at what point in bankruptcy proceedings dissolution occurs. It would seem that dissolution should occur immediately upon the filing of a petition for voluntary bankruptcy under the Bankruptcy Code, or its equivalent under state law, but otherwise not until the entry of an order for relief or its equivalent under state law.
Under Section 4X of this draft, a contrary agreement among the partners can be oral. In re Safren, 14 BCD 1261 (C.D.Cal. 1986), contains extensive discussion that distinguishes liquidations under Chapter 7 from reorganizations under Chapter 11.

A subcommittee deleted a separate cause of cessation of partner status based on RULPA § 402(5). The deleted language provided that a partner "ceases to be a partner 120 days after the commencement of any proceeding against the partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, if the proceeding has not been dismissed, or if within 90 days after the appointment without such partner's consent or acquiescence of a trustee, receiver, or liquidator of such partner or of all or any substantial part of such partner's properties, the appointment is not vacated or stayed or within 90 days after the expiration of any stay, the appointment is not vacated." A shorter version was also rejected: "120 days after the commencement of any proceeding against the partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief, if the proceeding is not dismissed."
The sense was that the provisions were too long and not necessary.

One member asks whether we have left open the question whether bankruptcy is a cause of winding up.

RUPA § 31(4)(i) provides that, in the case of a partner who is an individual, "death of the partner" causes cessation of partner status. This provision is based on the traditional rule in UPA § 31(4) that dissolution is caused "[b]y the death of any partner."

RUPA § 31(4)(ii) provides that, in the case of a partner who is an individual, "the appointment of a general [conservator] for the partner" causes the cessation of partner status.

RUPA § 31(4)(iii) provides that an individual ceases to be a partner upon a judicial determination that he has become in any way "incapable of performing his duties as a partner." This is based on UPA § 32(1)(b), which provides that, on application by or for a partner, the court shall decree dissolution whenever a partner "becomes in any other way incapable of performing his part of the partnership contract." This differs from RULPA § 402(6), which refers to an order "adjudicating him [or her] incompetent to manage.
his [or her] person or his [or her] estate." The intent was that physical incapacity be included. Crane & Bromberg report: "A few cases have held that the adjudicated insanity of a partner dissolves the partnership. The prevailing view is that insanity is not a self-operating cause of dissolution, but a reason for applying to the court for a dissolution by decree." Did the committee intend to change substance by eliminating the reference to application by or for a partner?

Sections 31(5)-31(8) and 31(11) attempt to define the analog to death or near death in the case of partners that are trustees or trusts, partnerships, corporations, representatives or estates, or other interests. These provisions attempt to respond to the uncertainty summarized in Bromberg & Ribstein at 7:49:

It is not clear what the effect is of the legal "death" (the dissolution, termination, or the like) of a partner that is not an individual, such as a corporation, partnership, trust, or estate. Because the cessation of legal existence of a legal entity, like the death of an individual, removes the entity from participation in the partnership, it should be treated like the death of an individual. However, partnerships and (in some jurisdictions) corporations do not necessarily cease legal existence upon dissolution, but rather enter into the winding-up phase. Perhaps this entry into a new phase should also be treated like the death of an individual, because it changes the nature of the partner's participation in the partnership.

The new provisions are based in large part on those in RULPA.

Section 31(5) states that, in the case of a partner who is a trust or is acting as a partner by virtue of being a trustee of a trust, partner status ends on the distribution of the entire interest in the partnership of the trust, but not merely on the substitution of a successor trustee. It was stated that Texas put in a provision that the bank as a successor trustee is not a partner. The question was raised whether the trust itself can ever be a partner. It was assumed at the meeting that the answer is affirmative, particularly a business trust. Interestingly, Texas § 6-A(1)(c) provides that "[a] trustee or trust" may be a partner. The question was then raised about the treatment of a life tenancy. Does the remainderman become a partner? That is, do you treat the end of a
life estate like death? It was suggested that the proper analogy is to the individual.

RUPA § 31(6) states that partner status ceases, "in the case of a partner that is a separate partnership, [upon] an event that causes the winding up of the separate partnership."

RUPA § 31(7) says that the partner status of a corporation ends on "the filing of a certificate of its dissolution or the equivalent for the corporation or the revocation of its charter, provided that any cure that relates back for purposes of other laws shall also relate back for purposes of this section." RULPA § 402(8) has no relation back language; it simply provides that "in the case of a general partner that is a corporation, [partner status ends upon] the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter." It was said that charter revocation is common in some states and partner status should not be ended for a technical noncompliance with corporate law. On the other hand, some felt that the corporation should not be given the option to remain a partner by reinstating itself retroactively. Presumably, under Section 35X, exposure to continuing personal liability ends on revocation. You do not want a corporation to decide to "wait and see" about its exposure, especially in tort situations. The question of reincorporation was raised. What if you reincorporate in another jurisdiction or merge? The committee was unsure whether relation back should be embraced in text or comment. Further questioning how the relation back cure will work, one member writes:

Revised MBCA Section 14.22 provides for reinstatement of the corporation within two years after the effective date of administrative dissolution. As of June 30, 1986, 24 states permit reinstatement within a specified period, including one up to 15 years. Fourteen states do not expressly limit the period for reinstatement. Section 14.22(c) states that when the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

What is the status of the corporate partner prior to the reinstatement? If the reinstatement is deemed to relate back to the original dissolution, does the corporation continue to vote as a partner in the
interim? Do we need to address this issue in the Act?

Section 31(8) provides that, "in the case of a partner who is an estate or who is acting as a partner by virtue of being a [personal representative] of an estate, [partner status ends on] the distribution by the fiduciary of the estate's entire interest in the partnership, but not merely the substitution of a new representative." RULPA § 402(9) provides that, "in the case of an estate, [partner status ends on] the distribution by the fiduciary of the estate's entire interest in the partnership." It was felt that a Section 31(8) occurrence would be a rare event. Under Section 31(4), the death of a partner ends his status as a partner and his estate becomes an assignee. It is a rare estate that would be admitted to the partnership. There was some sense that the case is so rare that Section 31(8) should be eliminated, with the further goal to make sure that the distributee is an assignee, not a partner.

RUPA § 31(9) provides that there is a cessation of partner status upon "any event expressly agreed to in the partnership agreement as resulting in a person ceasing to be a partner."

RUPA § 31(10) says that partner status ends upon "the assignment of a partner's entire interest in the partnership." This is in accord with RULPA § 702, which provides in part: "Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his [or her] partnership interest." To some extent this is a change in present law. UPA § 27(1) presently provides that a "conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership." Even under present UPA § 27(1), however, "a dissolution results if the assignment amounts to withdrawal of the assigning partner." Bromberg & Ribstein at 3:60. For the rights of assignees, see RUPA §§ 27 and 31Y(5). For the rights of nonassigning partners, see RUPA § 31Y(4). It was said that it should be made clear that assignment of a partnership interest will not be a way to escape the wrongful departure provisions.

RUPA § 31(11) provides that there is a cessation of partner status upon, "in the case of any other interest or entity, the termination or extinguishment of that interest or entity."
Section 31(12) provides that a person's status as partner ends when a partnership agreement is rescinded in accordance with Section 39. Does Section 39 sufficiently identify the moment of rescission?

SECTION 31X. WRONGFUL CESSATION OF PARTNER STATUS.

If the cessation of a partner's status occurs in violation of the partnership agreement or as a result of other wrongful conduct of the partner, the partnership may recover from the departing partner damages for such breach or wrongful conduct. The partnership may offset the damages against the amount otherwise distributable to him [or her] and may also pursue any remedies provided for in the partnership agreement or by applicable law. In the case of a partnership for a specified term or particular undertaking, a partner's withdrawal by express will and without cause before the expiration of that term or undertaking is a breach of the partnership agreement.

COMMENT

Section 31X provides that the partnership may recover damages when a person ceases to be a partner "in violation of the partnership agreement or as a result of other wrongful conduct." At its January 1989 meeting, the committee directed that the language in Section 31X conform to that in Sections 31Z(b) and 32(f). Section 32(f) provides the additional rule that the partner who withdraws by express will before the agreed time need not be paid until that time arrives.

Section 31X also provides that, in a fixed term partnership, a partner's withdrawal by express will "and without cause" before the expiration of the term is a breach of the agreement. Does the committee approve of adding the words "and without cause?" They were intended to protect the partner who withdraws for good
reason, for example, on discovering his co-partner is diverting firm assets.

SECTION 31Y. EVENTS THAT CAUSE A WINDING UP OF THE PARTNERSHIP. The following events shall cause a winding up of the partnership:

(1) at the express will of any partner, unless the partners, including the withdrawing partner, agree in the partnership agreement or at any other time that the business of the partnership be continued by the remaining partners;

(2) whenever a person ceases to be a partner in violation of the partnership agreement, upon the express will of any other partner or upon failure of the remaining partners to unanimously agree, within 90 days of such cessation, that the business of the partnership be continued, whichever occurs first;

(3) whenever a person ceases to be a partner because he [or she] dies or it ceases to exist, upon the express will of any other partner or upon failure of the remaining partners to unanimously agree, within 90 days of such cessation, that the business of the partnership be continued, whichever occurs first;

(4) 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;

(5) except as provided in an agreement between the purchaser and the partner, pursuant to the entry of an order by a court of competent jurisdiction on the application of the purchaser of a partner's interest under Sections 27 or 28:

(i) after the termination of the specified term or particular undertaking; or

(ii) at any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued;

(6) on the occurrence of an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, provided that any cure of illegality within 90 days of notice thereof shall be effective retroactively for purposes of this section;

(7) upon any event expressly agreed to in the partnership agreement as resulting in the winding up of the partnership;

(8) on the termination of the term or particular undertaking specified in the agreement unless, upon such termination, the partners continue the partnership business pursuant to Section 23; or

(9) upon the application by a partner, when a court decrees that the economic purpose of the
partnership is likely to be unreasonably frustrated, or
that it is not reasonably practicable to carry on the
partnership business in conformity with the partnership
agreement.

COMMENT

Section 31Y(1) provides that a winding up is
causd "at the express will of any partner, unless the
partners, including the withdrawing partner, agree in
the partnership agreement or at any other time that the
business of the partnership be continued by the
remaining members." The committee preferred the new
language to the language that appeared in the initial
version of the second draft: "at the express will of any
partner, but not if there is an agreement to continue
the business of the partnership for a specified term or
particular undertaking." It was said that "specified
term" is unclear and that there should be language that
defines the requisite agreement to stay together for a
certain period. It was felt that Section 4X helps here.
The new language is intended to cover both a preexisting
and a contemporaneous agreement.

Section 31Y(1) is intended to continue several
rules under present law. First, it is intended to
continue the rule that any member of an at will
partnership has the right to force a winding up.
Second, it is intended to continue the rule that, when
there is an agreed-upon term, the partners who wish to
continue will not be forced to liquidate the business.
They have the right to buy out the partner who departs
in violation of his agreement. The present law is found
by putting together the separate statements of
dissolution and its consequences, most basically, those
in UPA §§ 31 and 38. UPA § 31(1)(b) states that
dissolution is caused without violation of the agreement
between the partners "[b]y the express will of any
partner when no definite term or particular undertaking
is specified." UPA § 31(2) states that dissolution is
caused "]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." UPA
§ 38(1) provides that if dissolution is not caused
wrongfully, each partner has the right to have the
business wound up. On the other hand, UPA § 38(2) says
that, if the dissolution is in contravention of the
partnership agreement, the nonbreaching partners have
the right to continue the business upon buying out and indemnifying the breaching partner. That is, the unanimous partners may continue.

Assume there is a partnership agreement that provides that the majority can make decisions. Assume a majority does not want to wind up. Does the general provision for majority rule override the dissenter's right to force a winding up under Section 31Y(1)? Am I correct in understanding committee intent to be that, under the language adopted, the answer is no? The precise language of Section 31Y(1) merits at least one more hard look. One committee member writes: "While it is intended to cover an at will partnership, is it clear that a specified term in the partnership agreement is an agreement that the business of the partnership be continued by the remaining partners?"

Section 31Y(2) states that the partnership shall be wound up "whenever a person ceases to be a partner in violation of the partnership agreement, upon the express will of any other partner or upon failure of the remaining partners to unanimously agree, within 90 days of such cessation, that the business of the partnership be continued, whichever occurs first." This continues the present rule in UPA § 38(2)(b) insofar as it requires unanimity for the exercise of the continuation right: "The partners who have not caused the dissolution wrongfully, if they all desire to continue the business . . . may do so . . . ." It changes present law by imposing a 90-day limit on the exercise of the continuation right. See Section 32(c), which provides that "the remaining partners may continue the partnership by giving notice to the withdrawn partner . . . , within 90 days of the cessation of partner status, of their election to continue."

Sections 31X, 31Z(b), and 32(f) now refer to partners who depart because of "violation of the partnership agreement or other wrongful conduct." Should Section 31Y(2) be amended to include reference to "other wrongful conduct?" Should it also be amended to include reference to expulsion?

Section 31Y(3) provides that a partnership shall be wound up "whenever a person ceases to be a partner because he [or she] dies or it ceases to exist, upon the express will of any other partner or upon failure of the remaining partners to unanimously agree, within 90 days of such cessation, that the business of the partnership be continued, whichever occurs first." The 90-day limit on the continuation right in Section 31Y(3) is identical.
to the 90-day limit in Section 31Y(2). Section 31Y(3) interacts with new Section 32(c), which provides that the remaining partners may continue the partnership by giving notice to the representative of the deceased partner "within 90 days of the cessation of partner status, of their election to continue."

To summarize: Under Section 31Y(3), the death of a partner does not cause a winding up of the partnership if the remaining partners unanimously agree, within 90 days, to continue the business. Instead, the surviving spouse must be bought out under Section 32. This clarifies the law in some states but may reflect a change in others. See, generally, Bromberg & Ribstein at 7:100:

The right to compel liquidation is explicitly made available under U.P.A. §38(1) only to "each partner," not to legal representatives of deceased partners or assignees. It is unclear what rights are available to these parties. U.P.A. §38 provides for a right to continue only in the event of wrongful dissolution or expulsion, not death, but this does not necessarily mean that the estate, as opposed to the surviving partners, can compel liquidation. However, U.P.A. §41(3) implies that the consent of the legal representative is required for continuation. Moreover, not permitting the estate or assignee to obtain liquidation under §38(1) appears inconsistent with the fact that the legal representative of a deceased or incompetent partner or partner's assignee may obtain winding up by the court under U.P.A. §37, although such winding up need not necessarily involve a liquidation, as distinguished from a buyout of the estate's interest.

A strong argument can be made that an estate or assignee should not have a liquidation right over the objection of the surviving or nonassigned partners, because liquidation could result in substantial hardship to the partners, particularly when death or incapacity occurs prior to the expiration of an agreed term or undertaking. Some courts have permitted the surviving partners to buy out the estate without a liquidation of the business, and some state statutes explicitly give a buyout right to the surviving partners [citing Ohio and Washington]. In the event of a buyout, the estate or assignee is protected by the election of profits or interest under §42, which encourages prompt settlement.
See Ohio § 1779.04 for a buyout right in surviving partners.

One committee member writes about Section 31Y(3) as follows: "use of the phrase 'it ceases to exist' to describe the entity analogue of death doesn't work for a trust that ceases to be a partner when it distributes its entire interest in the partnership, without regard to the continued existence of the trust."

Section 31Y(4) provides that a winding up is caused "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." This language is taken verbatim from UPA § 31(1)(c). This reflects the belief that the remaining partners may find assignees very intrusive. They are not required to cause a winding up under this section. One option may be to redeem the interest of a charging creditor under Section 28(3).

Section 31Y(5) continues with only minor modification the following rule from UPA § 32(2):

On the application of the purchaser of a partner's interest under sections [27] or [28] [the court shall decree a dissolution]:

(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.

There was not complete agreement on the appropriate rule here. At least one member thought the assignee should not be able to demand more than a buyout. Another person questioned why an assignee should even have the right to force a buyout. It was also suggested that different kinds of assignees could be treated differently. The consensus, however, was to continue the present law, which is reflected in new Section 31Y(5). Note that this provision refers to "purchasers." It does not refer to those who take on the death of a partner. Our later discussions of Section 32 indicated that the person who takes on death is entitled to a buyout. Compare this with the rule in Texas § 28-B that states that persons who take on death "shall . . . be regarded . . . as assignees and purchasers . . . ." We need to clarify whether the
person who takes on death will be treated the same as
other assignees. How are donees to be treated?

An earlier draft provided that the partnership
would be wound up "on the failure of the partnership to
perform its obligations to the person who ceases to be a
partner pursuant to section 32." The intent was to give
the departing partner the right to force a liquidation
if his right to be bought out was not honored. The
committee deleted this provision because it did not want
to permit the continuing partners to "back out" of the
buyout route by causing a liquidation.

Section 31Y(6) provides that winding up is caused
"on the occurrence of an event that makes it unlawful
for all or substantially all of the business of the
partnership to be continued, provided that any cure of
illegality within 90 days of notice thereof shall be
effective retroactively for purposes of this section." New Section 31Y(6) modifies the rule in UPA § 31(3) that
dissolution is caused "[b]y 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 the
partnership." See, generally, Bromberg & Ribstein at
7:45-47:

The rationale for refusing to enforce an illegal
partnership are the ones familiar in general contract
cases, particularly including deterrence of illegal
bargains and disinclination to aid wrongdoers who
have chosen to operate outside the law.

The hands-off doctrine can easily produce
inequitable results, and courts have found ways
around it in some cases. At least one state allows
an accounting on the theory that, even if the
partnership agreement is illegal, it is not enforced
by an accounting. Or the illegality may seem so
limited, or so one-sided that a court will grant
relief. If the business is only partially illegal
and it is possible to separate the legal from the
illegal phases, an accounting may be had for the
proceeds of the legal part . . . . * * *

A third person cannot enforce against a
partnership formed for an illegal purpose a contract
with illegal subject matter. A third person who
makes a contract with a legal subject matter and is
without knowledge of the partnership's illegal
purpose has a remedy against partners who contract
with him or her, participate in the contract, or
expressly authorize it. Without such direct
participation or authority, however, [§ 35(3) says that] a partner's acts after the partnership becomes illegal do not bind the firm unless they are for winding up. This may impose an undue hardship on innocent third persons who deal with him or her.

The proposed new language reduces the possibility of such hardship. The committee added the "all or substantially all" language because it did not want any of a wide range of regulatory violations to cause a winding up of the partnership. For a similar reason, Section 31Y(6) provides that any cure within 90 days of notice operates retroactively for purposes of this section. Is this "cure" provision satisfactory? Can it be stated better?

Section 31Y(7) provides that a winding up shall be caused upon "any event expressly agreed to in the partnership agreement as" causing a winding up. The committee wanted a windup rule that would parallel the departure rule in Section 31(10).

Section 31Y(8) is based on UPA § 31(1)(a), which provides that dissolution is caused, without violating the partnership agreement, "[b]y the termination of the definite term or particular undertaking specified in the agreement." The "unless" language is new; Section 23 refers to the situation in which the partners simply continue the business with no additional formalities.

Section 31Y(9) is based in part on UPA § 32(1)(d), which states that, upon application by a partner, the court shall decree dissolution whenever "[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." Section 31Y(9) continues the notion that it applies only upon application by a partner (rather than a creditor or assignee) and follows with language that the committee felt more accurately reflects current contract notions: "when a court decrees that the economic purpose of the partnership is likely to be unreasonably frustrated, or that it is not reasonably practicable to carry on the partnership business in conformity with the partnership agreement." Have we lost anything by deleting specific reference to willful and persistent breach? Section 31Y(9) also operates to replace UPA § 32(1)(e), which provides that, on application by or for a partner, the court shall decree a dissolution whenever "[t]he business of the
partnership can only be carried on at a loss." The ABA Report at 166-67 recommended as follows:

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. 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.

The theory underlying section 32(1)(e) 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.

Poor performance of the business can justify dissolution under section 32(1)(f), that is, "other circumstances render a dissolution equitable."

The committee's language adopts the suggestion of the ABA Report in an attempt to clarify that mere tax or accounting losses will not cause a winding up of the partnership.

Sections 31Y(5), 31Y(6), and 31Y(9) have been included in the Section 4X list of rules the parties cannot vary by agreement.

Finally, what happens when one member of a two-person partnership dies? Note that, under UPA § 37, "the last surviving partner" has a right to wind up.

SECTION 31Z. WINDING UP THE PARTNERSHIP.

(a) When an event causes a winding up of the partnership under Section 31Y, the assets of the partnership shall be applied to discharge its liabilities, and the surplus applied to pay in cash the net amount distributable to the partners.

(b) If the partnership is wound up pursuant to a decree under Section 31Y(9), the partnership may recover
damages from any partner whose violation of the partnership agreement or other wrongful conduct causes such winding up and may offset the damages against any amount distributable to that partner, in addition to pursuing any remedies provided for in the partnership agreement or by applicable law.

COMMENT

The committee decided at its December meeting to create a separate section defining what happens when an event causes a winding up of the partnership.

Section 31Z(a) is drawn from UPA § 38(1). The committee decided to continue the rule in UPA § 38(1) that there must be payment "in cash" when the partnership is liquidated. It disapproved of in-kind distributions because of difficult valuation problems and because the "in cash" rule gives more bargaining power to the minority partner. The further thought was that, given the partners are not getting along, they should not be forced into a cotenancy. On the other hand, there was some discomfort with taking away the partition in-kind option. It was pointed out, for example, that in Tennessee partition of real estate cases, the court must first consider "in kind" as a possibility and only then go to sale. It was also pointed out that in the estate area, there is an attempt to avoid a forced sale of heirlooms. Is new Section 31Z(a) adequately coordinated with Section 18X, the new provision on distributions?

Courts have not been in complete agreement on their inability to order an in-kind liquidating distribution. See Dreifuerst v. Dreifuerst, 90 Wis.2d 566, 280 N.W.2d 335 (Wis.App. 1979), in which there was no allegation of fault or violation of partnership agreement. The lower court ordered a dissolution by partition in kind of the partnership's two feed mills. Plaintiff partners were awarded the feed mill in one city, and the defendant partners were awarded the feed mill in another city. On appeal, the court held that the "in kind" remedy was inappropriate: "We do not believe that the statute can be read in any way to permit in kind distribution unless the partners agree to in kind distribution or unless there is a partnership agreement calling for in-kind distribution at the time.
of dissolution and wind-up." The court discussed "winding up" as follows:

Unless otherwise agreed, partners who have not wrongfully dissolved a partnership have a right to wind up the partnership. Winding-up is the process of settling partnership affairs after dissolution. Winding-up is often called liquidation and involves reducing the assets to cash to pay creditors and distribute to partners the value of their respective interests. Thus, lawful dissolution (or dissolution which is caused in any way except in contravention of the partnership agreement) gives each partner the right to have the business liquidated and his share of the surplus paid in cash. In-kind distribution is permissible only in very limited circumstances. If the partnership agreement permits in-kind distribution upon dissolution or wind-up or if, at any time prior to wind-up, all partners agree to in-kind distribution, the court may order in-kind distribution. While at least one court has permitted in-kind distribution, absent an agreement by all partners, the court's holding in that case was limited (citations omitted).

The court cited a Michigan decision that "was limited to situations where: (1) there were no creditors to be paid from the proceeds, (2) ordering a sale would be senseless since no one other than the partners would be interested in the assets of the business, and (3) in-kind distribution was fair to all partners." The court emphasized the creditor-protection features of Section 38:

[Section 38] is intended to protect creditors as well as partners. In-kind distributions may affect a creditor's right to collect the debt owed since the assets of the partnership, as a whole, may be worth more than the assets once divided up. Thus, the creditor's ability to collect from the individual partners may be jeopardized. Secondly, if others are interested in the assets, a sale provides a more accurate means of establishing the market value of the assets and, thus, better assuring each partner his share in the value of the assets. Where only the partners are interested in the assets, a fair value can be determined without the necessity of a sale. The sale would be merely the partners bidding with each other without any competition. This process could be accomplished through negotiations or at trial with the court as a final arbitrator of the value of the assets.
The Wisconsin court, however, refused to accept even a narrow ground for following the Michigan decision: "The statute [is] quite clear that if a partner may force liquidation, he is entitled to his share of the partnership assets after creditors are paid in cash." A sale was required; it was not sufficient for the trial court to determine the fair market value of the assets and order [an amount paid] equal to his share in the assets. A "sale is the best means of determining the true fair market value of the assets. * * * While judicial sales in some instances may cause economic hardships, these hardships can be avoided by the use of partnership agreements."

Section 31Z(b) says that, if the partnership is wound up by decree under Section 31Y(9), "the partnership may recover damages from any partner whose violation of the partnership agreement or other wrongful conduct causes such winding up and may offset the damages against any amount distributable to that partner, in addition to pursuing any remedies provided for in the partnership agreement or by applicable law."

The committee directed that Section 31Z(b) be amended to conform to Sections 31X and 32(f). Why is Section 31Z(b) limited to Section 31Y(9) situations? Should Section 31Y(2) be amended to refer to "other wrongful conduct" and be referred to in Section 31Z(b)?

The question was raised whether lost profits would constitute an item of damages. It was ventured that courts generally say "no" when they are forced to decide whether lost profits are recoverable. Should loss of good will be a potential measure? It was said that personal good will is hard to distinguish from partnership good will. It was suggested that the statute might specify that damages include the cost of winding up and reasonable attorneys' fees.

SECTION 32. DISSOLUTION BY DEGREE 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.

e.

(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.

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 27 and 28:

(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.

SECTION 32. BUYOUT OF PERSON WHO CEASES TO BE A PARTNER WHEN PARTNERSHIP IS NOT WOUND UP.

(a) If a person ceases to be a partner under Section 31 but no event causes a winding up of the
partnership under Section 31Y, the partnership shall purchase the interest of the person who ceases to be a partner for its fair market value.

(b) The fair market value shall be determined as of the moment of the event causing cessation. Fair market value shall be the amount that would have been distributable to that person in a winding up of the partnership. In determining that amount, the assets of the partnership shall be valued at the greater of (1) liquidation value or (2) value based on sale of the entire business as a going concern without the withdrawing partner. In either case, the determination shall be made on the basis of the price that would be paid between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and with the knowledge of all relevant facts. Interest at the [ ] rate shall be paid from the date of value to the date of payment. In the case of a partner in a partnership in which capital is a material income-producing factor, regularly scheduled distributions shall continue to be made to the former partner or his successor in interest. These distributions shall be credited to the payments due on account of the former partner, first, as to interest, second, as to principal.

(c) Upon an event otherwise causing a winding up under Sections 31Y(2) or 31Y(3), the remaining partners
may continue the partnership by giving notice to the withdrawn partner or his representative, within 90 days of the cessation of partner status, of their election to continue. If no agreement for the purchase of the interest of the withdrawn partner is reached within 90 days after the notice, either the withdrawn partner or the continuing partners may commence an action to determine the amount due.

(d) When the court determines the amount due, it shall order the partnership or the continuing partners to purchase the interest of the former partner and enter judgment accordingly.

(e) The payee partner shall be indemnified against all liabilities that have been taken into account to determine the amount paid for the partnership interest.

(f) A partner who has been expelled because of violation of the partnership agreement or other wrongful conduct or who has withdrawn in violation of the partnership agreement or in a manner that is otherwise wrongful shall be liable for damages caused by his [or her] breach or wrongful conduct as provided in Section 31X. A partner who has withdrawn by express will prior to the expiration of a specified term or undertaking need not be paid any portion of the value of his [or her] interest until the expiration of the term or
undertaking, unless he [or she] establishes to the satisfaction of the court that payment may be made over a lesser term. Any deferred payments shall be secured and bear interest at the [ ] rate.

COMMENT

Section 32 was discussed at length by the committee at its meeting in December 1988 and again at its meeting in January 1989. Section 32 addresses those situations in which a person ceases to be a partner in a way that does not cause the partnership to be wound up. For example, Section 32 concerns the situation in which a partner expresses his will to cease to be a partner before the expiration of an agreed term. Section 32(a) provides that the partnership shall purchase that partner's interest for its fair market value.

New Section 32(a) reflects the committee intent that the buyout be made mandatory. It provides: "If a person ceases to be a partner under Section 31 but no event causes a winding up of the partnership under Section 31Y, the partnership shall purchase the interest of the person who ceases to be a partner for its fair market value." One committee member has suggested that the following additional language be added to the end of Section 32(a) to underscore that the obligation is on both parties: "and the former partner or his successor in interest shall sell that interest to the partnership for its fair market value."

Section 32(b) reflects the desire of the committee to provide guidance on the determination of fair market value. The first part of Section 32(b) provides:

The fair market value shall be determined as of the moment of the event causing cessation. Fair market value shall be the amount that would have been distributable to that person in a winding up of the partnership. In determining that amount, the assets of the partnership shall be valued at the greater of (1) liquidation value or (2) value based on sale of the entire business as a going concern without the withdrawing partner. In either case, the determination shall be made on the basis of the price that would be paid between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and with the knowledge of all relevant facts.
The view was expressed that, if value under Section 32 means the higher of liquidation value or going concern value, then from the point of view of the departing partner there would be no bottom line difference in remedy under Section 32 or Section 31Y. The departing partner is in as good a position and the continuing partners are in a better position because they need not sell the assets.

Other statements of value were considered and rejected. Liquidation value was distinguished from assignment value. The committee considered but declined to adopt the term "fair value" defined in Section 13.01(3) of the MBCA as follows:

"Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

"Fair value" is also the term used in RULPA § 604. The committee also rejected the Cal.Cp.Code § 2000(a) definition of value: "The [fair] value shall be determined on the basis of the liquidation value but taking into account the possibility, if any, of sale of the entire business as a going concern in a liquidation."

The last part of Section 32(b) is intended to provide that the distributions so important to a surviving spouse be continued in certain situations:

In the case of a partner in a partnership in which capital is a material income-producing factor, regularly scheduled distributions shall continue to be made to the former partner or his successor in interest. These distributions shall be credited to the payments due on account of the former partner, first, as to interest, second, as to principal.

This rule for the continuation of distributions is new. The concept of a partnership in which capital is a material income-producing factor is from the "family partnership" rules in Section 704(e) of the Internal Revenue Code.

Section 32(c) is designed to implement Sections 31Y(2) and 31Y(3), giving remaining partners 90 days to
elect to continue the partnership without winding up in certain situations. Section 32(c) provides that the remaining partners must give notice to the departed partner or his representative within 90 days of the cessation of partner status. If no agreement for the purchase of the interest is reached within 90 days after the notice, an action may be commenced to determine the amount due.

Section 32(d) provides that the buyout may be by the partnership or one or more of the continuing partners. For federal income tax purposes, a payment to a partner for his or her interest can be characterized as either a purchase of a partnership interest or as a liquidating distribution. The two have different tax consequences and form very much controls substance. In general, the purchase of an interest route is most cleanly documented as a payment from other partners, whereas the liquidating distribution route is most cleanly documented as a payment from the partnership. Section 32(d) is proposed here to facilitate that option by providing that the payment can be made either by the partnership or by some or all of the continuing partners.

The committee deleted the following language from Section 32(d): "The decree shall further provide that, if the demanding partner's interest is not purchased within [90 days], the court will order a sale of the partnership assets pursuant to [section 31Y]." The committee's decision was to make the buyout mandatory and not provide winding up as an alternative.

Section 32(e) attempts to clarify the "liabilities" that are subject to indemnification. Consider the comment on the indemnification provisions in present Section 38(2) in Hillman, Commercial Divorce, supra, at 556-57:

A further issue concerns whether the former partner is to be protected from "present or future partnership liabilities," as provided in section 38(2)(b), or only "existing liabilities of the partnership," as specified in section 38(2)(c). This interpretive difficulty is compounded because the terms "present," "existing," and "future" each lack precision when used to describe the elusive concept of a liability.

Although consideration of the nature of partnership liabilities is not undertaken in this Article, it should be observed that the references in
both subsections 38(2)(b) and (c) are not adequate to
describe the liabilities that should be the subject
of indemnity. The partner who has been the cause of
a wrongful dissolution is entitled to protection from
those "present," or "existing," liabilities that were
recognized in the valuation and settlement of the
account. Insofar as the partners in their
relationships with each other are concerned, the
withdrawing partner already has paid his or her share
of this type of liability through the process of
account settlement. At the other extreme are those
liabilities that do not pertain to pre-dissolution
partnership matters and arise only after the
dissolution. Although in certain circumstances third
parties without notice reasonably may assume that the
former partner continues as a member of the venture,
the partner who has been removed should be able to
expect indemnification from those who have continued
the venture and incurred the liability. This is
presumably the type of exposure that section 38(2)(b)
refers to as a "future" partnership liability and
that section 38(2)(c) inadvertently ignores.

Liabilities that are contingent or uncertain at
the time of dissolution and account settlement
present greater difficulties. In many circumstances,
liabilities of this nature will not be recognized in
the valuation of the withdrawing partner's account.
When a claim for indemnification relates to
liabilities that result from pre-dissolution
operations of the partnership, but mature after the
dissolution, the remaining partners quite naturally
may resist indemnification of a former partner whom
they believe has not yet paid a fair share of the
liability. The former partner, on the other hand,
may feel that this type of "future" liability is an
appropriate subject of indemnification if it
developed largely because of actions taken by the
remaining partners after the termination of the
withdrawing partner's participation in the venture.
The point of this discussion is not to demonstrate
the full range of partnership liabilities, but rather
to suggest that these situations must be resolved on
the equities rather than through an application of
the UPA's simplistic and inconsistent indemnification
provisions.

Section 32(f) provides that a person who has been
expelled because of violation of the partnership
agreement or other wrongful conduct or who has withdrawn
in violation of the partnership agreement or in a manner
that is otherwise wrongful shall be liable for damages
caused by the breach or wrongful conduct as provided in
Section 31X. Section 32(f) has been amended to conform
to Sections 31X and 31Z(b).

Proposed Section 32(f) rejects the forfeiture of
goodwill rule in present Uniform Act § 38(2)(c)(II).
The present rule is persuasively criticized in 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, 552-555
(1983):

The reason for disregarding goodwill in valuing
the interest of the partner who has caused the
dissolution wrongfully is unclear. It cannot be
justified as serving a compensatory function since
that function is served more effectively by the
permissible offset for damages resulting from the
dissolution. Similarly, it does not represent a
sanction since goodwill is forfeited only if the
remaining partners continue the business without a
liquidation; if a liquidation occurs, the partner who
has caused the dissolution wrongfully is entitled to
a proportionate share of any goodwill realized upon
the liquidation. The forfeiture of goodwill,
therefore, serves neither a compensatory nor a
punitive function.

The UPA directive to disregard goodwill may be
based on the perceived difficulties of valuation. At
its best, goodwill is nebulous. The drafters of the
UPA may have been attempting through this
"forfeiture" to prevent the assertion of inflated
claims based upon such a vague concept as goodwill.
Indeed, their concern in this regard was
substantiated by the state of accounting practices at
the turn of the century. Difficulty of valuation,
however, cannot provide a satisfactory basis for
denying the existence of an asset such as goodwill in
all cases. Much experience has been gained in
valuing goodwill and comparable assets in other
contexts. In addition, a wrongfully caused
dissolution may necessitate the valuation of other
intangible assets, such as licenses, trademarks, and
leases, which may be susceptible to no more precise
valuations than goodwill. Thus, difficulty of
valuation is not of itself sufficient to support the
UPA position on goodwill.

Finally, the required forfeiture of goodwill may
have been based upon concerns over whether goodwill
is an asset capable of realization. For example, the
drafters of the UPA may have assumed that all or a
substantial portion of the value of partnership
goodwill would not be realized in the event of a
liquidation of partnership assets. If this
assumption is correct, it is sensible to conclude
that the partner who has caused the dissolution
should not receive a windfall merely because the
business is being continued. The UPA, in effect,
establishes a conclusive presumption that goodwill
will not be realized upon a liquidation and,
accordingly, should be disregarded in valuing the
interest of the withdrawing partner. The possibility
that the goodwill component of the value of the
business is not capable of full realization, however,
should be regarded as a matter of proof rather than a
proper subject of rigid presumptions. Realization
concerns can be addressed adequately if the valuation
of the withdrawing partner's account is based upon
the amount that would be realized in the event that
the partnership assets were being liquidated. Under
this approach, the withdrawing partner would be
entitled to a proportionate share of the liquidation
value, if any, of the partnership goodwill. Such an
approach is far more sensible than a conclusive
presumption that goodwill could not be realized upon
liquidation.

Whatever may have been the reasons for the
development of the UPA's provision on goodwill, the
automatic forfeiture of this partnership asset
currently serves no useful purpose.

Similarly, the ABA Report at 175 suggests the rule be
abolished: "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."

SECTION 33. GENERAL-EFFECT LIMITATION OF DISSOLUTION
ON AUTHORITY OF PARTNER AFTER EVENT CAUSES WINDING UP OF
PARTNERSHIP. Except so far as may be necessary to wind
up partnership affairs or to complete transactions begun
but not then finished, dissolution an event that causes
a winding up of the partnership under Section 31Y
terminates all authority of any partner to act for the
partnership, as declared in Section 34; and

(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.

COMMENT

UPA § 33 limits the authority of partners upon
dissolution. The first distinction made by Section 33
is between authority to bind the partnership to third
persons and authority to bind the partnership as among
the partners themselves. UPA § 33(2) directs us to
Section 35 for the rules that end the authority of
partners to bind the partnership to third persons. UPA
§ 33(1) treats the end of authority to bind the partners
as among themselves. It distinguishes situations based
on the cause of the dissolution. If the dissolution is
causd by the act of a partner, UPA § 33(1)(b) directs
us to UPA § 34, more particularly, to UPA § 34(a). If
the dissolution is caused by the death or bankruptcy of
a partner, UPA § 33(1)(b) directs us to UPA § 34, more
particularly, to UPA § 34(b). If the dissolution is by
any other cause, UPA § 33(1)(a) provides that, as among
themselves, the dissolution terminates all authority of
any partner to act for the partnership. RUPA § 33
provides that, as among the partners, all events that
cause a winding up are governed by Section 34.

This new section was taken from Georgia § 14-8-33
and then modified to eliminate the term "dissolution."
Even as thus modified, new Section 33 simplifies present
law, although perhaps more could be done. The ABA
Report at 167 recommends that Section 33(1) be merged
with Section 34 and that Section 33(2) be merged with
Section 35. An earlier version of this memorandum
implemented this suggestion. This version restates the basic structure of Sections 33, 34, and 35 to avoid confusion over the integration of the new breakup provisions.

SECTION 34. RIGHT LIABILITY OF PARTNER PARTNERS TO CONTRIBUTION FROM CO-PARTNERS FOR ACTIONS AFTER DISSOLUTION EVENT CAUSES WINDING UP OF PARTNERSHIP.

Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners the other partners for his [or her] share of any liability created by any partner acting for the partnership after a winding up has been caused:

(1) if the act is appropriate to the winding up of partnership affairs or the completion of transactions begun but not then finished; and

(2) if the acting partner acts as if the winding up of the partnership had not been dissolved unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had caused, provided, however, that no partner shall be liable to any partner who acts with knowledge of the dissolution, or that a winding up has been caused.

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.
New Section 34(1) implements the suggestion in the ABA Report at 169 that new language: "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."

Some of the added language in new Section 34 is based on Georgia § 14-8-34. New Section 4X implements the suggestion of the ABA Report at 169 that new language: "Make the application of the section subject to contrary agreement of the partners." With slight variation, this language also implements the ABA Report recommendation at 169 to clarify that the partner who did not act for the partnership is entitled to contribution: "It is only the acting partner who should be denied contribution." This new language also implements the ABA Report recommendation at 169 that Section 34:

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.

RUPA § 34 deviates from the UPA and the new Georgia law insofar as it treats all events that trigger winding up (dissolutions under the old approach) alike. Hence, the acting partner with knowledge is denied contribution, independent of the cause of the winding up (dissolution).

SECTION 35. POWER OF PARTNER TO BIND PARTNERSHIP TO THIRD PERSONS AFTER DISSOLUTION EVENT CAUSES WINDING UP OF PARTNERSHIP.

(1) After dissolution an event that causes a winding up of the partnership under Section 31Y, a
partner can bind the partnership except as provided in Paragraph (3). Section 35(3):

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

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

(I) Had extended credit to the partnership within two years prior to dissolution the event that caused the winding up and had no knowledge— or notice of the dissolution that a winding up had been caused; or

(II) Though he [or she] had not so extended credit, had nevertheless known of the partnership prior to dissolution the event that caused the winding up, and, having no knowledge— or notice of dissolution winding up, the fact of dissolution the winding up 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 (b) Section 35(1)(b) shall be satisfied out of partnership assets alone when such partner had been
prior to dissolution the event that caused the winding up:

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his [or her] connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution an event that causes a winding up of the partnership:

(a) Where if the partnership is dissolved must be wound up because it is unlawful to carry on all or substantially all of the business under Section 31Y(6), unless the act is appropriate for winding up partnership affairs; or

(b) Where if the partner has become bankrupt; or

(c) Where if the partner has no authority to wind up partnership affairs except by a transaction with one who:

(I) Had an extended credit to the partnership within two years prior to dissolution the event that caused the winding up and had no knowledge or notice of his want of authority that a winding up had been caused; or

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Had not so extended credit to the partnership prior to dissolution the event that caused the winding up, and, having no knowledge or notice of his [or her] want of authority, the fact of his [or her] want of authority has had not been advertised in the manner provided for advertising the fact of dissolution winding up in Paragraph (II). Section 35(1)(b)(II).

(4) Nothing in this section shall affect the liability under Section 16 of any person who after dissolution an event that causes a winding up represents himself [or herself] or consents to another representing him [or her] as a partner in a partnership engaged in carrying on business.

COMMENT

Present Section 35 provides that partners have the authority to engage in winding-up transactions. It also provides the general rule that partners have the power to bind the partnership in transactions with third parties who did not know of the dissolution. Section 35 thus balances the interests of the partners to end their mutual agency against the interests of outside creditors without notice of dissolution.

The proposed Section 35 is different because it eliminates the term dissolution. It refers instead to an event that triggers a winding up of the partnership, which states the traditional consequence of dissolution.

The proposed new Section 35 is also based in part on Georgia § 14-8-35. It adopts the following ABA Report recommendation for change at 170:

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 the acting partner's lack 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.

Georgia and Texas have already limited the notice requirement to those who extended credit within two years prior to dissolution.

Section 35(3)(a) is modified to reflect new Section 31Y(6), which provides that not every illegality will cause a winding up. The change alleviates some of the hardship under this provision described in Bromberg & Ribstein at 7:47:

A third person cannot enforce against a partnership formed for an illegal purpose a contract with illegal subject matter. A third person who makes a contract with a legal subject matter and is without knowledge of the partnership's illegal purpose has a remedy against partners who contract with him or her, participate in the contract, or expressly authorize it. Without such direct participation or authority, however, a partner's acts after the partnership becomes illegal do not bind the firm unless they are for winding up. This may impose an undue hardship on innocent third persons who deal with him or her.

Section 35(3)(b) continues the UPA rule that bankruptcy automatically terminates the authority of the bankrupt partner, even as to innocent creditors who are unaware of the bankruptcy. See Bromberg & Ribstein at 7:52.

SECTION 35X. POWER TO BIND THE PARTNERSHIP AND LIABILITY TO THIRD PERSONS AFTER CESSIONATION OF PARTNER STATUS.

(1) A person who ceases to be a partner under Section 31 shall neither be personally liable as a partner for any partnership debt incurred, nor have the
power to bind the partnership, after the cessation of partner status, unless the transaction is one that would bind the partnership prior to cessation and the other party to the transaction:

(a) was a creditor of the partnership within two years prior to such time and, in either case, had no notice of the person's ceasing to be a partner; or

(b) though the other party had not so extended credit, had nevertheless known, prior to the cessation of partner status, that the person was a partner and, having no notice of the cessation, the cessation had not been advertised in a newspaper of general circulation in the place (or in each place) at which the partnership business was regularly carried on.

(2) The liability of a partner under this section shall be satisfied out of partnership assets alone when such partner had been prior to the cessation of partner status:

(a) unknown as a partner to the person with whom the contract is made; and

(b) so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his [or her] connection with it.

COMMENT

Under the present draft of new withdrawal provisions, the cessation of a partner's status does not
in itself trigger a winding up. Therefore, winding up is not discussed under Section 35X as a power given to the person who ceases to be a partner. The sole concern is therefore with any continuing apparent authority to engage in regular transactions. The suggested language is drawn from Partner Dissociation, which comments as follows at 422:

This section, which is drawn from current U.P.A. § 35, provides a method of escaping liability for post-dissociation partnership debts without dissolution of the partnership. It reaches the same basic result as under current law where the partnership is continued after a partner dissociation.

Partner Dissociation at 369 summarizes the role of present Section 35 as follows:

Dissolution largely terminates the partners' credit contributions as to post-dissolution transactions. U.P.A. § 35 provides that the partnership is bound after dissolution only by (1) acts by nonbankrupt partners that are appropriate for winding up; and (2) by other transactions with creditors who had no knowledge or notice of the dissolution (unless the partnership was dissolved because its business was unlawful).

SECTION 36. EFFECT OF DISSOLUTION CESSATION OF PARTNER STATUS ON PARTNER'S EXISTING LIABILITY.

(1) The dissolution cessation of the partnership partner status 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 the cessation of partner status by an agreement to that effect between himself [or herself], 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 cessation and the person or partnership continuing the business.

(3) Where if a person agrees to assume the existing obligations of a dissolved partnership after one or more persons ceases to be a partner, the partners whose obligations have been assumed persons who have ceased to be partners 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 estate of a deceased partner shall be liable for all obligations of the partnership incurred while he the deceased was a partner but subject to the prior payment of his separate debts.

(5) The provisions of this section also apply to a person who ceases to be a partner upon the completion of the winding up of the partnership.

COMMENT

New Sections 36(1) through 36(3) have been amended to refer to withdrawal rather than dissolution.

New Section 36(4) is edited to reflect the deletion of the "jingle rule" that provided that separate debts have first claim on separate property. This "dual priority" rule is being stricken from Section 40 to bring the UPA into conformity with the Bankruptcy Act.

New Section 36(5) is added to make Section 36 apply to the partner who exists by asset sale and not
merely to the partner who is bought out by the other partners.

SECTION 37. RIGHT TO WIND UP.

(a) Unless—otherwise—agreed—the The partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has caused a winding up under Section 31Y have the right to wind up the partnership affairs; provided, however, that any partner, his [or her] legal representative or his assignee, upon cause shown, may obtain winding up by the court.

(b) The persons winding up the partnership's affairs may, in the name of, and for and on behalf of, the partnership, preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend suits, whether civil, criminal, or administrative, settle and close the partnership's business, dispose of and convey the partnership's property, discharge the partnership's liabilities, and distribute to the partners any remaining assets of the partnership. This subsection is intended to be illustrative rather than exclusive.

COMMENT

RUPA § 37(a) is drawn from UPA § 37. The "unless otherwise agreed" language from the beginning of UPA § 37(a) is supplanted by the general rule in RUPA § 4X. Does Section 37(a) accurately provide that "good guys [and gals] only get to wind up?"
RUPA § 37(b) is intended to give further guidance on the powers of a winding up partner. It is based on Delaware Laws Title 6, § 17-803. The Delaware actions are similar to the list of powers in Texas Title 105, Art. 6132a-1, § 8.04(b). The Delaware language is expanded to include the preservation of the partnership's business or property as a going concern for a reasonable time. See the ABA Report at 168:

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 . . . 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.

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.

The committee also wanted a statement in the text that the powers in Section 37(b) are nonexclusive.

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.

COMMENT

Although UPA § 38 is eliminated as a separate section, much of its substance is located elsewhere in RUPA. The full liquidation right in UPA §§ 38(1) and 38(2) is now located in RUPA § 31Y. The UPA § 38(2) right to be paid the value of one's interest is now treated in RUPA § 32.
The first draft of the RUPA provisions on partnership breakups eliminated the Section 38(1) right to compel a liquidation of assets absent agreement to the contrary. The committee decided to retain the traditional rule, which now appears at Section 31Y(1).

SECTION 39. RIGHTS WHERE PARTNERSHIP AGREEMENT IS DISSOLVED RESCINDED FOR FRAUD OR MISREPRESENTATION.

Where if a partnership contract agreement is rescinded on the ground that it was entered into because of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) To to a lien on, or 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 [or her] for the purchase of an interest in the partnership and for any capital or advances contributed by him [or her]; and

(b) To 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 [or her] in respect of the partnership liabilities; and

(c) To to be indemnified by the any person guilty of the fraud or making the representation misrepresentation against all debts and liabilities of the partnership.
New Section 39 adopts the ABA Report suggestion that the term "contract" be replaced with the term "agreement." The words "that it was entered into because" are added to clarify the central concept that there was fraud that induced the entry into partner status.

The basic mechanism of Section 39 is that the partnership agreement is voidable ab initio as among the partners but not as to innocent third parties. See Bromberg & Ribstein at 7:186: "Because the partnership contract is voidable among the partners ab initio as a result of the fraud, the defrauded partner is not subject to damages or other remedies for premature dissolution." The authors further explain:

Upon dissolution, the defrauded partner is entitled to return of his or her investment from the defrauding partner, who holds the property as a constructive trustee. The difficult questions concern the rights of the defrauded partner vis-a-vis innocent partners and third-party creditors. Pursuant to U.P.A. § 39, the defrauded partner is entitled to the return of all of his or her payments from property remaining after payments of debts to third-party creditors, to be indemnified by the defrauding partner against all debts to third-party creditors, and, after paying such debts, to stand in the place of these creditors against the partnership. The defrauded partner's superiority over other partners is reinforced by a lien on partnership surplus under §39(a). The defrauded partner is entitled under general equitable principles, although not explicitly under §39, to be compensated for services to the partnership.

The ABA Report at 176 also recommends the following:

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 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.
The committee disagreed. The basic logic of the section is that the partnership relationship is void ab initio at the request of the partner whose membership was induced by fraud. That is, it is his or her right, as among the other partners, to withdraw membership retroactively. To that extent, he or she becomes an outside creditor. Why should the defrauded person be given priority over the "innocent" partners? Because the "innocent" partners voluntarily (without fraudulent inducement) assumed the partnership relationship with a person who committed fraud in connection with their partnership.

RUPA § 31(12) provides that a person ceases to be a partner upon "the rescission of the partnership agreement in accordance with Section 39." Is the moment of rescission sufficiently identified? Should cessation be upon the giving of notice of express will to cease being a partner, as under Section 31(1)?

SECTION 40. RULES FOR DISTRIBUTION UPON WINDING UP.
In settling accounts between the partners after dissolution upon a winding up of the partnership, the following rules in this section 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 to satisfy all the liabilities specified in clause (b) of this paragraph Section 40(b).

(b) The liabilities of the partnership shall rank in order of payment, as follows:
(I) Those owing to creditors other than partners,
(II) Those those owing to partners other than for capital and profits,

(III) Those those owing to partners in respect of capital,

(IV) Those those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph Section 40(a) to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18(a) Section 18(b) 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.

(e) 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 Section 40(d).

(f) Any partner or his partner's legal representative or assignee shall have the right to enforce the contributions specified in clause (d) of this paragraph Section 40(d), to the extent of the
amount which he [or she] has paid in excess of his [or her] share of the liability.

(g) The individual property estate of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph Section 40(d).

(h) 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.

(i) 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.

COMMENT

The language "subject to any agreement to the contrary" is retained in the first sentence of RUPA § 40 because it refers to agreements with third party creditors. It thus has vitality even after the addition of RUPA § 40X.

RUPA § 40(a)(II) provides that the contributions of the partners necessary to satisfy partnership liabilities are a debt to the partnership. Sections 40(b)(II) and 40(b)(III) refer to the liability of the partnerships to partners "for" and "in respect of" capital. Bromberg & Ribstein state this means that partners must share capital losses as they would other losses.
The fact that the partners' capital contributions are considered debts of the partnership means that the partners must share capital losses as they would other losses. Thus, unless the partnership agreement provides otherwise, one who joined the partnership as a service contributor may be required to contribute money on dissolution.

Sections 40(b) and 40(c) provide that in settling accounts after a winding up of the partnership has been caused, the claims of partners who were also partnership creditors rank below the claims of all other creditors. Section 804 of RULPA provides that partners who are creditors share with other creditors:

§ 804. Distribution of Assets

Upon the winding up of a limited partnership, the assets shall be distributed as follows:

(1) to creditors, including partners who are creditors, to the extent permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under Section 601 or 604;

(2) except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under Section 601 or 604; and

(3) except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in distributions.

The Comment to this language provides:

Section 804 revises Section 23 of the 1916 Act by providing that (1) to the extent partners are also creditors, other than in respect of their interests in the partnership, they share with other creditors, (2) once the partnership's obligation to make a distribution accrues, it must be paid before any other distributions of an "equity" nature are made, and (3) general and limited partners rank on the same level except as otherwise provided in the partnership agreement.
The language in RUPA § 40(f) has been modified to conform to the language in RUPA § 37(a).

Sections 40(h) and 40(i) have been deleted. These sections gave partnership creditors priority as to partnership property and separate creditors priority as to separate property. These deletions were recommended by the ABA Report at 177-78:

(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 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.

The specific provision of the Bankruptcy Code cited for the repeal of the dual priority rule is 11 USC § 723(c):

(c) Notwithstanding section 728(c) of this title, the trustee has a claim against the estate of each general partner in such partnership that is a debtor in a case under this title for the full amount of all claims of creditors allowed in the case concerning such partnership. Notwithstanding section 502 of this title, there shall not be allowed in such partner's case a claim against such partner on which both such partner and such partnership is liable, except to any extent that such claim is secured only by property of such partner and not by property of such partnership. The claim of the trustee under this subsection is entitled to distribution in such partner's case under section 726(a) of this title the
same as any other claim of a kind specified in such section.

Helpful explanation is contained in Notes of Committee on the Judiciary, Senate Report No. 95-989:

This section is a significant departure from present law. It repeals the jingle rule, which, for ease of administration, denied partnership creditors their rights against general partners by permitting general partners' individual creditors to share in their estates first to the exclusion of partnership creditors. The result under this section more closely tracks generally applicable partnership law, without a significant administrative burden. * * *

Subsection (c) requires the partnership trustee to seek recovery of the full amount of the deficiency from the estate of each general partner that is a debtor in a bankruptcy case. The trustee will share equally with the partners' individual creditors in the assets of the partners' estates. Claims of partnership creditors who may have filed against the partner will be disallowed to avoid double counting.

Thus, the legislative history focuses on the partnership creditor and seeks to eliminate the preference for the separate creditor. One bankruptcy expert has said this rule reflects that partnership creditors have an aggregate perception of partnerships.

The final Comment to Section 40 might contain a cross-reference to Section 16, dealing with persons held out as partners. To the extent that the new Bankruptcy Act puts creditors on equal footing, it has been recommended that the "equal footing" rule in Section 16(1)(b) be eliminated as no longer necessary. I am unclear about this. Is the goal to put partnership and separate creditors on equal footing with respect to all properties, or only with respect to separate property? That is, is the policy to continue to give partnership creditors prior claim over partnership property? See also present Section 41(8).

Does the deletion of the "jingle rule" from Section 40 have any impact on Section 36(4)?
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.

(1) Unless otherwise agreed, the relationships
between a partnership and its creditors are unaffected
by the cessation of a partner's status under Section 31
or by the addition of a new partner.

(4) (2) When all the partners or their legal
representatives assign their rights interests in the
partnership property to one or more third persons who
promise to pay the debts and who continue the business
of the dissolved winding up partnership, creditors of
the dissolved winding up 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
partner 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.

(8) (3) When the business of a partnership after dissolution is continued under any conditions set forth in this section after a person ceases to be a partner, 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) (4) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) (5) 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.

COMMENT

Section 41 raises the issue of successor liability. Assume, for example, that partners A, B, C, and D come to the end of their agreed term together. Assume, further, that partnership assets are sold and purchased by D, X, Y, and Z. The sale of the assets will not extinguish the liabilities of A, B, C, or D, except to the extent the liabilities are satisfied with the proceeds of the asset sale. The question is whether the group that purchases the assets should be deemed to assume the continuing liabilities of the old partnership simply because one original partner is a member of the group. Under this draft, the answer is no.

The committee should first consider whether the answer should be no. Given that the original partners remain personally liable, given that this draft makes them jointly and severally liable, and given that the law of fraudulent transfers still applies, why should the new partnership be considered a continuation of the old partnership after an asset purchase in every case in which one of the purchasers, no matter how small his interest, was an original partner? This draft says that as a general matter the new partnership does not take up the old liability. If the Drafting Committee should choose a different substantive result, it can achieve it without reinstating the concept of dissolution.

There appear to be four basic ways to answer the basic policy question in the affirmative. First, say that the original partnership has not dissolved even though it has terminated. This first approach seems awkward and confusing. That is, as I understand it, the problem with the Partner Dissociation definition of dissolution. Second, eliminate the concept of dissolution and say that the partnership has not yet terminated. Third, eliminate the concept of termination and say that the partnership has not yet dissolved. Fourth, eliminate the concept of dissolution, say that the partnership has terminated, but say, nevertheless, that the successor partnership is bound by the obligations of the terminated partnership. This last approach could be implemented by modifying Section 41, without either resurrecting the concept of dissolution or giving "termination" a strained meaning. The
Drafting Committee should decide which of these four approaches it favors if wishes to answer the basic question in the affirmative.

Consider the broad observation on Section 41 in Partner Dissociation at 371-72:

U.P.A. § 41 provides that in the absence of fraud the successor firm assumes liabilities of the old firm only in certain situations: when it agrees to do so or the firm is rightfully continued by one or more of the partners in the dissolved partnership. Thus, the successor firm is not generally liable if the partnership is continued without assumption or consent by some of the former partners, or if the partnership is incorporated, so that the party carrying on the business is technically the corporation rather than one or more of the original partners. If the liabilities of the old partnership do not carry over to the new one, the creditors cannot levy execution on its property to enforce the claim, but rather must resort to the more limited charging order against the former partners under U.P.A. §28.

Incorporation of the partnership is further discussed in Partner Dissociation at 402:

Perhaps the most difficult question with regard to the continuity of the entity concerns incorporation of the partnership. U.P.A. § 41(4) provides that there is no automatic assumption if the firm is continued exclusively by persons not partners of the dissolved partnership. This prevents carryover if the successor is a corporation, even if the corporation is owned by all of the partners in the old firm. If the business is continued on the same basis, the change wrought by incorporation appears merely technical. Although the change from individual liability of the partners to limited liability affects third parties, this change only affects post-incorporation creditors. Pre-incorporation creditors would undoubtedly prefer to have their liabilities assumed by the new firm, as long as the personal liability of the partners continued. On the other hand, excepting the corporation situation would present formidable drafting problems: What must the former partners' interest in the corporation be in order to prevent dissolution? What if the partnership was owned by two or more corporations that sold their interests to other corporations? On balance, it is preferable to
require the partnership to deal explicitly with the
corporation situation by agreement.

The rule proposed in this draft seems consistent
with the present rule concerning the corporate purchaser
of partnership assets. If the Drafting Committee
chooses to impose liability on successor partnerships,
it might limit the rule to situations in which original
partners purchase more than a minimum percentage
interest in the assets.

Section 41(1) provides the general rule that the
cessation of a partner's status does not affect the
relationship between a partnership and its creditors.
There is a companion rule in Section 30(a), which
provides that the cessation of partner status does not
affect the continuation of the partnership.

RUPA § 41(2) adds the word "legal" before
"representative" to conform to RUPA §§ 37(a) and 40(f).

Section 41(7) is eliminated as redundant with
Section 17.

In Sections 41(2) and 41(3), the reference to the
partner's "right[s] in partnership property" must be
deleted if the tenancy in partnership is eliminated in
favor of an entity approach that states that a
partnership has direct ownership of its assets.

Section 41 is a place where the problem of the
sole surviving partner might be addressed.

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
ex-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
ereditors, 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.

COMMENT

RUPA treats the buyout rights of partners and
estates of deceased partners under Section 32 and
eliminates Section 42. The buyout provisions in RUPA
§ 32 implement the basic thrust of the ABA Report
suggestions concerning Section 42. They go further
insofar as they eliminate the profits-interest option.

SECTION 43. ACCRUAL OF ACTIONS. The right to an
account of his interest shall accrue to any partner, or
his [or her] assignee or 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 cessation of partner
status. This right to an account on the cessation of
partner status is independent of any right to account under Section 22.

COMMENT

RUPA § 43 is based on UPA § 43, which is basically summarized in Bromberg & Ribstein at 7:89:

The general rule, and that provided for in U.P.A. §43 as to actions against a surviving or liquidating partner, is that the cause of action accrues at the time of dissolution, so the statute of limitations runs from that date. However, some courts have held that the limitations period does not begin to run until there is an occasion for resorting to legal remedies, such as neglect or withholding of information, or while partnership affairs are continuing during the winding up period. Also, regardless of when the statute of limitations accrues, accounting, as an equitable proceeding, may be barred by laches where there is an undue delay in bringing the action. Finally, the limitations periods may be tolled by a partner's fraud.

It should be emphasized that the provision in U.P.A. §43 for accrual on dissolution does not prevent a pre-dissolution accounting, which is provided for pursuant to U.P.A. §22. Although a partner may sue for an accounting prior to dissolution, the failure to do so normally would not bar a post-dissolution accounting.

The addition of the reference to assignees in Section 43 implements the ABA Report recommendation at 182:

(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.

(b) Clarify that section 43 precludes the statute of limitations from beginning before dissolution but
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. 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.

RUPA § 22 is expanded far beyond UPA § 22. Section 43 should be reviewed by the full committee.

The following comments in the ABA Report have not yet been addressed:

(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.

(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." [citing the Virginia statute] The winding up of a partnership might extend from dissolution for a period greater than the statute of limitations.

PART VII

MISCELLANEOUS PROVISIONS

SECTION 43X. SEVERABILITY CLAUSE.

(a) If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions
or applications of this [Act] which can be given effect
without the invalid provision or application, and to
this end the provisions of this [Act] are severable.

(b) 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.

COMMENT

Section 43X(a) is drawn from the Commissioners' Reference Book at page 64.

Section 43X(b) is drawn from the ABA Report at 131 and is based on UCC § 1-104. It originally appeared as part of Section 4 but was moved here at the instruction of a subcommittee.

SECTION 44. WHEN ACT [ACT] TAKES EFFECT. This act [Act] shall take effect on the ______ day of
_______ one thousand nine hundred and _______.

COMMENT

There are no recommended changes to Section 44.

SECTION 45. LEGISLATION REPEALED. All acts or parts of acts inconsistent with this act are hereby repealed.

(a) The following provisions are superseded by this [Act] and are hereby repealed:

(1) [the Uniform Partnership Act as amended and in effect immediately prior to the adoption of this [Act]].
(b) 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.

COMMENT

RUPA § 45(a) is an attempt to implement the recommendation of the ABA Report at 183 that the repealer "should require a specific list of each act that is repealed by title and code section." RUPA § 45 is language suggested in the ABA Report at 131. The ABA Report explains at 183-84:

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 accrued, prior to the effective date of the revised 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.
It might be useful to include a provision similar to MBCA § 17.01: "This Act applies to all domestic corporations in existence on its effective date that were incorporated under any general statute of this state providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved." MBCA § 17.03 also contains a Saving Provision and concludes with a Cross-Reference Table that compares the Revised Model Act to its predecessor.
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

PARTNERSHIP ACT

Waiohai Beach Resort
Kauai, Hawaii

Reported by:
RICHARD S. ADAMS
Dawn McNamee
If the Committee of the Whole will come to order, we will get started. We are considering the revised Uniform Partnership Act. It's under Tab 13 of your blue books.

I will call upon the chairman of the committee, Lane Kneedler, to give the opening statement.

COMMISSIONER H. LANE KNEEDLER, III (Virginia): Thank you, Commissioner Ewart. Good morning and welcome to the 75th anniversary -- we have a birthday party this morning -- the 75th anniversary of the adoption of the Uniform Partnership Act.

I'd like to begin by introducing the members of the committee, the one adviser who is here, and our reporter.

For the purposes of the reporter for the Conference, I am going for start on my right, work across, start on my left and come back.

On my far right is Gay Taylor from Utah, who is our drafting liaison.

Next to Ms. Taylor is Tom Jones from Alabama.
To Tom's left is George Buxton from Tennessee.

To George's left is Don Weidner, our reporter.

I am going to come back and say something about Don in just a moment.

All the way on my left is Bob Cornell, who is the chairman of Division E. Bob has also been a very active member of the committee, and I would like to thank him for that.

To Bob's right is Harry Haynsworth, who is one of our ABA advisers. I am going to come back and say something about Harry in just a moment as well.

To Harry's right is Fran Pavetti from Connecticut.

To Fran's right is Bill Gardner from Washington, D.C.

To Bill's right is Howard Swibel from Chicago, Illinois.

To Howard's right is Morris Macey from Georgia.

Bill Burke is the individual standing. He is going to be sitting somewhere along here. Bill Burke is from California.

In addition to formally recognizing the members of the committee for their hard work over this past now about a year and a half, I'd also like to thank Don
Weidner, our reporter, professor from the Florida State University Law School, for the extraordinary time and effort he has devoted to this project.

Indeed, if you have had a chance to read the commentary as well as the act itself, you understand the kind of time and effort Don has put into this project. Indeed, someone asked me at the sing-a-long last night where Don was. Then, before I could say anything, somebody said, "He is probably back in his room producing another hundred pages of commentary for us to read about the act."

Those of you who have been members of a committee for the Conference and, in particular, a Chair, know how important it is to have an efficient and effective reporter.

I have introduced one of our ABA advisers. Two of our-advisers have been extremely active in the project. One is Harry Haynsworth from the University of South Carolina Law School, all the way down, second from the left. Harry was the Chair of the UPA Revision Subcommittee of the ABA Committee on Partnerships and Unincorporated Business Associations. He is now, in effect, a full member of this committee. He has been very helpful. Harry, I'd like to thank you very much for all
you’ve done.

In addition, Stacy Eastland -- some of you know Stacy from Houston, Texas -- is our adviser from the ABA Real Property, Probate and Trust Law Section. Stacy has also been very active in the committee's work and quite helpful.

There are four other individuals I would like to name briefly, who are also mentioned in the preface to the materials, who have been appointed as official advisers to our committee, and, again, have been extremely helpful to us.

Joel Adelman of Detroit, Michigan; Professor Bob Hillman from the University of California at Davis Law School; Allan Donn from Norfolk, Virginia; and Professor Larry Ribstein who was at the Mercer Law School and is now at the George Mason University Law School in Virginia.

Harry Haynsworth, Joe Adelman and Allan Donn are three of the five members of the ABA subcommittee that I mentioned before, so we have been very fortunate in this project to have a majority of the ABA subcommittee that first looked in detail at the proposed revisions to the Uniform Partnership Act as official advisers to our committee.

In addition, some of you may know Professor
Larry Ribstein was the adviser to the Virginia committee that revised the Georgia partnership act in 1983 and 1984. So, we certainly have had expert outside help.

What I want to do this morning is say a few words about the history of the Uniform Partnership Act and how we got to where we are, then I am going to ask Don Weidner to give us a brief overview of the major policy issues presented by the act, then we will get to a line-by-line reading of various sections of the act.

... . . .

I mentioned that this is the 75th anniversary of the Uniform Partnership Act. It was indeed adopted by the Conference in 1914. It's been adopted in all states but Louisiana. And Louisiana, wherever, you are out here, we hope we are going to be able to persuade you to join the rest of us this time around.

It's been the subject of remarkably few amendments in those states over that 75 years, so that as with anything celebrating its 75th anniversary, we want to be careful in tinkering with the act so that something that seems to have been working quite well for 75 years isn't damaged. ...

Given this 75-year history of the Uniform Partnership Act, why is there this interest in revising
the act? I think it's fair to say this interest began with two efforts in the early 1980's -- the first, the Georgia revisions, a substantial revision of Georgia's Uniform Partnership Act, in 1983 and '84 that I mentioned previously, and, secondly, the ABA subcommittee that Harry Haynsworth chaired that I mentioned previously.

That subcommittee undertook a major study of the act beginning in early 1984, also keeping in mind that the UPA had apparently stood the test of time.

I'd like to read to you, from their report, their standard for looking at proposed revisions to the act, which eloquently states the exact same standard that we followed. Harry and his committee wrote after what was then 71 years: "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."

And they concluded: "This report summarizes the committee's findings, and" -- as the conclusion states -- "it recommends that complete revision of the UPA be undertaken.

After looking at the act, the ABA subcommittee
recommended 150 changes to the Uniform Partnership Act, including 12 new provisions. And of those 100 recommendations, 66 of them had to do with dissolution provisions. So, as you might imagine, that does reflect, I think, the need for change in the act, and as that number might indicate, this is where our Drafting Committee has spent most of its time certainly not all of its time, but most of its time over the past year and a half.

... [A] copy of that ABA report was delivered to the Conference. The Conference then decided to appoint a Drafting Committee. That Drafting Committee was appointed in the fall of '87. Since that time, we have had four full meetings, three in 1988 and one in 1989. ... Therefore, the work that we had not completed up through our, last meeting in January of this year, we divided our committee into four subcommittees and met by conference call for over eight hours to have those four subcommittees consider the remaining of the provisions we had hoped to consider at our March '89 meeting.

Now, a word about what we hope to accomplish today. We have limited time. ... We are not going to be able to have a line-by-line reading of the entire act.

Instead, we are going to focus on 20 of the
provisions of the act. We have tried to pick out those provisions which we believe you need to keep in mind as you're reviewing the entire act -- for example, new Section 4X that talks about the effect of a partnership agreement and the extent to which it can override the act, or those provisions where major changes are being suggested or major policy issues are raised.

Now, a word about the numbering of the sections. This is an act with which most Conference members are quite familiar. Therefore, for simplicity purposes for this first-reading draft we have kept the numbers from the old Uniform Partnership Act, and where we have added a new section, we have added both a number and a letter -- like 4X or 10X. We will go through a renumbering system the next time around, but it seemed to us, again, for simplicity purposes, it was a good idea to keep the same numbers for the first time through.

Finally I'd like to make four general points about the Revised Uniform Partnership Act, known affectionately as RUPA, and then I will turn it over to Don.

RUPA, like the Uniform Partnership Act, continues to be, in effect, a default statute -- that is,
it addresses the partnership, often the small partnership, that doesn't have a partnership agreement. And it also addresses those situations where there is a partnership agreement but that agreement don't cover a particular issue.

Second, as we will see, almost all of the provisions of RUPA maybe varied by agreement. There are a few exceptions, and we will cover those.

The third point I want to make has to do with the entity versus the aggregate approach to partnership law. Don is going to explain both of these approaches or theories in greater detail. Suffice it to say for the moment that RUPA, the revised act, like the Uniform Partnership Act, is a mixed approach, embodying some of both the entity theory and the aggregate approach as the ABA subcommittee recommended. However, it is an act that moves more in the direction of the entity theory of partnerships.

And, finally, I want to say a word about the interaction between the Revised Uniform Partnership Act, RUPA, and the Revised Uniform Limited Partnership Act.

You will remember that we revised the Limited Partnership Act in 1976 and then made extensive amendments to that act in 1985. The Revised Uniform Partnership Acts
governs general partnerships and also governs limited partnerships except where the Revised Uniform Limited Partnership Act is inconsistent, in which case the Limited Partnership Act governs.

MR. DONALD J. WEIDNER (Florida): Thank you, Lane, and thank the members of the Drafting Committee and the advisers for making this an extraordinary professional and personal experience for me. It's been an exciting group to work with.

We have broken Part 1 down into five parts, five relatively major decisions. I am going to take about ten minutes to summarize those major decisions for you.

The first is that we have introduced a blanket provision that, with certain exceptions, RUPA governs, the relations among the partners unless there is a contrary partnership agreement.

At present, the UPA has at many different places a parenthetical, "subject to contrary agreement by the partners." We decided to eliminate having parentheticals like that throughout the act and state directly at the beginning our general philosophy, which is that when it comes to the relations among the partners themselves, their agreement is supreme. And hence, as Lane said, the statute is a default setting. It's a stand-by partnership
agreement for those partnerships in which there is no provable agreement, only an incomplete agreement, or for those situations in which there is an inadvertent partnership.

Our primary focus in drafting the statute has been on the small partnership and the inadvertent partnership rather than on the very large partnership.

The one major exception to the rule that the partners can, by agreement, set aside the provisions of the statute is that there is a general duty of good faith in Section 21(a) which may not be disclaimed.

We have a provision in 4X that we will see that says performance standards can be set, but the duty may not be completely disclaimed. And we were as confident that we wanted an unwaivable duty of good faith in the statute as we were that we could not define it.

Section 24 is amended to eliminate reference to a partner's rights in specific partnership property. What this does is implement our change to Section 25, which I think gives you a flavor of what we found.

The present Section 25 begins by stating that the partners are co-owners of partnership property. And Section 25 then proceeds to strip the partners of all the incidents of ownership. What you have is an entity
solution couched in aggregate terms. At many places we found this problem -- that is, it was our perception as a committee that it looked like a duck, it walked like a duck, it quacked like a duck, it swam like a duck, and they called it an owl. And so we decided that we would call it a duck and say that property transferred to the partnership becomes partnership property.

Fourth of the five major issues, we have an expanded rule on the duty of loyalty. A traditional analysis of the fiduciary duties of people in business associations tends to distinguish between duty of care and duty of loyalty.

The present Uniform Partnership Act has no duty of care provision. The present Uniform Partnership Act has a duty of loyalty provision of sorts, in Section 21. Of sorts, I say, because it can be read narrowly. The ABA report describes the provision in Section 21 as an anti-theft provision. I think that the courts certainly have used Section 21 as a touchstone for finding a very broad, very powerful duty of loyalty on the part of partners.

This draft that we offer you started out with separate duty-of-care and duty-of-loyalty provisions. We wound up whittling away our own duty of care provision, and what you have now is an expanded duty of loyalty
provision in Section 21. That is one of the major provisions we would like you to look at.

The last area that I want to mention is the one that Lane said we spent the greatest amount of time on, the area of partnership breakups. If I could just take you back briefly again to the turn of century.

At the turn of the century, the law on partnership breakups was very confused. It was couched in terms of dissolution. Lewis, the reporter on the first project, said that he, as an aggregate person, defined dissolution as the change in the relation of the partners caused by any of the partners ceasing to be associated in the carrying-on of the partnership provisions. He said that is a great definition. He said the reason the law is so confused and isn't working right in the dissolution area is that we haven't defined our terms properly.

So, the Uniform Partnership Act provided in Section 29 the definition of dissolution that was stated in aggregate terms. Change in the relation of the partners caused by any partner ceasing to be associated in the carrying-on of the partnership business.

It then based all the dissolution provisions on that concept. So what has happened?

In 75 years, there is a perception that the law
of partnership breakups is still-confused. There is still a lot of confusion around this word "dissolution," and it's not because it hasn't been defined.

The ABA report, as Lane mentioned, made 66 specific changes to the dissolution provision. We tried to take a pragmatic approach -- maybe always everybody thinks they are pragmatic -- but a pragmatic approach to dissolution, say: What do you want to do when somebody leaves a partnership?

You have to do three things. When somebody leaves you, have to end that person's power to bind his fellow partners.

No. 2, fair is fair, you have to end the power of the former partners to bind that person.

And No. 3, you have to pay that partner for his equity.

Now, you do not necessarily have to end the partnership to do any of those things. And the short of it is, as we looked at it, the concept of dissolution in this UPA was very much like the tendency in partnership. The statute says: Well, whenever anyone leaves, -- and, strictly construed in some states, whenever anyone gets added on -- when anyone leaves, it's over, it's gone. And then, through contract and other statutes, we have to say
we didn't really mean that.

It's like saying partners are co-owners, and then saying, well, we didn't really mean it. We will take it back.

So, we have provisions that essentially try to do basic things, identify when you cease to be a partner, end your power to bind your former partners, end the power of the former partners to bind you, and then provide that you get your equity. And you get your equity in one of two ways. Either you will be bought out, in which event the partnership continues, or there will be a liquidation of the entire business as a partnership, in which event the partnership will end. And I better end at this point.

CHAIRMAN EWART: Thank you, Mr. Weidner. We are going to start, as Chairman Kneedler indicated with a section-by-section reading of selected sections.

The first section is Section 2, and only Parts (1) and (11) will be read.

Commissioner Kneedler will read those.

COMMISSIONER H. LANE KNEEDELER, III (Virginia): Thank you. Before I proceed to a reading of Section 2, I have two committee amendments to offer to the title.

On the front page, and on Page 1 at the top -- obviously, this should be the Revised Uniform Partnership
Act, to be consistent with Section 1, not just the Uniform Partnership Act.

With regard to Section 2, let me give you several amendments. They're brief ones here. You will find we have several amendments in the beginning of the act, and there really aren't many changes we need to make.

Section 2, Page 1, Line 20, change the word "includes" to "means." In fact, all of these, with the exception of the last one, are, changing "includes" to "means," so we are consistent throughout the definition.

Page 2, Line 4, change "includes" to "means."
Page 2, Line 6, change "includes" to "means."
Page 2, Line 22, change "includes" to "means."
Finally, two changes on Page 3, Line 6.
Delete the word "real," so it should be "property," and then change "includes" to "means."

That is the end of the amendment.

So now let me read Section 2(1) and (11). "As used in this [Act], unless the context otherwise requires:

"(1) 'bankrupt' means a person who is the subject of:

"(a) the entry of an order for relief under the involuntary bankrupt provisions of the federal Bankruptcy Code or the filing for voluntary bankruptcy under the
Bankruptcy Code; 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."

If you go to Page 3, (11) is: "Property means all property, real, personal and mixed, tangible or intangible, and any interest therein."

COMMISSIONER MILLARD H. RUUD (Texas): I have done some work with the study committee on incorporated organizations, and if that project goes further, my understanding is that it will deal only with nonprofits. I hope that this act will pick up every unincorporated organization that is organized and operated for profit. I haven't read the whole act, but I have read some of the definitions and so on, and it may not quite work. But I haven't looked at -- if there are special provisions on inadvertent partnerships, maybe it is covered, but I flag that for you.

CHAIRMAN EWART Thank you.

COMMISSIONER BRUCE A. COGGESHALL (Maine): May I comment on one of the definitions that was not read by the committee?

On the definition of partnership business on
Page 2, it would seem to me that it would be appropriate to add at the end of that language "by agreement of the partners," so it would read "or actually be conducted by the partnership by agreement of "the partners," so that if some but not all of the partners go off on to a different venture in the name of the partnership that does not become business of the partnership, with all of its following legal consequences.

CHAIRMAN EWART: Thank you. Is that an addition at Line 21?

COMMISSIONER COGGESHALL: At Line 21, correct.

MR. DONALD J. WEIDNER (Florida): Thank you.

CHAIRMAN EWART: Commissioner.

COMMISSIONER RONALD F. PHILLIPS (California): A question on Page 2, Line 12. Does the definition of partner here include a default partner when they don't realize they created a partnership?

MR. WEIDNER: Yes.

COMMISSIONER RONALD F. PHILLIPS (California): A question on Page 2, Line 12. Does the definition of partner here include a default partner when they don't realize they created a partnership?

MR. WEIDNER: YES.

COMMISSIONER RONALD F. PHILLIPS (California):
How does it? There would not be a partnership agreement in that instance.

MR. WEIDNER: We are intending to include inadvertent partners in the statute, and I will have to think about whether -- I see your point. This definition of partner doesn't seem to embrace the inadvertent partner, and we mean to. Thank you.

COMMISSIONER EDWARD I. CUTLER (Florida): I want to rise to compliment the committee on the definition of person on Page 2, beginning at Line 22.

This same blue book has about four different definitions of "person" in different acts.

I like what was deleted. I like what you said. I hope that our drafting in other acts can be similar, and I hope you will not allow anyone to dissuade you from sticking to this very limited definition.

CHAIRMAN EWART: Thank you, Commissioner. Any further comments on Section 2?

If not, Sections 3 and 4 will not be read.

The reporter will briefly comment on what changes were made in those sections.

MR. WEIDNER: Most basically, in Section 3, we have attempted to incorporate the definitions of knowledge
and notice presently in UCC Sections 1201-25 to UCC 1201-27.

In Section 4, we have essentially a consolidation of present Sections 4 and 5, taking guidance from UCC Section 1-103.

CHAIRMAN EWART: The next section to be read line by line is Section 4X.

COMMISSIONER H. LANE KNEEDLER. III (Virginia): There is an amendment to this section. On page 8, Line 2, after the word "partnership," add the words "and the other partners." Page 8, Line 2, after "partnership," add the words "and the other partners."

And in addition, the section reference to 20X should be changed to: 21(a). So, 4X reads:

"SECTION 4X. EFFECT OF PARTNERSHIP AGREEMENT. The provisions of this [Act] govern the relations among the partners unless there is a partnership agreement to the contrary. The following provisions, however, may not be varied by agreement:

"(1) the partners' duty of good faith to the partnership and the other partners under Section 21(a) 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;

"(2) the requirement to wind up the partnership business in the events specified in Sections 31Y(5), 31Y(6), and 31Y(9)."

CHAIRMAN EWART: Seeing no comments to Section 4X, Section 5 will not be read, and the reporter, Mr. Weidner, will give us a brief discussion of that.

MR. DONALD J. WEIDNER (Florida): Section 5, I mentioned earlier. This short, new section is to facilitate actions and proceedings in the name of the partnership.

The language of referring to managing or general agent is taken from the Federal Rules of Civil Procedure.

CHAIRMAN EWART: Commissioner Jones will read Sections 6 and 7.

COMMISSIONER THOMAS L. JONES (Alabama): I will just read these from here.

"Part II

"NATURE OF 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. A joint venture is a partnership and is subject to the provisions of this [Act].
"(2) This (Act) shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith."

CHAIRMAN EWART: Comments on Section 6?

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Is the partnership as defined a person as defined?

MR. DONALD J. WEIDNER (Florida): I am sorry. Is the partnership --

COMMISSIONER REITZ: Is the partnership as defined a person under the act?

MR. WEIDNER: We have not done that.

COMMISSIONER REITZ: A partnership cannot be a person, so a partnership cannot be a partner.

MR. WEIDNER: Oh, I am sorry. I thought you meant -- a partnership can be a partner under this statute. I thought you were asking whether in Section 6 we have defined a partnership as a legal person.

COMMISSIONER REITZ: You defined a person as an individual --

MR. WEIDNER: We have done in the definitions, but not in. Section 6, is what you are saying.

COMMISSIONER REITZ: You defined a partner as an individual or an organization, and you have deleted partnership there.
Do you intend therefore not to have the possibility of a partnership being a partner?

MR. WEIDNER: No. We intend -- partnerships are partners, can be partners.

COMMISSIONER REITZ: Do you not have to say somewhere in the act that a partnership is an organization?

MR. WEIDNER: All right. We will take care of that. Thank you.

COMMISSIONER NEAL OSSEN (Connecticut): I would like to go back to Section 5 which is service of process upon one partner will be notice to the rest of the partners of the partnership.

May the committee consider the use of the word "personal" service? I don't think you ought to have abode service or this type of thing where you are binding a series of partners.

At least the requirement of personal service ought to be put in.

CHAIRMAN EWART The committee will consider that Any further comments?

If not, we will continue to the reading of Section 7.

COMMISSIONER THOMAS L. JONES (Alabama): "SECTION
7. RULES FOR DETERMINING THE EXISTENCE OF A PARTNERSHIP.

In determining whether a partnership exists, the rules in this section apply.

"(1) Mere passive co-ownership, whether in the form of joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not of itself establish a partnership, even if such co-owners share profits made by the use of the property. Shared control of an active business indicates partnership.

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

"(3) The receipt by a person of a share of the profits of a business is a stronger indication of partnership than the receipt of a share of gross receipts. A finding of partnership shall not automatically follow from a finding of shared profits if the profit share is more properly characterized:

"(a) as a repayment of a debt by installments or otherwise,

"(b) as a payment of wages or other compensation to an employee or independent contractor,
"(c) as rent to a landlord,

"(d) as a payment of an annuity to a surviving spouse or representative of a deceased partner,

"(e) as a payment of interest or other charge on a loan, or

"(f) as a payment of consideration for the sale of a good-will of a business or other, property by installments or otherwise."

CHAIRMAN EWART: Commissioner.

COMMISSIONER BRADLEY J.B. TOBEN (Texas): I commend the work of the Drafting Committee and Professor Weidner for the language that appears in sub (3), where it's indicated that a stronger indication of partnership is such and such.

But let's go back for a moment to sub (1).

The last sentence in sub (1) I think really overstates the case. When we are looking at whether or not we have a partnership, we are looking at a number of factors. For instance, we look at the matter of joint control, we look at the question of profit-sharing, we look at the intent of the parties.

And this statement, standing alone, I don't think is correct: "Shared control of an active business indicates partnership." In particular, if "indicates"
means this is a partnership, we have really overstated the case, and I would suggest that the committee might want, in that subsection, to do something akin to what has been done in sub (3) and state that shared control of an active business is a stronger indication of partnership, to make sure that this is just, one indicia and is not the whole story.

Thank you.

MR. DONALD J. WEIDNER (Florida,): Thank you. I think that is an excellent point.

COMMISSIONER WILLIAM M. BURKE (California): Commissioner Toben, could you elaborate a little bit on how you think it overstates the case, to help us think this through.

Are you saying we should define control as control in the business or the management or operation of the business? Would you feel that that indicates partnership? Or is "control" just too broad of a term?

COMMISSIONER BRADLEY J.B. TOBEN (Texas): I think that the sentence as it stands is fine, but it's subject to being interpreted as a statement that says that shared control is a conclusive indication that we have a partnership. In other words, it ignores, so to say, if it's interpreted in that way, the consideration of the
sharing of profits, the intent of the parties, and so forth.

COMMISSIONER BURKE: Your concern is not with "control" being too broad of a term. Your concern is the word indicates."

COMMISSIONER TOBEN: Precisely, yes. I think if the language that is used in sub (3), along the line of "shared control of an active business is a stronger indication of partnership status," as opposed to mere passive co-ownership, I think that would probably do the job.

COMMISSIONER BURKE: Thank you. I have some concern about the word "control," and we may want to work on that a bit.

COMMISSIONER MORRIS W. MACEY (Georgia): Do you think that sentence ought to be omitted?

COMMISSIONER TOBEN: No, I don't believe it should be omitted. I think it's properly there, but I simply think that it is ambiguous, and, being ambiguous, overstates the case. In other words, "indicates" should not mean this is a partnership.

COMMISSIONER BURKE: You would be happier with "is evidence of"?

COMMISSIONER TOBEN: Yes. "Is evidence of," or,
if you want to be consistent with sub (3), you could
simply track the language there, saying that the shared
control of an active business is -- now I will paraphrase
here -- stronger evidence or stronger indication of
partnership status than mere passive co-ownership.

CHAIRMAN EWART: Thank you, Commissioner.

COMMISSIONER HAROLD E. READ, JR. (Connecticut):
In subparagraph (e) on Line 21, I think that the language
does not take into account the shared appreciation or
equity kicker transaction, and it would be helpful to
expand that language by a reference to right to income or
proceeds of the value of collateral, so as to make certain
that that does not create a partnership.

MR. WEIDNER: That is the language from the
Uniform Land Security Interest Act.

COMMISSIONER READ: Yes.

MR. WEIDNER: We will take that up at our next
meeting.

COMMISSIONER CARL. H. LISMAN (Vermont): I don't
see -- I may not see well today -- but I didn't find
reference to sharing in losses as evidence of partnership
existence.

I wonder if you considered that, and, if so, why
you didn't include it.
There is some body of law that says that the mere sharing in profits doesn't necessarily establish a partnership, but the sharing of losses goes a long way to establishing the partnership.

MR. WEIDNER: It was not our intent to exclude losses as a variable of consideration.

I suppose my assumption was that loss-sharing was inherent in the concept of co-ownership, and I just didn't think of making loss-sharing explicit.

....

COMMISSIONER WILLIAM S. ARNOLD (Arkansas): My concern in this is that shared control matter also. I think about the situation where a family owns a piece of land, which is being farmed, maybe, by a tenant. The tenant can't enter into a valid tenancy agreement without the signature of all of the partners in the ownership. But it does not necessarily mean that they are partners.

I am afraid that the language will lead to that conclusion because of the fact that they do something more -- it's not strictly passive, as in the first part of that thing. They do have to participate in control because of the legal requirements that they do so. But I don't think that ought to create an indication of partnership.

CHAIRMAN EWART: Thank you, Commissioner.
I think the committee indicated that they were going to look at that again.

....

MR. DONALD J. WEIDNER (Florida): There is one correction to be made at Section 8. At Page 19, Line 15, please delete the word "actual."

Section 8, we will skip. It is based on the Georgia statute, which was a recommendation in the ABA report. It is an attempt to give greater guidance on when property should be classified as partnership property as opposed to the separate property of a particular partner.

Certain property is presumed partnership property and certain other property is presumed separate property under this expanded Section 8.

CHAIRMAN EWART: Section 9 will be read by Commissioner Pavetti.

COMMISSIONER FRANCIS J. PAVETTI (Connecticut): "SECTION 9. PARTNER AGENT OF PARTNERSHIP AS TO PARTNERSHIP BUSINESS. Subject to the statement of partnership provisions of section 10X, the rules in this section apply to all partnerships.

"(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 kind carried on by the partnership of which he [or she] is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he (or she) is dealing has knowledge of the fact that he [or she] has no such authority.

"(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

"(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

"(a) file for bankruptcy of the partnership, or assign the partnership property for the benefit of creditors or on the assignee's promise to pay the debts of the partnership;

"(b) change the name of the partnership;

"(c) confess a judgment that would encumber all or substantially all of the assets of the partnership;

"(d) pledge all or substantially all of the assets of the partnership;
"(e) sell all or substantially all of the assets of the partnership unless contemplated by the purpose of the partnership;  

"(f) merge the partnership with or enter the partnership into a joint venture with another person; or  

"(g) do any act which is not apparently for carrying on in the usual way the business of the kind carried on by the partnership.  

"(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction."

COMMISSIONER BRUCE A. COOGESHALL (Maine): I have two comments on this section, one in (c), the provision dealing, with confessing a judgment.  

In many states, as in my state, a judgment does not automatically result in a lien or an encumbrance upon the assets.  

I think the concept here ought to be confessing a judgment that is in some fashion material to the partnership and not simply one that encumbers all of its assets.  

CHAIRMAN EWART: Any comment from the committee?  

MR. DONALD J. WEIDNER (Florida): I see the point. I haven't thought about that point. Thank you.
COMMISSIONER COGGESHALL: My second comment is in subsection (g). Now, this is the provision that says that unless authorized by the other partners, less than all the partners have no authority to do certain things. And this says not do any act which is not for carrying on business of the kind carried on by the partnership.

It seems to me that in many instances you have a limited purpose partnership and you shouldn't permit less than all of the partners to go beyond that limited purpose.

So I would suggest that this language be changed to read: do any act which is not apparently for carrying on the business of the partnership."

CHAIRMAN EWART: Does the committee have a comment?

COMMISSIONER GEORGE H. BUXTON, III. (Tennessee): I would like to go back to (c), if that is in order, what he was saying.

CHAIRMAN EWART: Commissioner Buxton.

COMMISSIONER BUXTON: Are you saying that in (c) you would suggest leaving in the phrase "confess a judgment" and delete balance of that subsection?

COMMISSIONER COGGESHALL: Well, I think that there ought to be some concept of the judgment being
material to the partnership. "Confess the judgment" was the language that I think is in the current act.

I see the change here is meant to be in the area of materiality. I've got, no problem with the materiality concept. But the problem is that judgment in many states simply doesn't create an encumbrance.

COMMISSIONER BUXTON: It may not, but I know in Tennessee that you can convert a judgment to a judgment lien by a subsequent act on your part. Granted that the judgment itself does not create a lien, but you can convert very easily a judgment into a judgment lien. I don't know about other states. But if you were going to read that literally, you could say that you were confessing a judgment and, therefore, had not created a lien and that is the end of the matter, then the plaintiff would convert it into a lien situation.

COMMISSIONER COGESHALL: If you read this literally, you could, in my state, confess any judgment at all, any judgment you wanted, because that judgment does not encumber the assets. You have got to take further action.

COMMISSIONER BUXTON: Right. That is the same in Tennessee.

CHAIRMAN EWART: The committee will take that
under consideration.

Is there anyone on the committee who is commenting as to subsection (g)?

MR. DONALD J. WEIDNER (Florida): We can take a look at the change in the context of (g). What we tried to do was act on the ABA report perception that the statute was ambiguous. When you look at the apparent authority of a partner, do you look at the --

COMMISSIONER COGGESHALL: Well, the apparent --

MR. WEIDNER: -- way that partnership business was carried on, the way other businesses were carried on?

COMMISSIONER COGGESHALL: The apparent authority was taken care of in subsection (1), where you use that language, but this is really relations between the partners themselves.

What I am suggesting is that no partner should have the authority to go beyond, to take the partnership beyond the scope of the partnership that they have agreed they're already in. This language would let it do that.

MR. WEIDNER: Good point. We will take a look at that.

CHAIRMAN EWART: There is also comment from the ABA adviser.

MR. HARRY HAYNSWORTH (ABA Adviser): The only
point to make there is that this section deals with the liabilities of the partnership to third parties, and it would not govern the relationship of the parties to themselves, and, hence, the apparent authority issue is a very real one here, and you have to be careful of that, as far as third parties are concerned, they normally rely on not only what this partnership does, but on what partnerships like this do.

COMMISSIONER COGGESHALL: That is fine, and the party, the third party is protected by subparagraph (1) if he doesn't have notice. But if that party knows that there is no authority, because the partners agree that they would own as a partnership one apartment building and they’re going to be partners in that apartment building, and the partner goes out on behalf of the partnership and says, "I am going to buy another one, and I am going pledge this first apartment building as security for my loan for the second one," and if there is no notice to the bank, perhaps that is okay. But that ought to be a violation of the agreement between the parties. And if the bank does have notice, then the bank ought not to be protected in that situation.

CHAIRMAN EWART: All right. I think the committee understands your concern, and we will take that
under consideration.

....

CHAIRMAN EWART: Commissioner.

COMMISSIONER JOHN W. WAGSTER (Tennessee): Can a partnership by agreement agree that every partner is not the agent of a partnership?

MR. WEIDNER: Within the meaning of which section, as a general proposition?

COMMISSIONER WAGSTER: Well, can a partnership by agreement abrogate the provisions of Section 9 with regard to dealing with third persons?

MR. WEIDNER: No, not all of the provisions.

COMMISSIONER WAGSTER: Then shouldn't you in Section 4X where you have the effect of a partnership agreement, include some language that not only can good faith not be abrogated, but the partnership cannot do away with provisions of Section 9?

MR. WEIDNER: Our intent to 4X was to say that the provisions of the statute that reflect the relations of the partners as among themselves can be drafted away by the partners, but not the provisions of the statute that affect the relations of the partners to the third parties.

And so, Section 9, I think, the part that could be not be drafted away would be the part that would bind
third parties, would bind the partnership to third parties under either apparent authority or actual authority.

COMMISSIONER WAGSTER: My suggestion is that 4X appears to say that these are the only two things you cannot do away with by agreement, and you might take a look at that.

MR. WEIDNER: Thank you. We shall.

CHAIRMAN EWART: Commissioner.

COMMISSIONER NEAL OSSEN (Connecticut): ... And then going down to Line 21, the concept of a confession of judgment is abhorrent to me, and I would suggest you use the word "stipulate" to a judgment. I think we all know what that means. I don't like the term "confession of judgment."

And this brings up another problem. You allow service of process upon one partner, then there may be five, but then the case is litigated, the party — all the partners, according to your draft, must agree to sign to the stipulation and must sign it, whereas you allow service on only one.

I think you've got to put the two together. Either you have service on all the partners, if you are going to mandate that all the partners have to stipulate to a judgment, or you allow one partner to stipulate for
the others.

I think you’re going to find that service is made upon one partner, an attorney is retained, the case is in litigation, perhaps it's settled at the courthouse, the one partner signs. And then, two weeks later, attempts are made to collect on a judgment, and somebody comes in and says, "Hey, invalid judgment. All the partners didn't sign."

Then, to go one step further on Line 1 of Page 25, where you "pledge all or substantially all of the assets" I had previously suggested that you use "grant a security interest."

I don't know how you pledge intangible. I assume that some partnership assets may in fact be intangibles.

MR. DONALD J. WEIDNER (Florida): Thank you. On that last point, we will change that word "pledge."

....

COMMISSIONER WILLIAM M.BURKE (California): Commissioner Ossen, how do you distinguish in your mind between a confession of judgment and a stipulation of judgment? In one way, distinguishing, a confession occurs at the time the note is signed or at the time the agreement is signed, where stipulation is something that
is done at the time the action is brought.

Is that how you distinguish it?

COMMISSIONER OSSEN: That is my distinction. I find that anybody who confesses a judgment in a note, at least in the consumer areas, as you know, Bill, We've gotten rid of confessions of judgments.

I think that is a good law, even in the business world, because many of these partnerships are small mom and pops. I just find the concept of confession of judgment abhorrent.

COMMISSIONER BURKE: So, you want to change this to "stipulate"?

COMMISSIONER OSSEN: Correct.

COMMISSIONER BURKE: So that they could confess the judgment without the consent of law, but not stipulate the judgment?

COMMISSIONER OSSEN: I want to make it clear that we just don't allow confession of judgment.

COMMISSIONER BURKE: This says "confess."

COMMISSIONER OSSEN: Okay. So you're saying one partner then can stipulate, the way this is written.

COMMISSIONER BURKE: What you want is "confess or stipulate"?

COMMISSIONER OSSEN: Yes.
CHAIRMAN EWART: Commissioner.

COMMISSIONER DAVID A. GIBSON (Vermont): In connection with the partnership operation, if a partnership or one of the partners wishes to purchase a significantly costly item which would result in, say, a pledge of the asset purchased without the consent of the other partners -- which may commit the partnership to an obligation over a significant period of time, say, three, five years for payment of the purchase -- is that something that can be done by a single partner without the knowledge or consent of the others?

MR. DONALD J. WEIDNER (Florida): It's something that can be done for the purposes of binding the partnership to the third party if it's within that partner's apparent or inherent authority.

The third parties might have a remedy against all the partners, and in the partnership and, hence, all the partners, and the other partners might then have a remedy against the partner who exceeded their agreement.

Section 9 is a little bit troubling insofar as two things are concerned. No. 1, the black letter law of agency now is basically that agents have power to bind the principal under any one of three concepts -- actual authority, apparent authority, or inherent authority.
The last concept is nowhere explicit in this statute. Everybody, the commentators seem to know it is in there, but it is not explicit.

And the other thing I will confess that is troubling is the flush language of Section 3. We have continued what is an unfortunate circularity in the present Uniform Partnership Act. We haven't fixed it yet. If you have any discussion for fixing it, I'd really appreciate it.

The "it" I refer to is the beginning language in Section 3. I think a couple of these questions are really getting at that. It authorized by the other partners," then one or more partners, quote, "have no authority."

Well unless it's authorized, you're not authorized, you see. And I confess that we haven't attempted, to clean that up and perhaps should have identified the problem and come up with a solution before now. Sorry for that. ...

....

COMMISSIONER DAVID A. GIBSON (Vermont): I appreciate the problems that exist in the business world, where one person may seem to have authority to bind an organization.

I do think this is a sensitive area, however,
particularly when you are dealing with significant capital asset type purchases for a business, if you will, by a partner in a partnership situation. And I don't know the solution to protection of the other partners, who may find it a little bit hollow to have a remedy against the other partner, but it's a difficult situation.

MR. WEIDNER: You are right. That is what subsection (3) is awkwardly trying to do. It basically is this: It's a course correction to the courts. It's to say: Don't readily find apparent or inherent authority here. Business people ought to know that one partner can't go off on his own and do this.

COMMISSIONER LEON M. McCORKLE, JR. (Ohio): With respect to Page 25, subsections (d) and (e), I have three points, I think.

I am curious as to why in (d) the phrase "unless contemplated by the purpose of the partnership" does not appear. It seems to me a major portion or a major purpose of many partnerships is the borrowing of money and the attendant pledging or encumbering of assets.

CHAIRMAN EWART: Does the committee have a comment?

MR. DONALD J. WEIDNER (Florida): Can we think about -- I think it's a good point -- can we think about
putting it in? I guess the thought, was that 9(3) doesn't concern actual authority, and the earlier provisions of 9, in effect, say: If it was your intent that a partner have authority to bind the partnership, then he can bind the partnership, even if there is no apparent authority. That is a concept in 9(2) here.

My quick reaction is that I can't see how that would hurt putting your language back in, but we better think about that.

....

COMMISSIONER McCORKLE: I am confused as to (d) and (e).

And as to Line 1, you have a recommendation that the word "pledge" be changed. I believe that the change recommended may not cover some real property interests. Perhaps words such as "grant a security interest in or otherwise encumber" would be useful to you.

CHAIRMAN EWART Thank you very much, Commissioner.

....

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I am a little troubled by the relationship between paragraph (g) of (3) on Page 25 and the provisions in Section 1.

Section 1 has an exception for the third person
who has actual knowledge of the lack of authority.

It appears to me that what the committee is trying to do with (3) (g) is to change that concept to notice.

I would assume, although it's not clear, that what has to appear under (3) (g) has to appear to the third party, not to the partner acting -- although, the way it's drafted it is not clear to whom something has to appear. It might even have to appear objectively in some way.

The other problem with (3)(g) as it's drafted is whether the third party has to have some notice not only of the kind of business, but also the usual ways of that kind of business, in order to be affected by this exemption.

What I think you're trying to do is to modify Section 1 to go from a knowledge standard there to a knowledge and notice standard. I think your drafting would go a lot better -- and you certainly will, I think, achieve better intelligence in the reader's mind if you would combine (g) with the knowledge provisions in 1 so that the knowledge and notice are put together.

CHAIRMAN EWART: Thank you.

COMMISSIONER MARLIN J. APPELWICK (Washington):
A minor point on 4, I think. As written, and I know that language isn't changed here, but, as written, it basically says that if you don't have actual knowledge of a restriction, which could include the lack of actual knowledge of the statute placing a restriction on partnership authority, a third party is entitled to rely. I don't think it's intended that the party can claim that they don't have actual knowledge of restrictions in the statute on a partner to act, and that might be cleaned up, as a helpful thought.

CHAIRMAN EWART: Thank you.

COMMISSIONER EDWARD I. CUTLER (Florida): I'd like to refer to subsection (f) on Page 25.

I see, I think, the very interesting concept that a partnership can merge with another organization, even a corporation, which, as I understand it, is now true under the statutes of Delaware and perhaps some other states.

This provision would not preclude such merger. It would simply say that it can't be done by one of the partners alone or without all the partners doing it.

My question is whether or not the committee has considered at all including in the revised act anything else about merger.
MR. DONALD J. WEIDNER (Florida): Yes. Our ABA advisers have suggested we consider merger provisions like those in Delaware, apparently, and we plan to look at them this next year.

COMMISSIONER CUTLER: I also suggest you might want to add the word "consolidate," so it would be "merge or consolidate with," particularly if you are going to have something specific in connection with merging with corporations.

CHAIRMAN EWART: Thank you, Commissioner. Are there any further comments on Section 9?

COMMISSIONER WILLIAM M. BURKE (California): I have a question for Commissioner Coggeshall from Maine. On the point you raise, I have been puzzling over that, in point (g), about doing an act which is not apparently for carrying on in the usual way the business of the kind carried on by the partnership.

Was your point that your feeling is that no single partner should be able to do an act that expands the business of the partnership, that it would require unanimous consent for that?

If that is your point, I don't understand why you'd want to delete the language you suggested we delete.
COMMISSIONER BRUCE A. COGGESHALL (Maine): My point was that in many instances there are limited-purpose partnerships. It's formed for one venture. And one of the partners ought not to be able to go out and engage the partnership in a separate venture of the same kind. I think this statute permits him to do that.

COMMISSIONER BURKE: Well, (g) says that no partner can do any act which is not apparently for carrying on in the usual way the same --

COMMISSIONER COGGESHALL: The same kind of business.

COMMISSIONER BURKE: The same kind of business.

COMMISSIONER COGGESHALL: If I have two partners running a grocery store and one of the partners decides, "I am going to open another grocery store," that, to me, is the same kind of business.

COMMISSIONER BURKE: So that would be okay.

COMMISSIONER COGGESHALL: I mean, that would be okay under the statute. I don't think it should be okay.

COMMISSIONER BURKE: Just so I understood, as I understood your amendment, you wanted (g) to say "do any act which is not apparently for carrying on the business of the partnership."

COMMISSIONER COGGESHALL: Right. The business
of the partnership.

COMMISSIONER BURKE: Couldn't you make the same argument in the grocery store example you gave, that that is the business of the partnership? They have just changed the nature a little bit.

I think, in other words, you may need more language to accomplish your purpose than simply deletion of the ...

COMMISSIONER COGGESHALL: That may be. The concept is, though, that you ought not to be able to expand it beyond what the parties contemplated when they formed the partnership.

COMMISSIONER BURKE: I think more surgery would be required on this section than what --

COMMISSIONER COGGESHALL: That may well be.

....

CHAIRMAN EWART: ... Section 10 will not be read.

Mr. Weidner will give a brief comment on that section.

MR. DONALD J. WEIDNER (Florida): Section 10 is modified in two basic ways, recommended by the ABA report.

First, it is expanded beyond real property to include personal property.

Second, it includes pledges and mortgages via
the new definition of conveyance in the conveyance section, section 2(4), in the definition section, Section 2(4).

CHAIRMAN EWART: Commissioner Pavetti will read Section 10X.

COMMISSIONER FRANCIS J. PAVETTI (Connecticut):
"SECTION 10X. RECORDING STATEMENT OF PARTNERSHIP.

"(1) A statement of partnership in the name of the partnership, signed, acknowledged, and verified by two or more of the partners, or such a statement signed by two or more of the partners as individuals, acknowledged and verified by each signing partner, may be recorded in the office of the county recorder of any county. Such recorded statement, or a copy thereof, certified by any recorder in whose office it or a copy thereof so certified is recorded, may be recorded in any other county or counties. The statement shall set forth the name of the partnership and the name of each of the partners, and shall state that the partners named are all of the partners. If a partnership is not wound up by the death or by the withdrawal of a partner, the statement or amended statement may state the name and date of death or withdrawal of such deceased or withdrawing (whether voluntarily or involuntarily according to the terms of the
agreement) partner and that the partnership will not be wound up by reason of such death or withdrawal.

"(2) It shall be conclusively presumed in favor of any bona fide purchaser for value of the partnership real property located in a county in which such statement or such certified copy thereof has been recorded, that the persons named as partners therein are members of the partnership named and that they are all of the members of the partnership, and that any partner stated to be dead is deceased, and any partner stated to have withdrawn has withdrawn therefrom, and that the partnership was not wound up by reason of such death or withdrawal, unless there is recorded by anyone claiming to be a partner, or a personal representative, whether executor, administrator, guardian, or, conservator, of such partner, a statement of partnership, verified and acknowledged by the person executing it, which shall set forth the name of the partnership, a statement that such person claims to be a member of such partnership, or a personal representative of such member, or a statement that any of the persons named in a previously recorded statement of partnership are not members of such partnership."

COMMISSIONER BROCKENBROUGH LAMB, JR. (Virginia): ... At the bottom of Page 34, Lines 33 and 34, we say you
may record that thing in any county. Then you go on to say, continuing on the next page, it may be recorded in any other county.

The first time, don't we mean "shall be recorded in the county where the business of the partnership is located"?

I mean, you have got to have a beginning part. You say it may be recorded in any county. ...

COMMISSIONER LAMB: Would the committee look at that?

CHAIRMAN EWART: The committee will look at that.

COMMISSIONER EDWARD I. CUTLER (Florida): My question is not whether you ought to make it mandatory or not, but it looks to me as though by providing that it should be recorded in a county or counties, that you're primarily tying to real estate.

If you do not make it mandatory, I am not sure that it really accomplishes any great purpose, even with regard to real estate.

My question really is, and you're talking about the differences between the California act and I guess it was Georgia?

MR. DONALD J. WEIDNER (Florida): Yes.

COMMISSIONER CUTLER: Length of one compared to
the length of the other.

Is there any reason why the same information that is required, if you are going to file one in a county, according to Section 10X, couldn't be similarly required if you were to provide for filing centrally in the office of the Secretary of State?

My reason for this is that Florida, and I guess most states, provide that where you have limited partnerships, the filing has to be in the office -- centrally in the office of the secretary of State.

What burden would there be on somebody searching a title to make his inquiry centrally as to a partnership owning real estate, particularly where the partnership owns property in more than one county.

It just seems to me a terrible waste. I would like to see, if you can do it, I'd like to see you revise this, use the same criteria for what needs to be stated for filing centrally, and then, in a case where, as frequently happens, you're not sure whether the partners are limited partners or general partners, despite the absence or presence of the word "limited" -- you want to be certain you could at least look centrally for a filing on behalf of that partnership.

Is there any strong reason why you cannot or
would not be willing to just provide for central filing? Then you don't have to worry about the different counties that my good friend Brocky worried about.

CHAIRMAN EWART: Comment from the committee.

MR. DONALD J. WEIDNER (Florida): None that I can think of.

Can I ask a further question? What would you like to be the essence of what ought to be in the certificate? Should there be simply the names of the partners and that they are all of the partners, or would you also like a statement of any restrictions on partner authority?

COMMISSIONER CUTLER: I would say if there are restrictions on partner authority, then it really ought to be filed somewhere, and people can be put on notice of those restrictions in some way, and perhaps they should be effective as a notice of restrictions.

If you are going to deal with a partnership, particularly with regard to real estate, you certainly could ask the Secretary of State in Florida: What do you have on such and such partnership?

MR. WEIDNER: This might mesh with the 9(3) changes.

COMMISSIONER CUTLER: Correct. And I just wonder
whether your choice was simply because of the difference in the length of the statement or the contents of the statement between the two states or whether you had any other particular reason to pick counties rather than centrally.

....

COMMISSIONER CUTLER: ... It's a difficult thing, and it takes a lot of work to check things out in more than one county. So I hope you'll reconsider and make it a central filing, even if it is only to be voluntary.

MR. HARRY HAYNSWORTH (ABA Adviser): Don, you will recall that the ABA report does recommend central filing, and they also recommended it be for more than just real estate, because there are other properties where this issue, authority comes into play.

COMMISSIONER CUTLER: I meant to ask that, because I thought I asked that, because if it were limited to real estate, that would be different, but there are reasons for having it in other situations besides real property situations.

MR. HAYNSWORTH: The other problem with the local filing -- several problems, but one is, if you have got a real estate partnership and they own property in ten
different counties, they're going to have to file ten different filings, and every time they change the partnership agreement, they're going to have to have ten different filings. That is the whole reason why you went to central filing in the limited partnership act, to get around those kinds of problems.

COMMISSIONER WILLIAM M. BURKE (California): I wonder about the wisdom, though, of having the statement of partnership set forth the restrictions on authority in terms of, what does that mean if there is a restriction that isn't in the statement of partnership, and could that result in statements of partnership that are ten, 15,.20 pages long? It's obviously an exaggeration, but I think if you start setting forth all the restrictions, it could be a burden in terms of the filing.

CHAIRMAN EWART: Commissioner.

COMMISSIONER BRUCE A. COGGEHALL (Maine): I think you ought not to put the restrictions on partnership authority in the certificate. I think that if you do that, an argument can certainly be made, then, that everybody is on notice of those restrictions, and many times people are going to deal with partnerships without searching real estate records or without searching the Secretary of State’s records.
What this would require is that whenever you deal with any partnership on any type of transaction, you’d have to search those records.

MR. DONALD J. WEIDNER (Florida): Can I just ask, is it your sense that you think that a provision should be confined to real property title purposes?

COMMISSIONER COGGESHALL: Yes. I think that that being the case, that it ought to be filed locally with the real estate records, rather than centrally. If you have got real estate in more than one county, you would file in more than one county.

MR. WEIDNER: That was our thinking.

COMMISSIONER COGGESHALL: The main reason for my getting up to speak on this point is, I agree with the approach of the committee that this be a voluntary filing, and not a mandatory filing, like the approach, as you know, under the Limited Partnership Act is that in order to have a valid limited partnership, you have to file.

I think that would be a bad mistake here because you have an awful lot of partnerships that simply wouldn't be aware of this requirement, and then you have all kinds of problems as to whether or not the partnership exists, and if it does exist, you know -- so I think the voluntary filing makes sense.
But once these things get on the record, they stay there for a long time. It seems to me that there ought to be a requirement that the thing be kept current. If you do file it, you ought to keep it current, and if the partnership terminates, you get rid of the thing.

MR. WEIDNER: ... This is one of the provisions we are going to take up this fall, and the only thing I can think of is that we are considering some language that refers to changes to reflect admission of new partners and the withdrawal.

COMMISSIONER COGGESHALL: That is the type of thing, it seems to me, that there ought to be -- if you take the step of filing and put something on the real estate records, then you ought to be required to reflect any changes in partnership on those same records.

CHAIRMAN EWART: Thank you.

Commissioner Read.

COMMISSIONER HAROLD E. READ, JR. (Connecticut): My problem is with the conclusive presumption. I don’t know what a conclusive presumption is but you cannot say that it is conclusive that a person named in this certificate is a partner.

You conceivably can have a person named in the
certificate who never had anything to do with the transaction. It might be very helpful to pick some rich guy, ... and name him as a partner. He might know nothing about it, but all of a sudden conclusively he is presumed to be a partner. It might help the credit. Might not.

....

CHAIRMAN EWART: Commissioner.

COMMISSIONER CARL H. LISMAN (Vermont): Do you want a rejoinder here?

COMMISSIONER BROCKENBROUGH LAMB, JR. (Virginia): On that same point about recording in the counties, I will ask the chairman, would it be much trouble to put in the county or city?

Because I don't know how many states there are that are like us -- a few, I think. But we in Virginia, our cities are not in counties. They're incorporated entities. So, we have to record in the city or county wherein real estate is located.

Is that much trouble?

COMMISSIONER H. LANE KNEEDLER III (Virginia): Commissioner, I have noted that on my version as well. We will probably bracket the county or whatever locality.

....

COMMISSIONER EUGENE A. BURDICK (North Dakota):
I like the idea of central filing of the information, but it seems to me it would eliminate some of the problems if in that notice the filer would indicate the counties or cities wherein the real estate properties were located, and then the researcher can go to those counties and examine all of the real estate owned by the partnership.

But, giving notice of those locations in the notice ought to be sufficient. They may have properties scattered all over the state.

MR. DONALD J. WEIDNER (Florida): Is it your sense, then, that you would prefer a statement of partnership, provision confined to real property title purposes?

....

MR. WEIDNER: You would prefer a broader provision of the disclosure of partners and restrictions on authority, for example.

COMMISSIONER BURDICK: Right. They would still be centrally filed, but the location of the property, the recorded real estate, could be referred to in the notice, not giving the descriptions by book and page and all this and that, but just indicate the counties or cities, or wherever the recording office is you know, in which the property is located.
That would obviate the necessity of going to the real estate records of 53 counties.

CHAIRMAN EWART: Thank you, Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): Commissioner Read raised a very real concern about someone being named in this that is not in fact a partner.

It seems to me that you might take care of part of that problem by requiring everybody that is named to sign, require all the partners to sign, rather than just having one or two people sign and say "I've got 17 partners."

Is there any reason for not requiring them all? That is certainly the requirement in the Limited Partnership Act.

MR. DONALD J. WEIDNER (Florida): I have to think that one through. John Goode of Lawyer's Title in Virginia and I discussed that. He raised that just before I came.

The problem is, at least if you build off this California approach, then it says, a statement that the partners -- that the people named as partners, and are all of the partners, binds the partnership -- all of the partners are named. And if they're all of the partners making the statement, then you don't need it.
Is the statement ineffective if someone is omitted? See, in a way -- and I don't have a firm answer for you -- but in a way, this is a modification of the basic agency authority rule.

I guess the risk would be that you would empower, under -- your question is, I gather, the risk is that you empower a minority of partners in perhaps the most major kind of transaction to bind all the partners by a recorded statement of partnership.

COMMISSIONER COGGESHALL: Not only that you bind all the partners, but you may name somebody that in fact is not a partner.

That is the real concern. Carl Lisman shouldn't be able to file a statement that says I am his partner when in fact I am not. I ought to be required to sign that, confirming that I am in fact his partner.

MR. WEIDNER: We have to look at that.

....

CHAIRMAN EWART: I am sorry. Commissioner Buxton, did you have a comment on that last remark?

COMMISSIONER GEORGE H. BUXTON, III (Tennessee): Not the last. The ones previous to that, I tried to get in Back on the central filing again, if someone could explain how -- this seems to work fine with limited
partnerships -- that is, the filing in a county filing, and that that takes care of all the notice requirements particularly the land title and this sort of thing. That seems to work fairly well, particularly even under -- as being revised.

Why we have this distinction between a general partnership and a limited partnership as to the filing and why it's more important to do that in a central place -- why are we making that distinction between a general and a Limited, I suppose I would ask, particularly bearing in mind, it would seem to me that to file at the county level is a fairly uneventful activity for all of us to do, whereas if we are talking about a central filing, then it would seem to be that the Secretary of State or whatever central filing office would have to set up a whole mechanism for that central filing, whereas now it's a matter of just recording wherever you record the deeds it would seem to me.

I am not sure we are thinking through that. If it's working for limited partnerships, why wouldn't it work for general partnerships?

COMMISSIONER GERALD L. BEPKO (Indiana): I think that the central filing system would be better, but I rose to suggest that whether it's a central filing system or a
system that requires filing in county recorders' offices, I think the statute ought to have some listing of the duties of the filing officer. If there isn’t any listing, it may be that if the filings are in counties, the county recorder will know what to do with the filing, but that is not clear.

If it's a central filing system, as the Commissioner from the committee just pointed out, there would have to be a whole new filing system established, and that should be specified in a statute.

Wherever you require a filing or make a filing opportunity available, you should have a provision that states what the filing officer is supposed to do, what kind of index is to be kept so that people can have access to the filings.

CHAIRMAN EWART: Thank you, Commissioner.

COMMISSIONER K. KING BURNETT (Maryland): Isn't the simple purpose of this section just to help out with title certifications, title insurance, when one takes a deed from a partnership? I mean, isn't that really why you put this in here?

MR. DONALD J. WEIDNER (Florida): Yes. But the question is, do we have a much broader kind of provision?

COMMISSIONER BURNETT: I think that is where you
ought to stick, that one simple thing. And if you keep your eye on that ball, then what happens now is that when the title transfers from a partnership, the attorney or the title company gets an affidavit, because that is all they can really do, you know. They get a certified copy of the partnership agreement. You get an affidavit, all these things off record.

It seems to me what you are trying to do is to clean up the title records so that the records show that, instead of just the title company's file or the attorney's file. And you're trying to permit people in the future, when somebody in the next person from the conveyance can go back and look in the land records instead of going back to find out whether there was authority or not.

Now, if that should be the limited purpose -- and I think you should not go along with the movements of some of the commentators from the floor to enlarge that -- and this goes to the presumed point which I am sure commissioner Read is going to re-address for you in a minute -- but if you focus on the purpose, of title purpose, I think you can get at the effect of the filing more readily.

And as relates to where you file, the central filing is the worst thing. If you're talking about land
record protection for people in the chain of title, you
are talking about filing it where the real estate is
located, the way you are.

We now have an act to get the federal tax liens,
or whatever it's called, registration, one of our targeted
acts. And one of the reasons for it is that when liens are
filed, tax liens aren't in the local land records. So, we
are trying to get them from some central place to the real
estate, place where the real estate is located, by another
uniform act.

And the last thing we want to do is to have
another central filing which is 200 miles from my office,
where I've got to hire somebody to go up there and look or
get a copy. You want it where the real estate is located.

MR. DONALD J. WEIDNER (Florida): Excuse me.
Could I ask you a question? What is your sense? Let's
leave aside the issue of the person who is not a partner.
We've obviously got to do something about that and have
got to think about that.

Do you want all the partners -- must all the
partners sign this certificate, this statement?

COMMISSIONER BURNETT: I would prefer it, yes.
I don't think that is a big -- remember, we are only doing
this to make sure the title is good, and the person
requiring this, the person acquiring property from the partnership, real property from a partnership, and that person, if they want to be protected, can either do it by an off-the-record one, like they are doing it now, which is "I will take the affidavit or certificate of" -- you know.

But if he really wants it in the land records, he can say, "Now, look, this statute says you can record this, but to record it, it requires the signature of everybody. I am not buying this property from you unless you do it."

I don’t think that is onerous. And it's permissive the way you have it, "may" -- should not be "shall" -- that is fine.

COMMISSIONER JOHN W. WAGSTER (Tennessee): That was my comment also, went to the ills that are intended to be cured by the requirement of a recording. And if it is purely real estate, then it seems to me the recording should only be required or used for real estate and not a general requirement for partnerships that have no real estate holdings.

That would seem to get rid of a lot of the problems that are going to be inherent in having a recorded statement about who the partners are and rights
of dissolution and things like that, if it's limited purely to the real estate area.

CHAIRMAN EWART: Thank you, Commissioner.

Commissioner Read.

COMMISSIONER HAROLD E. READ, JR. (Connecticut): When I mentioned that problem with the conclusive presumption, the last thing I intended was to get us into a situation where all the partners have to sign anything whatsoever of record.

Because I have dealt, as many of you have, with limited partnerships in states where everything that was done had to be signed by everybody. It dealt with limited partnerships with 3,000 partners. And you try to get a signature from each one of those, and it's a full-time job and nothing ever gets done properly.

I know there are powers of attorney and all that kind of stuff, but a simpler signature procedure is preferable to me, without the conclusive presumption.

....

COMMISSIONER GEORGE H. BUXTON, III (Tennessee): I don't really see that as a problem, because you have this signing of the certificate at the time of the creation of the partnership, and, again, going back to a limited partnership situation, that is a requirement.
Then you would have what I sometimes refer to as a memorandum. This would be the certificate or an abbreviation or a summary. You would have them sign that at the same time.

You are going to have to have all this signing at some time, at least at the inception, by all of the partners. All 3,000 are going to have to sign it sometime.

Your point might be better taken as to subsequent amendments, but it seems like, at least as to the creation, that wouldn't be any onerous task at all for them to all sign at the time of creation of the partnership.

COMMISSIONER READ: That is right. I agree with that. However, as a practical matter, the signature, if you have people in a public partnership and your partners are located all over the country, they sign counterparts of the agreement, so that you get an extra signature page, and the first thing you know, you're filing something with 2,000 pages so you can pick up everybody's signature.

The Limited Partnership Act has good provisions on powers of attorney, and I commend that to you.

COMMISSIONER BUXTON: Good point. But you're still getting the signature; you're just doing it by power of attorney.
COMMISSIONER READ: I agree. You have to have the original signature. But you shouldn't have to record that original signature just because of the volume and the complication of doing it. Power of attorney with respect to recording or something is fine, but without the conclusive presumption, however.

CHAIRMAN EWART: Thank you.

COMMISSIONER BRADLEY J.B. TOBEN (Texas): I will echo Commissioner Read's comments here. I think his suggestion regarding use of the power of attorney is well taken.

However, there might even be a simpler way to approach this. Why don't we simply provide that the statement to be filed under 10X must be filed by partners who are duly authorized pursuant to Section 9?

I assume that is the intention of the committee, since you provide for a counterstatement to be filed by those who would take issue with the presumed authority of the partner to sign this statement and to file it.

It certainly seems, at a minimum, that it must be authorized to have this conclusive effect against the partnership.

MR. DONALD J. WEIDNER (Florida): We will look at that.
COMMISSIONER TOBEN: Another question. Would this 10X statement -- clear this up in my own mind -- preclude a grantee from claiming no knowledge of lack of agency under Section 10(1), which appears on Page 30?

We provide that the partnership may recover the property unless the grantee -- I will let you read that for a moment. I am referring to Page 30, Line 32.

COMMISSIONER WILLIAM M. BURKE (California): Going back to your first suggestion, would your change then require a third party dealing with the partnership to read the partnership agreement in order to safely rely on the statement?

COMMISSIONER TOBEN: Perhaps not necessarily to read the partnership agreement, but at least to assure themselves that this is a filing that was authorized by the partnership. Perhaps it ought to be put in this way: The statement could have this conclusive effect against the partnership only if -- perhaps later in litigation -- it was established that it had been filed with the authority of the filing partners.

That might be the better way to put it.

COMMISSIONER BURKE: In terms of a third party, the third party, in order to safely rely -- for that matter, a title company, which is really what we are
primarily talking about here -- in order to be sure, to issue insurance, let’s say, would have to read it.

COMMISSIONER TOBEN: I believe so. That may seem onerous, but, on the contrary, certainly we should not allow a conclusive presumption against the partnership if this statement has been filed with no authority from the partnership.

If it's that way, that would be quite surprising -- shocking, nearly.

Thank you.

CHAIRMAN EWART: I think the committee will consider that comment.

Does the committee have a comment on your second point?

MR. DONALD J. WEIDNER (Florida): We are going to take a look at it and try to move ahead with some other provisions.

....

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I want to follow up that last comment, because that is why I did rise.

The reporter at one point did raise the question of the omitted partner from the statement that is provided for in 10X.
If I were a title company, that is the great thing that would concern me, is that this list was incomplete. There is nothing in what I read in this provision that in any way would protect an omitted partner.

Indeed, as I understand the way this reads, this statement could be recorded one day before the deed is signed. This statement doesn't have to be on file for any period of time. There is no reason why any partner who might be trapped by this statement, since it's a voluntary statement, would even know that such a statement exists, even if it had been filed earlier.

I think there is a total lack of due process protection for the omitted partner in the way this runs. What you’re doing, in effect, here is saying that an affidavit of some partners -- which is what may be happening now in some of these transactions -- that affidavit, if we put it on the land records, becomes binding on the omitted partners.

I don't, think you can do that. I don't think you can get away with that. That is depriving that omitted partner of property. The omitted partner may indeed have been consulted and said, "I don't want to sell the real estate. I do not agree to sell the real estate.
It's not the right price, not the right time."

The other partners go down to the court house, they file this statement, they leave his name off. A day later, they sign the deed, and the property is gone.

You can't do that.

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner Reitz, you have raised a good problem. We are going to look at that this fall.

Thank you.

CHAIRMAN EWART: Commissioner.

COMMISSIONER RONALD W. DEL SESTO (Rhode Island): Could we revisit for a moment the issue of central filing. We have assumed that the only time this would come up is in the real estate transaction.

What I was wondering about is, if I have entered into a partnership agreement where we have restrictions on each other -- for example, that two of us must sign checks or two must sign the deeds -- have you given any-thought to how I could protect myself by recording that agreement?

As I now see it, at least as I understand it, there is no central filing, so there is really no way I can put the world on notion of that restriction.

Has any thought been given that perhaps that should be provided?
CHAIRMAN EWART: I think that that has been part of the discussion on the section, and the committee will be taking that up in their meetings this fall. Thank you.

Commissioner.

COMMISSIONER MARLIN J. APPELWICK (Washington): It seems to me that all of the issues about fraud, by naming fewer than all the partners or by false filings, could be dealt with by perhaps substantially abandoning the approach but not the method.

You could have the same language required, or put the same presumptions in, if the partners are named individually in a deed. It would not seem to be more cumbersome that a deed to the property have an addendum attached, much like the legal description is often attached, which names the partners, and that if the partnership changes by withdrawal or death, that a quitclaim is filed which recites the new partners. That way, you're using the actual chain of title and not using another document that would need to be researched separately or incorporated by reference, and that by using the deeds themselves -- they represent actual ownership on the face of the deeds -- I think you would have less risk of fraud because there is an actual transfer when that deed passes.
This affidavit -- there are no penalties stated in the act -- would presumably give rise only to penalties for fraud or perjury, but would not necessarily have any criminal resource beyond that.

My concern is that the new document is unnecessary because all of this can be effectuated with the use of existing deeds.

CHAIRMAN EWART: Thank you. I think the committee will probably take that alternative into consideration.

COMMISSIONER WILLIAM S ARNOLD (Arkansas): Madam Chairman, I would maybe second that. It occurs to me that since you said in the prefatory note that this act really only comes into play in a very few situations -- it's a default act, which means there is no existing partnership agreement -- the likelihood of these kinds of statements being used is therefore very remote except probably in a few title situations, and I am not at all sure that you haven't stirred up more problems than it's worth for that purpose.

We have solved those problems pretty well without the benefit of this for many years, and I am not sure you are adding anything beneficial.

CHAIRMAN EWART: Seeing no further comments, we
are skipping to Section 15, but the reporter will briefly summarize the changes made in Sections 11, 12, 13 and 14.

MR. DONALD J. WEIDNER (Florida): We have deleted Section 11. The perception was that it was not necessary. This is the perception also in the ABA report, which essentially stated that state rules of evidence and civil procedure adequately cover the content of Section 11.

Section 12 we have left unchanged, but for language to make it gender-neutral. Section 12 provides that notice to and knowledge of partners operate as notice to and knowledge of the partnership.

Section 13 is amended to permit a partner to sue a partnership under a tort or other theory rather than be confined to an action for breakup or an accounting.

Section 14 we have deleted. Section 14 required the partnership to make good the loss when money or property of a third person is misapplied. The committee agrees with the ABA report, that there is no need for a special Section 14 that applies in the one case of the misapplication of money or property received from a non-partner, and so deleting Section 14 would leave the liability of the partnership to be controlled by the general rule of Section 13.
CHAIRMAN EWART: Section 15 will be read by Commissioner Cornell.

COMMISSIONER ROBERT H. CORNELL (California):
"SECTION 15. NATURE OF PARTNER'S LIABILITY.

"(1) A creditor has the right to proceed against one or more partners to satisfy a judgment based on a partnership debt or obligation, but only after partnership assets have been exhausted.

"(2) All partners are liable jointly and severally for all debts and obligations of the partnership, except as otherwise provided by law. Any partner, however, may enter into a separate obligation to perform a partnership contract."

CHAIRMAN EWART: Any comments on Section 15?

COMMISSIONER NEAL OSSEN (Connecticut): Does that mean that I first have to get judgment against the partnership, attempt to collect. If I am unable to collect, then I have institute another action against the partners, or can I make a multi-count link?

MR. HARRY HAYNSWORTH (ABA Adviser): Let me take a crack at that. You have to go back to what partnership law basically is now, and I will try to simplify it as much as possible. But in essence this would enable you, if you sued the partnership and all the partners, then all
you have to do would be to execute against the partnership assets, and you go directly against the partners individually under the revised wording.

Under the current law, you could go against, as long as you have served the partners, you could execute against any of the partners after you have got a judgment in the action, whether or not you go against the partnership or not. That is basically the intent.

COMMISSIONER OSSEN: I want to make it clear that I don't have to bring two actions.

MR. HAYNSWORTH: No.

COMMISSIONER OSSEN: Will the comment make it clear?

MR. HAYNSWORTH: The one thing, though, is, if you didn't serve one of the partners, you couldn't go against that individual partner. You can't do that under current law. If you serve them, made them a party, however, you can do so. In that situation, you would have to bring some kind of an action to enforce the judgment. That is a very complicated situation now.

COMMISSIONER OSSEN: I understand that. I just don't want to be forced with the court saying my suit against the partners is premature because I haven't gone against the partnership property first.
MR. HAYNSWORTH: No. That is clearly -- the other thing, of course, is now most bank loans that I am familiar with, when you've got a partnership, they get individual guarantees from the partners anyway.

COMMISSIONER OSSEN: I speak for the trade creditor, and he doesn't get guarantees, or he gets something that looks like it may or may not be.

MR. HAYNSWORTH: But that would override this provision. If you had a personal guarantee, that would override --

COMMISSIONER OSSEN: I understand if it's a personal guarantee, but if you don't have the guarantee, I don't want the trade creditor to be forced to first bring a lawsuit against the partnership and then exhaust his collection rights and then be told that he must must go now and sue -- you're saying I can sue the individual partners as well as the partnership, but I first must get my execution against the partnership property, and if it comes back unsatisfied, then I presumably, having a judgment --

MR. HAYNSWORTH: That is correct. That is the intent.

CHAIRMAN EWART: Thank you.

Commissioner Lisman.
COMMISSIONER CARL H. LISMAN (Vermont): ... I would like to really see the act specifically state that you can do what the last speaker said was clear, which I didn't think was all that clear.

I saw this as a marshalling argument, going after the partnership assets first and then you could only pursue the partners.

If that is what the committee intends, I think you really need to make it very, very clear.

COMMISSIONER MORRIS W. MACEY (Georgia): It should be pointed out that this section, which will undoubtedly be revisited, is in direct contravention of the policy adopted by the Bankruptcy Code when it was revised in the revision of 1978, so that you get a different result in state law than if there is a partnership Chapter 11 or bankruptcy.

As I stated, I think this is a major issue because the Bankruptcy Code rejected this result which is known as the "Jingle" Rule, and I am sure the committee will revisit Section 15.

COMMISSIONER PETER F. LANGROCK (Vermont): Commissioner Macey could you tell us what the bankruptcy rule is.

COMMISSIONER MACEY: Yes. Under the bankruptcy
rule, the liabilities of partnerships and the individual partners are satisfied from the assets of the partnership and the individuals, as contrasted with a situation where -- formerly, and which is what this provides -- that first out of partnership assets you satisfy partnership liabilities, and then you satisfy the liability of the individual, and vice versa.

COMMISSIONER LANGROCK: The question I had was, I don't think the language here states the position that the committee takes. But I am still curious. If you can bring an action against all the partners as well as the partnership, you still indicate you have to take satisfaction out of the partnership assets first. Is that basically correct?

What about the attachment process? What about a preliminary process of getting your hands on holding assets of the partner during the pendency of the litigation? Is that a problem?

It seems to me that if you are asked to look at the partnership assets first, before you can look to the partner, you may get liability against them, but unless you have the ability to tie up their assets, it may be a meaningless claim.

CHAIRMAN EWART: We will look at that.
COMMISSIONER ROBINSON O. EVERETT (North Carolina): This perhaps has been answered, but I am not sure about it. In North Carolina, as I understand the rule -- it was recently more or less reaffirmed in the Court of Appeals decision -- you cannot go after the partner unless there is a separate service or service on him designating him as being the subject of an attempt to impose personal liability -- this is independent of when you can actually try to go after his individual assets.

Would this change the rule? In other words, would there still be required some separate process indicating or designating that the individual was being proceeded against as a partner -- as an individual, that is?

MR. HARRY HAYNSWORTH (ABA Adviser): This would not change that.

CHAIRMAN EWART: Commissioner.

COMMISSIONER K. KING BURNETT (Maryland): My concern is with the word "exhausted." I don't really know when that is. I think you, really, if you’re going to take this concept, that you've got to flesh it out -- I hate to suggest that -- but I really don't know what is exhausted.

You send out the sheriff, and the sheriff comes
back and says he can't find the person, he can't find any property. You give bad instructions. You don't give him enough instructions.

This is particularly true with personal property. You may not know where all the assets are. I mean, you sue the individual partner, and his defense is, well, you know, there is a piece of property that we had hidden all this time, and it's over there, and it is worth $50. I know your judgment is 10 million. But you have got to go and get the sheriff and have the sheriff's sale and advertise that before you can come after me.

I think there is a potential here for a lot of mischief and an awful lot of ambiguity without your taking on, I think, the project, and it is probably a good paragraph or more, getting into what exhausted means and when it is that they're presumed to be exhausted or when you are going to deem -- whatever words you use. But somewhere you've got to allow the creditor to take on the partners without it being raised that there is some small thing hidden in another state.

You don't even have that covered. We've got to exhaust it -- where? In this state? I mean, they may be in another country.

Thank you.
CHAIRMAN EWART: Thank you, Commissioner.

COMMISSIONER JOHN W. WAGSTER (Tennessee):
Section 15 starts out saying that you may proceed against one or more partners to satisfy a judgment -- not a claim, but a judgment.

Do you mean judgment there, or do you mean claim based on a partnership debt or obligation?

This seems to imply that you have to get a judgment against the partnership before you’re allowed to go after the individual partners.

Is that what is intended? Do you intend to say judgment or do you intend to say claim?

MR. DONALD J. WEIDNER (Florida): We intend to say claim. This is one section that we approached by the subcommittee process, and the subcommittee has flagged this as a provision that we need to work on further this fall.

COMMISSIONER WAGSTER: So, what you’re really saying here is that you don’t have to have a judgment, but for any claim against the partnership, you may pursue the individual partners or the partnership. And the policy decision is that you must satisfy any judgment against the partnership assets first, and then proceed against the individual partners.
Is that correct?

MR. WEIDNER: Yes.

COMMISSIONER GEORGE H. BUXTON, III (Tennessee): I think inherent also would be the fact that if you didn't bring in all the partners, that you would have the right of those partners to implead, I suppose is the proper term, or bring in additional parties, those unnamed partners, for their rights of contribution, at least give you that opportunity.

COMMISSIONER WAGSTER: Let's suppose that you have -- it is still going to be necessary to bring a separate lawsuit against an individual partner if he was not personally served in the original action isn't that correct?

COMMISSIONER BUXTON: That is exactly right. That is why you'd have that right for those partners to bring him in.

COMMISSIONER WAGSTER: If the other partners don't bring him in, doesn't the original plaintiff have a right to sue him separately on the judgment against the partnership?

COMMISSIONER BUXTON: Right. If you want to take that --

COMMISSIONER WAGSTER: But it would require a
separate suit against an individual to get judgment against an individual.

COMMISSIONER BUXTON: If he hadn't done it in his original complaint, right.

COMMISSIONER WAGSTER: So, just to be clear now, if you sue only the partnership, the ABC Company, partnership, you get a judgment against only the partnership, you may satisfy that against partnership assets, but not against any individual partner, unless you sue the individual partners separately and get personal service, is that correct?

MR. BUXTON: I think that is a fair statement.

COMMISSIONER WAGSTER: I just think all that needs to be spelled out in detail to clear up the ambiguity.

COMMISSIONER TOM R. MASON (Mississippi): I agree. I think the present law is pretty vague on the nuts and bolts of that, and I am going to urge that the committee revisit that.

COMMISSIONER WAGSTER: I have had a lot of problem with the present law.

COMMISSIONER MASON: I am with you.

COMMISSIONER FRANK F. JESTRAB (North Dakota): I'd like to inquire. Do you understand that what you’re
doing, that there is any change in what's been the law for 75 years?

I always understood you could sue the partnership and levy on partnership assets, execution on the assets, returned unsatisfied, you proceed against the partners.

Now, is there a change? The question is -- one question is the substantive law of partnership. The other is a question of service. And what constitutes personal service on the individuals, of course, may be a separate procedural question. But certainly the substantive law -- are you changing it, or what are you doing with it?

MR. HARRY HAYNSWORTH (ABA Adviser): The basic change is, as I understand it, at least under current law, you don't even have to proceed against the partnership at all. You could sue one of the partners.

COMMISSIONER JESTRAB: That hasn't been my understanding. Maybe you are right, but I haven't understood that. But if that is current law, that you have go against each partner individually, then you're changing it from what it was. But I hadn't understood that.

Anyway, doesn't matter. All of these questions have impelled me to inquire as to whether there is, in
fact, a change.

MR. DONALD J. WEIDNER (Florida): My understanding is, we have essentially done a couple of things. No. 1, we have eliminated the rule that confined joint and several liability to tort situations only. And so, in Section 15, we have gone the road of some states and said: Henceforth, all partnership obligations are joint and several. That is, general contract obligations are now joint and several.

So, in Section 15(1), essentially what we were doing was putting in a rule like the mortgage rule that says when there is property mortgaged as security, somehow it's implied that the property pledged as security is the primary fund for payment and you cannot proceed against the debtor without at least contemporaneously proceeding against the property.

That is my sense of what this does. It says that given that all partnership obligations are now going to be joint and several, you just cannot decide that you are going to go after Don and his boat or beach house without at least contemporaneously pursuing the partnership assets.

We didn't agree with Morris. We haven't thought through the nuts and bolts of attachment and service of
process yet.

CHAIRMAN EWART: Commissioner.

COMMISSIONER PETER F. LANGROCK (Vermont): Just two thoughts. The partnership being a law partnership, I wondered if you worked through potential judgments based upon malpractice and insurance policies and how this would have effect on that.

And the second thing. When you talk about assets, think of work in progress and what a law office -- one of the greatest assets a law office has is work in progress, and you've got a real problem in attaching work in progress and attaching that before you go to the partners.

MR. DONALD J. WEIDNER (Florida): Do you have a sense -- and I guess it's the same question. I think it is a good point. The trouble with that word "exhausted," do you think we ought to work at that concept or just abandon the idea entirely?

COMMISSIONER LANGROCK: Abandon it.

MR. WEIDNER: So, delete reference to proceeding against the partnership assets first.

COMMISSIONER ROBINSON O. EVERETT (North Carolina): With respect to your last comment, I would like to applaud you for the way you set it up, have it go
against the fund of the partnership in the first instance.

Two comments, however. First, that there should be a limitation to partnership assets in the particular jurisdiction. I don't think a creditor should be required to wait until anything outside the jurisdiction has been exhausted.

Secondly, I think your wording in Line 28, "right to proceed," is rather confusing. If you have "right to recover," it would more meaningful, because otherwise you start a suit against the partner individually, and under a literal reading of that wording, he could possibly move to dismiss until after the other action had been taken, so I think you need to change that.

CHAIRMAN EWART: Thank you. Commissioner Burnett.

COMMISSIONER K. KING BURNETT (Maryland): I started to pass this up, but I thought I better do it orally so somebody can take this on.

It seems to me, if the judgment is unsatisfied against the partnership for a period of time, is one idea of saying that that is essentially an exhaustion. If there is a judgment -- in Maryland, you can't levy on a judgment until it's 30 days old, for example. You have got to wait 30 days, to give 30 days to the person against whom the judgment is entered to satisfy it. Then you can
send the sheriff out and so forth.

I don't know whether 30 days is the right time, but there ought to be some kind of an automatic cutoff so that the creditor at some point, if the judgment is not satisfied, whether it is 30 days, 60 days, that is maybe one way of saying if the judgment is still there, it is not satisfied, then the suit against the partners is okay and won’t bee subject to a motion to dismiss, which I think is really -- the way you have it worded now, if it is brought prematurely against the partners individually, you could move to dismiss, but that you could file suit and proceed to judgment against the individual partner once it's a certain age.

CHAIRMAN EWART: Thank you, Commissioner.

COMMISSIONER M. KING HILL, JR. (Maryland): If the debate on "exhausted" is in fact exhausted, have another point I'd like to raise.

What is the language on Page 42 "except as otherwise provided by law"? Do you intend – I thought this would be the law. What does "except as otherwise provided by law" -- my real question is, do you intend to recognize an exception for states which have abolished joint and several liability for certain obligations in malpractice cases or certain other things, and do you
intend to have comparative fault legislation override this joint and several obligation, or what does "except as otherwise provided by law" mean?

MR. DONALD J. WEIDNER (Florida): That language I put in there to anticipate tort reform. The case that concerned me was this. Suppose you're in a state where there is comparative fault and you have one person -- A is 99 percent at fault and B is one percent at fault. Under the state tort law, the risk of the insolvency of A falls on the plaintiff, not on B. So, that it's clear that of the $100 judgment, B is only liable, responsible for one dollar.

The question is then, can the plaintiff then say: But A and B were partners, and, therefore, by establishing the partnership relationship, B becomes liable not merely for one dollar, but for all $100.

I think that is precisely the issue that we need to flag -- should partnership law override, in effect, be an exception to the rollback in joint and several liability in those states that have had such a rollback? That is precisely the question.

COMMISSIONER HILL: I think if that is your intention, you need some attention to the drafting, such as, "unless otherwise provided by other law," or "unless
otherwise provided by" -- brackets, blank, brackets, so that we have some specificity. Because I can see a court saying: What are we talking about? Which law overrides? Does the other law mean this act or some other act?

I think you need to be more specific and have some reference to other law or perhaps a bracketed omission with a bracket to specify whatever law you are talking about in that particular state.

MR. DONALD J. WEIDNER (Florida): In a way, I was surprised that the ABA report recommended the move toward all joint and several liability at the same time some states have been moving away from it.

Do you think that we should retain that tradition, if you will, expand the traditional partnership rule?

COMMISSIONER HILL: I think it's a mistake to override the current trend in the legislature, and if the current trend in the legislature is to carve out certain exceptions, I think you ought to provide for the capacity, the ability of this act to carve out those exceptions, either by some appropriate language or other law, or by leaving a bracketed omission there and pointing out in your comment that if a state has enacted specific legislation abolishing joint and several liability in
certain specific, unusual situations, they ought to put
that in this section.

CHAIRMAN EWART: Commissioner Langrock.

COMMISSIONER PETER F. LANGROCK (Vermont): I am
not sure I understood your example of 99 and one. If they
are both partners and it's a partnership liability, then
obviously they're jointly, severally liable.

I take it the only exception would be -- I mean,
Isn't that where we are now? Unless there is a separate
statute that says two partners, one who is guilty of
malpractice, that is not jointly, severally liable with
that other partner. I think that is the only limited
exception that we are talking about here, not a general
negligence standard.

It seems to me that if a person commits a tort
in the course of a partnership, that is a partnership
tort, and it comes back into the partnership and comes
back against every partner.

MR. DONALD J. WEIDNER (Florida): That is the
basic policy question. Crunching through it, if you look
at the free access to the corporate form, the free access
to limited partnership form, tort reform in other areas,
you at least have the question, do you want to continue
joint and several liability in the partnership context?
COMMISSIONER LANGROCK: Let's talk about an automobile accident. I don't know anybody who wants to abolish joint and several liability for a partner on partnership business getting in an accident. You do have some limited areas in malpractice, and I think that is the only area we are talking about.

COMMISSIONER HILL: In response to Commissioner Langrock's comment, as I understand, you do have now joint venturers are partners, and that creates an additional problem that you have to deal with on this joint and several liability, because you may have to carve that out with the exceptions that have been drafted by statutes in several states.

MR. DONALD J. WEIDNER (Florida): Under this draft, joint venturers are explicitly partners, and there has been some controversy about whether we should state such a rule.

CHAIRMAN EWART: Commissioner Jestrab.

COMMISSIONER FRANK F. JESTRAB (North Dakota): As I understand it, the relationship of partners is simply an expansion of the law of agency. It's a different manifestation of the law of agency. Every partner is an agent for every other partner. ...
This question of liability of a partner, remember, is an agency imposition. It’s another manifestation of an agency imposition.

The question of how you are going to sue them, what kind of service you have got, who's liable in the lawsuit, that depends upon the rules of civil procedure.

When you start to work with this, don't inject procedural statutes into this substantive act.

Also, it seems to me, if you keep in mind that the law of agency, with the one exception, that the first thing you have to do is go to the partnership assets. If you proceed first against an individual partner, he will just marshal you on to the general assets. Once those are exhausted, you can get everything he has got. And you can get it from any solvent partner or any combination of them.

Now, that has been the law as I have understood it for 75 years. I don't know if you are going to change it, but it’s worked pretty good.

COMMISSIONER MORRIS W. MACEY (Georgia): I would point out that one of the big problems when a Chapter 11 is filed for a partnership, there is considerable anxiety about the individuals who are members of that partnership disposing of their assets during the year or longer that
it may take to work through the partnership Chapter 11 situation. And various rules have developed where, in certain instances, injunctions may be issued against the individuals who are members of the partnership with reference to their assets and requirements of disclosure. And a provision which says that first you must satisfy the liabilities out of the partnership assets, which doesn't give protection against the disposition of individual assets, may be an illusory protection for creditors.

CHAIRMAN EWART: Seeing no further comments, Sections 16 and 17 will not be read. The reporter will give a short comment on each of those.

MR. DONALD J. WEIDNER (Florida): Section 16 is modified slightly to eliminate the misleading term "partner by estoppel," but the text of Section 16 does not create a partner by estoppel, as the title to Title 16 implies. It merely imposes liability on specific people when someone is held out to be a partner.

There is also a change in 16(1)(b). We have eliminated 16(1)(b) to conform to the change in Section 40, that deletes the dual priority rule, because of the change in the bankruptcy law that says you have to eliminate the rule that says partnership creditors have priority to partnership property, and separate creditors
have priority to separate property.

This is a conforming amendment.

Section 17 --

COMMISSIONER EDWARD I. CUTLER (Florida): ... I wanted to ask you about what was formerly subparagraph (a) on Page 45. And I assume, from the way this has been done, that it's intended to be part of Paragraph 1 and just to run into -- without being a separate paragraph -- into Paragraph 1.

If that is so, what I am bothered by is the separate statement, "when a partnership liability results, the apparent partner is liable," as though the apparent partner were an actual member of the partnership -- and whether that is intended to apply even if there was no reliance upon his being a partner by people who gave credit or acted on the -- and is being advertised as a partner, even in Martindale-Hubbell.

MR. DONALD J. WEIDNER (Florida): We will look at that.

....

CHAIRMAN EWART: -The committee will look at those points, Commissioner.

Section 18 will be read by Commissioner Buxton.

COMMISSIONER GEORGE H. BUXTON, III (Tennessee)
Corrections to 18. Page 49, at Line 12, add back the phrase "and duties."

On Page 49, Line 19, insert a period after the word "partnership."

On Page 51, Line 4, delete parentheses (2), close parentheses, thus leaving "Section 9."

"SECTION 18. RULES DETERMINING RIGHTS AND DUTIES OF PARTNERS.

"(a) Each partner shall be repaid an amount equal to the cash plus the value of any property contributed to the partnership.

"(b) Each partner shall share equally in the profits of the partnership. Each partner shall share in the losses of the partnership in accordance with his [or her] share in profits.

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

"(d) A partner, who, to aid the partnership, makes any payment or advance beyond the amount of capital he [or she] agreed to contribute, shall be paid interest from the date of that payment or advance.
"(e) A partner shall receive interest on capital contributed only from the date when repayment should be made.

"(f) All partners have equal rights in the management and conduct of the partnership business.

"(g) No partner is entitled to remuneration for services performed for the partnership. A partner, however, is entitled to reasonable compensation for services in winding up the partnership affairs.

"(h) No person can become a member of a partnership without the consent of all the partners.

"(i) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners. No act outside the ordinary course of partnership business and no amendment of the partnership agreement may be undertaken rightfully without the consent of all the partners. Section 18(i) does not limit the partnership's obligations to third parties under Section 9."

CHAIRMAN EWART: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): Should there be something in subparagraph (a) with respect to the timing of the return of the capital contribution?

MR. DONALD J. WEIDNER (Florida): I will have to
think whether we put it in (a). We have timing provisions in the buy-out provisions of 32.

COMMISSIONER COGGESHALL: But this just standing by itself --

MR. WEIDNER: We haven't considered them here.

COMMISSIONER COGGESHALL: This just standing by itself says that I am entitled to get my capital contribution back, and, really, the concept, as I understand it, is you get it back when you withdraw or when the partnership terminates. It would seem to me that it would be appropriate to make some reference to that in this section.

MR. WEIDNER: Yes. This really operates in those contexts, yes.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I haven't gotten back into the 30's, so the answer may be back there, but may less than all the partners decide to terminate the partnership?

MR. DONALD J. WEIDNER (Florida): Under the rules, we distinguish between cessation of partner status and -- an event that causes a buy-out of a partner, versus an event that causes a winding-up of the partnership.

If the partnership agreement says that it shall continue for a stated term, then the person who leaves
prematurely cannot force a winding-up of the partnership. That person can ask only to be bought out, to be paid the value of his interest in the partnership, which essentially continues present law.

The sections completely underlined are all as if they were all new. They reflect in some significant part merely a reorganization of present substance. So, under our draft, we presently continue the distinction between the right to get out and the power to get out, and we say you have the power to get out of any partnership at any time.

COMMISSIONER REITZ: I have a different question in mind. In a ten-person partnership, nine of them decide that the tenth is just too obstreperous to live with any longer. The provision in (i) properly says that the nine cannot amend the partnership agreement without the consent of the ten.

But can the nine decide to get rid of the tenth by terminating that partnership and creating a new partnership of the nine?

MR. WEIDNER: It depends on whether there is an agreement to continue for a stated term.

COMMISSIONER REITZ: If there is no time term in the partnership agreement, can the nine dissolve the --
MR. WEIDNER: Yes.

COMMISSIONER REITZ: Do we need to say, something here that makes that clear?

MR. WEIDNER: I do not think so, but you may think so after you look at what we did in 31 and 32.

COMMISSIONER REITZ: It seems to me to have a considerable impact on the unanimous consent rule for amendment if less than unanimous consent is required to terminate in a partnership that does not have a definite time. You can do lots of things, including ousting a partner, by bringing down the existing partnership and intending to put a new one in place with different people, different terms.

MR. WEIDNER: We have intended to keep the present rule, but if it is not a term partnership, any partner has the power to end it at any time.

We might want to look at stating that here.

CHAIRMAN EWART: I am calling on Chairman Kneedler for a statement.

COMMISSIONER H. LANE KNEEDLER, III (Virginia): Thank you, Madam Chairman. We apparently have reached the bewitching hour. I just wanted to thank the members of the Conference who are here today for your input.

As I said at the outset, this is an act
celebrating its 75th birthday, and obviously we want to be careful, in working with the act, that we do the right thing. We went, a little slower than members of the committee had hoped this morning, but, again, I found all the comments to be very helpful, and we will be back next year.

Thank you.

CHAIRMAN EWART: Mr. President, the Committee of the Whole rises and reports it's had under consideration the Revised Uniform Partnership Act, has made progress, and asks leave to sit again.

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