### III. July 1990 Draft - Revised Uniform Partnership Act (RUPA)

A. Edited transcript of the second installment of the first reading of the July 1990 Draft of RUPA by NCCUSL at its Meeting in Milwaukee, Wisconsin, July 13-20, 1990. Topics addressed by the Commissioners and pages where the discussions are found are as follows:

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**B. Commentaries**

1. **February 22, 1990: Correspondence from Gerald V. Niesar to Dean Harry J. Haynsworth, IV.**

   The Ad Hoc Subcommittee expressed its concern with the RUPA draft provisions which dealt with changes in partner relationships and the attempt to abandon traditional language such as dissolution, winding-up and termination. The Subcommittee felt the traditional language should be retained to avoid generating confusion, litigation and unexpected results.

2. **October 29, 1990: Correspondence from James L. Jerue to H. Lane Kneedler.**

   The Ad Hoc Subcommittee commented on the first eighteen sections of the RUPA July 1990 draft and made suggestions on how to revise the language. Their comments specifically referred to the following sections:

   - Section 2X - Applicability to Limited Partners
   - Section 4X - Effect of Partnership Agreement
   - Section 7 - Definition of a General Partnership
   - Section 7(a) - Profit Motivation
   - Section 7(b) - Joint Ventures
   - Section 7(d) - Presumption of Partnership Status
   - Section 7(e) - Sharing of profits
   - Section 9(a) - Partners' Agency
   - Section 10X - Statement of Partnership Authority
   - Section 10X(a) - Mandatory/Voluntary - State/County Filing
   - Section 10X(d) - Actual Knowledge/Limitation on Authority
   - Section 15 - Liability of Partners
   - Section 16 - Partnership Liability
   - Section 18 - Rules Determining Rights and Duties

3. **October 29, 1990: Correspondence from Lauris G. L. Rall to Gerald V. Niesar.**

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*Comment Letter to the RUPA Drafting Committee.*
Commentary on RUPA dissolution issues, which included proposed sections 31, 31X, 31Y, 31Z and 32. Problems were discussed, and suggestions made, regarding the draft sections relating to a partnership's dissolution, winding up and buy outs.

Larry E. Ribstein, "A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act." Vol. 46, No. 1 THE BUSINESS LAWYER Ill (November 1990).

4. December 7, 1990: Correspondence from Gerald V. Niesar to H. Lane Kneedler.*

An analysis of RUPA Section 21 - The Fiduciary Duties of a Partner - and recommendations for changes concerning good faith and fair dealing, standard of care, and duty of loyalty. A proposed draft section 21 was enclosed.

5. December 11, 1990: Memorandum from Donald J. Weidner to RUPA Drafting Committee Advisors.

A suggestion was made to reorganize RUPA's breakup provisions. A sample redlined version of possible changes was attached.


Outline of possible areas of linkage between Delaware Revised Uniform Limited Partnership Act ("DRULPA") and Delaware Uniform Partnership Law ("DUPL").

7. January 25, 1991: Correspondence from Gerald V. Niesar to H. Lane Kneedler*

Report on the January 11 and 12, 1991 Ad Hoc Subcommittee meeting which specifically talked about Sections 29 through 32 of the RUPA draft. An explanation of their approval of the term "dissolution" in the "break up" provisions is given and a disagreement with the term "dissociation" to describe a partner's withdrawal. Discussion is given of why the Subcommittee believed the default vile should be a continuation of the partnership when a partner departs, rather than a dissolution, and why they favored "fair value" over "fair market value" under Section 32 is given. The discussions extended to indemnification under Section 32(e), liabilities, damages and the effect of written notice under Draft Section 31(1).

Attached was the summary of recommendations on break-up provisions from the RUPA Ad Hoc Subcommittee meeting.

* Comment Letter to the RUPA Drafting Committee.
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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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NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
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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 were then held, followed by meetings of four subcommittees held by conference call. A first reading was begun in Kauai, Hawaii in August of 1989, after which there have been three more full Drafting Committee meetings and subcommittee conference calls.
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 in which the parties have not addressed their partnership relationship, or a part of that relationship, in a partnership agreement.

The Drafting Committee has spent a very significant part 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 concept has led to considerable confusion and is incompatible with RUPA's move closer to an entity theory. The 1989 Hawaii Draft of RUPA eliminated the term "dissolution" and reorganized the provisions on partnership breakups, leaving much of the substance unchanged. The Hawaii Draft introduced three central provisions. The first section (Section 31) identified those ways in which one can cease to be a partner. The second section (Section 31Y) described those departures that result in a winding up of the partnership business. The third section (Section 32) provided that the partnership will buy out the interest of the departing partner if no event has caused the winding up of the partnership business. At its February, 1990 meeting, however, the Drafting Committee reinstated and redefined the term "dissolution" without changing the new structure of Sections 31, 31Y, and 32. Under this latest draft, a "partnership is dissolved when an event causes a winding up of its business under Section 31Y."

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 authority" 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 "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, Dean Harry J. Haynsworth of the Southern Illinois University School of Law, 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. The Drafting Committee also wishes to thank Edward S. Merrill and James F. Fotenos, of the California State Bar, and Professor Gary S. Rosin, of South Texas College of Law. 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.
UNIFORM PARTNERSHIP ACT (199_)

ARTICLE I
PRELIMINARY GENERAL PROVISIONS

Section 1. Name of Act.
Section 2. Definition of Terms.
Section 2X. Scope.
Section 3. Interpretation of Knowledge and Notice.
Section 4X. Effect of Partnership Agreement.
Section 5. Rules for Cases Not Provided for in This Act Actions and Proceedings in Name of Partnership.

SECTION 1. NAME OF ACT. This act may be cited as Uniform Partnership Act.

COMMENT

UPA Section 1 has been moved to the end of RUPA to comply with Conference Drafting Rule 24. It now appears as RUPA Section 43Y.

SECTION 2. DEFINITION OF TERMS. In this act, [Act]:

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

"Court" includes every court and judge having jurisdiction in the case.

(b) "Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act. "Debtor in bankruptcy" means a person who is the subject of:
(1) the entry of an order for relief or the filing of a voluntary case under Title 11 of the United States Code; or

(2) an equivalent order or case under a successor statute or code of general application; or

(3) an equivalent order or case under a state insolvency act.

(c) "partnership agreement" means an agreement, written or oral, of the partners as to the affairs of a partnership and the conduct of the partnership business.

(d) "partnership business" means the scope of business activity authorized by a partnership agreement.

(e) "Person" includes individuals, partnerships, corporations, and other associations. "person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

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

(g) "record title" means a statement of ownership of property that is duly recorded or registered according to applicable law, if it is property the
ownership of which is customarily publicly recorded or
registered.

(h) "Conveyance" "transfer" includes every an
assignment, conveyance, lease, mortgage, or deed and
encumbrance.

COMMENTS

A subcommittee has recommended that the RUPA
Section 2(a) definition of "business" be expanded to
include financial operation.

RUPA Section 2(b) is based on the new Georgia Act
but differs in several respects. The defined term in
RUPA is "debtor in bankruptcy" rather than "bankrupt."
In addition, RUPA Section 2(b) differs from the Georgia
version by eliminating the references in the Georgia Act
to specific sections of the bankruptcy act. RUPA
Section 2(b) must be read in connection with RUPA
Section 31(3), which provides that a person ceases to be
a partner when "the partner becomes a debtor in
bankruptcy within the meaning of Section 2 or executes
an assignment for the benefit of creditors." The ABA
Report suggests the new 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. Under RUPA,
when a partner becomes a debtor in bankruptcy, there is
a cessation of partner status but the cessation does not
cause a winding up of the partnership business. The
term "debtor in bankruptcy" is also used in RUPA Section
35(c)(2).

RUPA Section 2(c) is based on the Revised Uniform
Limited Partnership Act (RULPA) Section 101(9). The
definition here includes any agreement among inadvertent
partners.

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

RUPA Section 2(e) was supplied by Judge Burdick.
RUPA Section 2(g) reflects RUPA Section 10, which covers transfers of record title property. The broad definition is intended to include registered intellectual property.

RUPA Section 2(h) is amended as a result of Committee discussions of RUPA Section 10. The change reverses the roles of the words "transfer" and "conveyance."

SECTION 2X. SCOPE. This [Act] this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

COMMENT

This language has been taken from UPA Section 6(2) and moved to this new section on Scope at the suggestion of Judge Burdick.

SECTION 3. INTERPRETATION OF KNOWLEDGE AND NOTICE.

(1) (a) A person "knows" or has "knowledge" of a fact within the meaning of this act [Act] when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith [or she] is aware of it.

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

(a) (1) States the fact to such person, knows of it; or

(b) (2) 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

(3) has reason to know it exists from all of 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].

(c) A person "notifies" or "gives" a notice or notification to another by taking steps reasonably required to inform the other in the ordinary course, whether or not the other person actually learns of it. A person "receives" a notice or notification when:

(1) it comes to his [or her] attention; or

(2) it is duly delivered at the place of business through which the contract was made or at any other place held out by that person as the place for receipt of communications.

(d) Notice, knowledge, or a notice or notification received by a partnership is effective for a particular transaction from the time it is brought to the attention of the individual conducting the transaction, and in any event from the time 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 individual 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 the individual has reason to know of the transaction
and that the transaction would be materially affected by
the information.

(e) Notice to or knowledge of any partner
operates as notice to or knowledge of the partnership to
the same extent as notice to or knowledge of a
nonpartner agent of the partnership.

COMMENT

RUPA Section 3 implements the ABA Report
suggestion that RUPA draw heavily from the definition
and amplification of "knowledge" and "notice" in U.C.C.
Sections 1-201(25) to 1-201(27).

RUPA Section 3(c) is based on U.C.C. Section
1-201(26). The Official Comment to that section
provides:

"Notifies". New. This is the word used when the
essential fact is the proper dispatch of the notice,
not its receipt. Compare "Send". When the essential
fact is the other party's receipt of the notice, that
is stated. The second sentence states when a
notification is received.

RUPA Section 3(d), which defines the time at which
a receipt of notice is effective, is based on U.C.C.
Section 1-201(27). The Official Comment to that section
states:

New. This makes clear that reason to know,
knowledge, or a notification, although "received"
for instance by a clerk in Department A of an
organization, is effective for a transaction
conducted in Department B only from the time when it
was or should have been communicated to the individual conducting that transaction.

The UCC term "organization" has been replaced with the word "partnership."

RUPA Section 3(e) reflects that UPA Section 12 is no longer necessary after the heavy borrowing from the U.C.C.

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.

(2) (a) 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 merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

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

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

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

(b) If interest is not specified in the contract,
the rate of interest is the rate specified in [the
locally applicable statute].

COMMENT

UPA Section 4(1) is deleted as unnecessary and
potentially confusing. A subcommittee suggested Comment
that the proposition in UPA Section 4(1) is so well
established that it no longer need be in the statute and
that no change in the law is intended by the deletion.
See Comments on RULPA Section 1101.

RUPA Section 4(a) combines the principles of UPA
Sections 4(2), 4(3) and 5. The language is drawn from
the ABA Report at 131, which is in turn based on UCC
Section 1-103. A subcommittee concluded that the
rationale that caused the deletion of UPA Section 4(1)
also requires the deletion of RUPA Section 4(a). ULPA
Section 28(1) was the same as UPA Section 4(1). Also,
ULPA Section 29 is similar to RUPA Section 4(a). Do we
need a reference to the law merchant?

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

UPA Sections 4(4) and (5) are moved to the end of
RUPA to conform to Conference sequence rules.

SECTION 4X. EFFECT OF PARTNERSHIP AGREEMENT.

(a) Unless the partnership agreement provides
otherwise, the provisions of this [Act] govern relations
among the partners. The following provisions, however,
may not be varied by agreement:

(1) a partners' general duty of good faith and
fair dealing under Section 21(a);
(2) a requirement to wind up the partnership business in the events specified in Sections 31Y(5), 31Y(6) and 31Y(9);

(3) a partners' right to judicial expulsion of a partner in the events specified in Section 31(2)(ii); and

(4) a power of a partner to withdraw as a partner under Section 31(1).

(b) A partnership agreement may not deprive third parties of rights they have under this [Act].

COMMENT

RUPA Section 4X(a)(1) states that "the partners' general duty of good faith under Section 21(a)" may not be varied by agreement. This is a reference to the mandatory duty of good faith in RUPA Section 21(a). If there is a floor on the duty rather than both a floor and a ceiling, is "varied" the word we want? A subcommittee recommends the Committee review use of the words "varied" and "disclaimed" in Section 4X and the referenced provisions.

RUPA Section 4X(a)(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. RUPA 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 Sections 27 or 28 if the partnership is at will. RUPA 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. RUPA Section 31Y(9) provides that a winding up is caused "upon the application by a partner, when an appropriate forum decrees (i) that the economic purpose of the partnership is likely to be unreasonably frustrated; (ii) that it is not reasonably practicable to carry on the partnership business in conformity with the partnership agreement; or (iii) that another partner so conducts himself [or herself] in matters relating to the partnership business that it is not reasonably
practicable to carry on the business in partnership with that partner."

Section 4X(a)(3) provides that "the partners' right to judicial expulsion of a partner in the events specified in Section 31(2)(ii)" may not be drafted away. Section 31(2)(ii) refers to a judicial determination (a) that a party has been guilty of conduct "tending to affect prejudicially the carrying on" of the business or (b) that "the expelled partner has willfully or persistently committed a breach of the partnership agreement or otherwise breached a partnership duty to the extent that it is not reasonably practicable to carry on the business in partnership with that partner."

See Ribstein, A Statutory Approach to Partner Dissociation, 65 Wash. U.L.Q 357, 416 (1987), which suggests a statute under 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 . . . .

RUPA Section 4X(a)(4) is new since the Hawaii draft. The reference is to RUPA Section 31(1) rule that any person ceases to be a partner by giving notice of express will to cease to be a partner.

RUPA Section 4X(b) is new since the Hawaii draft but intended only as a clarification.

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

(a) A partnership may sue and be sued in the partnership name.
(b) A partner is not personally liable for any judgment against the partnership unless he [or she] has been served or has appeared in the action.

COMMENT

The rule in UPA Section 5, that the rules of law and equity shall govern cases not governed by the Act, is moved to RUPA Section 4(1).

RUPA Section 5(a) provides that "a partnership may sue and be sued in the partnership name." This entity approach is designed to simplify suits by and 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 Section 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.
RUPA Section 5(b) provides that "A partner is not personally liable for any judgment against the partnership unless he [or she] has been served or has appeared in the action." A subcommittee deleted a draft of RUPA Section 5(b) that provided that no partner "shall be personally liable for any judgment against the partnership unless the court rendering that judgment had personal jurisdiction over that partner." It was recommended that RUPA stay out of the question how the partner must be served. 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 PARTNERSHIP

Section 6. Partnership Defined.

Section 7. Rules for Determining the Definition and Existence of Partnership.

Section 8. Partnership Property.

SECTION 6. PARTNERSHIP DEFINED.

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

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

The Committee moved UPA Section 6(1) to RUPA Section 7. A subcommittee subsequently recommended that all but the last part of UPA Section 6(2) be reinstated and moved to RUPA Section 7.

RUPA Section 2X now contains the rule that RUPA governs limited partnerships as well as general partnerships. The ABA Report wanted this point emphasized in a separate section.

SECTION 7. RULES FOR DETERMINING THE DEFINITION AND EXISTENCE OF A PARTNERSHIP.

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

(b) 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 it would have been a partnership in this State prior to the adoption of this [Act].

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

(d) In determining whether a partnership The sharing of profits, losses and control creates a
presumption that co-ownership of a business exists,
these rules shall apply but:

(2) (1) Joint 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 co-ownership of a business, whether such
even if the co-owners do or do not share any profits
made by the use of the property; i

(3) (2) The sharing of gross returns
receipts does not of itself establish a partnership
coo-ownership of a business, 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; and

(3) shared control of an active business
indicates partnership if such control is substantially
greater than what would exist absent co-ownership.

(4) (e) 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 a stronger
indication of partnership than the receipt of a share of
gross receipts. Partnership status may be inferred from
a finding of shared profits unless the profit share is
more properly characterized:
(a) (1) As a payment of a debt by installments or otherwise,

(b) (2) As a payment for services as an independent contractor or payment of wages of or other compensation to an employee or;

(3) as a payment of rent to a landlord;

(c) (4) As a payment of an annuity or other retirement or health benefit to a widow or any beneficiary, representative, or designee of a deceased or retired partner;

(d) (5) As a payment of interest or other charge on a loan, though the amount of payment vary with the profits of the business, including a direct or indirect present or future ownership interest in the collateral, including rights to any income, proceeds or increase in value derived from the collateral; or

(e) (6) As the as a payment of consideration for the sale of the good-will of a business or other property by installments or otherwise.

COMMENT

RUPA Section 7(a) reflects a Committee decision to combine UPA Sections 6(1) and 7. RUPA Section 7(a) modifies the definition of partnership in UPA Section 6(1) to provide that a partnership is an "entity resulting from the" association of two or more persons to carry on as co-owners a business for profit. It was felt that an explicit definition of a partnership as an entity represents the net effect of the many changes in RUPA toward an entity theory of partnerships. As other provisions of RUPA make clear, however, an aggregate approach is retained for some purposes.
RUPA Section 7(b) reinstates the first part of UPA Section 6(2). This was done on instructions from a subcommittee.

A subcommittee changed the introductory language of RUPA Section 7(d) and added Section 7(d)(3).

Committee members would have liked to have given greater guidance concerning when co-ownership rises to the level of partnership. On the other hand, the UPA avoids an attempt to identify in every case whether a partnership exists. Two changes in RUPA Section 7(d) 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 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 important. The factors of business activity and control sharing have sometimes been subsumed under the term "co-ownership."

A subcommittee changed the introductory language of RUPA Section 7(e). The Committee deleted the language in UPA Section 7(4) that a profit share in a business "is prima facie evidence . . . but no such inference shall be drawn," etc. It was felt to be inconsistent with present statements of the law of evidence. The offensive language does not appear in RUPA Section 7(e). RUPA Section 7(e) does not attempt to answer whether a relationship is more properly characterized as that of borrower and lender or employer and employee rather than partnership.

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 above, the most important factors are 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). Loss sharing, of course, would strongly suggest partnership. 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

RUPA Section 7(e)(5) contains language taken from the following rule in the Uniform Land Security Interest Act:

§ 211. Secured Party's Equity in Collateral.

Notwithstanding a rule denominated "fettering," "clogging the equity of redemption," or "claiming a collateral advantage" or a rule of similar import:

(1) a secured party, without adversely affecting its security interest, may acquire from a debtor [other than a protected party] any direct or indirect present or future ownership interest in the collateral, including rights to any income, proceeds or increase in value derived from the collateral.

The Comment to this section explains:

The common-law doctrine prohibiting a mortgage from "clogging" the equity of redemption is a major impediment to alternative mortgage transactions.

The purpose of this section is to protect shared-appreciation mortgages, contingent interest mortgages, and other equity participation arrangements from impairment by the clogging doctrine in all cases in which that doctrine has not already been abrogated by federal law.

The purpose of the inclusion is to give comfort to shared-appreciation mortgagees.

The Joint Venture Issue.

The Committee declined to include joint ventures in the definition of partnership. The thought was that not every relationship called a joint venture rises to the level of partnership. The tax definition of partnership in Internal Revenue Code Section 7701(a)(2), on the other hand, expressly includes joint ventures:

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
in 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 UPA. 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 expressed doubt whether the UPA should be applied:
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.

Id. at 662-63. Infusaid also cited Shain Investment Co. v. Cohen, 15 Mass. App. 4, 443 N.E.2d 126, 129-31 (1982) as a Massachusetts case "refusing to apply partnership law to joint ventures." On the other hand, Infusaid 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.

Consider the nice summary in 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 matter, 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.
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 deemed to be partnership property if it is acquired in the partnership name or in the names of all the partners with an indication that they are doing business as a partnership.

(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 Section 8(d), if property is acquired in the name of an individual partner without use of partnership funds, it is presumed to be the separate property of that partner even if it has been used for partnership purposes.

(d) If record title to property is other than in the partnership name, the property is not partnership property as against a nonpartner who did not have knowledge to the contrary.
(3) (e) Any estate or interest in real property may be acquired in the partnership name and title to any estate or interest so acquired vests as partnership property in the partnership itself rather than in the partners individually. Title so acquired can be conveyed only in the partnership name.

(4) (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 Section 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 UPA Section 8 as a "feeble attempt," Bromberg & Ribstein at 3:4 critique UPA 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.

RUPA Section 8 had as its starting point the Georgia statute, which the ABA Report recommended as a model.

RUPA Section 8(a) provides that "Subject to Section 8(d), property is deemed to be partnership
property if it is acquired in the partnership name or in
the names of all the partners with an indication that
they are doing business as a partnership." The
Committee deleted language that presumed that
partnership property includes property described as
partnership property in the partnership agreement or in
a recorded Statement of Partnership. A subcommittee
added the "with an indication" language to the end of
8(a).

RUPA Section 8(b) provides that, "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." A subcommittee wanted Comment rather than
text to indicate that the presumption is rebuttable.
Pursuant to Section 8(d), if "record title to property
is other than in the partnership name, the property is
not partnership property as against a nonpartner who did
know have knowledge to the contrary." RUPA Section 2(g)
defines record title.

RUPA Section 8(c) presumes that, "Subject to
Section 8(d), if property is acquired in the name of an
individual partner without use of partnership funds, it
is presumed to be the separate property of that partner
even if it has been used for partnership purposes." A
subcommittee wanted Comment rather than text to indicate
that the presumption is rebuttable.

A subcommittee amended RUPA Section 8(d) to take
in to account the new definition of "record title" in
RUPA Section 2.

RUPA Section 8(e) is based on UPA Section 8(3) but
has been expanded to include personal property. This
change 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. A
subcommittee recommends considering the deletion of RUPA
Section 8(e). In the alternative, consideration should
be given to expanding RUPA Section 8(e) to refer also to
property taken "in the names of all the partners with an
indication that they are doing business as partners."

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.

RUPA Section 8(f) is identical to UPA 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 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.

There is more judicial flexibility under RUPA than under
the Georgia statute. 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
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.
Section 10. Conveyance of Real Property of the
Partnership.
Section 10X. Statement of Partnership Authority.
Section 10Y. Notice of Denial of Partner Status.
SECTION 9. PARTNER AGENT OF PARTNERSHIP AS TO PARTNERSHIP BUSINESS. Subject to the statement of partnership authority provisions of Section 10Z, this section applies to all partnerships.

(a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution of an instrument in the partnership name of any instrument, for apparently carrying on in the usual way the partnership business or business of the kind carried on by the partnership of which he 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 is dealing has knowledge of the fact knows that he has no such the partner lacks authority.

(b) 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 the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership;

(b) Dispose of the good will of the business;

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

(d) Confess a judgment;

(e) Submit a partnership claim or liability to arbitration or reference.

(4) An act of a partner in contravention of a restriction on authority shall not bind the partnership to persons having knowledge of the restriction.

COMMENT

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

Section 9(a) 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 9(1) at 4:4:

Authority is based on the principal's manifestation of consent to the 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 UPA Section 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" may 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.
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."

Official Comment can embrace the interpretation of UPA Section 9(1) expressed in Burns v. Gonzalez, 439 S.W.2d 128 (Tex.Civ.App. 1969): "As we 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."

RUPA Section 9(b) continues UPA Section 9(2) without change. An earlier draft deleted UPA 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 a draft of RUPA Section 9 that did not include the UPA Section 9(2) language, a subcommittee felt we had obscured the idea that partners can be bound by actual authority even if there is no 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.

RUPA Section 9 eliminates UPA Section 9(3), which contained a list of acts that required unanimous consent before they could bind third parties. Crane & Bromberg at 296 suggest 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.

An earlier draft of RUPA retained a list and adopted the basic suggestion of the ABA Report that the list be revised to reflect modern business practice.

UPA Section 9(3)(b) required unanimous consent to "[d]ispose of the good will of the business." The earlier draft eliminated this as a separate provision on the ground that good will can be treated under more general provisions governing other assets and decisions. 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 business. 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 of 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.

UPA Section 9(3)(c) 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 § (3)(b) . . . if it involves an agreement not to engage in the line of business.

UPA Section 9(3)(d) required unanimous consent for any confession of judgment. Even the earlier draft narrowed this provision in an attempt to conform more closely to modern business practice.

UPA Section 9(3)(e), which required unanimous consent to submit "a partnership claim or liability to arbitration or reference," was eliminated even under the earlier draft 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. The ABA Report suggestion to include the relinquishment of a partnership opportunity seemed to cover too many small transactions and be too vague.

The earlier draft required 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 Comment include a cross reference to RUPA Section 18, which treats the rights of partners among themselves.

SECTION 10. CONVEYANCE OF REAL PROPERTY OF THE PARTNERSHIP IF OWNERSHIP IS RECORDED.

(a) Where if record title to real property is in the partnership name, any partner may convey title to such property transfer it by a conveyance transfer executed in the partnership name but the partnership, however, may recover such the property unless it proves that the partner's act binds did not bind the partnership under the provisions of paragraph (1) of section Section 9, or unless such the property has been conveyed transferred 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 transfer, has exceeded his [or her] authority.
(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) (b) Where record title to real property is in the name of one or more but not fewer than all of the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the transfer it. 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 [or her] assignee, is a holder for value, without knowledge that the partners, in making the transfer, have exceeded their authority.

(4) (c) Where the record title to real property is in the name of one or more or all of the partners, or in a third person in trust for the partnership, a conveyance transfer executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of unless the partnership proves that the partner under the provisions of
paragraph (1) of section 9, in making the transfer, exceeded his [or her] authority.

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

COMMENT

RUPA Section 10 expands UPA Section 10 to include not only real property but also personal property. See the ABA Report at 138:

(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.

On the other hand, RUPA does not include all personal property--it includes only "record title" property. RUPA Section 2(g) indicates that it is record title property "if it is property the ownership of which is customarily publicly recorded."

RUPA Sections 10(a) and 10(c) 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 the language that is continued in RUPA Section 10(b).
RUPA Sections 10(a), 10(b), and 10(c) are each amended to refer to any authority under Section 9, rather than merely to authority under Section 9(a):

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 is not revoked by the provisions of Section 10.

UPA Section 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."
The Official Comment should contain a cross reference to RUPA Section 8(e), which provides that any interest in 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."

SECTION 10X. STATEMENT OF PARTNERSHIP AUTHORITY.

(a) The partnership may execute and file, in the office of [the Secretary of State], a statement of partnership authority. The statement shall:

(1) list the name of the partnership and the street address of an office of the partnership in this State, if there is one, or of the principal executive office of the partnership;

(2) list the names and street addresses of either all of the partners or of an agent who must be appointed and maintained by the partnership and who must maintain a list of all partners and make it available to any third party on request;

(3) be verified by all of the partners if there are ten or fewer partners and at least ten partners if there are more than ten partners;

(4) specify the partners required to sign a transfer of real property held in the name of the partnership; and

(5) contain any other matters the partnership chooses, including the authority, or restrictions upon
the authority, of some or all of the partners to enter
into other transactions on behalf of the partnership.

(b) Any amendment to the statement must be
verified by at least two partners who are identified as
current partners in the original statement, or any
amendment to the statement, unless otherwise provided in
the statement. In the absence of two named and current
partners, the amendment must meet the requirements of an
original statement. A notice of denial under Section
10Y is not an amendment under this subsection.

(c) The filing of the statement of partnership
authority in the office of the [Secretary of State]
creates a conclusive presumption in favor of any bona
fide purchaser or encumbrancer of partnership property,
or any creditor of the partnership giving value, that
the partners stated to be authorized to convey or
encumber partnership property or enter into other
transactions on behalf of the partnership are authorized
to do so.

(d) A statement of authority may limit or
restrict the authority of a partner granted under
Section 9 to enter into transactions on behalf of the
partnership, but a limitation on or restriction of
authority under this section is effective only against
persons who are not partners if they have knowledge of
the restriction or limitation.
 COMMENT

This is the third approach to a Statement of Partnership provision. The first approach was based on the Georgia provision, which the Committee rejected as too long and complex. The second was based on the present California Statement of Partnership provision, Cal. Stat. Section 15010.5. The present draft had as its starting point the revisions recommended by representatives of the California Bar's Partnership Committee, who have become regular and valued participants at our Drafting Committee meetings. The California draft was then edited to borrow from language contained in the latest draft being forged by the Texas Bar Partnership Committee.

RUPA Section 10X(a) provides that the partnership "may execute and file, in the office of [the Secretary of State], a statement of partnership authority." This language reflects that the filing is optional. It was felt there is no need to add paperwork or disclosure requirements to the law of partnership simply because paperwork and disclosure may be required to form corporations and limited partnerships. First, our focus has been on informal partnerships with little or no written agreement. Second, RUPA also applies to inadvertent partnerships. It is unclear how we can ask a group of people who do not think they are partners to register as partners. Nor was it clear what should be the sanction for noncompliance.

The ABA Report at 139 recommended a mandatory filing:

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.

The ABA Report at 140-41 recognized that mandatory filing rules would also require application to "foreign" partnerships:
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.

RUPA Section 10X also reflects a change from earlier drafts insofar as the filing is now central filing rather than county filing.

The most important goal of the statement of authority is to facilitate real property transfers. RUPA Section 10X(a)(4) provides that the statement must "specify the partners required to sign a transfer of real property held in the name of the partnership." The new provision is also intended to give effect to statements of authority far beyond real property transfers. RUPA Section 10X(a)(5) provides that the statement may "contain any other matters the partnership chooses, including the authority, or restrictions upon the authority, of some or all of the partners to enter into other transactions on behalf of the partnership."

The recording of an extraordinary grant of authority is treated differently than a recorded restriction on authority. A recorded grant of extraordinary authority, provides RUPA Section 10X(c), binds the partnership, whether the grant concerns real estate or other transactions. On the other hand, a recorded restriction on authority only binds nonpartners who have actual knowledge of the restriction.

On the other hand, RUPA exacts disclosure of partnerships that exercise the option to file a statement of partnership authority. Accordingly, RUPA Section 10X(a)(2) provides that the statement must "list
the names and street addresses of either all of the partners or of an agent who must be appointed and maintained by the partnership and who must maintain a list of all partners and make it available to any third party on request." Is the disclosure tax appropriate?

Do we need a foreign partnership qualification statute? It was said that there is good reason for having it because the status of a partnership in another state is been unclear.

SECTION 10Y. NOTICE OF DENIAL OF PARTNER STATUS.

Any person named in a statement of partnership authority, or his [or her] legal representative, may verify and file in the office of [the Secretary of State] a notice of denial of partner status that shall:

(a) state the name of the partnership; and
(b) state that a person named as a partner has ceased to be or never was a partner in the partnership.

COMMENT

RUPA Section 10Y is a new provision to complement RUPA Section 10X. A subcommittee asked that several issues be called to the attention of the Committee. What should be the effect of a withdrawal of a partner who does not file a notice of denial? Is there any liability if there is no denial? See RULPA Section 304 for a similar rule, and consider the relation to UPA Section 16. The fact that you file a denial does not mean that you were a partner until you file. In addition, see RULPA Sections 102(3) and 103 concerning name and reservation of name. It was said that we do not want an exclusive name filing as part of this provision. We do not want a requirement that the name not infringe. Filing under this statute might satisfy any requirement to file under an assumed name statute.
SECTION 10Z. LIABILITY FOR INACCURACIES IN STATEMENTS OF AUTHORITY.

(a) The partnership shall file amendments to the statement within 30 days of any event causing the statement to become factually inaccurate in any material respect.

(b) Partners filing an amendment to the statement must contemporaneously provide copies of the amendment to all partners and to any former partners affected by the amendment.

(c) Any partner filing a statement of partnership authority or any amendment thereto or any notice of denial of partner status, shall be liable to the partnership and each person named in the statement or any amendment for any claim, loss or damage, including attorney's fees, to the partnership or other partner as a consequence of any inaccuracy in the statement. The authority of any partner, as among the partners, to take any action that may be reflected in a statement or an amendment thereto is governed by the partnership agreement or other provisions of this [Act] and is not affected by the provisions authorizing the execution of statements or amendments.

COMMENT
RUPA Section 10Z is new. It is designed to complement RUPA Section 10X. A subcommittee has suggested the Committee study RUPA Section 10Z further. Are there any teeth to the requirement in RUPA Section
10Z(a) that the partnership file amendments? Is this creating additional partnership liability? Should statements of authority automatically sunset? Can you cancel by amendment?

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

COMMENT

UPA Section 12 is eliminated because "knowledge" and "notice" are now covered more extensively in RUPA Section 3.
SECTION 13. PARTNERSHIP BOUND BY PARTNER'S WRONGFUL ACT ACTIONABLE CONDUCT. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners,

(a) If loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred as a result of actionable conduct or omission of any partner acting in the partnership business or with the actual or apparent authority of his [or her] co-partners, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

(b) The partnership is bound to make good the loss if, in the course of its business, it 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

RUPA Section 13(a) is a continuation of UPA Section 13 and RUPA Section 13(b) is drawn from UPA Section 14(b).

The deletion in Section 13(a) of the language "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 term "actionable conduct" replaces the term "wrongful act" to implement the suggestion in the ABA Report that the term "wrongful act or omission" be broadened to cover no-fault torts.

The Drafting Committee eliminated UPA Section 14 as a separate section. The words "actual or apparent authority" were added to RUPA Section 13(a) in light of the deletion of Section 14, which specifically includes the partner acting "within the scope of his apparent authority." UPA Section 14(b) was added to RUPA Section 13. The addition of RUPA Section 13(b) is the major change since the Hawaii draft.

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

An earlier draft adopted the ABA Report recommendation at 142 that UPA 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." At its February, 1990 meeting, the Drafting Committee directed that UPA Section 14(b) be made part of RUPA Section 13. This draft also differs from the ABA Report by moving the reference to "apparent authority" in UPA Section 14(a) to RUPA Section 13.

SECTION 15. NATURE OF PARTNER'S LIABILITY.

(a) Unless otherwise agreed by the creditor or provided by law, all partners are liable

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

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

(b) Except as provided in Section 15(c), a claimant may not proceed directly against the assets of a partner to collect a judgment based on a claim that could have been successfully asserted against the partnership unless:

   (1) a judgment is also obtained against the partnership; and

   (2) the writ of execution thereon has been returned unsatisfied in whole or in part.

(c) Notwithstanding Section 15(b), a claimant may proceed directly against the assets of a partner without first obtaining a judgment against the partnership if:
(1) a proceeding under the involuntary provisions of Title 11 of the United States Code has been commenced against the partnership and not been dismissed within 60 days, or the partnership has filed a voluntary case under Title 11 of the United States Code;

(2) the claimant and the partner have agreed that the claimant need not exhaust partnership assets;

(3) the court so orders based on a finding that the partnership assets subject to execution within the state are clearly insufficient to satisfy the judgment or that exhaustion of partnership assets is excessively burdensome; or

(4) liability is imposed on the partner by law independently of the existence of the partnership.

COMMENT

RUPA Section 15 has been changed significantly since the Hawaii draft, borrowing heavily from a provision crafted by the Texas Bar Partnership Committee.

RUPA Section 15(a) is based on Alabama Section 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.

RUPA Sections 15(b) and 15(c) represent a detailed
attempt to incorporate the suggestion in 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 basic rule in RUPA Section 15(b), that partnership
assets should be pursued first, is presently the law in
some states. See 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.

A subcommittee deleted the following two
subsections from the end of RUPA Section 15:

(d) The court in which the judgment against the
partnership is obtained, or, if on account of Section
15(c), judgment is obtained only against the partner,
the court in which the judgment against the partner
is obtained, shall have continuing jurisdiction to
determine the amount of the deficiency recoverable
from the partner.

(e) Pending determination of the deficiency, the
court may order the partner to provide the claimant
with indemnity for, or assurance of payment of, any
deficiency recoverable from such partner, or not to
dispose of property.

The deletion of these two provisions should be reviewed
by the full Committee, as should all of RUPA Section 15.

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

(1) (a) When If a person, by words spoken or
written or by conduct, represents himself [or herself],
or consents to another representing him [or her] to any
one anyone, as a partner in an existing partnership or
with one or more persons not actual partners, he this
apparent partner is liable to any such a person to whom
such the representation has been made, who has, on the
faith of such the representation, has given credit to
the actual or apparent partnership, and if he has made
such. If the representation or consented to its being,
either by the apparent partner or with the apparent
partner's consent, has been made in a public manner he
is, the apparent partner is liable to such person,
whether the representation has or has not been made or
communicated to such person so giving credit by or with
the knowledge of the apparent partner-making the
representation or consenting to its being made one who
gives credit in reliance upon the apparent partnership
even though the apparent partner is not aware of being
held out as a partner to the individual seeking
recovery.

(a) (1) When Whenever a partnership liability
results, he the apparent partner is liable as though he
the apparent partner were an actual member of the
partnership.

(b) (2) When no partnership liability results,
he the apparent partner is liable jointly and severally
with the other persons, if any, so consenting to the
contract or representation as to incur liability,
otherwise separately representations.

(2) (b) When If a person has been thus
represented to be a partner in an existing partnership,
or with one or more persons not actual partners, he the
apparent partner is an agent of the persons consenting
to such the 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 give credit in reliance upon the
representation. Where If all of 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
are jointly and severally liable.

COMMENT

The title "Persons Who Appear As Partners" more
accurately reflects the substance of RUPA Section 16
than does the UPA Section 16 title "Partner by
Estoppel." 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."

RUPA Section 16(a) 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?

RUPA Section 16(a)(2) clarifies UPA Section
16(1)(b), which is discussed in 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 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.

An earlier draft had eliminated the language, which now appears in RUPA Section 16(a)(2), but the Committee reinstated it to clarify the rule.

RUPA Section 16(b) is modify slightly to emphasize that the person being protected by RUPA Section 16 is one who gives credit in reliance upon the representation.

SECTION 17. LIABILITY OF INCOMING PARTNER. A person admitted as a partner into an existing partnership is liable for all obligations of the partnership arising before his admission as though he [or she] had been a partner when those obligations were incurred, except that this liability shall must be satisfied only out of 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.

The Committee decided to retain RUPA Section 17 for several 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, RUPA removes the redundant language from Section 41 rather than from Section 17. Under RUPA, Section 41 assumes much less importance. Third, even if the redundancy were reinstated, it is tolerable. The UPA Official Comment contains a cross-reference to UPA 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 U.L.A. 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 narrows the need
for the UPA Section 41's fictional "liability
assumption" by the new partnership.

PART IV

RELATIONS OF PARTNERS TO ONE ANOTHER

Section 18. Rules Determining Rights and Duties
of Partners.
Section 18X. Distributions in Kind.
Section 20. Duty Rights of Partners to Render Obtain
Information.
Section 21. Partner Accountable as a Fiduciary Duties
of Partners.
Section 22. Right to an Account Remedies of Partners.
Section 23. Continuation of Partnership Beyond Fixed
Term.

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
credited with an amount equal to the cash plus the value
of any property he [or she] contributes to the
partnership property—

(b) Each partner shall be credited with an equal
share equally in of 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 proportion to 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.

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

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

(f) All partners have equal rights in the
management and conduct of the business.
(g) (h) No partner is entitled to remuneration for acting in services performed for the partnership business, except that a surviving partner is entitled, however, to reasonable compensation for his services rendered in winding up the partnership affairs.

(h) (i) No person may not become a member of a partnership without the consent of all of the partners.

(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. Expulsion of a partner under Section 31(2) requires the unanimous vote of all partners other than the partner to be expelled. This section does not limit the partnership's obligations to third parties under Section 9.

COMMENT

The Committee first decided that there is no need for language at the beginning of RUPA Section 18 concerning the role of the partnership agreement. Instead, it drafted RUPA Section 4X, which provides that, with certain exceptions, rules in RUPA that govern the relations among partners are subject to contrary agreement.

RUPA Section 18(a) states that each partner "shall be credited with an amount equal to the cash plus the
value of any property he [or she] contributes." This
differs in statement but not in basic substance from the
UPA Section 18(a) rule that every partner shall be
repaid his contributions.

The right to be credited with an amount equal to
contribution can perhaps best be understood in
conjunction with the rule in RUPA Section 18(b) that
partners share in losses "in proportion to his [or her]
share in the profits." 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
Committee has decided they want this rule to continue.
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 $1,000, 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.

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

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 . . . .

There was strong subcommittee sentiment to provide in a Comment that, as among the partners, a negative capital account does not represent a debt to the partnership unless they so intended.

The Committee suggested that Comment make clear that RUPA Section 18(c) applies in a liquidation context.

RUPA Section 18(f), which states that all partners have equal rights in the management and conduct of the business, is UPA 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.

Official Comment could refer to RUPA Section 20(b),
which states the rights of partners to obtain
information.

The first sentence of RUPA Section 18(g) provides:
"No partner is entitled to remuneration for services
performed for the partnership." This language continues
the UPA rule summarized 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" in what is now the
second sentence of RUPA Section 18(g) indicates that any
partner winding up, and not merely a partner winding up
after the death of another member, may be entitled to
compensation. The view was expressed during a
subcommittee meeting that this last part of RUPA Section
18(g) does not apply to give compensation in the
mini-winding up that takes place if there is a buyout.
Is the distinction justified as a policy matter?
RUPA Section 18(h) continues the UPA rule that no person can become a member of a partnership without the consent of all the partners.

RUPA Section 18(i) begins by making into two sentences and modifying UPA § 18(h):

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.

The Committee wanted commentary that RUPA 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 last sentence of RUPA Section 18(i) did not appear in the Hawaii draft:

Expulsion of a partner under Section 31(2) requires the unanimous vote of all partners other than the partner to be expelled. This Section does not limit the partnership's obligations to third parties under Section 9.

Should the reference be to all of RUPA Section 31(2), which was substantially expanded at our February 1990 meeting, or only to portions of Section 31(2)? Compare RUPA Section 4X, which states the partners may not vary by agreement "a partner's right to judicial expulsion of a partner in the events specified in Section 31(2)(ii)."

The Committee declined to include provisions that expressly authorize different classes of partners.

SECTION 18X. DISTRIBUTIONS IN KIND. A partner has no right to receive a distribution in kind and a partner may not be forced to take a disproportionate distribution in kind.
COMMENT

RUPA Section 18X states: "A partner has no right to receive a distribution in kind and a partner may not be forced to take a disproportionate distribution in kind." The Committee wanted a separate section on distributions. The two rules in RUPA Section 18X echo those in RULPA Section 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 Committee has decided to retain but relocate the rule in UPA Section 38(1) that every member of a partnership at will has the right to a liquidating distribution "in cash." This rule now appears in RUPA Section 31Z, which describes what happens when a winding up is caused.

SECTION 19. PARTNERSHIP BOOKS. The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

COMMENT

The Committee deleted UPA Section 19 at its January, 1990 meeting. The topic of partnership books was moved to RUPA Section 20, "Rights of Partners to Obtain Information." The move was recommended by the ABA Report. In the move, however, partners lost the unqualified right they had under UPA Section 19 to inspect and copy partnership books.
SECTION 20. DUTY RIGHTS OF PARTNERS TO RENDER OBTAIN INFORMATION.

(a) The partnership books and records, if any, shall be kept at the principal place of business of the partnership.

(b) and every partner shall at all times Partners and their agents and attorneys may have access to and may inspect and copy any of them partnership books and records. Former partners may have access to books and records pertaining to the time when they were partners. A partnership must provide the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished to a partner.

(c) Partners, and the legal representative of any deceased partner or partner under legal disability, shall render on demand have the right, to the extent just and reasonable, to true and full information of all things affecting concerning the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

COMMENT

The ABA Report suggested that RUPA Section 20 be stated as a "rights" section rather than a duty section, and the new title and statutory language adopt that suggestion.
RUPA Section 20(a) adopts the suggestion of the ABA Report that the right to inspect and copy partnership books be moved from UPA Section 19 to RUPA Section 20. As recommended in the ABA Report, the treatment of "books" has been expanded to include "records" other than "books."

RUPA Section 20(a) provides: "The partnership books and records, if any, shall be kept at the principal place of business of the partnership." Crane & Bromberg at 383 fn. 13 point 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." RUPA Section 20(a) reflects a rejection of a requirement that partnership books be kept. An earlier draft had stated a partnership duty to keeps books and records. Crane & Bromberg state 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 did not want to create new liability to third parties by stating a duty to keep partnership books. Members of a subcommittee were uncomfortable with the suggestion that RUPA says you don't have to keep books and records.

RUPA Section 20(b) begins with the statement: "Partners and their agents and attorneys may have access to partnership books and records." The Committee at its initial meeting embraced the suggestion of the ABA Report that a "laundry list" of books and records 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 Section 105. A limited partnership does not come into existence unless a certificate has been filed, whereas 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 should keep books and records necessary to enable a partner to determine her
share of the profits and losses of the partnership and
her rights on withdrawal.

The Committee rejected the ABA Report suggestion
that the books and records must be kept "in perpetuity."

The first substantive change from UPA Section 19
is that RUPA Section 20(b) 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. RUPA Section 20(b)
makes it explicit 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."

RUPA Section 20(b) 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 (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, RUPA Section
20, because it is not listed in RUPA Section 4X, permits
restrictions to be included in the partnership agreement.

The rule in RUPA Section 20(b) that the
partnership may impose a reasonable charge for documents
is similar to the rule in RULPA Section 105(b) that
records "are subject to inspection and copying at the
.. . expense of any partner during normal business
hours."

RUPA Section 20(c) should be read in light of UPA
Section 18(e) (RUPA 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 UPA 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). UPA Section 20
arguably limits the thrust of the UPA 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. Should Comment give some guidance on the extent to which information must be provided even if not requested?

SECTION 21. PARTNER ACCOUNTABLE AS A FIDUCIARY

DUTIES OF A PARTNER. A partner's only fiduciary duties are the duty of good faith and fair dealing and the duty of loyalty [and the duty of care] set out in this section.

(a) A partner has a duty of good faith and fair dealing towards the partnership and the other partners in all matters related to the formation, conduct or liquidation of the partnership. This general duty of good faith and fair dealing may not be varied by agreement, but the parties by agreement may identify specific conduct that does not violate the general duty of good faith and fair dealing. A partner shall not be considered to have violated the general duty of good faith and fair dealing merely because the partner's actions furthered that partner's individual interest.

(b) A partner has a duty of loyalty to the partnership and the other partners that is limited to the following:

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

(2) to refrain from dealing with the
partnership as, or on behalf of, an adverse party
without the informed consent of the partnership; and

(3) to refrain from competing with the
partnership without the informed consent of the
partnership.

This Section 21(b) does not preclude a partner from
purchasing the assets of the partnership in a
foreclosure sale or upon liquidation of the partnership.

(c) [a duty of care rule is under study]

(2) (d) This section Section 21 applies also to
the personal representatives of a deceased partner or
the legal representatives of any other partner engaged
in the liquidation of the affairs of the partnership as
the personal legal representatives of the last surviving
partner.

COMMENT

RUPA Section 21, "Fiduciary Duties of a Partner,"
has been changed significantly since the Hawaii draft.
RUPA Section 21 begins as follows: "A partner's only
fiduciary duties are the duty of good faith and fair
dealing and the duty of loyalty [and the duty of care]
set out in this Section." The Committee plans to give
further study to a duty of care rule. Even if such a
rule is included, should RUPA Section 21 be structured
as an exclusive statement of the fiduciary duties of partners?

RUPA Section 21 continues the term "fiduciary" in its title and first sentence. There are those who believe 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. Consider the "Rule Against Pursuit of Private Advantage" set out in Hillman, Private Ordering within Partnerships, 41 U.Miami L.Rev. 425 (1987): "No partner may without the consent of all other partners secure gain, arising from his position as a partner, not shared with other partners." Professor Hillman 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."

How much could the principle be clarified or qualified, either in its statement or in commentary?

Professor 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.

Unfortunately, the article makes no specific suggestions for statutory reform.

The Duty of Good Faith and Fair Dealing.

RUPA Section 21(a) provides for a "general duty of good faith and fair dealing" that "may not be varied by agreement," but the parties "by agreement may identify specific conduct that does not violate the general duty of good faith and fair dealing." See also RUPA Section 4X(a)(1). The duty runs "towards the partnership and the other partners in all matters related to the formation, conduct or liquidation of the partnership."
The last sentence of RUPA Section 21(a) states: "A partner shall not be considered to have violated the general duty of good faith and fair dealing merely because the partner's actions furthered that partner's individual interest." This language is intended to reflect the point expressed in the Hillman article that not all pursuit of self-interest is inappropriate.

The Duty of Loyalty.

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.

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 corporation 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.

American Law Institute, Principles of Corporate
5, ix (April 15, 1986).

RUPA Section 21(b) begins: "A partner has a duty
of loyalty to the partnership and the other partners
that is limited to the following . . . ." The Committee
may want to reconsider whether to continue what purports
to be an exclusive statement of the duties of loyalty.

RUPA Section 21(b)(1) is based upon UPA Section
21(1) and continues the purpose to declare that a
usurped asset held by a partner is held in trust. That
is, the partnership's claim is more than that of an
ordinary creditor. See the Official Comment to UPA
Section 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 Section 21(b)(2) provides that a partner must
"refrain from dealing with the partnership as, or on
behalf of, an adverse party without the informed consent
of the partnership." This language is derived from
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 Section 21(b)(3) provides that a partner must
"refrain from competing with the partnership without the
informed consent of the partnership." This language is
derived from Restatement, Second, Agency § 393: "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.

RUPA Section 21(b) concludes with the statement:
"This Section 21(b) does not preclude a partner from
purchasing the assets of the partnership in a
foreclosure sale or upon liquidation of the
partnership." Once again, the Committee sought to
protect legitimate pursuit of separate advantage.

This draft does not contain the general principle
that was in the Hawaii draft: "A partner must act
solely on behalf of the partnership in all matters
connected with that partner's position as a partner."
This language was derived from the general principle in
the 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."

Duty of Care

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

§ 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

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 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.

The Committee has decided to give further study to a duty of care provision.

RUPA Section 21(d) provides: "This Section 21 applies also to the personal representatives of a deceased partner or the legal representatives of any other partner engaged in the liquidation of the affairs of the partnership as the legal representatives of the last surviving partner." This is based on UPA Section 21(2).

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.

A partner may bring an action for legal or equitable relief, including an accounting as to partnership affairs, to:

(1) Enforce a right of a partner specified in Section 18:

Section 18:
(2) enforce the right to obtain the fair market value of a partner's interest in the partnership as provided in Section 32(a);

(3) compel a winding up of the partnership business as provided in Section 31Y;

(4) to enforce a right of a partner under the partnership agreement; and

(5) to otherwise protect the rights and interests of a partner.

COMMENT

The Committee at its initial meeting decided to expand UPA Section 22 from a provision treating only the right to an accounting to a broad remedies provision. 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 with 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 UPA 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 UPA 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 Section 22 reflects the increased willingness of courts to grant relief without the requirement of an accounting. In the past, courts often denied partners 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."
SECTION 23. CONTINUATION OF PARTNERSHIP BEYOND FIXED TERM.

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

(b) 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 UPA Section 23 is recommended. The ABA Report at 153 recommends only that UPA Section 23 be moved to Part VI.

PART V

PROPERTY RIGHTS OF A PARTNER

Section 24. Extent of Property Rights of a Partner.
Section 27. Assignment of Partner's Interest.
Section 28. Partner's Interest Subject to Charging Order.
SECTION 24. EXTENT OF PROPERTY RIGHTS OF A PARTNER.

The property rights of a partner are (1) his rights in specific partnership property; (2) his interest in the partnership; and (3) his right to participate in the management.

COMMENT

UPA Section 24 was eliminated at the Committee's February, 1990 meeting. The Hawaii draft provided: "The property rights of a partner are limited to his [or her] interest in the partnership."

The essence of both drafts is the elimination of reference to a partner's rights in specific partnership property. The deletion of Section 24 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.

UPA Section 24 did not seem to add anything after the elimination of the reference to rights in specific partnership property. A partner's assignable interest in the partnership is defined in RUPA Section 26 and her right to participate in management is defined in RUPA Section 18.

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

(1) (a) 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 property of the partnership rather than of the partners individually.

(2) The incidents of this tenancy are such that:
(a) (b) A partner, subject to the provisions of this 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 the property for any other purpose without the consent of his partners.

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

(c) A partner's partner has no right in specific partnership property is not subject to that can be transferred, either directly or by attachment or execution, except on a claim against the partnership.

When If partnership property is attached for a partnership debt, the partners, or any of them, or the personal representatives of a deceased partner, cannot may not claim any a right under the homestead or exemption laws. Partnership property is not subject to exemption or allowances or spousal rights on the death of a partner.

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

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

COMMENT

RUPA 25 more directly states the substance expressed in UPA Section 25. Although UPA Sections 24 and 25 both refer to the partner's "right in specific partnership property," the detailed rules of UPA Section 25 define away such a right. RUPA Section 25 more directly states the entity result embodied in the rules of UPA Section 25. In this regard, we are in accord with the ABA Report. The changes in RUPA Section 25 are intended to advance the entity theory by more directly stating the substance of present law: it is the entity that owns the asset, not the individual partners pro rata.

More direct statement of the entity theory also addresses a matter raised by the "Additional Comments" in the ABA Report. The ABA Report wanted it made clear "that a partner who misappropriates partnership property is guilty of embezzlement in the same manner and to the same extent that he would be guilty of embezzlement if he misappropriated the property of a corporation, or any other kind of entity, in which he had an ownership interest."

Separate creditors of a partner may pursue the charging order remedy under RUPA Section 28.

RUPA Section 37 should make clear that the representative of the last surviving partner need not go to court to establish the right to wind up.

This direct adoption of the entity theory should not prejudice optional adjustments to basis under the
Internal Revenue Code. Optional adjustments to basis permit a partnership to elect that certain transfers of partnership interests and certain distributions be treated according to an aggregate rather than an entity model. At present, the IRC Section 754 election is available as a matter of statute and is not subject to the discretion of the Service. Nor does its availability appear to depend upon the dominant theory under state law. All the Internal Revenue Code asks is that the partnership consistently apply one theory or the other. See Int. Rev. Code of 1986, Section 754, which provides in part: "Such an election shall apply with respect to all distributions of property by the partnership and to all transfers of interests in the partnership during the taxable year with respect to which such election was filed and all subsequent taxable years."

SECTION 26. NATURE OF PARTNER'S ASSIGNABLE INTEREST

IN THE PARTNERSHIP. A partner's assignable interest in the partnership is his the partner's share of the profits and surplus, and the same distributions. The interest is personal property.

COMMENT

RUPA Section 26 was amended at the February, 1990 meeting to introduce the concept of a partner's assignable interest in the partnership: "A partner's assignable interest in the partnership is the partner's share of the distributions. The interest is personal property."

The ABA Report recommended that UPA Section 26 be modified slightly to conform more closely to RULPA Section 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." RULPA does not specify that the interest in the partnership is personal property. The Committee concluded that profits, losses and distributions should not be listed together because profits and losses must both be kept account of to determine the distributions to which a partner is entitled. Related changes were made to RUPA Section 18.
An earlier draft also executed the ABA Report recommendation to move UPA Section 26 to RUPA 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.

SECTION 27. ASSIGNMENT OF PARTNER'S INTEREST.

(1) (a) The assignment of a partner's interest in the partnership:

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

(2) does not of itself dissolve cause a winding up of the partnership, nor its business;

(3) does not, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere participate in the management or administration conduct of the partnership business or affairs, or to require access to any information or an account of partnership transactions, or to inspect the partnership books; but it merely entitles

(4) the assignee is entitled to receive in accordance with his contract the assignment, the profits distributions to which the assigning partner assignor would otherwise be entitled; and

(5) upon assignment, the assignor retains all the rights and obligations of a partner other than the interest in distributions.
In case of a dissolution an event causes the winding up of the partnership business under Section 31(2)(b). The assignee is entitled to receive his assignor's interest and, in accordance with the assignment, the net amount otherwise distributable to the assignor. The assignee may require an account only from the date only of the last account agreed to by all of the partners.

Upon receipt of notice of an assignment, the partnership shall implement the assignee's rights under this section.

**COMMENT**

RUPA Section 27(a)(1) provides that the assignment of a partner's interest in the partnership "is permissible, in whole or in part." In light of the latest changes to RUPA Section 26, should not RUPA Section 27(a) refer to the assignment of a partner's "assignable interest" in the partnership? Pursuant to RUPA Section 4X, restrictions on assignment are generally permissible. Thus, RUPA 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 Section 27(a)(2) provides that the assignment of a partner's interest in the partnership "does not of itself cause a winding up of the partnership business." UPA Section 27 provides that the assignment "does not of itself dissolve the partnership." RUPA Section 31(2)(5) makes a related change. It states that a person ceases to be a partner upon expulsion "by the partnership of a partner who has assigned his [or her] entire assignable interest to an assignee who has not been admitted as a substituted partner." UPA Section 27(1) states that a conveyance of a partner's interest in the partnership "does not of itself dissolve the partnership."
RUPA Section 27(a)(3) is derived from UPA Section 27(1) and provides that an assignment "does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to participate in the management or conduct of the partnership business or affairs, to require access to any information or an account of partnership transactions, or to inspect the partnership books." The Committee did not intend to give 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." Note that RUPA Section 20(c) provides that "the legal representative of any deceased partner or partner under legal disability" shall have the right "to the extent just and reasonable, to true and full information concerning the partnership." RUPA Section 22 is couched in terms of remedies of partners.

RUPA Section 27(a)(4) states that "the assignee is entitled to receive, in accordance with the assignment, the distributions to which the assignor would otherwise be entitled." This language is derived from UPA Section 27(1) but refers to "distributions" rather than "profits." The ABA Report at 155 recommended use of the word "distribution" rather than the word "profits."

RUPA Section 27(b) states: "If an event causes the winding up of the partnership business under Section 31Y, the assignee is entitled to receive, in accordance with the assignment, the net amount otherwise distributable to the assignor. The assignee may require an account only from the date of the last account agreed to by all of the partners." This rule is drawn from UPA Section 27(2). The words "in accordance with the assignment" are added to avoid giving a partial assignee the entire amount.

RUPA Section 27(c) provides: "Upon receipt of notice of an assignment, the partnership shall 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's provisions on assignment are thus remarkably similar to those in RULPA. See, e.g., RULPA Section 702:
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.

RUPA Section 27 governs generally the status of assignees. Comment might include reference to other rules that apply in the case of assignments. For example, RUPA Section 31Y(4) provides that the nonassigning partners may unanimously agree to a winding up. RUPA Section 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 Committee has not yet recommended a provision that deems estates and divorced spouses assignees and purchasers. 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.

SECTION 28. PARTNER'S INTEREST SUBJECT TO CHARGING ORDER.

(a) 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 assignable interest of the debtor partner or assignee with payment of the unsatisfied amount of such the judgment debt with interest thereon; and may then or later appoint a receiver of his the debtor's share of the profits, and of any other money distributions 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.

(b) The charging order constitutes a lien on the judgment debtor's assignable 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.

(c) 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) (1) With with separate property, by any
one or more of the partners, or

(b) (2) With with partnership property, by any
one or more of the partners with the consent of all of
the partners whose interests are not so charged or sold.

(c) (d) Nothing in this act shall be held to This
[Act] does not deprive a partner of his any right, if
any, under the exemption laws, as regards his with
respect to the partner's interest in the partnership.

(e) This section provides an exclusive remedy by
which a judgment creditor of a partner or a partner's
assignee may satisfy a judgment out of the judgment
debtor's assignable interest in the partnership.

COMMENT

RUPA Section 28(a) is amended to clarify that a
charging order is available to the creditor of an
assignee of a partnership interest. 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).

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.

RUPA Section 28(b) is added to clarify the charging order remedy in several respects:

The charging order constitutes a lien on the judgment debtor's assignable 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.

See 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.

A 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."

Is the clarification sufficient? One commentator said the following of the Hawaii draft, which did not contain RUPA Section 28(b):

The RUPA provides neither explicit authorization of foreclosure, nor even minimal judicial direction for determining when foreclosure occurs and what procedures become available. Both ambiguities had been identified in the ABA Report and by frustrated courts and commentators for many years. Similarly, the RUPA perpetuates the naked reference to receivership. The RUPA supplies no guidance as to what circumstances require appointment of receivers, or what powers receivers might have beyond those available to creditors acting without benefit of
receivers. The substantial additional expense that
receivers add to the proceedings, without apparent
useful purpose, creates particular concern in the
child support enforcement context.

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

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

RUPA Section 28(e) provides that the charging
order is the "exclusive remedy by which a judgment
creditor of a partner or a partner's assignee may
satisfy a judgment out of the judgment debtor's
assignable 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. See Weinberger, Making Partners Pay Child
Support: The Charging Order at 100), 27 Hous.L.Rev.
297, 326 (1990):

The charging order is . . . ill-suited for
enforcement of child support arrearages.
Nevertheless, judicial interpretation has made the
charging order the exclusive process for reaching the
beneficial interest in partnership assets owned by
delinquent child support obligors. The drafters of
the Revised Uniform Partnership Act either should
provide relief from the exclusivity rule or should
strengthen the charging order remedy by bringing the
debtor partner's interest in the business within
reach of the family in need of support.

Professor Weinberger suggests that "RUPA could provide
that the holder of a charging order has an absolute
right, enforceable against the partnership, to receive
the amount that otherwise would have been distributable
to the debtor partner in the event of dissolution of the
partnership, to the extent necessary to satisfy the
judgment creditor's judgment." Id. at 324.

ARTICLE VI

DISSOLUTION CONTINUATION, CESSIONATION OF

PARTNER STATUS AND WINDING UP

Section 29. Dissolution Defined.
Section 29X. Cessation That Does Not Cause a Winding Up
of Partnership Business.
Section 30. Partnership not Terminated by Dissolution
Continues until Winding Up Completed.
Section 31. Causes Events Causing Cessation of
Dissolution Partner Status.
Section 31X. Wrongful Cessation of Partner Status.
Section 31Y. Events Causing Winding Up of Partnership
Business.
Section 31Z. Winding Up Partnership Business.
Section 32. Dissolution by Decree of Court Buyout of
Person Who Ceases to Be Partner when Partnership
Business Is Not Wound Up.
Section 33. General Effect Limitation of Dissolution on
Authority of Partner after Event Causes Winding Up of
Partnership Business.
Section 34. Right Liability of Partner Partners to
Contribution from Co-partners for Actions after
Dissolution Event Causes Winding Up of Business.
Section 35. Power of Partner to Bind Partnership to
Third Persons after Dissolution Event Causes Winding Up
of Business.
Section 35X. Power to Bind Partnership and Liability to
Third Persons after Cessation of Partner Status.
Section 36. Effect of Dissolution Cessation of Partner
Status on Partner's Existing Liability.
Section 37. Right to Wind Winding Up.
Section 38. Rights of Partners to Application of
Partnership Property.
Section 39. Rights Where Upon Rescission of Partnership
Is Dissolved Agreement for Fraud or Misrepresentation.
Section 41. Liability of Persons Continuing the
Business in Certain Cases.
Section 42. Rights of Retiring or Estate of Deceased Partner When the Business is Continued.

Section 43. Accrual of Actions.

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. A partnership is dissolved when an event causes the winding up of its business under Section 31Y.

COMMENT

The UPA provisions concerning dissolution are most complex and troublesome. In short, under the UPA, there is a dissolution every time someone leaves a partnership. 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 Dissociation, 65 Wash.U.L.Q. 357 (1987) (hereinafter Partner Dissociation). In many ways, the ABA Report is compatible with the 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 the core of the Partner Dissociation suggestions into RUPA. The draft went further in that it eliminated the term "dissolution" and incorporated additional changes suggested by the ABA Report, Professor Hillman and others.

Differences at the margin should not obscure the basic consensus that the role of the term dissolution should at the very least be significantly reformed. At a minimum, RUPA should take an approach more like that presently found in RULPA. RULPA provides that limited
partnerships dissolve far less readily than under the
UPA. 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
Section 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
partner to be carried on by the remaining general
partner and the 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 . . . .

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 continues the rule of UPA Section 38(1). Second,
continue to draft a statute that gives partnerships
greater stability, preferably without using "the D
word." The Committee did not want the partnership
theoretically blown apart on every departure. Moreover,
there did not appear to be the need for two separate
terminal concepts: dissolution and termination.
Compare I.R.C. Section 708, providing that a partnership
continues for tax purposes until it is terminated and
that the withdrawal of a partner does not constitute
termination. The Committee selected termination rather
than dissolution because the term dissolution was seen
as having caused a great deal of confusion. Moreover,
the UPA's definition of dissolution reflects an
aggregate conception of partnerships that is
inconsistent with our move closer to an entity model.

A 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, which lists the events
that cause a winding up of the partnership business; and
third, Section 32, which describes the buyout that takes
place if there is no winding up of the business.

At the end of its February, 1990 meeting, the
Drafting Committee decided to reinstate the term
dissolution. It did so without altering the structure
or substance of the rules it had forged in earlier
drafts. Dissolution, however, no longer takes place
every time someone leaves the partnership. Stated
differently, not every cessation of partner status will
cause a dissolution of the partnership. A dissolution
is one of the special departures that will trigger a
winding up of the partnership business rather than a
buyout of the departing partner. RUPA Section 29
provides: "A partnership is dissolved when an event
causes the winding up of its business under Section
31Y."

In summary, under RUPA, 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
business. Stated differently, the partnership business
may continue even though a partner withdraws. In many
situations, the person who ceases to be a partner has
the right to be paid the value of her partnership
interest, but does not have the right to have the
partnership liquidated. This is the rule, for example,
if her voluntary departure violates the partnership
agreement. In other 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.
SECTION 29X. CESSATION THAT DOES NOT CAUSE A WINDING UP OF PARTNERSHIP BUSINESS. If the cessation of a partner's status does not cause a dissolution and winding up of the partnership business 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 or she was a member of the partnership.

COMMENT

This section was added at the February, 1990 Drafting Committee meeting. The sense was that there should be some provision that describes the relationship between the partnership and the partner being bought out. RUPA Section 29X provides for the winding up of the relationship between the continuing partners and the departing partner. Income from the completion of work in progress when the person leaves must be considered, as must the liabilities that arise in the completion of that work. Do the buyout provisions adequately address work not yet performed?

SECTION 30. PARTNERSHIP NOT TERMINATED BY DISSOLUTION CONTINUES UNTIL WINDING UP COMPLETED. On dissolution when a partnership is dissolved and a winding up is commenced under Section 31Y, the partnership is not terminated, but continues until for the limited purpose of winding up the partnership business and terminates when the winding up of partnership affairs is completed. Until termination,
the partners are associated in the winding up of the partnership business.

COMMENT

RUPA Section 30 provides that "[w]hen a partnership is dissolved and a winding up is commenced under Section 31Y, the partnership continues for the limited purpose of winding up the partnership business and terminates when the winding up is completed." Under RUPA, a winding up of the business is to be distinguished from the "mini-winding up" that takes place if there is a buyout. See RUPA Section 29X. Until the winding up is completed, "the partners are associated in the winding up of the partnership business." Stated differently, the partnership continues but its scope contracts.

SECTION 31.—CAUSES OF DISSOLUTION. Dissolution is caused:

(1)—Without violation of the agreement between the partners;

(a)—By the termination of the definite term or particular undertaking specified in the agreement;

(b)—By the express will of any partner when no definite term or particular undertaking is specified;

(c)—By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking;

(d)—By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.
(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in the 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 CESSATION OF PARTNER STATUS. A person ceases to be a partner upon the occurrence of any of the following:

(1) upon the future date specified in a notice, or, in the absence of such a date, on the giving of notice by one partner to another partner of his [or her] express will to withdraw as a partner;

(2) the expulsion of a partner

   (i) bona fide in accordance with a power conferred by the partnership agreement; or

   (ii) pursuant to a judicial determination that:

      (A) the expelled partner has been guilty of conduct tending to affect prejudicially the carrying on of the partnership business; or
(B) the expelled partner has wilfully or persistently committed a breach of the partnership agreement or otherwise breached a partnership duty to the other partners or the partnership to the extent that it is not reasonably practicable to carry on the business in partnership with that partner; or

(iii) by the partnership on the ground that it is unlawful to carry on the partnership with the expelled partner; or

(iv) in the case of a partner that is a corporation, 90 days after the partnership notifies it that it will be expelled because it has filed a certificate or articles of dissolution or the equivalent or because its charter has been revoked, if there is no cure within 90 days; or

(v) by the partnership of a partner who has assigned his [or her] entire assignable interest to an assignee who has not been admitted as a substituted partner; or

(vi) in the case of a partner that is a partnership, an event causing the winding up of the business of that partnership.

(3) the partner becomes a debtor in bankruptcy within the meaning of Section 2 or executes an assignment for the benefit of creditors;

(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 partnership duties.

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

(6) In the case of a partner that is an estate or 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 assignable interest in the partnership, but not merely the substitution of a new representative;

(7) An event agreed to in the partnership agreement as resulting in a person ceasing to be a partner;

(8) In the case of any other interest or entity, the termination or extinguishment of the interest or entity; or

(9) The rescission of the partnership agreement in accordance with Section 39.
RUPA Section 31 attempts to list all the events that cause cessation of a partner's status. RUPA Section 31 is similar in approach to RULPA Section 402, which is entitled "Events of Withdrawal" and which lists the ways in which one ceases to be a general partner of a limited partnership. Although RUPA Section 31 is similar to RULPA Section 402, it does not use the term "Events of Withdrawal." The Committee found the word "withdrawal" too narrow to describe all the ways in which one can cease to be a partner. For example, it was felt that the word "withdrawal" does not fit the expulsion of a partner.

Under RUPA, the mere cessation of partner status does not cause a dissolution and winding up of the business. RUPA Section 31(1) identifies the situations in which the cessation of a partner's status causes a winding up of the business. RUPA Section 32 provides that in all other situations the cessation of partner status causes a buyout of a partner rather than the winding up of the business.

RUPA Section 31(1) provides that a person ceases to be a partner "upon the future date specified in a notice, or, in the absence of such a date, on the giving of notice by one partner to another partner of his [or her] express will to withdraw as 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 Section 31(2). 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 too harsh on the other partners when one
partner decides to leave prematurely.

The new language provides that notice must be
given to terminate partner status, which reflects UPA
Section 31's "express will" concept. RUPA Section
31(1) permits a withdrawing partner to specify an
effective date in the notice so that the effective date
is that specified in the notice, or, if none is
specified, on the date of giving of notice. The giving
of notice is to be interpreted under RUPA 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. Even though all of RUPA Section 31 is
not couched in terms of "events of withdrawal,"
"withdrawal" seems the appropriate term for RUPA Section
31(1) situations.

RUPA Section 31(2) provides that a person ceases
to be a partner upon expulsion. Section 31(2)(i)
provides that a person ceases to be a partner when she
is expelled "bona fide in accordance with a power
conferred by the partnership agreement." This reflects
the rule in UPA Section 31(1)(d), which provides that
dissolution is caused without violation of the agreement
between the partners "[b]y the expulsion of any partner
from the business bona fide in accordance with such a
power conferred by the agreement between the partners."
Discussing UPA Section 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 Comment reflect that the mandatory duty of good
faith and fair dealing in RUPA Section 21(a) applies to
the expulsion situation?

RUPA Section 31(2)(ii) is new insofar as it
expressly refers to expulsion pursuant to court order.
The causes, however, are based on the UPA.
RUPA Section 31(2)(ii)(A) provides that a person ceases to be a partner upon expulsion pursuant to a judicial determination that "the expelled partner has been guilty of conduct tending to affect prejudicially the carrying on of the partnership business." This language is based on UPA Section 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 Section 31(2)(ii)(B) provides that a person ceases to be a partner upon expulsion pursuant to a judicial determination that "the expelled partner has wilfully or persistently committed a breach of the partnership agreement or otherwise breached a partnership duty to the other partners or the partnership to the extent that it is not reasonably practicable to carry on the business in partnership with that partner." This provision is based on UPA Section 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."

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

RUPA Section 31(2)(iii) provides that a person ceases to be a partner upon expulsion "by the partnership on the ground that it is unlawful to carry on the partnership with the expelled partner." This provision is based on UPA Section 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." A related rule is in RUPA Section 31Y(6), which provides that the partnership business shall be wound up "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 any cure of illegality within 90 days after notice to the partnership thereof is effective retroactively for purposes of this Section."
RUPA Section 31(2)(iv) provides that, in the case of a partner that is a corporation, it ceases to be a partner "90 days after the partnership notifies it that it will be expelled because it has filed a certificate or articles of dissolution or the equivalent or because its charter has been revoked, if there is no cure within 90 days." RULPA Section 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.

RUPA Section 31(2)(v) provides that there is a cessation of partner status upon expulsion "by the partnership of a partner who has assigned his [or her] entire assignable interest to an assignee who has not been admitted as a substituted partner." This differs from the Hawaii draft, which provided that partner status ends upon "the assignment of a partner's entire interest in the partnership." RULPA Section 702 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." UPA Section 27(1) provides that a "conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership." Even under UPA Section 27(1), however, "a dissolution results if the assignment amounts to withdrawal of the assigning partner." Bromberg & Ribstein at 3:60. The change reflects new RUPA Section 26, which introduces the term "assignable interest in the partnership." For the rights of assignees, see RUPA Sections 27 and 31Y(5). For the rights of nonassigning partners, see RUPA Section 31Y(4).

RUPA Section 31(2)(vi) provides that there is a cessation of partner status upon the expulsion "in the case of a partner that is a partnership, [upon] an event causing the winding up of the business of the partnership." Should RUPA Section 31(2)(vi) expressly refer to expulsion "by the partnership?" The Hawaii draft had provided for automatic cessation of partner status "in the case of a partner that is a separate partnership, [upon] an event that causes the winding up of the separate partnership." This draft makes the commencement of winding up a cause for expulsion. See generally 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.

RUPA Section 31(3) provides that a person ceases to be a partner when "the partner becomes a debtor in bankruptcy within the meaning of Section 2 or executes an assignment for the benefit of creditors." UPA Section 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 Section 2 includes the filing for voluntary relief under the Bankruptcy Code and also 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.

The Committee rejected an earlier draft based on RULPA Section 402(5). The deleted language provided that a person 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." The sense was that this provision is too long and not necessary.

RUPA Section 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 is based on UPA Section 31(4), which provides that dissolution is caused "[b]y the death of any partner."

RUPA Section 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 Section 31(4)(iii) provides that an individual ceases to be a partner "upon a judicial determination that the partner has become in any other way incapable of performing partnership duties." This is based on UPA Section 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 Section 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 to include physical incapacity. 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?

RUPA Section 31(5) states that there is a cessation of partner status "in the case of a partner that is a trust or is acting as a partner by virtue of being a trustee of a trust, [upon] the distribution by the trust of its entire assignable interest in the partnership, but not merely [upon] the substitution of a successor trustee." It was stated that Texas has 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 concluded that the
answer is yes, particularly a business trust.

Interestingly, Texas Section 6-A(1)(c) provides that "[a] trustee or trust" may be a partner.

RUPA Section 31(6) provides that, "in the case of a partner that is an estate or 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 assignable interest in the partnership, but not merely the substitution of a new representative." RULPA Section 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 RUPA Section 31(8) occurrence would be a rare event. Under RUPA 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 opinion that the case is so rare that RUPA Section 31(6) should be eliminated, with the further goal to make sure that the distributee is an assignee, not a partner.

RUPA Section 31(7) provides that there is a cessation of partner status upon "an event agreed to in the partnership agreement as resulting in a person ceasing to be a partner."

RUPA Section 31(8) provides that there is a cessation of partner status upon, "in the case of any other interest or entity, the termination or extinguishment of the interest or entity."

RUPA Section 31(9) provides that there is a cessation of partner status upon "the rescission of the partnership agreement in accordance with Section 39."

Does RUPA Section 39 sufficiently identify the moment of rescission?

SECTION 31X. WRONGFUL CESSATION OF PARTNER STATUS.

If a person ceases to be a partner by violation of the partnership agreement or as a result of other wrongful conduct, the partnership may recover from the departing partner damages for the breach or wrongful conduct. The partnership may offset the damages against the amount
otherwise distributable to the departing partner and may also pursue any remedies provided for in the partnership agreement or by law. In the case of a partnership for a specified term or particular undertaking, a partner's withdrawal by express will before the expiration of that term or undertaking is a breach of the partnership agreement unless the withdrawal is authorized by a provision of this [Act] other than Section 31(1) or by the partnership agreement.

COMMENT

RUPA Section 31X provides that a partnership may recover damages when a person ceases to be a partner "by 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 RUPA Section 31X conform to that in RUPA Sections 31Z(b) and 32(f). RUPA 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.

RUPA Section 31X also provides that, in a fixed term partnership, "a partner's withdrawal by express will before the expiration of that term or undertaking is a breach of the partnership agreement unless the withdrawal is authorized by a provision of this [Act] other than Section 31(1) or by the partnership agreement." The new language is intended to protect the partner who withdraws for good reason, for example, on discovering her co-partner is diverting firm assets. See Hillman, Misconduct as a Basis for Excluding or Expelling a Partner: Effecting Commercial Divorce and Securing Custody of the Business, 78 Nw. L. Rev. 527, 543 (1983), in which it is suggested that the focus be:

on the objectives of the dissolving partners and permitting a limited use of self-help. If they are content with dissolving their relationship with the offending partner and do not seek to impose the sanctions for a dissolution caused wrongfully, and if they are prepared to assume the risk that their assessment of the wrongfulness of the conduct of the offensive partner may not withstand judicial review,
the dissolving partners should be permitted to effect a premature dissolution of the fixed term partnership by express will rather than incurring the time and expense involved in judicial proceedings for the dissolution of the partnership. If, on the other hand, the dissolving partners want to enjoy any of the protections that section 38 accords to those who have not caused a dissolution wrongfully... or if they desire to lessen the risks inherent in their actions, they should be expected to seek a judicial decree of dissolution and a finding that the dissolution has been caused wrongfully rather than exercise self-help.

SECTION 31V. EVENTS CAUSING WINDING UP OF PARTNERSHIP BUSINESS. A partnership is dissolved and its business shall be wound up on the occurrence of any of the following events:

(1) subject to subsection (2) of this section, on the giving of notice by one partner to another partner of the first partner's express will to withdraw as a 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) when a person ceases to be a partner in violation of the partnership agreement or as a result of expulsion, upon the express will of any other partner, within 90 days of the cessation, to wind up the partnership business;

(3) when a partner dies or otherwise ceases to be a partner pursuant to Sections 31(4), 31(5), 31(6), or
31(8), upon the express will of any other partner, within 90 days of the cessation, to wind up the partnership business;

(4) by the express will of all the partners who have not assigned their assignable interests under Section 27 or suffered them to be charged for their separate debts under Section 28, 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 on the application of a person who becomes a purchaser of a partner's interest under either Section 27 or Section 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 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 any cure of illegality within 90 days after notice to the partnership thereof is effective retroactively for purposes of this section:
(7) upon an event agreed to in the partnership agreement as resulting in the winding up of the partnership business;

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

(9) upon the application by a partner, when an appropriate forum decrees:

(i) that the economic purpose of the partnership is likely to be unreasonably frustrated;

(ii) that it is not reasonably practicable to carry on the partnership business in conformity with the partnership agreement; or

(iii) that another partner so conducts himself [or herself] in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with that partner.

COMMENT

The word "dissolution" was added to RUPA at the February, 1990 Committee meeting. RUPA Section 29 provides that "[a] partnership is dissolved when an event causes the winding up of its business under Section 31Y." RUPA Section 31Y has been modified to state that a "partnership is dissolved and its business shall be wound up on the occurrence of any of" the listed events.

RUPA Section 31Y(1) provides that the business shall be wound up, "subject to subsection (2) of this section, on the giving of notice by one partner to another partner of the first partner's express will to withdraw as a 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."
The new language is intended to cover both a preexisting and a contemporaneous agreement. 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. 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?"

RUPA 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 Sections 31 and 38. UPA Section 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 Section 31(2) states that dissolution is caused "[i]n 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 Section 38(1) provides that, in general, if dissolution is not caused wrongfully, each partner has the right to have the business wound up. On the other hand, UPA Section 38(2) provides 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.

Section 31Y(2) states that the business shall be wound up "when a person ceases to be a partner in violation of the partnership agreement or as a result of expulsion, upon the express will of any other partner, within 90 days of the cessation, to wind up the
partnership business." This continues the rule in UPA Section 38(2)(b) that 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 liquidation right. At its February 1990 meeting, the Committee deleted a rule that would have required the remaining partners to give notice of their election to continue within 90 days. Does RUPA Section 32(c) coordinate properly with RUPA Section 31Y(2)?

RUPA 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 RUPA Section 31Y(2) be amended to include reference to "other wrongful conduct?"

RUPA Section 31Y(3) provides that the business shall be wound up "when a partner dies or otherwise ceases to be a partner pursuant to Sections 31(4), 31(5), 31(6), or 31(8), upon the express will of any other partner, within 90 days of the cessation, to wind up the partnership business." The 90-day limit on the liquidation right in RUPA Section 31Y(3) is identical to the 90-day limit in RUPA Section 31Y(2). Here, again, the Committee deleted a rule that would have required unanimous agreement to continue within 90 days. Does RUPA Section 32(c) properly interact with RUPA Section 31Y(3)?

To summarize: under RUPA Section 31Y(3), the death of a partner gives every other partner 90 days to elect to cause a winding up of the business. If no other partner elects to wind up, the surviving spouse must be bought out under RUPA 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.

RUPA Section 31Y(4) provides that a winding up is
cauld "by the express will of all the partners who have
not assigned their assignable interests under Section 27
or suffered them to be charged for their separate debts
under Section 28, either before or after the termination
of any specified term or particular undertaking." This
language is based on UPA Section 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
RUPA Section 28(c).

RUPA Section 31Y(5) continues with only minor
modification the rule in UPA Section 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 RUPA 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 subsequent discussions of RUPA Section 32 concluded that the person who takes on death is entitled to a buyout. Compare this with the rule in Texas § 28-B, which 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.

RUPA 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 after notice to the partnership is effective retroactively for purposes of this Section." RUPA Section 31Y(6) modifies the rule in UPA Section 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 rationales 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, RUPA Section 31Y(6) provides that any cure within 90 days of notice operates retroactively for purposes of this section.

RUPA Section 31Y(7) provides that a winding up is caused upon "an event agreed to in the partnership agreement as" causing a winding up. The Committee wanted a windup rule that would parallel the departure rule in RUPA Section 31(7).

RUPA Section 31Y(8) is based on UPA Section 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.

RUPA Section 31Y(9) is based in part on UPA Section 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." RUPA 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 the Committee felt
more accurately reflects current contract notions, that
is, "when an appropriate forum decrees: (i) that the
economic purpose of the partnership is likely to be
unreasonably frustrated; (ii) that it is not reasonably
practicable to carry on the partnership business in
conformity with the partnership agreement; or (iii) that
another partner so conducts himself [or herself] in
matters relating to the partnership business that it is
not reasonably practicable to carry on the business in
partnership with that partner." "Appropriate
forum" was
used rather than "court" to include arbitration. Have
we lost anything by deleting specific reference to
willful and persistent breach? RUPA Section 31Y(9) also
operates to replace UPA Section 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
book losses do not necessarily cause a winding up of the
business.

RUPA Sections 31Y(5),(6) and (9) are included in
the RUPA Section 4X list of mandatory rules.

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

SECTION 31Z. WINDING UP PARTNERSHIP BUSINESS.

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

(b) If the partnership business is wound up pursuant to a decree under Section 31Y(9), the partnership may recover damages from a partner whose violation of the partnership agreement or other wrongful conduct causes the 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 law.

COMMENT

The Committee wanted a separate section defining what happens when a winding up is caused.

RUPA Section 31Z(a) is drawn from UPA Section 38(1). The Committee decided to continue the rule in UPA Section 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 RUPA Section 31Z(a) adequately coordinated with RUPA Section 18X, the new provision on distributions in kind?

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) and in-kind distribution was fair to all partners." The court emphasized the creditor-protection features of § 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."

RUPA Section 31Z(b) states that, if the business is wound up by decree under Section 31Y(9), "the partnership may recover damages from a partner whose violation of the partnership agreement or other wrongful conduct causes the 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 law." RUPA Section 31Z(b) has been amended to conform to RUPA Sections 31X and 32(f). Why is RUPA Section 31Z(b) limited to RUPA Section 31Y(9) situations? Should RUPA Section 31Z(b) be expanded to include "other wrongful conduct" and be referred to in RUPA Section 31Z(b)?

It was asked whether lost profits 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. DISOLUTION 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) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business;

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

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

(f) Other circumstances render a dissolution equitable.
(2) On the application of the purchaser of a
partner's interest under sections [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.

SECTION 32. BUYOUT OF PERSON WHO CEASES TO BE
PARTNER WHEN PARTNERSHIP BUSINESS 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 business 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 must be determined as
of the moment of the event causing cessation. Fair
market value is the amount that would have been
distributable to that person in a winding up of the
partnership business. In determining that amount, the
assets of the partnership must be valued at the greater
of (i) liquidation value or (ii) value based on sale of
the entire business as a going concern without the
departing partner. In either case, the determination
must be made on the basis of the price that would be
paid by a willing buyer to a willing seller, neither
being under any compulsion to buy or sell, and with the
knowledge of all relevant facts. Interest at the
rate must be paid from the date of value to the
date of payment. In a partnership in which capital is a
material income producing factor, regularly scheduled
distributions must continue to be made to the former
partner or successor in interest. Those distributions
must 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
of the partnership business under Section 31Y(2) or
31Y(3), the business may be continued if there is no
express will of any other partner, within 90 days of the
cessation of partner status, to wind up the partnership
business. If no agreement for the purchase of the
interest of a departing partner is reached within 90
days after a demand for payment, either the departing
partner or the continuing partners may commence an
action to determine the amount due.

(d) If the court determines the amount due, it
shall order the partnership or the continuing partners
to purchase the interest of the departing partner and
enter judgment accordingly.
(e) The payee partner must 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 is liable for damages caused by breach or wrongful conduct as provided in Section 31X. A partner who has withdrawn by express will before 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 the partner establishes to the satisfaction of the court that payment be made over a lesser term. Any deferred payments must be secured and bear interest at the [_____] rate.

COMMENT

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

RUPA Section 32(a) reflects Committee intent to make the buyout mandatory: "If a person ceases to be a partner under Section 31, but no event causes a winding up of the partnership business 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 RUPA 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."

RUPA Section 32(b) reflects an intent to provide guidance on fair market value. The first part of RUPA Section 32(b) provides:

The fair market value must be determined as of the moment of the event causing cessation. Fair market value is the amount that would have been distributable to that person in a winding up of the partnership business. 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 departing partner. In either case, the determination must be made on the basis of the price that would be paid by a willing buyer to 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 RUPA Section 32 is the higher of liquidation value or going concern value, then from the point of view of the departing partner there is no bottom line difference in remedy under RUPA Section 32 or RUPA 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 Section 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 RUPA Section 32(b) is intended to
provide that the distributions so important to a
surviving spouse be continued in certain situations:

In a partnership in which capital is a material
income producing factor, regularly scheduled
distributions must continue to be made to the former
partner or successor in interest. Those
distributions must 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.

The Committee has not yet seen RUPA Section 32(c),
which required amendment because of changes the
Committee made at its February 1990 meeting to RUPA
Sections 31Y(2) and 31Y(3). The Committee deleted a
rule that would have required the remaining partners to
elect to continue the business within 90 days. Section
32(c) had provided that the remaining partners must give
notice to the departed partner or his representative
within 90 days of the cessation of partner status. Does
RUPA Section 32(c) implement RUPA Sections 31Y(2) and
31Y(3)? Can the first sentence of RUPA Section 32(c) be
eliminated, thus leaving a provision applicable to all
of RUPA Section 32? Should the second sentence refer to
the "person entitled to payment" rather than to "the
departing partner?" Should it provide for an action by
the partnership rather than by the continuing partners?

RUPA 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 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 a payment from the partnership.
RUPA Section 32(d) is drafted 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
RUPA 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 31V]."
The Committee's decision was to make the buyout
mandatory and not provide winding up as an alternative.

RUPA Section 32(e) attempts to clarify the
"liabilities" that are subject to indemnification.
Consider the comment on the indemnification provisions
in UPA 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.

RUPA 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 RUPA Section 31X. RUPA Section 32(f) has been amended to conform to RUPA Sections 31X and 31Z(b).

RUPA Section 32(f) rejects the forfeiture of goodwill rule in UPA Section 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 good will. 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 OF DISSOLUTION LIMITATION ON AUTHORITY OF PARTNER AFTER EVENT CAUSES WINDING UP OF PARTNERSHIP BUSINESS. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution an event causing a winding up of the partnership business under Section 31Y terminates all authority of any partner to act for the partnership:

(1) With respect to the partners, 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 Section 35.
COMMENT

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

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

CAUSES WINDING UP OF BUSINESS. Where the dissolution is caused by the act, death or bankruptcy of a partner, each

(a) Each partner is liable to his co-partners the other partners for his the partner's share of any
liability created by any partner acting for the partnership after a winding up has been caused if:

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

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

(b) A partner is not liable to another partner who acts with

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

COMMENT

RUPA Section 34(a)(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 language added in Section 34 is based on Georgia Section 14-8-34. RUPA 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 BUSINESS.

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

(a) (1) By by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution when the winding up is caused;

(b) (2) By by any transaction which that would bind the partnership if dissolution the winding up had not taken place been caused, provided the other party to the transaction:
(i) (i) Had had extended credit to the
partnership prior to dissolution within two years before
the event causing the winding up and had no knowledge or
notice of the dissolution that a winding up had been
causéd; or

(ii) Though he had not so extended
credit, had but nevertheless had known of the
partnership prior to dissolution, before the event
causing 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.

(b) The liability of a partner under
Paragraph (ib) shall Section 35(a)(2) must be satisfied
out of partnership assets alone when such the partner
had been prior to dissolution, before the event causing
the winding up, had been:

(a) (1) Unknown unknown as a partner to the
person with whom the contract is made; and

(b) (2) So 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 the partner's connection with it.
(3) (c) The partnership is in no case bound by any act of a partner after dissolution an event causing a winding up of the partnership business:

(a) (1) Where if the partnership is dissolved business 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) (2) Where if the partner has become bankrupt a debtor in bankruptcy; or

(c) (3) Where if the partner has no authority to wind up partnership affairs except by a transaction with one who:

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

(II) (ii) Had not so extended credit to the partnership prior to dissolution before the event causing the winding up and, having no knowledge or notice of his want of authority, the fact of his want of authority has had not been advertised in the manner provided for advertising the fact of dissolution winding up in Paragraph—(1bII) Section 35(a)(2)(ii).
(4) (d) Nothing in this section shall affect the liability under Section 16 of any person who after dissolution an event causing 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

UPA 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 had no notice 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.

RUPA Section 35 is different because it eliminates the term dissolution. It refers instead to an event that triggers a winding up of the partnership. RUPA 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(c)(1) is modified to reflect RUPA 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(c)(2) 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. It differs insofar as the term "debtor in bankruptcy" is used and defined in Section 2.

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

(a) A person who ceases to be a partner under Section 31 may neither 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 before cessation and the other party to the transaction:

(1) was a creditor of the partnership within two years before such time and, in either case, had no notice of the person's ceasing to be a partner; or
(2) though the other party had not so extended credit, had nevertheless known, before 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) where the partnership business was regularly carried on.

(b) The liability of a partner under this section must be satisfied out of partnership assets alone when the partner, before the cessation of partner status, had been:

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

(2) 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 the partner's 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 UPA
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 non-bankrupt 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) (a) The dissolution Cessation of the partnership partner status does not of itself discharge the existing liability of any a partner.

(2) (b) 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 the partner, the partnership creditor, and the person or partnership continuing the business—and such. The 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) (c) Where If a person agrees to assume the existing obligations of a dissolved partnership after a person ceases to be a partner, the partners whose
obligations have been assumed shall be person who has ceased to be a partner is 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 those obligations.

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

(e) This section also applies to a person who ceases to be a partner upon the completion of the winding up of the partnership business.

COMMENT

RUPA Sections 36(a) through 36(c) have been amended to refer to withdrawal rather than dissolution.

RUPA Section 36(d) 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 deleted to conform to the Bankruptcy Act.

RUPA Section 36(e) is added to make Section 36 apply to the partner who exits by asset sale and not merely to the partner who is bought out by the other partners. Is this appropriate?

SECTION 37. RIGHT TO WIND UP. Unless otherwise agreed the partners

(a) Partners who have not wrongfully dissolved the partnership or the legal representative of the last
surviving partner, not bankrupt, has the right to caused a winding up under Section 31Y may wind up the partnership affairs; provided, however, that any and a partner, his a partner's legal representative or his assignee, upon cause shown, may obtain winding up by the court.

(b) Persons winding up a partnership's affairs, in the name of, and for and on behalf of, the partnership, may 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, distribute to the partners any remaining assets of the partnership, and perform other necessary acts.

COMMENT

RUPA Section 37(a) is drawn from UPA Section 37. The "unless otherwise agreed" language from the beginning of UPA § 37(a) is supplanted by the general rule in RUPA § 4X. Does § 37(a) accurately provide that "only good guys [and gals] 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.

The February 1990 discussion of RUPA Section 25(b)(3) indicated that RUPA Section 37 should make clear that the representative of the last surviving partner will not be forced to go to court for a winding up right. Perhaps make it a duty.

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 (2a II) 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 (2a II), 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 (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 § 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 § 31Y(1).

SECTION 39. RIGHTS UPON RESCISSION OF PARTNERSHIP AGREEMENT 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 a lien on, or a right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him the party for the purchase of an interest in the partnership and for any capital or advances contributed by him the party; and

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

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

COMMENT

RUPA 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 § 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 § 31(1)?

SECTION 40. RULES FOR DISTRIBUTION UPON WINDING UP.

(a) In Upon a winding up of the partnership business, subject to any agreement to the contrary, the provisions of this section must be observed in settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) (b) The assets of the partnership are:

(I) (1) The the partnership property,

(II) (2) The the contributions of the partners necessary for the payment of to satisfy all the liabilities specified in clause (b) of this paragraph Section 40(c).

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

(I) (1) These liabilities owing to creditors other than partners
These liabilities owing to partners other than for capital and profits, distributions; and

These liabilities owing to partners in respect of capital, distributions.

These owing to partners in respect of profits.

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

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.

An assignee for the benefit of creditors or any person appointed by the court shall have the right to may enforce the contributions specified in clause (d) of this paragraph Section 40(e).

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

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

(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 Section 40 because it refers to agreements with third party creditors. As such, it has vitality even after the addition of RUPA Section 4X. Thus, for example, a third-party creditor could agree that a partner who is also a creditor could get liquidation priority. RUPA Section 4X is relevant because it provides that, as among themselves, the partners may contract away RUPA
Section 40. Thus, as among themselves, partners may agree to any liquidation priorities they choose.

The Committee should review RUPA Section 40 on a narrow point and on a broad point. The narrow point is that I have eliminated the distinction in UPA Sections 40(b)(2)-(4) between the liability to a partner for her interest in profits and the liability to a partner for her interest in capital. Instead, RUPA Section 40(c)(3) talks simply of the liability of to a partner in respect of distributions. I was attempting to implement the logic of the Committee decisions under RUPA Sections 18 and 26, which was that contributions to capital and shares in profits and losses combine to determine the right to distributions.

More broadly, the Committee should reconsider eliminating the present structure of RUPA Section 40 that refers to the "assets" and "liabilities" of the partnership. Our discussion under RUPA Section 18 concluded to continue the default rule that partners share all losses. Thus, partners are free to share "operating" losses differently from "capital" losses. Our sense was that capital accounts are often misunderstood and that, as among the partners, a negative capital account does not reflect a debt to the partnership unless that was the intent. Do we confuse that message by retaining the statements that the "assets" of the partnership include the "contributions" necessary to satisfy the "liabilities," which include those owing to other partners?

RULPA Section 804 is instructive because it is not structured as lists of assets and liabilities:

§ 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.

One substantive contrast between RUPA and RULPA is worth highlighting. Unlike RULPA Section 801(1), RUPA sections 40(b) and 40(c) provide that the claims of partners who were also partnership creditors rank below the claims of all other creditors.

UPA 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 Code.
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 U.S.C. § 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 are 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 RUPA Section 40 might contain a cross reference to RUPA 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. See also present UPA Section 41(8).

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 partner 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.

(a) Unless otherwise agreed, 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) (b) When all of the partners or their respective 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 30(2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved
partnership are also creditors of the person or partnership continuing the business.

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

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

(8) (c) When if 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 that interest or for his right in partnership property.
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 chooses 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. This is, as I understand it, the
1 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 § 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 it wishes to answer the basic question in
the affirmative.

Consider the broad observation on § 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 incorporation 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(a) provides the general rule that the cessation of a partner's status does not affect the relationship between a partnership and its creditors.

RUPA Section 41(b) adds the word "legal" before "representative" to conform to RUPA Sections 37(a) and 40(f). In light of our changes to RUPA Section 26, should RUPA Section 41(b) refer to the assignment of their "assignable interests" in the partnership?

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

In Sections 41(b) and 41(c), the reference to the partner's "right[s] in partnership property" must be deleted if the tenancy is 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 or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41(6) of this act.

COMMENT

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

SECTION 43. ACCRUAL OF ACTIONS. The right to an account of his partnership interest shall accrue to any partner, or his the partner's 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. The right to an account on the
cessation of partner status is independent of any right
to account under Section 22.

COMMENT

RUPA Section 43 is based on UPA Section 43, which
is 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.

Does RUPA Section 26, defining a partner's
"assignable interest in the partnership," require any
change to RUPA Section 43?

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.

The new second sentence in RUPA Section 43 is an attempt to respond to the following comment in the ABA Report:

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

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 Section 22 is expanded far beyond UPA Section 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.
ARTICLE VII
MISCELLANEOUS PROVISIONS

Section 43X. Uniformity of Application and
Construction.

Section 43Y. Short Title.

Section 43Z. Severability.


Section 45. When Legislation Repealed.

Section 46. Application to Existing Relationships.

SECTION 43X. UNIFORMITY OF APPLICATION AND
CONSTRUCTION. This [Act] shall be applied and construed
to effectuate its general purpose to make uniform the
law with respect to the subject of this [Act] among
states enacting it.

COMMENT

This language is drawn from Commissioners'
Drafting Rule 25.

SECTION 43Y. SHORT TITLE. This act [Act] may be
cited as Uniform Partnership Act, 199.

COMMENT

This contains the substance of UPA Section 1,
which has been moved to this place in the statute to
conform to Commissioners' Drafting Rule 24.

SECTION 43Z. 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 43Z(a) is drawn from the Commissioners' Reference Book at p. 64.

Section 43Z(b) is drawn from the ABA Report at 131 and is based on UCC § 1-104.

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 UPA Section 44.

SECTION 45. LEGISLATION REPEALED. All acts or parts of acts inconsistent with this act are hereby repealed. The following provisions are superseded by this [Act] and are hereby repealed: [the Uniform Partnership Act as amended and in effect immediately prior to the adoption of this [Act]].
RUPA Section 45 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 Section 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.
SECTION 46. APPLICATION TO EXISTING RELATIONSHIPS.

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 proceeding begun or right accrued before this act [Act] takes effect.

COMMENT

This provision is taken from UPA Section 4(4). It is moved to this place in the statute to conform to Commissioners' Drafting Rule 24.
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
PROCEEDINGS IN COMMITTEE OF THE WHOLE
UNIFORM PARTNERSHIP ACT

July 13 – 20, 1990
Hyatt Regency Milwaukee Hotel
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I N D E X

UNIFORM PARTNERSHIP ACT

Tuesday, July 17, 1990

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NINTH SESSION

UNIFORM PARTNERSHIP ACT

TUESDAY, JULY 17, 1990

Commissioner H. Lane Kneedler (Virgina) Chairman of the Drafting Committee

What we are going to do today is begin with a few introductory comments by me, trying to set the stage philosophically for where we are. Then I am going to ask Don Weidner, our reporter, to mention briefly the sections that we covered last year -- that is, Sections 1 to 17 of the act -- mentioning them only briefly and telling you where we have made some changes.

We do not intend to discuss Sections 1 through 17 today. We have enough work to do with the other provisions of the act. But I will ask him to describe briefly Sections 1 to 17 and what we have done.

You will remember last year I said "Welcome to a birthday party," the 75th anniversary of the Uniform Partnership Act, which, as you remember, was adopted by the conference in 1914 and has been adopted by all of the states but Louisiana.

Over the years, there have been remarkably few changes in the states to the Uniform Partnership Act. You might ask logically, why, after now 76 years, is there an interest in
reviewing and revising the uniform Partnership Act? With an act that's this old and this undisturbed over such a long period of time, I think one needs to begin with the principle -- and I want to assure you that we did -- begin with the principle of "if it ain't broke, don't fix it."

But there were two efforts in the early and mid 1980's that did lead the conference to decide that it should appoint a Drafting Committee to review and revise the Uniform Partnership Act.

The first effort was the Georgia effort to revise -- a successful effort -- its Uniform Partnership Act. And the second was this report of the UPA revision subcommittee of the ABA committee on partnerships and unincorporated business associations which Harry Haynsworth chaired.

I might say, among our advisers, between Harry, Joel Adelman and Allan Donn, we have three of the five people whose names appear on that report.

The ABA committee called for some 150 recommendations for changes in the Uniform Partnership Act and 12 new provisions. Of those 150 recommendations for changes, 66 of them came from the dissolution provisions. As you will see, that is where we are going to try to spend most of our time today.

The conference appointed a Drafting Committee in the fall of 1987, and we have met seven times since then. We have
also, because of the volume of the work we had to do and its importance, we appointed some subcommittees to do work between the full committee meetings. They have met for over 16 -- I might say expensive, because I have seen the bill -- 16 hours of conference calls, and have done fine work.

Let's move now to the act. I would like to mention four general points about the draft of the revised Uniform Partnership Act, and, again, for our conference's reporter's purposes, we are going to refer to that as RUPA -- four general points about the draft of RUPA that you have before you.

First is that RUPA, the Uniform Partnership Act, continues to be, in effect, a default statute. That is, it addresses the partnership, often the small or inadvertent partnership, that doesn't have a partnership agreement; also covers, of course, those situations where there is a partnership agreement but the agreement doesn't cover the particular point at issue.

Secondly, as we will see, almost all the provisions of RUPA may be varied by agreement. There are some exceptions, and we will mention what those exceptions are.

The third point has to do with the entity versus the aggregate approach to partnerships. You will remember that that year our reporter, Don Weidner, explained in some detail the difference between the entity and aggregate approach. I want to
remind you that RUPA, like the Uniform Partnership Act, is a mixed approach -- that is, embodying some of both the entity approach to partnerships and some of the aggregate approach -- although RUPA moves much closer to an entity theory than the UPA itself did.

Finally, RUPA governs, of course, general partnerships, but it also covers limited partnerships except where the Limited Partnership Act is inconsistent, in which case the Limited Partnership Act governs.

....

With regard to the numbering of the sections, we have had some people ask whether we are ever going to change the numbers for the sections. The answer is "yes." But because this is an act with which so many members of the conference are familiar, we decided in the early drafts to use the old numbers, and, where we added a new section, to use a number and a letter -- like 4X or 10X. Obviously, as we get to a final draft, we will change that to a 101, 201 type numbering system.

Now, finally, with regard to reading, as I said, Don will start off by describing Sections 1 through 17. Then we are going to go to Section 29, which is on Page 92, and discuss Sections 29 through 32. They are the dissolution provisions.

We do believe we need some guidance from the floor about whether we are taking the right direction with the
dissolution provisions. After the description of 1 through 17, we will do 29 to 32, then we will go back to 18 and begin with 18 and just walk through the act.

Mr. Chairman, I would like now to call on our reporter, Don Weidner, to give a description on Sections 1 to 17.

MR. DON WEIDNER: Thank you, Lane. Very briefly, Section 1. The name of the act has been moved and made RUPA Section 43Y.

Section 2, at Page 4 of your materials, is a definition section. Responding to comments made on the floor in Hawaii last year, the committee eliminated "bankruptcy" as a defined term because it is not used in the bankruptcy act except in the title. The term we have used instead is "debtor in bankruptcy." In the definition, we make a distinction between the filing of a voluntary case and the entry of an order for relief. In an involuntary case, we are, throughout our process, now trying to coordinate with the National Bankruptcy Conference through Morris Macey.

"Record title" was added to Section 2 as a defined term in order to implement our new Section 10 on conveyances of record title property.
Section 2X at Page 7 of your materials, which says that RUPA applies to limited partnerships, is drawn from UPA Section 6(2).

Section 3 defines "knowledge" and "notice" and distinguishes the giving of notice from the receipt of notice. This new Section 3 implements the basic ABA recommendation to incorporate knowledge and notice rules from the Uniform Commercial Code into the Uniform Partnership Act.

Section 4 at Page 10 concerns supplemental principles of law and continues much of UPA Section 4 and some of UPA Section 5. Parts of UPA Section 4 have been moved and made UPA's Sections 43X and 46.

RUPA Section 4X now on Page 11, that sets our basic tone. It provides that, with very limited exception, the rules in RUPA that govern the relations of the partners among themselves are default rules. That is to say, with respect to the relations among the partners, the partnership agreement is supreme. The rules in RUPA are simply the rules that will apply in the absence of a provable partnership agreement to the contrary. There are very few rules in this statute that are mandatory.

Since Hawaii, we have added Section 4X(a)(4) to explicitly continue the present law that every partner has the
power, if not the right, to withdraw at any time from the partnership.

Finally, we have also added Section 4X(b) to make explicit that the partnership agreement may not deprive third parties of rights they have under RUPA.

Section 5 at Page 13 adopts the ABA report suggestion to provide that a partnership may sue and be sued in the partnership name.

Since Hawaii, we have added the language in Section 5(b) that says that a partner is not personally liable for any judgment against the partnership unless he or she has been served or has appeared in the action. Our intent was to keep RUPA out of the question of how it is that a partner is to be served.

Section 6 at Page 15. We have merged UPA Section 6 into our UPA Section 7.

Our UPA Section 7 at Page 16 then includes the stuff of both of UPA Sections 6 and 7. The basic purpose of most of the changes we have made in this new Section 7 are made to clarify the factors that indicate partnership. However, since Hawaii we have done a couple of additional things.

No. 1, Section 7(a) defines a partnership as an entity, reflecting the basic move of our statute toward an entity model. As Lane said, we are not attempting to say that a
partnership shall be treated as an entity for all purposes. In fact, it is clear, you will see as we get to certain specific rules, that we take a mixed entity and aggregate approach. Nevertheless, the committee felt they wanted just to put it straight up to you, basically our move to the entity model.

Then, second, we have added Section 7(e)(5) at Page 18, and that is language that is protective of shared appreciation mortgagees. Protective language is drawn from the Uniform Land Security Interest Act.

Section 8 is at Page 23 of your materials, attempts to give greater guidance on whether property is partnership property or the separate property of a partner.

Since Hawaii, the committee has added flexibility to the new provision which was initially based on the Georgia statute. Some property under this version is deemed partnership property. Some property is only presumed to be partnership property. Other property is presumed to be separate property.

Section 8 says the title vests in the partnership itself rather than the individual partners, once again reflecting the move toward an entity theory.

Section 9 at Page 28 reflects the general rule that every partner is a general managerial agent who can bind the partnership if she has actual, apparent, or inherent authority. In general, there are technical changes to clarify that general
business practice is relevant. Those changes essentially take the shape of referring to, quote, business of the kind carried on by the partnership.

Section 9 begins with a reference to our new statement of partnership authority provision in section 10X.

Since Hawaii, we have eliminated the list in UPA Section 9(3) of acts that could not bind the partnership to third parties unless all partners consented. The ABA report you may recall, had recommended updating the list which our Hawaii draft did. On further discussion, however, the committee decided to leave to the courts the discretion to determine the scope of actual, apparent, or inherent authority.

Our decision reflects that what is within the ordinary course of business can vary over time and place.

Section 10 concerns transfers of partnership property and makes distinctions based on the state of title -- for example, depending on whether title is in the name of the partnership or some or all of the partners. Our Hawaii draft expanded Section 10 to include all personal property. Since Hawaii, the committee has contracted our expansion of section 10. It no longer is expanded to include all personal property. It is expanded only to include record title property as defined in Section 2(g).
Section 10X is our new statement of partnership authority provision. There was extensive discussion of a very different version in the Hawaii draft, and we went back to the table. The Hawaii draft, among other things, provided for county filing. This draft provides for filing centrally -- that is, with the secretary of the state.

Section 10X -- the basic purpose of this section, by the way, is to facilitate transfers of real property. It goes beyond that. Section 10X(c) binds the partnership by any recorded grant of extraordinary authority to a partner.

On the other hand, if the partnership records an extraordinary restriction on the authority of a partner, that restriction will bind only those third parties who have knowledge of it. Again, "Doc" Merrill and Jim Fotenos of the California Bar Partnership Committee really supplied us with a draft based on their experience in California with statement of partnership provisions. That was the foundation for our new 10X.

10Y is a new rule, and essentially that permits a person named as a partner in a statement of partnership to file a notice of denial.

The committee is going to, this fall, review Section 10Y.

10Z requires the partnership to amend the statement within 30 days of its becoming factually inaccurate in any 
material respect. Once again, the committee is going to review 10Z this fall.

At Page 44 of your material, Section 11 is deleted, following the suggestion of the ABA report, that its subject matter -- admissions by partners -- is best left to rules of civil procedure and evidence.

Also on Page 44, Section 12, on charging a partnership with notice, that entire section is deleted in favor of the new knowledge and notice rules borrowed from the UCC and incorporated into our Section 3.

At Page 45, Section 13 is amended to permit a partner to sue her partnership on a tort or other theory rather than be limited to an action for dissolution or accounting -- once again reflecting our move toward an entity theory.

13 differs from the Hawaii draft, however, because UPA Section 14(b) has been made 13(b), and that simply continues the rule that the partnership is liable if it receives money or property held from a third person and misapplies that money or property.

Section 14 is deleted as a separate section after portions of it have been moved to Section 13 -- again, especially the portion on misapplication of money or property.
Section 15 now provides, as did the Hawaii draft, that all partners are jointly and severally liable for all partnership obligations unless otherwise provided.

In Hawaii, the floor asked for a more elaborate rule expanding the notion that essentially a creditor should pursue partnership assets before pursuing the separate assets of a partner. We have responded by adding Sections 15(b) and (c). And, in general, the rule is that before a creditor can pursue a partner's separate assets, there must be a judgment against the partnership and the writ of execution thereon must be returned unsatisfied in whole or in part.

Section 15(c) contains various exceptions such as when exhaustion of partnership assets is excessively burdensome. The committee plans to review Section 15 this fall. Thanks here are due also to the Texas Bar Committee, especially Bob Hamilton and Steve Waters, who have supplied draft that was the basis of much of this language.

Getting close to the end. Section 16 has been modified slightly to eliminate the term "partner by estoppel." Section 16 merely imposes liabilities on specific people when someone is held out to be a partner.

Section 16 differs from the Hawaii draft in two respects. No. 1, Section 16 now emphasizes that the person who is to be protected is one who gives credit in reliance on the
apparent partnership. And second, the language of UPA Section 16(l)(b) is reinstated and clarified.

Finally, Section 17 reinstates UPA language. It provides that a new partner's liability for existing obligations may only be satisfied out of partnership property. The Hawaii draft had said, quote, out of the new partner’s interest in the partnership.

That takes us through recent developments on the first 17 sections. Thank you.

CHAIRMAN BARRETT: Thank you, Mr. Weidner.

Are there any comments on those sections?

....

COMMISSIONER DALE G. HIGER (Idaho): I have a question. You have a comment on Page 42 relative to Section 10X. Do we need a foreign partnership qualification statute?

I wondered where the committee came out on that question.

MR. DON WEIDNER: The committee hasn't reached any decision on that, as I recall.

MR. HARRY HAYNSWORTH: Don, the way the draft reads now, since this is a permissive filing statute, there is no restriction that only someone who is domiciled in the state could file a statement of partnership. The way it's worded now,
any partnership could file in the state, whether they were
domestic or foreign.

COMMISSIONER NIGER: I would suggest the committee
consider having a foreign partnership qualification statute, as
in the Limited Partnership Act.

COMMISSIONER ROBERT H. CORNELL (California): "SECTION
29. DISSOLUTION DEFINED. A partnership is dissolved when an
event causes the winding up of its business under Section 31Y."

CHAIRMAN BARRETT: Are there any comments. Please
continue. There is a comment.

COMMISSIONER JAMES C. MCKAY, JR. (District of
Columbia): That seems a little redundant. You are just defining
dissolved as winding up. I don't know if you really need this
section at all. I just want you to think about that for next
reading. It just seems to be a stylistic way of saying the same
thing.

MR. DON WEIDNER: We have spent more of our time on the
dissolution, the so-called dissolution provisions, than on any
other provision. We frankly seize on this as an opportunity to
explain basically what we have done.

The UPA defined dissolution as a change in the
relation of the partners caused by any member ceasing to be
associated in the carrying on of the business. In effect, that
definition is an extreme aggregate definition of partnership. It
says that a partnership is a specific cast of characters, and that cast is gone whenever anyone leaves.

If you go back to when the Uniform Partnership Act was first passed, the law of partnership breakups was stated in terms of dissolution, and it was confused. The Uniform Partnership Act took the approach as follows. It said: Well, the concepts are really good, and their place in the law is good. They are just not defined because nobody -- there is no clear understanding of what constitutes a dissolution and what does not.

So, the approach of the UPA was simply to have more definitions. In Section 29 of the UPA, the UPA defines what dissolution is: Anybody leaving.

In Section 30, the UPA says what dissolution is not. It is not termination, because after dissolution, the black letter law of Section 30 is, the partnership continues. It continues through a winding-up process until it’s terminated.

We looked at the law 75 years later, and 75 years later the law of partnership breakups was still couched in terms of dissolution and it was still confused. We began to perceive a couple of things. No. 1, that an extreme aggregate definition of dissolution was inconsistent with our move to an entity theory. But N. 2, that the problem was more than the lack of a precise
definition. It was with the way this concept was defined and how it was used in the statute.

Forgive me, if I can just get real brief. If you look at what happens when, let's say, one person leaves a four-person partnership. One person could leave a four-person partnership, and they could happily and harmoniously with the other three partners agree that that person would simply withdraw and that the partnership business would continue unaffected and that there would be no pay-out needed.

Our question was this: Can we just say that the partnership continues if that's what all of the partners want? The answer is, under the UPA we could not say it just continued.

So, the question is: "What are the consequences of saying it doesn't just continue? Some of the consequences were that there were decisions saying things like: You had better have a new conveyance of partnership property from the old four-person partnership to the new three-person partnership. There were other decisions saying that the contracts of the old partnership were no longer the contracts of the new partnership.

COMMISSIONER McKay: Could I just follow up?

CHAIRMAN Barrett: I would ask the commissioners, including the committee members, to identify themselves.

COMMISSIONER McKay: It was a question of style. Do you prefer winding up or dissolution? You should choose one, not
define one as the other and use both. As a matter of style, you should choose one of those two terms. You have just created a redundancy here that is confusing.

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner McKay, we will consider that. What you have put your finger on is a debate among the committee members. There was some concern that without the word "dissolution" --and it wasn't in, if you look at last year's draft -- one of the concerns was whether that would have tax consequences.

It seems that including it might avoid the tax consequences and, in addition, satisfy some folks who just didn't want to see, as we called it, the "D" word disappear.

COMMISSIONER STANLEY PLETTMAN (Texas): Just to help me follow what you are doing or not doing in Section 29 do you mean "is dissolved only when an event occurs under 31Y"?

If you mean that, why didn't you say it? If you don't mean it, then what are the exceptions to it?

MR. DON WEIDNER: Yes, we mean it.

COMMISSIONER PLETTMAN: Then why not say it?

CHAIRMAN BARRETT: Commissioner Weidner, do you have more to add?

MR. DON WEIDNER: You are promoting me, by the way. I'm not a commissioner. Well, we will have to think about that. We definitely mean that if someone leaves a partnership and that
departure does not trigger a winding up of the business of the partnership, then there is no dissolution.

Really, the preceding question was right. Under this draft, the word "dissolution" is unnecessary. That may be -- my opinion. Logically it got put in after two years of proceeding without it, for various reasons.

What we have done is say that a dissolution no longer takes place whenever anyone leaves. There is only a dissolution when a winding up of the business is caused.

COMMISSIONER PLETTMAN: just want to encourage you either to specifically make it exclusive, and then if you want to carve out some exception, then do that.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER EUGENE A. BURDICK (North Dakota): I agree with the comments from the floor. 31Y tells when a partnership is dissolved.

The original definition in Section 29 was a definition. Your language now is not a definition. It merely tells when it occurs. It simply says it occurs when it's dissolved under 31Y.

I think you need a substantial revision of Section 29 along the lines that you have last suggested, to say when it does not occur. It certainly isn't a definition of a dissolution.
MR. DON WEIDNER: ... Let me get to that four-person partnership for a second. One person pulls out. If they all agree that that person simply ends, that you don't have to pay that person anything, that it all continues, then why not just say the partnership continues?

The tax law says the partnership continues. Why doesn't the state law say it continues? Because you are dealing with 19th century jurisprudence of conceptions, essentially. It says that whenever anyone leaves, the metaphysical essence of a specific cast of characters ends.

Now, every provision in RUPA after Section 29 is triggered by a dissolution and by nothing else.

In effect what you have to do is destroy the partnership anytime anyone leaves, even if you have an agreement among all of the partners that there is no need to destroy it.

So, in effect, you have to say: Well, it's gone, but we didn't really mean it. Now we will let you try to put it back together.

That's caused a lot of confusion. What are some of the problems we have found? There are still cases that say: Oh, the contracts of that four-person partnership are not the contracts of the three-person partnership because the metaphysical essence is different. It's a different cast of characters.
We just yesterday morning at our meeting had another person hand us a suggestion for a statute, say: Here, whenever anyone leaves, let's have a statutory provision that sets out a fictional conveyance of all the four-person partnership property to the three-person partnership.

What we tried to do was look at what you have got to accomplish when somebody leaves a partnership. Essentially you have got to accomplish three things. No. 1, you have got to end the authority of the person who is leaving to bind the people who continue. No. 2, you have to end the authority of the people who continue to bind the person who is leaving. And No. 3, you have to pay the person who is leaving whatever equity she has in the partnership.

Now, you don't have to end the partnership to do any of those things.

Now, might you have to end it? You might. We said essentially: When you get out of that partnership, there are basically two tracks. And that's the structure here. They said: First let's look at when you get out of the partnership. And that's Section 31. Essentially, our policy decision under Section 31, our policy question was this: Has enough happened such that you should be deemed to be no longer a partner in the partnership, whether it continues or not?
We have got a list there. We try to say every way in which you can cease to be a partner. Then we say: All of Gaul is divided into two parts. No. 1, the person who gets out is either bought out or there is a winding up of the business of the partnership.

So, we just tried to identify those tracks. And we say that, in 31Y: In these situations, we are going to wind up the business of the partnership. That is, liquidate the business, pay off the liabilities, and divide the pool of cash among the partners.

On the other hand, we won't always do that. For example, if there is a fixed-term partnership, the fourth has promised to stay in for ten years, gets out at the end of three, we say: No, no. You can't force a winding up of the business -- that is, the sale of the business -- but you will be bought out. You are entitled to get paid the value of your partnership interest.

That's the 32 route. That's the route that says the partnership must pay you the value of your interest, the fair market value of your interest.

Those are the two tracks we are trying to set up. We have now moved dissolution to a concept that only identifies that winding up of the business track.

....
COMMISSIONER ROBERT H. CORNELL (California): "SECTION 29X. CESSATION THAT DOES NOT CAUSE A WINDING UP OF PARTNERSHIP BUSINESS: If the cessation of a partner's status does not cause a dissolution and winding up of the partnership business under Section 31Y, he (or she) shall have the continuing relationship with the remaining partners for the limited purpose of completing business undertaken while he (or she) was a member of the partnership."

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): I've got a real problem with this section. It seems to me that it seems to say that if you have got a partnership that has undertaken some multi-year project and one of the partners withdraws, that that withdrawing partner continues to have a relationship with the remaining partners until that project is completed.

I would think that just the opposite should be the case, absent an agreement. If somebody withdraws from the partnership -- maybe because he doesn't like the project -- he ought to be free of that project and he ought not to have a continuing relationship until that project is completed.

CHAIRMAN BARRETT Any further comments?

MR. DON WEIDNER: At some point, it is hard to determine when liability accrues. And recognizing there is only going to be that uncertainty, that class that's difficult to
identify, the sense here is -- and this is present law, as I understand it -- if you are a member of a partnership that undertakes a liability, you cannot escape that liability simply by leaving the partnership.

COMMISSIONER COGGESHALL: That may be a question of liability as between that partner and some third party. It doesn't tie them into any particular relationship with the other partners. The project, the business may well continue to incur other liabilities.

I think the current law is -- and I think the law as preserved in this draft is -- that liabilities that are in fact incurred after someone withdraws are not liabilities of that withdrawing partner.

Again, if you have got a multi-year real estate development project where you are incurring liabilities well into the future, after this partner has withdrawn, why is this partner locked into that? I'm not sure what it means, what the language means, where it says it has a continuing relationship until the business is completed.

MR. WEIDNER: It's a hole right now. People don't understand it. Let me give you the extreme case. I agree with you as to future liabilities.

It's a case called Redmon v. Walters. A person is an attorney and a small law firm, something like a four-person
firm. While he is still a partner, the law firm undertakes an attorney-client relationship with somebody else, takes on a case with someone he has never even heard of. He subsequently leaves the firm, never having heard of this client.

Subsequently, and subsequent to his departure, the firm commits malpractice with respect to that client.

The present law, as I understand it, is that that attorney is unlimitedly personally liable for the malpractice of his partners with respect to the client that he has never met.

People don't understand that. We put that in the statute here. What we are trying to do -- maybe we have done it inartfully -- is clarify that you are still liable. And if you are still liable, then also that means you have certain rights. You have information rights, for example. If you are going to be unlimitedly personally liable for any malpractice that goes on, that means you have some right to the information about how the case is proceeding.

COMMISSIONER COGGESHALL: The section as you have written it, one, it doesn't describe what the relationship is. Two, if it's meant to deal with a situation, to cover the situations of continuing liabilities to third parties, then that ought to be dealt with other than saying he has got a continuing relationship with his partners.
The section just stands out, doesn’t tell you what it means, doesn't tell you what the relationship is. It creates a situation that ought not be created. I would urge the committee to take a hard look at that section.

MR. WEIDNER: We will. Thank you.

COMMISSIONER MAYNARD E. PIRSIG (Minnesota): I'm not familiar with partnership law, but I got into a subject indirectly related to it. Let me give you the situation with which I was confronted.

A business partnership was engaged in a business in which one of the partners was engaged as the manager of the business. The partnership decided that the manager was not doing his job, was negligent, so they fired him as manager and then sued him for negligence. He maintained that he was not negligent, that he continued to be a partner. He then made a motion to disqualify the attorneys for the partnership on the ground that the attorney represented the partnership, including himself, and therefore he was in a conflict situation.

They asked my opinion. I looked into it. And my reply was that I didn't know. I wonder whether the partnership provisions here would deal with that kind of a situation.

CHAIRMAN BARRETT: Response from the committee?

MR. DON WEIDNER: No. 1, the general move toward the entity theory facilitates suits between partnership and partner.
No. 2 specifically Section 13 strengthens the category of cases in which a partner can deal with a partnership in a third-party capacity.

What you suggest raises one of the most difficult questions before us when we get to Section 21 on fiduciary duties. You will see that we have reserved, we have under further study whether there is a duty of care rule among partners. That is one thing on which -- there is an awful lot of consensus behind a good bunch of this. But whether to say in this statute that the parties owe each other a duty of reasonable care is something that we haven't decided yet, and the authority appears to be divided.

COMMISSIONER JOHN A. CHANIN (Hawaii): Two questions. First of all, the last line of the comment, "Do the buyout provisions adequately address work not yet performed?" I don't know whether that is supposed to be some kind of a law school quiz question or whether it has some kind of a meaning that you can explain to us.

The second observation is -- and I think it's basically implicit in what an earlier comment indicated -- is there a problem with spelling out what you mean by continuing relationship? Is that something that the committee can do, is reluctant to do? I guess what I am really asking is, why haven't
-- it seems so obvious that there must be some reason why it hasn't been done up until now.

CHAIRMAN BARRETT: Your first question was why the question at the end of the comment?

COMMISSIONER CHANIN: If you look at the comment, the last line of the comment, last sentence, "Do the buyout provisions adequately address work not yet performed?"

My first thought was, gosh, this must be related to some other section. But I'm assuming that what this talks about is, take a look at your agreement and find out basically whether or not you have adequately covered your bases.

Could you explain what the import of that is supposed to be.

MR. DON WEIDNER: What we are trying to do is explain in this statute something that isn't explained at all in the current statute. What's really at stake in this, and it's behind our battle over the word "dissolution," -- I, for one, would rather see it out of here entirely -- is really the language of partnership law itself.

In my judgment, both the present law through the word "dissolution," which says that the partnership is gone when someone leaves, and our law, cessation of partner status, both are misleading.
What we are saying is that there isn’t a cessation of partner status. It's very, very hard to talk about. This is the distinctive feature of partnership. You don’t have to wind down reciprocal agency authority in getting out of a corporation, and you don't have to disengage the personal liability account.

I would love to have a suggestion -- if you could, say, just take the Redmon v. Walters situation. I am no longer a partner in that firm. We are all used to saying: No. I quit that partnership whatever words you want to say. That partnership was dissolved. It was over. I'm out. I'm gone. I'm done.

And now what does the law say when push comes to shove? Is that true? No. It's not true at all. You can be liable to people you never met for malpractice that was committed after you left. I, for one, don't know how to describe that. I welcome suggestions.

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner Chanin, two points. One, can we define continuing relationship? The answer is "yes." And we will take a look at that and see if we can't be more specific. I thought the suggestion was a good one.

Second, with regard to the -- I think you are referring to the question at the end of the comment. We have done this purposely. We have decided in our comments, where
there were still issues remaining, to raise them as issues as opposed to having kind of a continuing narrative commentary, because there are still some questions. You will see that throughout our commentary. Hopefully, there will be no question marks when the final draft is before you.

....

COMMISSIONER ROBERT H. CORNELL (California): I think you will find, as you follow through the following sections here, what the committee has done -- which is, flesh it out. What we have had in the past is the concept that once you had any change in the partnership -- partner dies or he withdraws, whatever it may be -- you have a dissolution. But dissolution doesn't mean anything because that doesn't necessarily terminate the business or the relationship.

What we have here is a status. We say there is a continuing relationship. And then what that relationship is in various circumstances is spelled out. For instance, the example given of the person who doesn't want to be a partner any more. Well, 31 provides for that kind of situation and what the continuing relationship will be under various circumstances. It may not be as complete as you want it, and there may be some things you will have to add to it. That's the general idea here.

What we are trying to do is, we are victims of our own history. The confusing concept of dissolution, which meant
nothing other than a change in the partnership relationship, alot of people thought that was the same as the dissolution of a
corporation, subject only to the winding up of the business. It
isn’t. What we are trying to do is spell it out. So, if you
look at the subsequent sections, I think you will see it is
fleshed out, but there may be some more flesh to add to it.

CHAIRMAN BARRETT: Commissioner, additional comment.

COMMISSIONER EDWARD F. LOWRY, JR. (Arizona): You may
be going to cover this later. The thing that concerns me is
that, say, a partner wants to terminate his relationship. He
doesn’t really want to wind up the partnership. He wants to cut
his losses. He may be required to contribute capital. His
personal guarantee on a loan for a partnership project may be
required. He wants to do this.

It appears from this section that the only way he can
really cut his losses and actually get out is to force a winding
up. Or am I missing something here?

CHAIRMAN BARRETT: Commissioner Cornell.

COMMISSIONER ROBERT H. CORNELL (California): Actually,
if you look at 31, unless you have agreed to be in the
partnership for a certain period of time -- if you say, "I am
going to be in this for five years, come hell or high water,"
that is one thing. But if you haven’t put a definite time on it,
you -- a partner can voluntarily withdraw at any time.
What he does when he withdraws depends on a lot of things. Don't forget these provisions are in the absence of a specific agreement. If you have no specific agreement, then the subsequent sections tell what happens -- if it's a wrongful termination or not. But you can voluntarily withdraw from the partnership.

COMMISSIONER LOWRY: Would it be fair then to say that this section, really, in the absence of agreement, requires a continuing relationship to wind up whatever project that partnership has at that time?

COMMISSIONER CORNELL: If you withdraw from a partnership, you've got something left over, and the subsequent sections are supposed to deal with what that something is.

CHAIRMAN BARRETT Commissioner.

COMMISSIONER CARL H. LISMAN (Vermont): I wanted to pursue Commissioner Cornell's comments prior to the last go 'round having to do with the choice of words and labels.

I wonder if the committee, notwithstanding 75 years of history and interpretation of the original act, wouldn't better serve the legal community and the business community by finding better words than "dissolution" and "winding up."

I know they have a gloss and I know they have a history. But I think you might find a lot of pleasant reception to better or different words to say what you want them to say.
I see Professor Haynsworth reaching for the microphone.

MR. HARRY HAYNSWORTH: We have struggled with this and gone back and forth on it, and at the present time have chosen to retain the term "dissolution" for a number of reasons, one of which is that this act dovetails with the Uniform Limited Partnership Act, revised Uniform Limited Partnership Act, and the term "dissolution" is used there, and you would have some redrafting have to be done in RULPA if you get rid of the term. That's one aspect.

A second aspect is the potential tax questions that would be raised by the IRS if you eliminate the word "dissolution" and the tax consequences for limited partnerships there because it's keyed on having a general partner -- in part, at least -- a general partner -- the partnership dissolving when a general partner leaves.

Thirdly, the term "dissolution" is used in corporate statutes to mean just what it means here -- that is, the liquidation of the business or the winding up of the business so that it is consistent with the corporate meaning of the term, which is what we were trying to get at anyway.

COMMISSIONER LISMAN: The problem that I see with the word "dissolution" is that in the practical-world sense, it is deemed to be an act with some finality to it, when, in fact,
under the partnership law, it's the beginning of a process rather than a specific event only.

The problem with the word "dissolution" is that it doesn't go far enough to describe the circumstance. I appreciate the three reasons that you advance. I wonder, though, whether or not, given the opportunity to have a law that is going to carry us another 75 years, whether we shouldn't simply bite the bullet and say let's do it right this time and get the correct labels and we will get everybody else to follow us.

I take it you will have further discussion of this issue.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): I would like to suggest an amendment to Section 29X which came to mind in listening to Commissioner Cornell's remarks.

I would like to see it read: the event of the cessation of a partner's status, he or she shall have a continuing relationship with the remaining partners to the extent provided in this act.

I think that does what Commissioner Cornell said it, was intended to do.

MR. DON WEIDNER: What was the last -- to the extent -- what?

COMMISSIONER COGGESHALL: Let me repeat it.
In the event of the cessation of a partner’s status, he or she shall have a continuing relationship with the remaining partners to the extent provided in this act.

COMMISSIONER ROBERT H. CORNELL (California): What about the partnership agreement itself, which might have very complex provisions?

COMMISSIONER COGGESHALL: This is obviously in the absence of other agreements.

....

COMMISSIONER HOWARD J. SWIBEL (Illinois): "SECTION 31. EVENTS CAUSING CESSATION OF PARTNER STATUS A person ceases to be a partner upon the occurrence of any of the following:

"(1) upon the future date specified in a notice, or, in the absence of such a date, on the giving of notice by one partner to another partner of his [or her] express will to withdraw as a partner;

"(2) the expulsion of a partner

"(i) bona fide in accordance with a power conferred by the partnership agreement; or

"(ii) pursuant to a judicial determination that:

"(A) the expelled partner has been guilty of conduct tending to affect prejudicially the carrying on of the partnership business; or
"(B) the expelled partner has willfully or persistently committed a breach of the partnership agreement or otherwise breached a partnership duty to the other partners or the partnership to the extent that it is not reasonably practicable to carry on the business in partnership with that partner; or

"(iii) by the partnership on the ground that it is unlawful to carry on the partnership with the expelled partner; or

"(iv) in the case of a partner that is a corporation, 90 days after the partnership notifies it that it will be expelled because it has filed a certificate or articles of dissolution or the equivalent or because its charter has been revoked, if there is no cure within 90 days; or

"(v) by the partnership of a partner who has assigned his [or her] entire assignable interest to an assignee who has not been admitted as a substituted partner; or

"(vi) in the case of a partner that is a partnership, an event causing the winding up of the business of that partnership.

"(3) the partner becomes a debtor in bankruptcy within the meaning of Section 2 or executes an assignment for the benefit of creditors;

"(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 partnership duties.

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

(6) in the case of a partner that is an estate or 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 assignable interest in the partnership, but not merely the substitution of a new representative;

(7) an event agreed to in the partnership agreement as resulting in a person ceasing to be a partner;

(8) in the case of any other interest or entity the termination or extinguishment of the interest or entity; or

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

CHAIRMAN BARRETT: Commissioner Kneedler.
COMMISSIONER H. LANE KNEEDLER (Virginia): I just want to remind the floor that analytically what we are saying here in 31 is, these are the events that cause the cessation of partner status. It doesn't address the issue of what the effect of that cessation is. That will occur in the next several sections that we are reading.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER CARL H. LISMAN (Vermont): I am a little late here. You have the provision for recording a statement of authority. But I don't find anything in the act that allows for the recording of a statement that says that the XYZ partnership is dissolved or that it has liquidated -- has proceeded to wind up its affairs and has done so.

Given the ongoing, frightening liability of partners for the acts of a partnership, even when that partnership might not exist anymore, I wondered whether you would have some thoughts about adding that kind of provision for partnerships that choose to be able to give notice to the world by filing with the Secretary of State.

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: The draft at Sections 35 and 35X increases the liability of partners if they do not advertise the dissolution, if there is going to be a winding up, in Section
35; or cessation of partner status, if there is not going to be a winding up, 35X.

You're right. The question is a very good one as to 10x because now the question that we have to brainstorm the next time that committee takes up 10x and 10Y and 10Z, we have to ask ourselves this question. Suppose I was listed in a statement of partnership and suppose I leave and I do everything else right, but I forget to file an amendment to the statement of partnership.

That's something we have to talk about more. That's an excellent question, how those three come together.

COMMISSIONER MICHAEL D. HAWKINS (Arizona): Just a question to the committee. Under 31(2)(ii)(A), right at the bottom of 98, did the committee consider a materiality requirement?

It just seems to, me in reading, quote, conduct tending to affect prejudicially, is a pretty low standard. I can't imagine that couldn't be met.

MR. DON WEIDNER: I assumed that there is a materiality requirement in the present law, in the case law in that area. We did not mean to say it would be a formalistic judicial expulsion.

COMMISSIONER HAWKINS: As long as that's covered in some fashion.
COMMISSIONER BRUCE A. COGGESHALL (Maine): First a comment and then a question. On Page 99 on Line 14, dealing with the revocation of a corporate charter, I wonder if we might add the language there, after the word "revoked," "or its right to conduct business suspended."

We have a concept, at least in my state, if you don't file your annual report on time, you get suspended. You can't conduct business further, but your charter may not necessarily be revoked.

MR. DON WEIDNER: Sounds like a good idea.

COMMISSIONER BRUCE A. COGGESHALL (Maine): Secondly, over on Page 98, Lines 22 and the next five or six, when it talks about expulsion pursuant to a judicial determination, is there anywhere in this act an affirmative statement that says that a partner may be expelled for those reasons?

I would think there should be.

MR. DON WEIDNER: This is as direct as we get. This is it.

COMMISSIONER COGGESHALL Shouldn't there be a statement somewhere that says the reasons why a partner can be expelled?

MR. WEIDNER: I see what you are saying. We are not saying it -- we are saying it obliquely.

COMMISSIONER FRANCIS J. PAVETTI (Connecticut): I think what we tried to do here was ensure that there would be a
judicial determination. There could not be an action promulgating its expulsion without having -- these are the grounds by which the court would decide to expel. We have set forth that as a standard.

COMMISSIONER COGGESHALL: It would seem to me that you might have a statement that says a partner may be expelled upon being found guilty in a judicial determination of conduct -- and take your language.

COMMISSIONER DAVID A. GIBSON (Vermont): I may have missed it, but in section 31, it looks to me like if you have, say your four-man law partnership that you talked about earlier, one of the partners says, "Well, I want to get out, but six months from this date." The other partners may think that is too long a period of time to have the fourth person hanging around and perhaps not fully performing the way that the person would be deemed to be wanted to perform, given that situation.

I am just wondering whether there is elsewhere in the act, and perhaps I have missed it, some provision whereby the remaining partners, who wish to carry on that partnership business can either shorten the time or otherwise provide for withdrawing themselves and forming a new partnership sooner than, say, the six-month period.

COMMISSIONER HOWARD J. SWIBEL (Illinois): You are talking about the ability of the partners to shorten the term of
a partnership for a term. They could amend the partnership agreement so long as they follow the statutory requirements and it was not inconsistent with the partnership agreement itself.

COMMISSIONER GIBSON: I am thinking, there may be no written partnership agreement.

COMMISSIONER SWIBEL: If it's a partnership for a term, there has to be an agreement.

COMMISSIONER GIBSON: What I'm suggesting is, the partnership has started without any written agreement. Then, after it's operated for a couple of years, one of the partners wants to get out, but he gives a six-month advance notice date.

I don't see anything in here that would enable the remaining partners to say: That's too long. We don't want you hanging around for six months.

Perhaps I have missed it.

COMMISSIONER HOWARD J. SWIBEL (Illinois): We don't require a written agreement. You can have an oral agreement.

COMMISSIONER GIBSON: Assuming that there is no agreement on what period of time you can have -- as I understand 31(1), the withdrawing partner can select a future date by giving notice of when he wishes to withdraw and there is no way for the remaining partners to have any effect on the date given.
MR. DON WEIDNER: I'm sorry. That was not our intent behind this section. They have the right to say: You are not our partner as of now.

We had different people urging us to change the traditional UPA rules about when you can get out of a partnership, and essentially this committee has decided to retain the present rules.

The present rules say that anybody can get out of the partner status at any time by doing so, even if there is no right to do so. I mean, the traditional jargon is that every partner has the power to get out at any time, even if not the right. In other words, if somebody said, "I hereby notify you that I am through with you in 60 days," they can say, "Well, hell, we are through with you now."

COMMISSIONER GIBSON: I don't find where it says that in the section.

MR. DON WEIDNER: We will have to take a look at that, then.

COMMISSIONER MARLIN J. APPELWICK (Washington): Following up on Commissioner Gibson’s remark, I find a cause for expulsion missing that I would like to see you add. That is simply one that a majority of the partners can simply expel another partner by majority vote for any reason, without having to go through the enumerated purposes.
I think that also encompasses what Commissioner Gibson has raised. I suggest that because this is a default set of rules. If the partners want something different than that, they could certainly contract for it.

The practical aspect is this: If you have a three-person partnership and one of the partners is doing things that may be aggravating the staff or the other partners but do not rise to the level of a violation you have enumerated, the choice of the other partners is to liquidate, terminate, withdraw, as opposed -- under your set of rules. I would propose that it is better for the entity concept and the continuation of the business for those other two partners to simply decide by vote to expel the other partner.

The rules for determining value would protect the vested value of the expelled partner as of that date, whereas under your proposal, they can't expel him, they can only buy him out at some premium rate in order for them to continue without having to liquidate.

My sense is, your rules create an advantage for someone who is a problem but does not rise to the level of violation or who is not encompassed in some well-thought-forward agreement.

COMMISSIONER HOWARD J. SWIBEL (Illinois):
Commissioner, this is one section which we did spend some time
on, going back and forth and weighing the conflicting interests. Sometimes we were concerned about protecting the majority against the minority, and sometimes we ended up being concerned about protecting the minority against the majority.

In this case, as the reporter indicated, we stuck with the present law which does protect the minority. It protects the person who voluntarily joins with others from having committed himself, perhaps his energy or his resources, and then having the others throw him out without any ground.

It’s a balancing test. Someone is going to get the edge on that issue. We were not aware that the present law was flawed, and so we adopted the system --

COMMISSIONER APPELWICK: Let me raise the question for your consideration, to truly speak to what you are protecting them from. If they’re right, being expelled is to have their share of the partnership valued and to be cashed out at that point in time, if they are expelled by the majority partners, they would be entitled to the fair market at that point in time.

It's identical to what they would be entitled to should they withdraw voluntarily. I see no penalty-- I see no loss except future opportunity. But since association is voluntary and you are stepping up to greater recognition of an entity status and the ability to continue business, it seems to me there ought to be a greater embrace of the continuation by
partners who wish to remain associated and conduct the majority of the business of the firm.

COMMISSIONER SWIBEL: The distinction that we draw is between a partnership for a term and a partnership that's at will.

If the partners had agreed at the outset that the partnership would last for a period of time, then we come out where you do. If the partners did not agree on a period of time, then we believe that we were going to follow the present law, which is that any withdrawing partner can cause the winding up of the business.

COMMISSIONER APPELWICK: I don't mean to prolong this. I acknowledge you have made the choice. I simply haven't heard reasons that would persuade me that there is any justification for that result.

COMMISSIONER SWIBEL: We will go over it again.

I want to make one comment on Commissioner Coggeshall's point earlier about the grounds for the judicial determination.

The comment on Page 103 at the top reflects the fact that what we did was borrow the same terminology that's currently in the Uniform Partnership Act, which allows a partner to seek a judicial dissolution whenever a partner has been
guilty of conduct that tends to affect prejudicially the carrying on of the businesses.

That language has accumulated a lot of case law baggage over the last 75 years. It involves a whole set of equitable considerations. While it may look like a naked standard, in fact there is a substantial body of case law that fills that out.

COMMISSIONER JOHN FOX ARNOLD (Missouri): I would like to go back to Section 30 just for a moment. You say in that section that after there has been a dissolution, the partners are associated together.

I went back to the definition section. I couldn't find out what that meant. I think you have got a troublesome term that you might want to give some consideration to doing something with. Because a court is going to have a hard time figuring out what you meant by "associated together" under those circumstances.

MR. DON WEIDNER: Interestingly, at least it's interesting to me, we have been struggling among ourselves -- of the two routes, the winding up of the business route and the buyout route, we have used the jargon a "winding up" verses a "mini-winding up."

Again, if you have any more specific suggestions, would you let us know how to describe that? Again, in both cases
we are trying to describe something that has not been described properly under present law because it’s all hidden behind this term "dissolution." We are trying to make this continuing liability explicit and pull it out here to warn people. I, for one don't know how to do it as well as I would like.

CHAIRMAN BARRETT: Are there any additional comments? We will then proceed - excuse me.

COMMISSIONER BRUCE A. COGGESHALL (Maine): Why can't you simply say in Section 30 that the partners continue as partners for the sole purpose of winding up the business? Isn't that in fact what is the case?

That would be more precise than saying that they are associated.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Could you repeat that?

COMMISSIONER COGGESHALL: Following up on the comment most recently made over here. In Section 30, rather than saying "until termination, the partners are associated in the winding up of the partnership business," why don't you simply say that they continue to be partners for the sole purpose of winding up the partnership business?

COMMISSIONER SWIBEL: We are going to be considering both 29X and 30.
COMMISSIONER MORRIS W. MACEY (Georgia): Or we could use the word "over," as the partnership is not over until it's over.

COMMISSIONER COGGESHALL: I agree, it's not over until it's over. That is the point, that they are partners until the winding up is terminated.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER EDWARD F. LOWRY, JR. (Arizona): Back in Section 31, the events that cause dissolution. One of them, (2), refers to the expulsion of a partner.

Assume the situation where you have a very casual arrangement and this act is supposed to come and provide the answer if you don't have something specifically provided.

What happens -- and I believe another Commissioner addressed this earlier -- if you have a situation where a majority of the partners just decide they want to expel somebody. Can you do that under this section as it's now drawn, or may you only expel a partner in accordance with the partnership agreement, which you may not have, or are you forced to go to court?

Is there any other way?

COMMISSIONER SWIBEL: The other way is that you could withdraw yourself. If it's a partnership not for a term, you would cause the winding up of the business.
COMMISSIONER LOWRY: But if you really wanted to stay, you just loved the partnership but they didn't love you and they wanted you out, would they have a way of getting you out, other than the agreement, which you may not have, or a judicial determination?

I guess what I'm suggesting is, would it not be wise to put in here something, as was previously suggested, that there be a way that the majority of the partners could, with perhaps standards of good faith, fair dealing, expel a partner on their own without having to go to court?

COMMISSIONER SWIBEL: You could do that. We voted not to do that. We chose a different course. But, yes, you could do that.

COMMISSIONER LOWRY: Could you explain to me why.

COMMISSIONER SWIBEL: The biggest lever that a partner has is causing the winding up of the business. It's a joint venture. The people are in it together. And if they are not going to continue, then you wind it up and everybody takes what's left.

The remedy of being bought out is viewed by many as not being as satisfactory. Those who continue on with the business get the benefit of what was put in to create the business, and you get potentially a lot of problems in valuation when you do a buyout.
Again, to protect in the voluntary situation a casual partnership, we thought that the general knowledge of people who are in partnerships is, they are either in it together or they are not in it at all, and that the remedy, if one person wants to quit, is to bust up the partnership, but not to allow people who join together -- and they are all supposed to be equal partners -- to allow -- if no one has engaged in misconduct, to allow the majority to expel one of those parties. It was considered basically unfair.

In other words, if the person has done something which hurts the partnership or makes the partnership unlawful, there, there would be grounds. But if you have no grounds at all, you shouldn't be able to have the majority simply buy that person out.

We thought it was a potential for mischief and not consistent with the expectations of the parties. But, of course, our view of what the expectation of the parties is is an academic exercise to some extent. But that was the decision.

COMMISSIONER EUGENE A. BURDICK (North Dakota): As I look at and hear the discussion here, I don't believe you need a definition of "dissolution". I think the emphasis was all in 31Y. I would also suggest that 31Y be followed by Section 30. I think it would read a little easier if Section 30 --
seems to follow as a sequence of whatever you do in 31Y. Then I would eliminate the reference to "dissolution" in 30.

CHAIRMAN BARRETT: Any additional comment? We will turn to Section 31X on Page 107.

COMMISSIONER HOWARD J. SWIBEL (Illinois): "SECTION 31X. WRONGFUL CESSATION OF PARTNER STATUS. If a person ceases to be a partner by violation of the partnership agreement or as a result of other wrongful conduct, the partnership may recover from the departing partner damages for the breach or wrongful conduct. The partnership may offset the damages against the amount otherwise distributable to the departing partner and may also pursue any remedies provided for in the partnership agreement or by law. In the case of a partnership for a specified term or particular undertaking, a partner's withdrawal by express will before the expiration of that term or undertaking is a breach of the partnership agreement unless the withdrawal is authorized by a provision of this [Act] other than Section 31(1) or by the partnership agreement."

CHAIRMAN BARRETT: commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): As I understand the way this act is drafted, the only way a partner is either expelled or withdraws from the partnership is listed under Section 31, is that correct?

MR. DON WEIDNER: Yes.
COMMISSIONER COGGESHALL: Rather than saying "other wrongful conduct," could we not specify here which sections of Section 31 we are talking about that he is either expelled under or withdraws under?

MR. WEIDNER: Could we look at that and think about that? What we have tried to do -- there is a whole range of provisions here in which we have tried to use the same language and tried to put side by side damages for breach of the agreement and other wrongful conduct.

Could we just see to what extent we could try that?

COMMISSIONER COGGESHALL: Is it wrongful for a corporation to let its charter expire? is that wrongful or not wrongful? This doesn't tell us which of those acts are actionable. I think that ought to be spelled out in more detail.

Let me also suggest in the first line that the word "by" probably ought to be "in."

MR. DON WEIDNER: Thank you for the suggestions.

....

COMMISSIONER MORRIS W. MACEY (Georgia): "SECTION 31Y. EVENTS CAUSING WINDING UP OF PARTNERSHIP BUSINESS. A partnership is dissolved and its business shall be wound up on the occurrence of any of the following events:

"(1) subject to subsection (2) of this section, on the giving of notice by one partner to another partner of the first
partner’s express will to withdraw as a 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) when a person ceases to be a partner in violation of the partnership agreement or as a result of expulsion, upon the express will of any other partner, within 90 days of the cessation, to wind up the partnership business;

"(3) when a partner dies or otherwise ceases to be a partner pursuant to Sections 31(4), 31(5), 31(6), or 31(8), upon the express will of any other partner, within 90 days of the cessation, to wind up the partnership business;

"(4) by the express will of all the partners who have not assigned their assignable interests under Section 27 or suffered them to be charged for their separate debts under Section 28, 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 on the application of a person who becomes a purchaser of a partner’s interest under either Section 27 or Section 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 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 any cure of illegality within 90 days after notice to the partnership thereof is effective retroactively for purposes of this section;

"(7) upon an event agreed to in the partnership agreement as resulting in the winding up of the partnership business;

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

"(9) upon the application by a partner, when an appropriate forum decrees:

"(i) that the economic purpose of the partnership is likely to be unreasonably frustrated;

"(ii) that it is not reasonably practicable to carry on the partnership business in conformity with the partnership agreement or

"(iii) that another partner so conducts himself [or herself] in matters relating to the partnership business that it
is not reasonably practicable to carry on the business in partnership with that partner."

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): On Page 110, as I understand subsection (4), the partner can be terminated by the express will of all of the partners. But if any of the partners have assigned any part of his partnership interest, he doesn't get a say in that vote.

An assignment could be an assignment of the entire interest. It could be an assignment of a small part of the interest. It could be an assignment for security.

It would seem to me that in those situations where he is assigned less than his entire interest, he still ought to have a say as to whether or not the partnership is going to be dissolved and wound up.

Did you give any thought to that?

MR. DON WEIDNER: If I understood your reading of the section -- it is not my understanding of the section. That language is drawn from UPA, Section 31(c), the present act.

And essentially what that says is that whenever one partner assigns his interest, either in a consensual transaction or under -- that is, Section 27 -- or involuntarily, under Section 28, because he has become subject to a charging order, then enough has happened such that if all of the other partners
say the presence of the assignee is so intrusive that the business should be wound up, then the business can be wound up.

COMMISSIONER COGGESHALL: That's not what it says. This says that even if there hasn't been an assignment, all of the partners can elect to terminate the partnership. This says all the partners, except the one that has assigned it, have the right to a vote.

MR. DON WEIDNER: I see your point. It is inelegantly worded. What this says is that -- again, back to Howard's point -- you either have at-will partnerships or fixed-term partnerships. It says even in a fixed-term partnership, if one of your partners assigns his interest or has a charging order slapped on it, and if all the rest of you agree to wind up, you get to wind up the business. It's not wrongful.

COMMISSIONER COGGESHALL: But it's not a precondition under this section that one of the partners has assigned his interest.

MR. WEIDNER: We will look at it. It's inelegantly drafted, I think.

COMMISSIONER COGGESHALL: I think, still, that the partner that is assigned less than his entire interest should not be precluded from voting on partnership affairs, especially one as important as terminating the partnership.
MR. HARRY HAYNSWORTH: Could I ask an information question. Take a situation where a partner is divorced from his or her spouse and has assigned, at least partially assigned the income interest for child support, something like that.

Is this the kind of situation you are talking about?

COMMISSIONER COGGESHALL: Or may have given a bank a security interest in your annual distributions from the partnership. That's no reason to preclude that partner from a vote on the termination of the partnership.

MR. HAYNSWORTH: I think that's the point that's being made.

COMMISSIONER COGGESHALL: May I also comment on Line 16. After, the words "particular undertaking," could we add the language "specified in the partnership agreement"?


CHAIRMAN BARRETT: The language you wish to add?

COMMISSIONER COGGESHALL: I would like to add, after the word "undertaking," "specified in the partnership agreement."

MR. DON WEIDNER: With no implication that the specification need be in writing.

COMMISSIONER COGGESHALL: There is no agreement that the agreement needs to be in writing. This just kind of stands out by itself, and it says that after termination of a specified
or particular undertaking --it's got to be the undertaking that's the subject of the partnership agreement.

....

COMMISSIONER C. BEN DUTTON (Indiana): Page 109, Section 1. This follows the language of "A partnership is dissolved and its business shall be wound up on the occurrence of any of the following events."

It says, "subject to subsection (2) of this section, on the giving of notice by one partner to another partner of the first partner’s express will to withdraw". I'm kind of troubled whether that's formal enough. It seems to me that notice ought to be at least in writing, particularly in this day and age when partners are many. It just says one partner to another. Let's say there are partners in the firm. I'm not sure - I know this is used in other places--what's meant by "the express will."

I have wished a number of times I a were not a partner in a couple of things, including a law firm or two.

CHAIRMAN BARRETT: Speak up a bit, please.

CHAIRMAN DUTTON: I say, I am not at all sure of the use of this term "will." Lots of us wish at times that we weren't mixed up in things. I have had that wish, and I don't know whether a will is the same as a wish.
Seems to me, we need a stronger word than "will."
It needs to be almost -- it should be, seems to me, "of my withdrawal." I put a written notice in that says I hereby withdraw from the partnership of ABC. The "will" to withdraw, I don't know what it means.

Seems to me it ought to be at least looked at. I would suggest some way or other -- No. 1, I would suggest you require written notice. No. 2, ask yourselves whether that, word "will" really has an adequate meaning to what you are trying to accomplish.

MR. DON WEIDNER: Thank you for the comments. On the second point, it may help a little bit. What we have done here is used language of giving of notice, which refers to that new Section 3, incorporating the UCC definitions, which I think are more clear about what constitutes giving of notice than the present express-will concept. I think that's a good point.

More generally, we just decided that at a number of points, that if there is no requirement that the partnership agreement be in writing in the first place, should we nevertheless require some subsequent transaction to be flagged with a writing? And throughout we have tended to answer it "no." It's not been easy questions in all cases. That's the way we have come down.

CHAIRMAN BARRETT: Are there any additional comments?
COMMISSIONER H. LANE KNEEDLER (Virginia): You could also require that in the partnership agreement.

COMMISSIONER C. BEN DUTTON (Indiana): Yes, but it's a little bit different. I think if there was any way you could, if you could make people, if they are going to enter into partnerships, put them in writing, you ought to do it. I don't know whether you can make people do it by passing a statute.

But having become a partnership and incurred the liabilities and all the other baggage that goes with being a partner, it doesn't seem to me it's unreasonable at all -- in fact, it seems unreasonable not to require them and say, "I'm getting out, put that in writing," rather than simply walk up one day to one partner out of, say 75, and say, "I want out of this partnership."

COMMISSIONER HOWARD J. SWIBEL (Illinois): Commissioner Dutton, we had the same conversation with the same hypothetical in our committee meeting. The observation was made that we are trying to draft a statute that deals not only with the large urban law firm, but also with the partnership to haul garbage with two people with no written agreement.

It was pointed out to us by the reporter that this language "express will" appears now in the Uniform Partnership Act. We asked the question: Has it caused any mischief? Have
there been any cases over whether or not the will had been expressed or whether it was given in the proper way?

We were told that there is not a problem right now in application. So, as with many other provisions, we decided not to make what appeared to be possibly an improvement, and just keep things the way they are.

CHAIRMAN BARRETT: Mr. Reitz.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I had something of the same reaction as the last commissioner. I pictured the end of a long, hard day where almost everything had gone wrong and the partner is going out the door, and as he’s going out the door, he turns to his colleague sitting there and says, "I'm going to quit this stupid place."

Literally, that meets this language.

....

COMMISSIONER ROBERT J. TENNESSEN, (Minnesota): Page 109, beginning on Line 25, we are having a little trouble figuring out the meaning of that last part where it says, "upon the express will of any other partner, within 90 days of cessation, to wind up the partnership business."

It doesn't seem to flow. We are having a little trouble understanding what that means. Can you tell us?

CHAIRMAN BARRETT: Mr. Weidner.
MR. DON WEIDNER: Page 109, subsection (2) of 31Y.

Again, the question we're asking here is when is there a
cessation of partner status that will cause the whole business
to be wound up? That is, the business to be sold.

Here what we are trying to say is that if one partner
leaves in breach of the agreement or if one partner is expelled,
that that's so serious that any other partner, as opposed to all
of the partners together, any other partner has the right to
cause the business to be liquidated.

And what we have said here is that you have got to do
it within 90 days. This is based on present UPA Section 31(3).

CHAIRMAN BARRETT: Are there any additional comments?

COMMISSIONER JOHN P BURTON (New Mexico): I rise in
support of the last commissioner. I respectfully submit that I
could not explain to my legislature what subsection (2) does. I
understand what it's designed to do, but I could not say what it
does.

I would suggest that you take another look at it and
try to make it flow a little bit easier and incorporate some
concept of notice here rather than express will, which might be
to your spouse or to your bartender.

Thank you.

CHAIRMAN BARRETT: Mr. Weidner.
MR. DON WEIDNER: Those are good points, think, and we will consider them further.

Can I respond to a question that was submitted at the table in writing? I think it's one that is worth flagging so you will know what we are doing.

A person is looking at Page 111, line 8 and 9, which says, "upon the application by a partner, when an appropriate forum decrees," and the note that was put up said, "what is an appropriate forum? Do you mean court? If so, just say court."

We did not mean court. We had "court" in there originally. It's obviously not clear what we were doing. We were intending to embrace arbitration or other out-of-court settlement in this. We didn't make that intent clear, apparently. But I think that's significant enough to call it to your attention.

Thank you.

CHAIRMAN BARRETT: Section 31Z.

COMMISSIONER MORRIS W. MACEY (Georgia): "SECTION 31Z. WINDING UP PARTNERSHIP BUSINESS.

"(a) If an event causes a winding up of the partnership business under Section 31Y, the assets of the partnership must be applied to discharge its liabilities, and any surplus applied to pay in cash the net amount distributable to the partners.
"(b) If the partnership business is wound up pursuant to a decree under Section 31Y(9), the partnership may recover damages from a partner whose violation of the partnership agreement or other wrongful conduct causes the 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 law."

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): Just a question. Is there anywhere in this act where it says when the winding up is completed? I ask that question because in Section 30, the partnership continues until the winding up is completed.

It would seem to me that -- I didn't see it anywhere -- seem to me that a statement here that says that once -- that the winding up is complete once the assets are distributed to the partners, might be appropriate.

MR. DON WEIDNER: We will think about it. In some cases it will be hard to know when the winding up is completed. It may appear to be completed, and yet there may be contingent liabilities -- that's the peculiarity of partnerships -- that will surface at some point in the future and cause you to reopen it. But I think it's a good question..
I think our thought here was that the cash distribution would be ordinarily when the winding up would be completed.

COMMISSIONER JOHN FOX ARNOLD (Missouri): notice on page -- well, in the comment anyway, you asked the question whether or not you have -- it's on Page 117 -- whether or not you have gone far enough in dealing with the uneconomic continuation problem.

Now, I'm not sure what kind of reaction you want. It looks to me that (9) on Page 111 pretty well deals with it. Is the committee in doubt whether it does?

CHAIRMAN BARRETT: Nobody seems to be in doubt.

COMMISSIONER ARNOLD: Have I managed to confuse you? I'm looking at Page 117 in the first paragraph, the top of the page. You say, "Have we lost anything by deleting specific reference to willful and persistent breach?"

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER THOMAS L. JONES (Alabama): I think the question in there is sort of a rhetorical question. I think we felt that we have dealt with it. We didn't want to lose it without reviewing it again. I think it's in there just to caution us to review it again in case we received comments here. I think we felt we had dealt with it sufficiently.
COMMISSIONER ARNOLD: Where have you dealt with the persistent breach?

MR. HARRY HAYNSWORTH: It's primarily in subsection (9) of 31, dealing with the court action where a partner -- subsection (iii) -- that another partner so conducts himself or herself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with that partner.

That's essentially what we were trying to get at there. Also, it would be grounds for expulsion as well.

COMMISSIONER ARNOLD: It just doesn't seem to me that any of that language talks about breaching the partnership agreement. I assume that's what your question went to.

MR. DON WEIDNER: What we have done is moved -- in UPA Section 32 there are a number of causes for dissolution in part that -- well, that we made causes for expulsion, then try to -- we tried, as part of the cessations under 31, and then we put part of those cessations under 31Y and part of them under 32.

CHAIRMAN BARRETT: Yes, commissioner.

COMMISSIONER EDWARD F. LOWRY, JR. (Arizona): I noticed that you're following the old law that we have, in that the surplus is divided or distributed in cash.

I think that perhaps 75 years ago when this started, that probably made a lot more sense than today when your
partnership interest may be in things that may involve capital
gains, for example, where if a forced sale were to occur, you
would trigger tax liabilities that perhaps nobody wants.

I note in the comment that the Tennessee court is now
suggesting that you try to see if you can distribute in kind.

I guess I would just suggest to the committee that
perhaps you might consider bracketing, after "in cash," some
language that would say something to the effect "or in kind,
where practicable," and then just close the brackets, so we can
sort of update this concept and not just stay rigidly with the
past on that one.

....

MR. DON WEIDNER: "In kind, where practicable" -- you
do not mean to suggest that where practicable, you should have
the liquidating distribution in kind?

The courts right now are split under 38 as to whether
you can order a liquidating distribution in kind. There is a
case in which two brothers are in a partnership and they have,
whatever it was, feed lots in two separate cities. Lower court
decided that they are going to wind up the partnership, and they
do it by partitioning in kind -- say Brother A gets Feed Lot 1
and Brother B gets Feed Lot 2.
Some courts say you just don't have the authority to do that. Are you saying that you want that authority in there, or you want to avoid the full liquidation to cash?

COMMISSIONER LOWRY: I think that the conference's position should probably be that it should be up to the legislature to decide, in view of today's economy and the economics that we deal with, whether or not an in-cash distribution is appropriate as a state policy or whether an in-kind is appropriate. You may have a partnership that has just nothing but stocks as investments. They might be very susceptible to division in kind without the triggering of capital gains, capital losses, those sorts of things.

I guess my suggestion is, why be so rigid and say it has to be in cash? We are 75 years further down the road. Maybe it would be well to at least provide the option that an in-kind distribution, if practicable, would be appropriate.

COMMISSIONER ROBERT H. CORNELL (California): Ed, would you be satisfied if there was a comment saying that this was a default provision and that the parties could agree to a different form of distribution?

COMMISSIONER LOWRY: Yes, I think so.

COMMISSIONER EDWARD I. CUTLER (Florida): I would not agree. I think it's a mistake not to let the court decide that
it may be in kind, even if the partnership act says it shall be cash and the parties have not reached an agreement.

One party might indeed want to avoid a capital gain at the time; the other might not. I think that the court ought to be allowed to choose it. I would object to making it in kind only if the parties agree.

CHAIRMAN BARRETT: Are there any additional comments?

MR. DON WEIDNER: In effect, you want to change in substance from the UPA.

COMMISSIONER CUTLER: Yes. I'm working out a partition right now of a partnership that is in the form of a trust and is very meaningful because of that very thing. We are doing it by agreement. But if we had to do it without an agreement, I think we would be in real trouble. I think it would be acceptable to the tax people if the court could order it to be in kind. Why not let the court decide it, particularly if the parties are in disagreement?

CHAIRMAN BARRETT: Are there any additional comments on that section?

COMMISSIONER JOHN FOX ARNOLD (Missouri): Mr. Chairman, do you want a sense of the House on this?

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner, we will certainly look at it. If you want to make a motion for the sense of the House, that's fine.
COMMISSIONER ARNOLD: Why not do it? Maybe that's what I am missing. Just because it wasn't done 75 years ago is certainly no excuse for not doing it now.

COMMISSIONER JONES: Commissioner, we debated this at length. I think we felt, as Commissioner Cornell had pointed out, that this is a default provision and that they could agree earlier, but at the point that they are likely to reach this stage, the disagreement is likely to be so severe that the sale is probably the most reasonable solution, plus the fact that it was the old UPA solution.

COMMISSIONER ARNOLD: But you have deprived here the court of any opportunity to make an in-kind division. If I read your comments there, you cite a Michigan case and some other cases in regard to this.

I would move, sir, that the sense of the House be that the committee draft this provision so as to allow discretion in the court to make an in-kind distribution.

CHAIRMAN BARRETT: Is there further discussion on that?

All those in favor of the motion, vote "aye."

All those opposed, "no."

I think the "ayes" have it.

....
COMMISSIONER FRANCIS J. PAVETTI (Connecticut):

"SECTION 32. BUYOUT OF PERSON WHO CEASES TO BE PARTNER WHEN PARTNERSHIP BUSINESS 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 business 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 must be determined as of the moment of the event causing cessation. Fair market value is the amount that would have been distributable to that person in a winding up of the partnership business. In determining that amount, the assets of the partnership must be valued at the greater of (i) liquidation value or (ii) value based on sale of the entire business as a going concern without the departing partner. In either case, the determination must be made on the basis of the price that would be paid by a willing buyer to a willing seller, neither being under any compulsion to buy or sell, and with the knowledge of all relevant facts. Interest at the [ ] rate must be paid from the date of value to the date of payment. In a partnership in which capital is a material income producing factor, regularly scheduled distributions must continue to be made to the former partner or successor in interest. These distributions must 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 of the partnership business under Section 31Y(2) or 31Y(3), the business may be continued if there is no express will of any other partner, within 90 days of the cessation of partner status, to wind up the partnership business. If no agreement for the purchase of the interest of a departing partner is reached within 90 days after a demand for payment, either the departing partner or the continuing partners may commence an action to determine the amount due.

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

"(e) The payee partner must 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 is liable for damages caused by breach or wrongful conduct as provided in Section 31X. A partner who has withdrawn by express will before 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 the partner establishes to the satisfaction of the court that payment be made over a lesser term. Any deferred payments must be secured and bear interest at the [ ] rate."

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER EDWARD I. CUTLER (Florida): Addressing the interest provision on Page 123, beginning at Line 3, would the committee be willing to insert the word "simple" at the beginning of the sentence?

That would clarify it and eliminate the controversy that exists in various valuation statutes or under those statutes as to whether it should be simple or compound.

The same thing at the very end of the section on the next page, Line 16.

COMMISSIONER H. LANE KNEEDLER (Virginia): We will consider that.

....

COMMISSIONER BRUCE A. COGGESHALL (Maine): I have a number of questions about this section. First of all, on Page 123, Line 4, what do the words "date of value" mean? Is that meant to mean the date of the event causing cessation? Wouldn't it be better to say that?
MR. DON WEIDNER: Probably.

COMMISSIONER COGGESHALL: Would somebody explain to me what the next sentence means.

MR. WEIDNER: Can you refer to the sentence.

COMMISSIONER COGGESHALL: It starts at Line 5, "in a partnership in which capital is a material income producing factor."

MR. WEIDNER: The suggestions was made, although there was a dispute between people from different states -- people from Texas said that in Texas, most typically in the case of a divorce, most typically in the case of a male partner, when the male dies, the widow basically gets abused out of the partnership because regular distributions stop coming through to her and she gets forced to be bought out a low price. People from California, I recall, said that such things don't happen out there.

Anyway, we decided that this rule is really a rule to protect the surviving spouse, male or female. What it attempts to say is generally if the partnership is one in which capital is a material income-producing factor and if you have -- really, it is saying that if you have no reason to stop your regular distributions, then don't stop them. We know that frequently in this situation you are going to try to force the surviving spouse out at the low price, and we are going to be watchful
over it. The concept of capital as a material income-producing factor --

COMMISSIONER COGGESHALL: I thought we were talking here about a partnership that's been bought out because of his withdrawal from the partnership.

Why are we continuing to make distributions?

MR WEIDNER: This is focusing on what’s happening during the buyout, while the buyout is being negotiated.

COMMISSIONER COGGESHALL: so, you are saying prior to the payout.

MR. WEIDNER: Yes.

....

COMMISSIONER COGGESHALL: Line 20, the action ought to be commenced, it seemed to me, by the partnership and not by the continuing partners.

COMMISSIONER H. LANE KNEEDLER (Virginia) Commissioner, where is that?

COMMISSIONER COGGESHALL: Line 20, Page 123. Is there anything in here that tells you when the bought-out partner is going to get paid? When does he get paid?

MR. WEIDNER: I guess the only -- that's a good question. I guess the only thing we say is that if you are being bought out because you are leaving early -- that is, before a
set term or transaction has expired then you get bought out at the end of that set term or transaction.

I’m going to have to look to see if we explicitly say that. We may not explicitly say that.

COMMISSIONER COGGESHALL: In reading this, I couldn't tell at what point -- absent an agreement -- when this payment is due.

MR. WEIDNER: Lane is saying we say it in this situation, but we don't say the general rule.

CHAIRMAN BARRETT: Are there additional comments on that section? Commissioner.

COMMISSIONER LEON M. McCORKLE, JR. (Ohio): With reference, for example, to Page 122, Line 18, the determination is giving effect or not giving effect to the event which caused the cessation? A partner dies. Is the partnership valued with him or without him?

MR. DON WEIDNER: Without him.

....

COMMISSIONER McCORKLE: I am not at all sure the language you have drafted is clear one way or the other. I was trying to determine your intent.

MR. DON WEIDNER: Without him. And I think more generally, part of what we were trying to do here is say that when you are being bought out you don't have to be paid for the
value of the services that you would have put in the partnership.

....

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, before Commissioner Buxton begins, I just want to remind you, the reason we went out of order here was to get some general feel from you about your reaction to the general approach that the committee has taken with the "D" word, "dissolution," what happens with the winding up of a partnership.

I think I can speak for the remainder of the committee here, to say while there have been a number of major issues raised, and we will look at those issues over the next year, I think it's a fair conclusion that there seems to be agreement with the general approach that we are taking.

I guess if that's not the case, that's really the reason for taking these provisions out of order, to get some feedback. I guess, -- who was it originally said this -- I guess Commissioner Cutler -- I guess this is an area where we would say, at least with the general framework of how we were proceeding, that we would read something into the silence -- not the particular issues as we went along, but the general approach. I think we would conclude that there seems to be agreement.
COMMISSIONER JOHN P. BURTON (New Mexico): All I can let you know is I don't understand what your basic approach is. I suspect that there may be some others in the room who do not understand what the basic approach is by reading three sections somewhat out of context and getting explanations of, well, that's covered somewhere else, and we mean this here, but we don't mean it over there.

I really, do not have a succinct statement of your approach to the "D" word that you are trying to get an expression on. My concern is that you may know what it is, that you are saying silence is acceptance, but that all of us may have quite different ideas.

If you want to try and state something in four sentences or less and get a sense of the House or a show of hands on that, I think that might be a reasonable way to proceed. But the way we are proceeding now, I think it may very well lead to a lot of confusion and misunderstanding and hard feelings next time we take this up.

COMMISSIONER H. LANE KNEEDLER (Virginia): Let someone who doesn't practice in the area of partnership law try, and then we will allow my colleagues here to correct me.

Under current partnership law, I think the problem we had with dissolution was that somehow the entity disappears.
Take the one that our reporter used, the four partners. One wants to leave; everyone is fine about the person leaving. Now we have this fiction about the four-person partnership disappearing, a new three-partner partnership being formed, with some circumstances that flow from that that were undesirable, including some expenses.

We said: Let's do it a little differently. Let’s say that we are going to have situations in which person ceases to be a partner. They are set forth for you in Section 31. Then we said: All right, the person has ceased to be a partner. What's the effect?

We said that in some instances that leads to a winding up, a completion of the partnership, and in others it leads to a buyout. That's really it.

That's more than four sentences, but less than those four sections

MR. HARRY HAYNSWORTH: Could I try one sentence, then? In essence, what we have done is make a general partnership have the same type of continuity as you have in a limited partnership under the revised Uniform Limited Partnership Act. That, in one sentence, is what we have done essentially.

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: I don't agree with that at all. I think what we've said here is that in the partnership area, we
continue the traditional rule that unless it's a fixed-term partnership, every partner has a right to liquidate the business at any time. That's not the right of a limited partner.

Let me approach it a different way -- I have not been very successful, I guess -- approach it in a mechanical way. Mechanically, we have unpinned all of the provisions on partnership breakups from the word "dissolution." If you look at the present statute, all of the sections from 29 through 42 use the word "dissolution." They are triggered by a dissolution. If you have a dissolution, then they are all triggered. If you don't have a dissolution, none of them is triggered.

Harry's ABA report is pioneering. We have a lot of people saying that you shouldn't say the partnership is over every time someone gets out. That's what the old definition of dissolution really did. So, what do we? Do we just add a list of sections that say, "Oh, by the way, the partnership is not dissolved here"? In these situations, the partnership will not be dissolved when somebody gets out. Some states have done that. California has fooled with it. The Limited Partnership Act does it at some point.

It doesn't work. Why? Because then none of those other rules apply. So, what happens when I leave my partnership? And let's say we agree. Let's say we just had a rule that came down, the partnership doesn't dissolve if none of them wants it
dissolved. And I left. What would end my agency power to bind
the other partners?

Well, the section that did that in the UPA is
triggered by and only by a dissolution. So, just as a mechanical
matter, what we said is that now most of those sections in the
back are not triggered by the abstract concept of a dissolution.
They are triggered by the presence of one of those two
mechanical routes. Everybody is going to be getting out either
through buyout or through a winding up of the business.

It's horribly difficult to talk about. What we are
trying to do is speak more in practical terms about what is
happening and separate those issues. We know that when Don gets
out of the partnership, you want to stop his agency power. Let's
just do that. Let's get him out under 31 and let's stop his
agency power, either 35 or 35X. Then we will worry about how he
gets paid out.

I don't know if that makes sense. In a way, it's not
radical. The substance that we have here is pretty traditional.
We have been asked, like we have been asked today, to give
almost a corporate kind of stability to partnerships. Don't let
anybody get out at will. What we have done is use new words
describing it without using "dissolution" -- is radical. That's
the thing.
If we have made one change, we have defined dissolution not to be the change in the relation that takes place whenever anyone leaves. We have defined it to mean the withdrawal, the cessation of partner status that causes the winding up.

If I have any problem with it, the question I would flag for you is, are you comfortable with giving dissolution a meaning different than it's had? It refers to a smaller set of situations now.

CHAIRMAN BARRETT: Commissioner Cornell.

COMMISSIONER ROBERT H. CORNELL (California): Just to emphasize that, take a look at Section 29 in the bluebook on 93 and look at the original definition that -- we are reversing a definition here. It said the dissolution is a change in the relationship as distinguished from a winding up of the business. Now we are tying in -- what 29 does, it's trying to call the dissolution something else. It's tying it in only to those situations where there is a winding up of the business.

This act 76 years ago was a compromise between the entity and aggregate theory. This is a compromise based on the fact that the word "dissolution" is around, has been used in many ways. What we are trying to do here is to satisfy those people who want the dissolution for other reasons to be in here,
but to give it a very limited definition which ties it in to the winding up, just the opposite of the old definition.

CHAIRMAN BARRETT: Yes, commissioner.

COMMISSIONER JOHN P. BURTON (New Mexico): I guess that's my point. It's hard for us to give you a sense of the House or even an acquiescence in your approach, succinctly stated three different ways by three different people, without going through the rest of the provisions dealing with dissolution and with winding up and cessation of partner status. Because it seems like they are all very much connected. That is, what is the relationship of the partner who is being bought out but still has a relationship in one section, or some other thing in another section, to the partners, and responsibility to third parties?

I'm curious. I think the reporter gave an illustration at the beginning of a horror story about a lawyer who left a law firm and later the law firm committed malpractice against a person who was a client at the time. You are saying that under present law the ex-partner is liable for the subsequent act of malpractice.

Is your proposed change going to change that result?

MR. DON WEIDNER: No.

COMMISSIONER BURTON: It would seem to me, then, that advising clients about -- you're in a partnership, you get out
without winding it up, or whatever, or dissolving -- I mean, is that the only way you can protect yourself against that situation, is insist that the partnership be wound up and dissolved?

MR. WEIDNER: I don't think you can protect yourself that way. I think if there is an obligation undertaken, you cannot get out of the obligation by winding up the partnership. That's what I'm saying. At some level, it's hard to say when it's wound up.

That case is a case called Redmon v. Walters. If you have undertaken the obligation to represent a client, you can't escape that obligation. In that case, what happened was they let a statute to limitations pass.

You can't escape the obligation by saying that the partnership no longer exists. What we are trying to do is warn people. I use it as an example, because lot of people don't realize that that is the state of the law.

A colleague and I discussed it. When we teach our students, we ask them as young attorneys, you should always consider whether you're committing malpractice whenever you let anyone operate in a partnership. I think it's a serious question.

COMMISSIONER BURTON: I understand about agency, but if you are going to expand the entity theory, make this more like a
corporation or a limited partnership that can continue after people get out, it seems to me that you have got to have some mechanism for ending the liability of the person who got out voluntarily or involuntarily.

MR. WEIDNER: You are going to be hit with constitutional limitations on the other side, taking the property rights of the creditor.

COMMISSIONER BURTON: Let me finish.

MR. WEIDNER: Can I mention one thing about what you said, though? It's troublesome to me that people say: When you are using an entity theory, you are using a corporate theory.

I would rather come at it from a property point of view. I would say I'm using the entity theory of the joint tenancy. That's all at one level -- that's how the partnership law started, as fine-tuning the law of joint tenancy. Under state law, the theory of joint tenancy is an entity theory. You have tenancy in common is aggregate. Joint tenancy is entity. And under the state law everywhere, as far as I know, of a joint tenancy, it's a theory of the unities. Let's say when one of four joint tenants dies, the theory of basic property law everywhere is that that joint tenant vacates the entity and the entity survives.

Now, can that joint tenant extinguish the joint tenancy, get out of it at any time, and demand partition? Yes.
That's what we are doing. That is why I think some of the question about you going to an entity model, is that going to jeopardize you for tax purposes, the answer is no, just like going to an entity model for joint tenancy doesn't.

COMMISSIONER BURTON: That was not my question. My question is -- let's use your joint tenancy example. If I am in joint tenancy with a fool and that fool is going around causing injury to people -- you know joint tenancy owning an apartment building and this guy is letting drug dealers run crack houses in there, and I want to cut my losses, I can partition. And I can go to court in about ten different ways, and a court can say: Okay, Burton, you are out, you are not liable for anything this rascal does in the future.

If I'm understanding you right, there is no way for Burton to do that if the crack house is held in a partnership instead of a joint tenancy.

MR. WEIDNER: We are taking the same rule maybe my example -- or I didn't make my example clear in Redmon v. Walters. The liability was undertaken while that attorney was still a member of the law firm. The theory there was that he had undertaken an obligation as an attorney to the client to act according to professional standards -- and did not -- by seeing the case through.

COMMISSIONER BURTON: This attorney --
MR. DON WEIDNER: We agree with you, I think, about the house. In that example, you see, there shouldn't be the collision. Suppose these joint tenants think -- these are the people we are drafting the statute for. I think maybe we are in agreement on substance. We are drafting the statute for the smaller partnership, the inadvertent partnership. Many of them are going to be documented just as tenancies in common and as joint tenants.

The substance that we are saying is basically the same. Can you get out of that joint tenancy at any time? And the answer is, is there an agreement against partitioning? If not, then, it's a joint tenancy or a tenancy in common at will, and you can get out. That's what we are saying.

CHAIRMAN BARRETT: I want to get to these gentlemen.

COMMISSIONER STANLEY PLETTMAN (Texas): We will never be able to move to a perfect entity status where we would be on parallel with a corporation in all aspects. But it doesn’t seem to me that it necessarily has to be analyzed or drafted the way the reporter is approaching it.

Specifically with respect to your malpractice suggestion, the case, the malpractice example, the undertaking of the case was before a partner left. But the liability did not arise until after he left.
I sent you up a note, and I want to pursue it now because I think it's pertinent. It's on Section 35X, which you are not going to. But 35X deals with how and to what extent you cut off future responsibilities with respect to a partner who has withdrawn.

I suggested to you in the written note I gave you that in Line 26 on Page 137, you change the word from "debt" to "liability incurred" -- "for any partnership liability incurred." He would not have responsibility for any partnership liability incurred after cessation of a partner status.

Now, with respect to a bank loan, a note that had been signed by the partnership before he left, he is going to continue to be obligated, on it.

But in your example, I don't see why we can't come in -- my wording obviously is not necessarily felicitous, or whatever. But I don't see why we can't cut off the liability of a withdrawing partner for a wrong or a breach that does not occur until after he has left.

I think we can get a quasi-entity approach here, not perfect. But it doesn't have to be black or white like you were expounding.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman.

COMMISSIONER PLETTMAN: What's the response to that?
MR. DON WEIDNER: I think the liability comment is a good one. I think that we're in basic agreement on the lawyers -- that is, that new obligations accruing -- if I can use that term -- accruing after you leave are not going to be obligations that bind you.

I just differ in your analysis of when the obligation accrued in the lawyer malpractice case.

COMMISSIONER PLETTMAN: I understand. You need to play with that some, though. There should be an ability to be relieved of responsibility for something that is a wrong or breach or a default that occurs after you have left.

....

COMMISSIONER TOM R. MASON (Mississippi): I'm interested in the same point that the last two speakers were addressing, and inquiring, did the committee make a policy decision to continue what is apparently now the common law rule about continuing liability on obligations arising while he was a partner, or did you simply assume, I mean, just draft it in because it was the existing law?

Was a policy decision made that that was good law in 29X?

MR. DON WEIDNER: I'm not sure. I would have to ask different people. I think when you get outside -- that's a good question. When you get outside the area of professional
responsibility, states appear to have no fundamental policy in favor of personal liability.

COMMISSIONER MASON: Other tort areas or contract areas -- I would endorse what Mr. Plettman was suggesting, that you look at it and you see if there is not a way to cut off tort contract liability after the partnership status has ceased. It may be that they did enter into an agreement to represent a client prior to the --

MR. WEIDNER: Can I give you one example? Suppose you are one of five partners in a partnership that signs a two-year lease. Is that what you mean? You leave after one year. Do you want the person to be able to say "I'm off the lease"?

COMMISSIONER MASON: No, not at all. May I speak to you just a minute now. Assume that the lawyer undertakes, through the firm, representation of a client, then leaves the partnership status. Thereafter the firm enters into contractual obligations in that representation or thereafter undertakes additional obligations to that client. They have an ongoing relationship which may be expanded.

I just think that lawyer who got out should not have continuing obligations, even though the obligation did originate prior to his leaving.

MR. WEIDNER: I agree. I think we agree. I think that's the intent of our statute.
COMMISSIONER M. MICHAEL CRAMER (Maryland): Doesn't this all become resolved by the manner in which the action is brought? If it's tort, doesn't it terminate when the partnership terminates? And if it's contract, doesn't it exist regardless of the subsequent termination?

You can't change a contract because there is an internal termination. Isn't that the way it's going to come down? If you have a malpractice action and someone sues in contract, they are going to sue every partner who was a partner at the time the contract was made. If they sue in tort, which is sort of difficult to conceive of, a malpractice action in tort, but I'm sure you can, then it depends upon who were the members of the partnership at the time.

I think rather than trying -- you're going to work on it. You're the brains. Rather than try to insulate it by artificial means, why not just have it depend upon the means by which the suit is brought, what theory it's brought on.

....

COMMISSIONER STANLEY PLETTMAN (Texas): I'm sorry. I would like to make an additional comment. It was triggered by the last comment that someone made from the committee to this last inquiry.

In the malpractice situation, the action will frequently be both in contract and in tort, and the plaintiff
will seek to prevail on the tort action if he can, because then he may well be able to get punitive damages.

It does make a difference about how you chop this thing. I just wanted to focus, your minds on that. It isn't just the contract.

....

COMMISSIONER FRANCIS J. PAVETTI (Connecticut):
"SECTION 33. LIMITATION ON AUTHORITY OF PARTNER AFTER EVENT CAUSES WINDING UP OF PARTNERSHIP BUSINESS. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not yet finished, an event causing a winding up of the partnership business under Section 31Y terminates all authority of any partner to act for the partnership:

"(1) with respect to the partners, as, declared in Section 34; and

"(2) with respect to persons not partners as declared in Section 35."

CHAIRMAN BARRETT: Are there any comments on Section 33?

No comments? We will turn to Section 34 and Commissioner Buxton.
COMMISSIONER GEORGE H. BUXTON, III (Tennessee):

"SECTION 34. LIABILITY OF PARTNERS TO CO-PARTNERS AFTER EVENT CAUSES WINDING UP OF BUSINESS.

"(a) Each partner is liable to the other partners for the partner's share of any liability created by any partner acting for the partnership after a winding up has been caused if:

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

"(2) the acting partner acts as if the winding up of the partnership business had not been caused.

"(b) A partner is not liable to another partner who acts with knowledge that a winding up has been caused."

CHAIRMAN BARRETT: Are there any comments on Section 34? Any comments on Section 34?

COMMISSIONER BRUCE A. COGGESHALL (Maine): Mr. Chairman, first of all, on Page 131, Line 35, is there any need to retain the word "co-partners" in this act? It's in there a few times and I think it ought to be partners, not co-partners.

MR. DON WEIDNER: I think that's a good comment.

COMMISSIONER COGGESHALL: Secondly, I have read this section a number of times, and I just can't understand what it means. It says that a partner is liable to the other partners
after a winding up if the act is appropriate to the winding up
and the acting partner acts as if the winding up had not been
caused. What does that mean?

....

MR. WEIDNER: This is one of my least favorite
sections, and frankly one I didn't think we would talk about
today. The section we just finished, Section 33, is a
switchboard section. It says after you have got -- once there is
a winding up in process, then for continuing obligations that
are generated, see Section 34 as to your rights, the rights
among your fellow partners. See Section 35 for the power you
have to bind the partnership to third parties.

First of all, in general terms, Section 34 covers the
rights of the partners as among themselves.

Some of the history of some of this was just unclear.
Through 33, as we come into 34, they were distinctions made
between dissolutions caused by different sources that we
couldn't -- at least I couldn't explain on policy -- yes, in
current law -- that we couldn't explain on policy grounds.

What we have essentially tried to do is eliminate the
distinctions that we couldn't explain, while trying to keep the
present structure.

What really -- you could see what we have done is tried
to eliminate, in 34, eliminate the distinctions we couldn’t
explain and keep the present structure. I think essentially what it boils down to is that if you engage in these acts during the winding-up process but would have been appropriate to the partnership business had it been continued, then you are not entitled to contribution if you knew that the winding up had been caused.

    Just as a general matter, what we had already decided to do was to come back and take a look at this run of 33, 34 and 35, 35X together. That’s essentially what it does.

    COMMISSIONER COGGESHALL: I won't try to redraft it from the floor, but it sure looks to me that section needs some attention. Even with the history you give me, it's pretty difficult to understand.

    The same with subsection (b). Subsection (b) says that a partner is not liable to another partner who acts with knowledge that a winding up has been caused. What does that mean?

    MR. DON WEIDNER: You see, what's happening is again, under the old law, when a partnership is under present UPA, when a partnership is dissolved -- this is an accurate statement of present law -- when a partnership is dissolved, it continues for all purposes, except its scope contracts slightly. That's the present law.

    COMMISSIONER COGGESHALL: Sure.
MR. DON WEIDNER Now what that means is that when the winding up is caused, that you have the authority as a winding up partner -- if you are a winding up partner, if you are not a wrongful resolver -- you have the authority to do acts appropriate for the winding up.

You also have your agency authority as a partner to bind your fellow partners if you continue to act in the old scope, in the ordinary scope of the past partnership business. For example, the case that somebody mentioned earlier. Suppose the partnership is dissolved but you haven't published notice of it in the newspaper and you get somebody who is a creditor in the prior two years, under 35, and you cut a deal with him. You have the authority to bind your fellow partners by that deal, even though it's appropriate for the winding up. But if you cut that deal knowing that the winding up had been caused, you can't make them contribute.

The third party may be able to get at them, but they can get at you, which, in a way, you see, whoever was suggesting the rule -- would have some sympathy for it, but I go with the committee on it -- but whoever was saying that there ought to be written notice for getting out of the partnership

COMMISSIONER COGESHALL: This section says that the partner is liable to his other partners if the act is
appropriate to the winding up of the partnership affairs and he is acting as if the winding up had not been caused.

How can you have both?

MR. WEIDNER: We are going to have to take a look at the language.

....

COMMISSIONER THOMAS L. JONES (Alabama): "SECTION 35. POWER OF PARTNER TO BIND PARTNERSHIP TO THIRD PERSONS AFTER EVENT CAUSING WINDING UP OF BUSINESS.

"(a) After an event causing a winding up of the partnership business under Section 31Y, a partner can bind the partnership except as provided in Section 35(c):

"(1) by any act appropriate for winding up partnership affairs or completing transactions unfinished when the winding up is caused;

"(2) by any transaction that would bind the partnership if the winding up had not been caused, provided the other party to the transaction:

"(i) had extended credit to the partnership within two years before the event causing the winding up and had no notice that a winding up had been caused; or

"(ii) had not so extended credit, but nevertheless had known of the partnership before the event causing the winding up and, having no notice of the winding up, the fact of the winding
up had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) where at which the partnership was regularly carried on.

"(b) The liability of a partner under Section 35(a)(2) must be satisfied out of partnership assets alone when the partner, before the event causing the winding up, had been:

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

"(2) 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 the partner's connection with it.

"(c) A partnership is in no case bound by an act of a partner after an event causing a winding up of the partnership business:

"(1) if the partnership business 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

"(2) if the partner has become a debtor in bankruptcy; or

"(3) if the partner has no authority to wind up partnership affairs, except by a transaction with one who
“(i) it had extended credit to the partnership within two years before an event causing the winding up and had no notice that a winding up had been caused; or

“(ii) had not so extended credit to the partnership before the event causing the winding up and, having no notice of want of authority, the fact of want of authority had not been advertised in the manner provided for advertising the fact of winding up in Section 35(a)(2)(ii).

“(d) This section does not affect the liability under Section 16 of a person who after an event causing 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.”

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): Just a minor point on this section. On Page 134 in Line No. 1 and on 135 on Lines 14 and 19, why do you limit that to somebody that is extended credit? Why wouldn't it be more appropriate to make that category of people those who had done businesses with the partnership during that period of time?

CHAIRMAN BARRETT: Is there a response from the committee?

MR. HARRY HAYNSWORTH: The only answer we can provide you there is that that is the way--
COMMISSIONER COGGESHALL: It's been that way since 1912.

MR. HAYNSWORTH: -- 1912. And that we didn't see anything in the literature or the case law that had said that it had ever been a problem.

COMMISSIONER COGGESHALL: The concept is, if somebody knew that this was a partnership and had been doing business with them for some period of time and they continued to do business with them during the winding up, not knowing that there had been a winding up, then they ought to have benefit of the fact that there was a partnership there. There are lots of business transactions other than the extension of credit that ought to be treated in the same fashion.

MR. HAYNSWORTH: I'm not disagreeing with you.

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: I think it's a good point.

CHAIRMAN BARRETT: Additional comments? Commissioner.

COMMISSIONER GERALD L. BEPKO (Indiana): The transaction will bind the partnership under (a)(2)(ii) if the person dealing with the partner of the partnership being wound up had known of the partnership before the event causing the winding up, and then, having no notice of that winding up, also has not -- there has not been an advertisement in a newspaper of
general circulation in the place where business is regularly carried on.

Originally, the standard had been that the person dealing with the partnership being wound up had no knowledge, and it was changed to notice, which is a broader, more encompassing concept.

I wonder if it’s still necessary to have that last qualification now. In other words, wouldn't there be notice in any event if there had been advertisement in a newspaper of general circulation where the partnership business was regularly carried on?

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: We had defined notice as including knowledge or notice, and so it was redundant to use the term "knowledge or notice," and we just struck the "knowledge or" whenever we had used that term "knowledge or notice" throughout the act.

COMMISSIONER BEPKO: I thought knowledge was the standard before.

MR. WEIDNER: Before, it was knowledge or notice, and under our definitions we have defined notice to include knowledge. In effect, it said "knowledge" or "knowledge or notice."
COMMISSIONER BEPKO: That is redundant. I guess I can't answer the question myself, but it seems that notice is a broad enough concept -- as defined in the Uniform Commercial Code, anyway -- so that it would be unusual to find a case where the person involved did not have notice and at the same time there was an advertisement in a newspaper of general circulation at the place where the entity in question was regularly carrying on its business.

MR. WEIDNER: You could have a situation in which there had been an advertisement or, rather, there had been no advertisement but the creditor had notice from some other source.

COMMISSIONER BEPKO: Right.

MR. WEIDNER: In other words, if you don't advertise, you lose it to this class of person unless the particular member of that class that you are dealing with had notice from some other source.

CHAIRMAN BARRETT: Commissioner Kneedler.

COMMISSIONER H. LANE KNEEDLER (Virginia): This is one of the disadvantages of not starting all the way at 1. Let me ask if you would go back and look at the definition of notice back in Section 2 and see if the way that it's defined takes care of your problem

I think it does, but I may be wrong.
CHAIRMAN BARRETT: Additional comments on Section 35.

Are there any additional comments on Section 35?

We will turn to Section 35X, and Commissioner Gardner.

COMMISSIONER WILLIAM C. GARDNER (District of Columbia): "SECTION 35X. POWER TO BIND PARTNERSHIP AND LIABILITY TO THIRD PERSONS AFTER CESSION OF PARTNER STATUS.

"(a) A person who ceases to be a partner under Section 31 may 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 before cessation and the other party to the transaction:

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

"(2) though the other party had not so extended credit, had nevertheless known, before 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) where the partnership business was regularly carried on.

"(b) The liability of a partner under this section must be satisfied out of partnership assets alone when the partner, before cessation of partner status, had been:
"(1) unknown as a partner to the person with whom the contract is made; and

"(2) 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 the partner's connection with it."

CHAIRMAN BARRETT: Are there any comments on Section 35X? Are there any comments on Section 35X?

I see President Bugge coming up. I think I will report to him on his way up here.

Mr. President, the Committee of the Whole rises and reports that it has had under consideration the Uniform Partnership Act, has made progress, and asks to leave to sit again.
COMMISSIONER MENDES HERSHMAN (New York): "SECTION 36. EFFECT OF CESSATION OF PARTNER STATUS ON PARTNER'S EXISTING LIABILITY.

"(a) Cessation of partner status does not of itself discharge existing liability of a partner.

"(b) A partner is discharged from any existing liability upon the cessation of partner status by an agreement to that effect between the partner, the partnership creditor, and the person or partnership continuing the business. The agreement may be inferred from the course of dealing between the creditor having knowledge of the cessation and the person or partnership continuing the business.

If a person agrees to assume the existing obligations of a partnership after a person ceases to be a partner, the person who has ceased to be a partner is 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 those obligations.

"(d) The estate of a deceased partner is liable for all obligations of the partnership incurred while the decedent was a partner."
"(e) This section also applies to a person who ceases to be a partner upon the completion of the winding up of the partnership business."

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): Could the committee give an example of an agreement that would be inferred from the course of dealing between the creditor and the partnership that would release the departing partner.

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: My understanding of this language which appeared in the UPA is that essentially it's reflecting a series of quasi-surety notions by -- the partner who is left is treated as a quasi-surety and that he -- or the notion is that the kind of agreement that must be inferred is one in which the third party would intend a novation with respect to the continuing partner. That is a rare situation rather than a common situation.

COMMISSIONER COGGESHALL: We've got, down in the next section, the suretyship type of relation that you have provided. Is something other than that intended in the first paragraph?

MR. WEIDNER: It's the same basic idea, only without the assumption by a third party without the obligation.

COMMISSIONER COGGESHALL: That brings me to my next question. In Paragraph (c) you are providing this suretyship
{defense defines}, and I don't understand what the rationale is for limiting that only to those situations where somebody else has assumed the obligation.

He is, in effect, a surety for the continuing obligations of the partnership, and you're saying that if somebody else had assumed that debt and then the creditor makes some change in the obligation, he is released.

What difference does it make to the partner, the departing partner, whether somebody has assumed the debt or not? And if it makes no difference and if it makes sense to release him because there has been a change in the obligation, why wouldn't that be effective in either case?

MR. WEIDNER: Are not those the two cases in (b) and (c)? Again, we haven't discussed this at any length at all. But my understanding is that both these are ultimately grounded on a fictional intent to discharge the --

COMMISSIONER COGGESHALL (Maine): If 1 and 2 are the same, why don't we just make it into 1 and say that if there is a material change in the obligation after the partner leaves, then he is discharged.

MR. WEIDNER: We will look at that. Thank you

CHAIRMAN BARRETT: Additional comments?
COMMISSIONER COGGESHALL: I have a couple more that I would like to make on the same subject. I would be happy to yield to Mr. Cramer for him to make his, if he would like.

COMMISSIONER M. MICHAEL CRAMER (Maryland): On Section 36(b), I wonder why a matter which is strictly evidentiary, quote, the agreement, Lines 24 through 27, would be appropriate for the act.

Maybe there is a good reason. It just seems to me that's a strictly evidentiary matter.

CHAIRMAN BARRETT: Response from the committee?

COMMISSIONER CRAMER: The Style Committee told me it's a pretty crazy sentence anyway.

MR. WEIDNER: Consonant with the deletion earlier tonight, I think it might be consistent to delete that sentence.

COMMISSIONER CRAMER: I don't think it helps.

MR. DON WEIDNER: We will take a look at that.

....

COMMISSIONER COGGESHALL: In subsection (d), you treat an estate of a deceased partner differently than any other departing partner. You provided certain limiting benefits to the departing partnering (b) and (c), but you don't provide those to an estate of a deceased partner.

Is there any reason for a difference in treatment?
MR. WEIDNER: Essentially what we did with (d) was change it, eliminate the application of the "jingle rule," which we have taken out of Section 40 on the ground that it's inconsistent with the provision of the bankruptcy act.

I guess what you are suggesting is, once we eliminate the portion of now (d) that gave the separate creditor a prior right to payment over separate debts, that there is nothing left of (d).

I think it's a good point. I think we need to look at that.

....

COMMISSIONER ROBERT H. CORNELL (California): "SECTION 37. RIGHT TO WIND UP."

"(a) Partners who have not wrongfully caused a winding up under Section 31Y may wind up the partnership affairs; and a partner, a partner's legal representative or assignee, upon cause shown, may obtain winding up by the court.

"(b) Persons winding up a partnership’s affairs in the name of, and for and on behalf of, the partnership, may 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, distribute to the
partners any remaining assets of the partnership, and perform other necessary acts."

CHAIRMAN BARRETT: Commissioner

COMMISSIONER BRUCE A. COGGESHALL (Maine): I would like to suggest in Section 37(a) that it be amended slightly to read as follows: "If there is an event causing a winding up under Section 31Y, those partners who have not wrongfully caused a winding up may control the winding up of the partnership affairs."

COMMISSIONER H. LANE KNEEDLER (Virginia): We will be happy to look at that. Could you submit that in writing?

COMMISSIONER COGGESHALL: Yes, I will.

Secondly, in the next clause in subparagraph (a), it provides that a partner may obtain winding up by the court. Is that meant to be limited to only those partners that did not wrongfully cause the winding up?

MR. DON WEIDNER: I don't know the answer to that

COMMISSIONER COGGESHALL: I can see an argument either way. It's unclear as it now sits.

MR. WEIDNER: My assumption was that even a wrongfully dissolving partner, who by this section does not have a right to wind up himself or herself, would nevertheless have a right to have a partnership wound up, and that if nobody was winding it up, then that person had a right to go to court.
I don't know the case law on the use of that word right there.

COMMISSIONER COGGESHALL: I suppose --

MR. WEIDNER: I would just have to check.

COMMISSIONER COGGESHALL: It could also mean that if the partner causing the winding up didn't like the way it was being wound up, he could go to court and get a court's supervision of the winding up. That might be clarified.

Then in subparagraph (b), as I understand the way this is written, the only authority the partners have once the winding up commences is to do things that are consistent with the winding up. And where you have got language here that says that they can preserve the partnership business or property as a going concern for a reasonable time, I think it should be made clear that that must be done in a manner consistent with the winding up.

I would suggest you add the language, after the words "reasonable time," "as may be necessary to preserve the value of the businesses or property in the course of winding up."

MR. WEIDNER: If you could submit that one, too, in writing. I assume, at the beginning of your question, you didn't mean technically the only authority they have. Because 35 says they have authority. They can bind the partnership to third party -- I think I understand what you are saying. They can have
authority to bind certain creditors who don't have notice of the winding up.

COMMISSIONER COGGESHALL: What I am saying is, they can't simply just say: I'm going to delay the winding up for a reasonable period of time while I continue to run the business. The continuation of the business has to be part of the winding-up process.

CHAIRMAN BARRETT: Commissioner Macey, did you want to add something?

COMMISSIONER MORRIS W. MACEY (Georgia): Are you saying that we don't need 37(b)?

COMMISSIONER COGGESHALL: I'm not suggesting we don't need 37(b). I just want to make it clear that the authority here for continuing the operation of the business must be consistent with the obligation to only do things that are in the nature of winding up.

MR. HARRY HAYNSWORTH: That was clearly the intent, that it be limited to that. The problem under the present case law is that there is some, at least, dicta that would say that you couldn't even preserve it as a going concern. You just got to stop everything right today and liquidate in a forced sale, which we didn't feel was appropriate.

COMMISSIONER JAMES C. McKay, JR. (District of Columbia): I see you struck out "unless otherwise agreed by the
partners." Was that done because it was considered superfluous or did you intend to preclude the partnerships by agreement from permitting one of these partners to participate? So, this is a statutory prohibition that would limit a partnership agreement.

CHAIRMAN BARRETT: Commissioner Kneedler.

COMMISSIONER H. LANE KNEEDLER (Virginia): No. Commissioner McKay, the answer there is that appears in several provisions in the act. We struck it entirely because of 4X. It says the partnership agreement may dictate otherwise unless it's provided that the partnership agreement may not do so.

So, we would read through 4X that the partnership agreement could provide otherwise.

CHAIRMAN BARRETT: Are there any additional comments?

Section 37. Commissioner.

COMMISSIONER TOM R. MASON (Mississippi): We keep saying "winding up." I have been searching for some way to know what winding up was. Subsection (b) that we just finished seems to be as close as we have to a definition.

Is there a need for a definition of winding up and the period of time and the things that are included in that, or do we just treat it as some term of art that's defined by the common law? What is winding up?

CHAIRMAN BARRETT: Mr. Weidner.
MR. DON WEIDNER: I think in here winding up is defined in terms of its goal rather than its means. Earlier, we defined, when we say what happens during a winding up, winding up is the process by which you sell your assets, satisfy your liabilities, and distribute the remaining equity.

COMMISSIONER MASON: Is that said somewhere in the act?

COMMISSIONER H. LANE KNEEDLER (Virginia): The answer is "no." It's not defined specifically. And we will look at that. You are suggesting that (b) may do it.

COMMISSIONER MASON: There is a start on it in subsection (b) there, where it allows you to continue the business and do several things.

CHAIRMAN BARRETT: Commissioner Macey wants to address this.

COMMISSIONER MORRIS W. MACEY (Georgia): Winding up is used in the present Uniform Partnership Act and has shown up in a good many cases because the phrase has been around a long time.

When I first got on this -- I would like to say this: I always thought when you say, "I want to get out of the partnership," the partnership is dissolved -- but that's not enough. You have got things going and you have got to wind it up. That's why we really are looking at this almost as a two-tier type of situation -- first, the dissolution, but
dissolution only means for our purposes that the partnership has ended. Then you have to conclude the affairs of the partnership, and that's the winding up part.

I think that phrase is really not defined, but it has been in the present Uniform Partnership Act for a long time.

MR. DON WEIDNER: The closest we come to defining it is, you might just take a look at Section 31Z(a), where we say: "If an event causes a winding up of the partnership business under Section 31Y, the assets of the partnership must be applied to discharge its liabilities, and any surplus applied to pay in cash the net amount distributable to the partners."

We will think about it. If you want to submit a specific suggestion -- we meant to give a thumbnail sketch of what winding up was in 31Z(a). It's hard to generalize among capital-intensive partnerships, pure service partnerships and so forth.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): A suggestion to the committee. You have to remember that these acts are going to be in many cases used by some general practitioner looking for a quick answer, and he doesn't want to read a treatise on partnership to find out what the term you use throughout means.
Would it violate your act to write a simple definition of the phrase "winding up" that you use so often, as compared to, you can distinguish it in a comment from dissolution. It would be a great help to many of us who don't work in this area to become familiar with it and have your background.

CHAIRMAN BARRETT: Commissioner Kneedler.

COMMISSIONER H. LANE KNEEDLER (Virginia): We will look at it.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER JOHN P. BURTON (New Mexico): Not to belabor the point, but I would join the last two commissioners in prayerfully requesting the committee to include a definition of winding up and any other key terms like that throughout the act.

I'm concerned not about the lawyer like me who looks at the statute and has a client who won't pay him or her to look for much more.

I also litigate. And that's a horrible admission to make, but I can't imagine trying to explain winding up to a judge who is in general practice, let alone a jury. I think we owe it to the public to define this term rather than continuing it as a term of mystical art.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I have three comments before I get to 39. One, with
regard to winding up, I want to reiterate that that's a term undefined that's in the current act. That doesn't mean we shouldn't define it, but to whatever extent it presents a problem, it probably presents a problem now, and we will take a look at defining it.

With regard to Sections 33 to 43 in general, obviously we have spent a great deal of time on this act, all of it -- once in a cursory way, a second time in a detailed way, and basically a third time up through Section 42. If you find us a little rusty on 33 to 43, that's the portion of the act that's most distant from our detailed consideration.

With regard to 38, I'm going to ask our reporter, Don Weidner, to say a word about why that was deleted.

MR. DON WEIDNER: Essentially 38 is a very encoded section. It was hard to read and it tried to describe everything that could happen after a dissolution. That is, it includes what discussion there is of the buyout route. It includes what discussion there is of a winding up. It includes reference to the fact that you can sue the partner who wrongfully dissolves for breach. It includes a penalty for loss of good will, and so forth.

What we were trying to do -- and I think we can certainly say we did in the case of the buyout -- what we were trying to do is say that there are basically, when you get out
of the partnership, there are only two routes, there are two ways you can go. No. 1, there can be a full winding up of the business of the partnership, in which event the entire business will have to be sold, the liabilities will be satisfied, and the surplus will be distributed, or there will be a buyout, at which some partners are going to continue, the entity is going to continue, and they are going to pay you the value of your interest.

We tried to organize the statute in terms of those two routes so you could look at Section 32 and say: Here is the buyout. That's how it's organized. And 32 tells you at the beginning that it applies if there is no winding up. We thought that that would be a clearer way to lay out what the law is.

Also we have in our Section 32 tried to describe the buyout and to use commonly used terms in the buy and sale of an interest of a small business. Adding that on to 38 would make it much too long, if nothing else.

....

COMMISSIONER H. LANE KNEEDLER: "SECTION 39. RIGHTS UPON RESCISSION OF PARTNERSHIP AGREEMENT FOR FRAUD OR MISREPRESENTATION. If a partnership agreement is rescinded on the ground that it was entered into because of the fraud or misrepresentation of one of the parties, the party entitled to rescind, without prejudice to any other right, is entitled:
"(a) to a lien on, or a right of retention of the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by the party for the purchase of an interest in the partnership and for any capital or advances contributed by the party; and

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

"(c) to be indemnified by any person guilty of the fraud or making the misrepresentation against all debts and liabilities of the partnership."

COMMISSIONER BRADLEY J.B. TOBEN(Texas): I'm looking at the section just read, Lines 10 through 15, which encompass subpart (a). I think I understand that section. The lien is on an amount which remains after third-party liabilities have been satisfied, the partner has gotten back what it kicked in for the interest, and also been returned advances.

if you read that sentence, it doesn’t even make grammatical sense. It's run-on. It's gibberish.

MR. DON WEIDNER: We will take a look at that and try to improve it.

CHAIRMAN BARRETT: Commissioner.
COMMISSIONER BRUCE A. COGGESHALL (Maine): I have a number of questions about this section. First of all, it seemed to me that you ought to have some provisions in here for priority and perfection of a lien. Just to say that he has got a lien doesn't really tell him what he has got. There ought to be some mechanism for perfecting the lien, such as by filing something with the Secretary of State's office, and ought to be a provision that the lien takes priority over whatever it takes priority over. That is really mechanics.

A couple of questions. What if there is more than one party that's defrauded? Do those parties share equally in the lien?

MR. HARRY HAYNSWORTH: You mean equally pro rata or on the basis of their --

COMMISSIONER COGGESHALL: They have equal priorities?

MR. DON WEIDNER: I don't know what the answer to that question is under present law. I could just give you -- a gut reaction would be that as to ratio, what we are doing is giving a partner an opportunity to defraud the partnership agreement, and if two partners -- to rescind the partnership on the ground that it was induced by fraud, and if there are two partners doing that, you might look at their partnership agreement to see what their relative interests are.
COMMISSIONER COGGESHALL: You ought to take a look at it, because it could well be interpreted as the first one to rescind gets alien, and that takes priority over the second one to rescind. That probably is not what you intended.

MR. WEIDNER: We need to know if there is any case law, and I don't know. I'm sorry.

COMMISSIONER COGGESHALL: When he gets a lien, he gets a lien on the remaining assets, which is apparently superior to the claims of the innocent partners who also now are no longer partners in a partnership that they thought they were in. The partnership has been -- just dissolved. It's terminated, I guess, is the correct term. They are no longer partners either.

What happens to them?

CHAIRMAN BARRETT: Response from the committee?

MR. WEIDNER: I'm not sure I understand the question. You, in effect, have levels of victims here.

COMMISSIONER COGGESHALL: Let's say one partner was induced fraudulently to join the partnership by one partner, and you have got a dozen partners.

When the partner that was defrauded exercises his rights under the section, the partnership terminates. The language is, it's void from the beginning.

MR. WEIDNER: I don't think that's the case. It raises a good question. What happens is that the partnership agreement
ceases, and I guess he ceases to be a partner, but that doesn't answer --

COMMISSIONER COGGESHALL: Doesn't the partner --

MR. DON WEIDNER: That doesn’t answer where there is a buyout or a winding up of the business.

COMMISSIONER COGGESHALL: Doesn't the partnership terminate? I think the comments indicate that if it's a fraudulently induced agreement, then it's void ab initio. If that's the case, it is probably void not only as to this partner that’s been defrauded, but as to the whole partnership.

What happens to the people that did not participate in the fraud?

MR. WEIDNER: My understanding is that it was rescinding his part of the partnership agreement -- that as to him, it was being rescinded.

Again, under the old terminology, you follow immediately from any withdrawal of any person.

COMMISSIONER COGGESHALL: That's right.

MR. DON WEIDNER: Saying the partnership is gone and it's entering a winding-up phase. We don't do that now. We say if one person is gone, we try to identify when that happens, and then ask the separate question: Now, does that departure cause a buyout of that one person or does it cause a winding up?
I think under our draft, it causes a buyout. In other words, in 31, if we have done it right in 31, then those ways in which one ceases to be a partner includes the Item 31(9), the rescission of the partnership agreement in accordance with Section 39.

That's how you cease to be a partner under this draft. And the question then is: Are you going to be bought out? Or is there going to be a full winding up of the business?

My recollection, is under 31Y, we do not have rescission under 39, winding up the business. Therefore, we are left to Section 32, the buyout.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER EDWARD I. CUTLER (Florida): I think the draft is correct. The principles that apply to rescission generally would apply here. I don't see any exception.

They also require that the party seeking rescission be able to restore the status quo. If the status quo can't be restored because of a third party's involvement, the court will have to fashion relief around that.

I think it's okay as it is.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): If I understand the reporter, I think the draft does have a problem in that what is being rescinded is the whole agreement, not just a partner's participation in the partnership.
If I understand the reporter correctly, the problem that was raised earlier is raised by the language of rescission of the entire partnership agreement, which would be an agreement of both the victim partner and the innocent partners, if there are such. So, if the whole agreement goes down, we are back into the old type of dissolution this act is intended not to follow. I think the language “rescission of the partnerships agreement”, is not appropriate to that point.

CHAIRMAN BARRETT: The committee will be looking into that issue. Yes.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): A few hours ago, you said that we were burdened in partnership law with language that's 200 years old.

When you pick up and use the word "rescission," you are burdened with language that's 400 years old, and it does imply restoration to the status quo ante for all parties to the agreement, if it's classic rescission. Maybe the Uniform Partnership Act used a term incorrectly if they didn’t mean restoration to the status quo ante.

CHAIRMAN BARRETT: Additional comments.

COMMISSIONER ROBERT J. TENNESSEN (Minnesota): Looking at paragraph (b), I know it's old language, but if the party is standing after all of the liabilities of the third party have been satisfied, and he stands in the place -- how can you stand
in the place of the creditors if you have satisfied all obligations to third parties? Aren't all creditors third parties?

CHAIRMAN BARRETT: Response? Mr. Weidner.

MR. DON WEIDNER: I'm sorry. I'm missing the technical question. This is not just a specific expression of the general idea of subrogation? I’m missing something.

COMMISSIONER TENNESSEN: Maybe I have got the parties wrong. If the person has been defrauded and he goes to paragraph (a) and has his rights, then it says he also stands, after all the liabilities of third parties have been satisfied, in the place of creditors of the partnership for payments made by the party in respect to the partnership liabilities.

Does that mean that he is -- defrauded parties paid all the creditors and now he is in the place of the creditors with regard to the party who defrauded him?

MR. WEIDNER: I think that's the idea. We will take a look at it. That might answer part of the priority, the lien priority question.

COMMISSIONER TENNESSEN: If you could try to make it less obscure than they did 75 years ago, it might be helpful.

MR. WEIDNER: Nicely put. Thank you.

...
COMMISSIONER MORRIS W. MACEY (Georgia): "SECTION 40. RULES FOR DISTRIBUTION UPON WINDING UP."

"(a) Upon a winding up of the partnership business, subject to any agreement to the contrary, the provisions of this section must be observed in settling accounts between the partners.

"(b) The assets of the partnership are:

"(1) the partnership property,

"(2) the contributions of the partners necessary to satisfy all the liabilities specified in Section 40(c).

"(c) The liabilities of a partnership rank in order of payment as follows:

"(1) liabilities owing to creditors other than partners;

"(2) liabilities owing to partners other than for distributions; and

"(3) liabilities owing to partners in respect of distributions.

"(d) The assets must be applied to the satisfaction of the liabilities in order of their declaration in Section 40(b).

"(e) The partners shall contribute, as provided by 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 process, refuse to contribute, the other partner 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.

"(f) An assignee for the benefit of creditors or any person appointed by the court may enforce the contribution specified in section 40(e).

"(g) Any partner or partner's legal representative or assignee may enforce the contribution specified in Section 40(e), to the extent of the amount that the partner has paid in excess of that partner's share of the liability.

"(h) The estate of a deceased partner is liable for the contributions specified in section 40(e)."

CHAIRMAN BARRETT: Thank you, commissioner.

COMMISSIONER LEON M. McCORKLE (Ohio): What is the priority of liability of the partnership to a partner who has dealt with the partnership at arms length?

MR. DON WEIDNER: I assume that that falls under the category on Page 148, subsection (c)(2). That would fall under the category of liabilities owing to partners other than for distributions. That is, we anticipate to continue the dichotomy under state law between a partner engaging with a partnership in a partner capacity as opposed to a partner engaging with partnership in a non partner capacity. We hold open here the
opportunity to have a partner engage in a transaction with a partnership in a non partner capacity. What we have done differently than some would have us do, we leave that partner who has arguably dealt with his partner in a non partner capacity inferior in rank to outside creditors, which is a different approach, I believe, than is taken under RULPA.

COMMISSIONER McCORKLE: May I illustrate what I believe you said with an example. If you and I are partners in an enterprise, the business of which is the sale of jewelry, and because I happen to be licensed to practice law in this state, I furnish legal services to the partnership. My statement for services as attorney to the partnership would rank under (c)(2) and not under (c)(1).

That is, I believe, the answer you gave me.

MR. WEIDNER: That is correct.

COMMISSIONER McCORKLE: That is a result which I do not find attractive.

In (f), you define the assignee for the benefit of creditors. That is to me an archaic term in my state. It hasn't been used since the 1800's.

CHAIRMAN BARRETT: The question, please?

COMMISSIONER McCORKLE: Does it mean a custodian under (f), Page 148(f) -- assignee for the benefit of creditors. Is
that a custodian under the Bankruptcy Code or does it mean the old assignee under probate court?

CHAIRMAN BARRETT: Commissioner Macey.

COMMISSIONER MORRIS W. MACEY (Georgia): I will deal with the second one first.

Assignment for the benefit of creditors is a practice which is frequently used in many, many states in the U.S.A. It may date back many years, but it is presently used as a technique for liquidating a business. One makes an assignment of all the assets to an assignee, who then liquidates the assets and distributes them to creditors.

It's not an archaic term.

COMMISSIONER McCORKLE: There would at least be an alternative term in jurisdictions in which I'm familiar that might cover assignees as well as other possible court-appointed custodians.

COMMISSIONER MACEY: As far as the other is concerned, I guess that's tradition, the relative rank of putting a liability of a partner behind a liability to a creditor. But if you were in a law firm, for example, as contrasted with a sole practitioner, then I think you would come under 1 and not under 2.

CHAIRMAN BARRETT: Additional comments.
COMMISSIONER JOHN A. CHANIN (Hawaii): Subsection (e).

Can the committee explain what it means by, Lines 14 and 15, not being subject to process, refuses to contribute.

And also could you indicate what kind of insolvency you mean. Are we talking about not being able to pay off obligations when they become due, balance sheet test? How is that insolvency to be determined in the context of the so-called winding up?

MR. DON WEIDNER: I don't know the answer to those questions. We didn't look at that language. I don't know the answer. We will look at it, though.

CHAIRMAN BARRETT: Mr. Haynsworth.

MR. HARRY HAYNSWORTH: Those terms, they were left as they were because we weren't aware of any problems with the present wording. I'm not saying that that's the correct decision. I'm just saying that's the way they were left, the way they were.

COMMISSIONER CHANIN: I don't necessarily want to take a page from Bryce Baggett's book because I find that most of those pages are difficult for me to read. But this idea of me going before a legislature and saying to them, "I don't know the answer to that because, frankly, I asked the committee and they told me, they told me essentially it was something that didn't have a problem."
I really do need to know essentially what the thinking of the committee is. You people are obviously the experts in this area, and you need to educate us as to what the analysis is. Whether or not it was a problem for 75 years or not, I really would like to get some kind of feedback from you as to what the thinking is. I think that you do yourselves a disservice when we can't get that kind of analysis.

COMMISSIONER MORRIS W. MACEY (Georgia): To answer your question, what is meant by the word "insolvency" in sub (e)?

COMMISSIONER CHANIN: That's part of the question. What is meant by: How do you determine it, when it is determined --

COMMISSIONER MACEY: Do you want us to spell out that we mean balance sheet insolvency rather than equitable insolvency? I think it means balance sheet insolvency and excess of liabilities over assets.

COMMISSIONER CHANIN: I could look at it and say: Well, gee, maybe it makes more sense for it to mean that I can't pay my debts when they become due.

I don't know. We need to get some guidance, it seems to me. You know better than anyone here, Morris, that you get into a bankruptcy context, and one of the major arguments is whether or not you can make a determination of insolvency. I'm sitting here -- to use the average practitioner who really
doesn't know this area very well and is reading it for the first time, needs some guidance, he is not going to call you up in Georgia and say: Which test of insolvency are we really talking about here and how is it determined?

Do I just say to you, "Gee whiz, fellows, I can't pay my debts. Take a look at my balance sheet." Does there have to be some kind of judicial determination? These are the kinds of questions it seems to me this committee has to take a look at.

COMMISSIONER MACEY: Then your suggestion is that we have a definition of insolvency. Maybe we should look at it.

COMMISSIONER CHANIN: My suggestion is the standard old cliche of, I'm a poor practitioner who is reading this for the first time. I need to be led by the hand, down the path, and you've got to give me the guidance. I don't care how you do it, just give it to me.

CHAIRMAN BARRETT: Commissioner Kneedler.

COMMISSIONER H. LANE KNEEDLER (Virginia): I would like thank Commissioner Chanin for pointing that out. John, in a number of these areas -- you see where we have changed a lot of language. And some areas where we decided not to, there is obviously a reason why we decided not to; and others, we thank you for pointing out our problems.

CHAIRMAN BARRETT: Commissioner McKay.
COMMISSIONER JAMES C. McKAY, JR. (District of Columbia): In a subsection (e) situation where some partners have to pay other partners' liabilities because those other partners are not subject to service, is it clear in the act that the partners who pay have a cause of action against the partners who don't pay? Is that something that has to be implied? You see what I'm saying?

CHAIRMAN BARRETT: Is there a response from the committee?

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner, could you repeat the question again.

COMMISSIONER McKAY: In a subsection (e) situation where you do have some partners who are not paying their share of the liabilities because they are not subjected to service and other partners pay their shares, which they are required to do under subsection (e) is it clear in the act that those partners who pay the others' shares have a cause of action against those other partners who haven't paid, to get that money back that they paid?

MR. HARRY HAYNSWORTH: Subsection (g) is intended to give that right.

McKAY: I guess that would take care of it.
COMMISSIONER BRUCE A. COGGESHALL (Maine): Can you tell me where I look to find out what the liabilities are that are owing to partners in respect to distributions?

MR. DON WEIDNER: How you define the liabilities of the partner with respect to distributions?

COMMISSIONER COGGESHALL: Can I find that in the statute anywhere?

MR. WEIDNER: Not really. That is the end result of the charges of profits and losses.

COMMISSIONER COGGESHALL: Is there a definition of distributions?

MR. WEIDNER: No. We talked about it. We have not yet put any definition of distribution in.

COMMISSIONER COGGESHALL: I think it's unclear what's intended here. As I have read this -- and I have to go back and look at Section 18 again -- but if you have got a situation where one party puts in $100 in cash and another party puts in $100 worth of services and the partnership loses the $100, the guy that put in the services has got to pay the guy that put in the money 50 bucks. Is that what's owing to him for distribution?

MR. WEIDNER: Maybe I ought to say a couple words about what's happening here. A couple of things are happening in now sub (2) and sub (3)
No. 1, we've eliminated the words "capital" and "profits" and replaced it with distributions. More largely, in this act, we have changed the definition of a partner's interest in the partnership. One of the provisions we are about to get to is the provision that says that a partner's assignable interest in the partnership is his right to distributions.

Our sense was that one of the things that's changed since this act was first drafted was the dichotomy between capital and profits. Modern notions are that the two really get folded into each other, that this year's profits, if kept in the partnership, become partnership capital. The focus of an assignable interest in a partnership, and, really, the focus of the partner's right, is to receive distributions, by which we mean simply payments of cash.

How much the payment of cash is depends on the partnership agreement. If there is no partnership agreement, then we go to Section 18 and we start parsing what is a partner's -- the contributions that he is to be credited with, the profits that he is to be credited with the losses that he is to be charged with.

What we are saying here is, as they are winding up the partnership, after liabilities to third parties are also taken into account, the net result will be a distribution of cash,
which is simply a payment of cash. It's primarily Section 18 and here that attempts to get at what's left over.

COMMISSIONER COGGESHALL: It seemed to me that somewhere here you have got to say that in the event of a winding up and termination of the partnership, that each partner is entitled to the amount of his contribution plus or minus the amount of his share of the earnings.

MR. WEIDNER: That's the old way of talking about it.

COMMISSIONER COGGESHALL: You have got to define that as the distribution he is entitled to.

MR. WEIDNER: I don't mean to duck the question, but that's really what we have moved from. The old Section 18 said you had a right to be repaid your contribution.

COMMISSIONER COGGESHALL: All Section 18 says is that he is going to be credited with the amount of his contribution.

MR. WEIDNER: That is what it says now.

COMMISSIONER COGGESHALL: He is going to be credited with the amount of his profit. It doesn't say that in the event of a dissolution, that's what he's entitled to as the distribution.

MR. DON WEIDNER: That's right. We are saying -- that's exactly what we do not intend to say. We do not intend to say that in the event of a winding up of a partnership, you are entitled to a distribution in the amount of your contribution.
You cannot segregate the contribution like that and say you are entitled to be paid. You can say that that's one of the things that will go into the account -- your contributions, your share of profits, your share of losses.

COMMISSIONER COGGESHALL: You could say he's entitled to a distribution equal to the amount that's been credited to his account, to define that as the distribution, and you've got to tie that into this section somehow. Otherwise, what do I -- you say liabilities owing in respect of distributions. What does it mean? You have got to establish that liability somehow by this statute.

MR. WEIDNER: The accounting for the liabilities as among the partners, you're right in the sense that it's taken into account under Section 18. Again, we are following the old structure of the statute. The accounting under Section 18, the rules of Section 18 ultimately have consequence here on liquidation. I may be misunderstanding you. Do not want to say simply that the adding up of these contributions gives you a right to a distribution. Because you have to net out -- enter some other things into the equation.

CHAIRMAN BARRETT: Commissioner over here.

COMMISSIONER EDWARD F. LOWRY (Arizona): I would like to go back to the point that was raised by the commissioner from
the District of Columbia on section (e) on the right of contribution.

As I read that, this right arises only if one of your partners is insolvent or is not subject to service of process and refuses to contribute.

One of the members of the committee indicated that the right of recovery or a cause of action to recover was covered in section (g). But that says that the partner has a right to enforce the contributions.

I don't believe that that's really the language that you would want to use here. That almost sounds like he is becoming sort of an ex officio member of a creditors' committee or something like that.

I would think that the language that should be there, if the comment that I heard earlier is correct, is that it has a right to enforce or a right to recover any of the surplus amount over what he would have otherwise been obligated to pay.

I think using the words "enforce the contribution specified" is very confusing. In other words, "recover" would maybe be the better word to use there. I just suggest that for your consideration.

What I am really more concerned about is what are you really giving this poor fellow in section (g) if you are giving
him a right to recover against somebody who is insolvent or not subject to process?

Is that really what you want to do? If he is insolvent and not subject to process, (g) really becomes meaningless.

CHAIRMAN BARRETT: Any additional comments?

COMMISSIONER CURTIS R. REITZ (Pennsylvania):

Commissioner Lowry, if you have a stone without any blood in it, you can't get anything out of it obviously. If you are a partner and you have a hopelessly insolvent other partner who can't contribute to the paying of the partnership debts, you are not going to get very much other than what you can get out of the insolvency estate.

However, if you have a partner who is not subject to process where the partnership is being wound up, that doesn't mean you can't go where that partner is, and where he is amenable to process, and pursue the partner wherever he can be found and wherever his assets can be found.

So, that is a remedy, but it’s not a remedy available necessarily in the place where the partnership is being wound up.

CHAIRMAN BARRETT: Commissioner Macey.

COMMISSIONER MORRIS W. MACEY (Georgia): That section also gives you the right to recover from a partner who may have...
the money but just doesn't pay. I know a lot of folks like that. We have them in Georgia.

[Laughter]

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER TOM R. MASON (Mississippi): A couple of comments, one with regard to subparagraph (3), the one that we were talking about a moment ago dealing with liabilities in respect of distributions.

Is there some mysterious meaning to "in respect of" that I don't know about? Or does that just mean liabilities owing to partners as distributions?

CHAIRMAN BARRETT: Commissioner Reitz.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I believe what the draft means is distribution of the surplus after the liabilities have been paid, which is the formulation in 31Z.

I think many of the comments that are being made assume that there is a liability for contributions to the partnership. This act does not, as I understand it, impose any liability for distribution of contributions to the partnership. What it does contemplate is that after the liabilities have been paid, if there is a surplus, that's what is distributed in the winding up.
COMMISSIONER MASON: I think I understand that, commissioner. I was only questioning the wisdom of saying owing two partners in respect of distributions, instead of simply saying owing to partners as distributions. "In respect of" doesn't add anything to that sentence, I believe.

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: I think it's a good point, and we will take it up.

COMMISSIONER MASON: With regard to (e), might I suggest that it shouldn't make any difference why a partner fails too satisfy his contributory share -- whether he is insolvent, not subject to process, simply refuses to pay, hides his assets.

Why don't you just leave those qualifications of why he doesn't pay and say if they don't pay and others have to, then the others are entitled to recover against him -- for whatever reason. I don't think adding "insolvency" or "not subject to process" adds anything to that.

CHAIRMAN BARRETT: Yes, commissioner.

COMMISSIONER JOHN P. BURTON (New Mexico): I was going to say something very similar to that I think you said it better and more comprehensively.

I was going to say that 75 years ago there were probably lots of partners in this country who were not subject
to process. In this day and age, with the long arm statute and other similar statutes, I would have to strain real hard to find a partner who is not subject to process in a winding up or contribution situation.

I believe the commissioner from Mississippi has stated the correct -- or has stated one way to go on this. That may be the right way. That is, if they catch one partner, the one partner has to pay it all, and then that partner looks around for contribution.

But I think that is a policy decision this committee needs to address and then this group needs to address. The policy question is: Who has the burden of chasing down all of these various partners and looking for their hidden assets? Is it the creditor or is it the innocent party? Thank you.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER THOMAS S. LINTON (South Carolina): In (g), I don't believe that's properly worded either because the contribution has already been made. It's not enforcing the contribution. It's changed its name. It becomes, in effect, the debt to the partner who paid the excess.

The other question I have is, as far as the partner-who failed to make his contribution being like a turnip, you don't get the blood from it, what is the statute of limitations applying to his capability of -- if you have it enforcing the
contribution. Because there are many people who, on the day that his contribution is due, he is broke, but that doesn't mean he is going to be broke for the rest of his life.

The statute of limitations -- what statute of limitations would apply to an action against him? Point 1.

Point 2. As far as getting it from him when he was insolvent at the time, as I say, doesn't mean he is going to continue to be insolvent. Therefore, you can get a judgment against him and hope that he will pull out and be able to pay you off.

CHAIRMAN BARRETT: Commissioner, do you have a response? Commissioner Jones.

COMMISSIONER THOMAS L. JONES (Alabama): I think contribution is a proper term in the sense that if you have joint and several liability and your creditor sues a deep pocket, you have a right of contribution from your other partners.

As far as the statute of limitations is concerned, it seems to me that your statute of limitations in your state for a debt, whether or not you have taken it to a judgment or just a debt, that statute of limitations would apply in this situation, because there is a subrogation.

CHAIRMAN BARRETT: Mr. Weidner.
MR. DON WEIDNER: I was just wondering if it wouldn't be the statute of limitations on a fiduciary obligation, which might be longer.

COMMISSIONER BRUCE E. MUNSON (Wisconsin): The speaker before last was mentioning the various reasons why the partner would not pay.

Was it the sense of the committee you were going to accept that suggestion and strike those provisions, the ones being insolvent or not subject to process?

Did the committee accept those suggestions? I want to speak against that acceptance, if I might. I thought that the whole purpose --

CHAIRMAN BARRETT: I think you better. I think they were going to accept it.

COMMISSIONER MUNSON: The purpose of those provisions was that you had to -- the partner would have to establish that this particular partner who did not pay was not paying because she was judgment-proof.

You can't just simply say: Well, this person is a tough nut to crack. I will go after the one that's got the ready cash and easily attached assets.

Wasn't the sense of this provision that the insolvency or not subject to process, if, for one reason or other, the
partner is judgment-proof, then you go after the other partners. You weren't going to take that out, were you?

CHAIRMAN BARRETT: Commissioner Jones.

COMMISSIONER THOMAS L. JONES (Alabama): Commissioner, I think we agreed to review it. Your comments are very helpful in doing that. But I think all we agreed to was to review it in light of Commissioner Mason’s comments.

COMMISSIONER MUNSON: When you review it, I think you should have some kind of burden on the partner that before they can go after this easy target, they should -- if a guy is out there who can be sued and you can pry the money loose, they should be forced to take that route before they go after the other partners.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): I would like to follow up on a comment that Commissioner Reitz made. Is it my understanding that this statute does not contemplate that a partner will have to make a contribution to make up an imbalance in the accounts between partners?

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: Again, I'm afraid we may be anticipating Section 18 again. Section 18 states, among other things, that all losses, will be shared equally.
In the hypothetical you gave a few questions ago, I think that is a good question, a classic question -- you say: What happens if you have one partner who contributes $100 of property and the other partner contributes services that are worth $100? And what happens then if that $100 of property gets wiped out somehow?

Under our draft, we have said that -- let's assume it's a plain vanilla 50/50 partnership -- the default rule is that all losses are shared equally, if you will, and I have trouble with the concept, the jargon, the capital losses as well as operating losses are shared equally.

In that event, to answer the question, yes, the service partner would have to contribute that extra 50 bucks.

Having said that much, though, we did not want to set out an absolute rule that every partner has an obligation to make up a negative capital account. We definitely do not want to say that. We have taken a position on the sharing of the losses.

COMMISSIONER COGGESHALL: In the situation we just posed, and under section (e) the service partner would have to make a contribution of $50 -- that's what that's talking about -- to pay the liability owing to partners in respect to distributions.

Commissioner Reitz is shaking his head "no."
CHAIRMAN BARRETT: Commissioner.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Again, I might be quite misunderstanding this draft myself, but as I understand the provisions in (e) and (f), those will apply where the assets of the partnership in the winding up are insufficient to meet the liabilities to third parties. There were third parties, not partners, who are making claims against the partnership.

If you will start with the Category 1 priority creditors. If the partners then have to contribute to pay those debts to third parties, the contribution rules here apply.

If you go down to the Level 2 priorities where you are dealing with debts to partners but not subject to the -- not distributions, but for the kind of third party or arm's length dealing, again, those debts are not capital contribution, are not contribution to the partnership. Those are contract obligations to a partner in the nature of a partnership debt.

Again, if the assets of the partnership are not sufficient to pay the partnership debts, you have a deficit in the winding up. That deficit has to be met. When you go down to the contributions of the partners to the partnership, its at that level, I think, the contribution rule stops.

COMMISSIONER COGGESHALL: I'm confused as to the language of the statute. I guess the committee seems to be also.
It says that in subparagraph (c) the liabilities of a partnership rank as follows. Then in subparagraph (e), it says the partners shall contribute the amount necessary to satisfy the liabilities.

Liabilities clearly include the items listed in 1, 2 and 3.

COMMISSIONER REITZ: If there is a surplus, you get to 3.

COMMISSIONER COGGESHALL: But you wouldn't have to contribute if there is a surplus.

....

COMMISSIONER FRANCIS J. PAVETTI (Connecticut):
"SECTION 41. LIABILITY OF PERSONS CONTINUING BUSINESS IN CERTAIN CASES.

"(a) Unless otherwise agreed, 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.

"(b) If all of the partners or their representative legal representatives assign their interests in the partnership to one or more third persons who promise to pay the debts and who continue the business of the winding-up partnership, creditors of the winding-up partnership are also creditors of the person or partnership continuing the business."
"(c) If the business of a partnership is continued after a person ceases to be a partner, the creditors of the 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 partnership or on account of any consideration promised for that interest.

"(d) This section does not modify any right of creditors to set aside any assignment on the ground of fraud.

"(e) The use by the person or partnership continuing the business of the partnership name, or the name of the deceased partner as part thereof, does not of itself make the individual property of the deceased partner liable for any debts contracted by that person or partnership."

CHAIRMAN BARRETT: Yes, commissioner.

COMMISSIONER JAMES C. MCKAY, JR. (District of Columbia): Is this not applicable to a removed partner, just a retired or a deceased partner? Just because somebody could cease to be a partner by being removed, but you seem to limit it to a retired or deceased partner and exclude the possibility that a partner might be removed.

CHAIRMAN BARRETT: Any comments from the committee?
MR. DON WEIDNER: I think it’s a good point.

COMMISSIONER BRUCE A. COGGESHALL (Maine): How does this work when you have got continuing payments to the withdrawn partner? Does this mean that the creditors have got to be paid before that retired partner gets paid?

MR. WEIDNER: I would think so.

COMMISSIONER COGGESHALL: If that's the case, how does --

MR. WEIDNER: That's consonant with 40. I'm not quite sure where I would pin it here.

COMMISSIONER COGGESHALL: How does the guy that's being bought out ever get paid if you have got a long -- the partnership has got a long-term obligation to the bank, for example.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER MORRIS W. MACEY (Georgia): Wouldn't it be like the principles governing the purchase of shares of stock in a corporation of a shareholder who is being bought out on the installment plan can make payments to the shareholder over a period of time the creditors are getting paid, too. If the company becomes insolvent or goes into bankruptcy, they can't make any more payments to the shareholder. The creditors get paid before he gets any more payments.
If you have that kind of a payout, I'm sure the same principles would apply in a partnership where the partner is being bought out over a period of time.

COMMISSIONER COGGESHALL: Really what we are saying then is that any unpaid obligations to a retired partner are subordinate to claims of ordinary creditors. That's really what we are saying.

CHAIRMAN BARRETT: That's true.

COMMISSIONER COGGESHALL: I'm sure that is the law. That probably, stated that way, would probably make it a lot clearer, what’s intended.

I wonder how you square that with the provision over on Page 124 where deferred payments -- it's the last sentence on Page 124, deferred payments must be secured.

MR. DON WEIDNER: I don't understand the inconsistency. In other words, you can be defeated -- the person being bought out can be defeated by a third-party creditor who is entitled under 40 to prior payment. But if he is, going to be content to walk away from the partnership -- if his partners are permitted to continue the business, promising him that he will be paid at some point in the future, they have to provide some security to back up that payment. That continues the present law under UPA Section 38.

CHAIRMAN BARRETT: Commissioner.
COMMISSIONER BRYCE A. BAGGETT (Oklahoma): A question not of substance but of style and form. Referring to Page 156, Lines 4 and 5. I guess this Uniform Partnership Act was drafted before Gene Burdick was chairman of the Style Committee. He would probably require it to read: The use of the partnership name or the use of the name of a deceased partner as part thereof by the person.

Have you all resisted such clarifying amendments of the UPA because of some affection for its style?

MR. WEIDNER: We were just talking at dinner. We are grateful that Judge Burdick has supplied us with many suggestions that have made this draft a lot smoother. And we were just saying that one of the first things we wanted to do after this meeting was get the resulting draft and send it to him for further changes.

One of the frustrating things is, you have a statute that many of us -- and we spent hours -- there are some of these provisions in here that are unreadable by any of us. We all have our favorites. Section 10 is one of mine. You are dealing with something that is a 19th century, late 19th century animal -- it's a jurisprudence of conceptions. It's very hard to clean it all up. We will keep trying.

COMMISSIONER H. LANE KNEEDLER (Virginia): The answer is that I think what you are seeing, through 33 to 43,

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is, when we went through it the first time in detail, we spent most of our time on the policy issues. When we got through it the second time in detail, I think you found it with 29 through 32, hopefully you found it with 1 through 17, and you will find it now with 18 through 28, the style has been changed dramatically and we will continue that with this.

COMMISSIONER BAGGETT: In this particular section, you haven't styled it yet.

COMMISSIONER ROBERT H. CORNELL (California): Bryce, I would like you to know that our hearts are already warmed by a manuscript of a law review article criticizing what we have done so far for meddling with this wonderful language that's been around for 76 years and everyone understands so well. (Laughter) ....

COMMISSIONER GEORGE H. BUXTON (Tennessee): "SECTION 18. RULES DETERMINING RIGHTS AND DUTIES OF PARTNERS.

"(a) Each partner shall be credited with an amount equal to the cash plus the value of any property he [or she] contributes to the partnership.

"(b) Each partner shall be credited with an equal share of the profits of the partnership. Each partner shall share in the losses, whether of capital or otherwise, of the partnership in proportion to 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 in the ordinary and proper conduct of its business, or for the preservation of its business or property.

"(d) A partner, who, in aid of the partnership, makes any payment or advance beyond the amount of capital agreed to be contributed, must be paid interest from the date of the payment or advance.

"(e) A partner is entitled to interest on capital contributed only from the date repayment should be made.

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

"(g) No partner is entitled to remuneration or services performed for the partnership. A partner is entitled, however, to reasonable compensation for services rendered in winding up the partnership affairs.

"(h) A person may not become a member of a partnership without the consent of all of 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 of the partners. Expulsion of a partner under Section 31(2)
requires the unanimous vote of all partners other than the partner to be expelled. This section does not limit the partnership's obligations to third parties under Section 9."

CHAIRMAN BARRETT: Yes, commissioner.

COMMISSIONER JAMES C. MCKAY, JR. (District of Columbia): Just a quick question. If one partner has 52 percent and the others have 49, they can expel him. That's the way you read a unanimous vote of all the others.

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: I am sorry. The question is, if one has 52 and the other has 48 --

COMMISSIONER MCKAY: Unanimous -- there are five partners. One -- I have 52 percent, the other partners have collectively 48, but they can expel me even though I'm the majority owner of the business.

MR. WEIDNER: The basic model in here is not -- it's an egalitarian model, so it's per capita. The default rules are per capita. One person, one vote rule applies even if one person is a 90 percent partner and the other is a ten percent partner. That's one of the basic differences between partnerships and corporations.

CHAIRMAN BARRETT: Commissioner Kneedler.
COMMISSIONER H. LANE KNEEOLER (Virginia): I would remind you again, it's a default rule. Of course, you can change that by the partnership agreement.

MR. HARRY HAYNSWORTH: There is one other, if I might comment. This would be subject to the fiduciary duty obligations of the partners to one another, subject to the duty of good faith and fair dealing. That would put a limitation on the type of squeeze-out you are talking about.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): Again I raise this question of crediting the partner for the contribution for the profits and losses.

Where does that get credited, just somewhere up in the sky?

MR. WEIDNER: An asset will come in on the asset side. If its coming in is accompanied by a liability, the liability will be entered under the liability account, and any remaining credit of assets over liabilities will be reflected in capital accounts.

In effect, it's the algebra of the double entry system of accounting that is going to flush out in an end product of a balance sheet with a capital account.

Mainly what we have tried to do with these changes -- it's very hard -- we have tried to reflect that today, many
people are more familiar or more used to talking of capital accounts and analyzing capital accounts, and we did not want to go full bore and in the partnership act, in the state act, require people to keep their capital accounts according to the way they are required to under the 704(b) regs for federal income tax purposes. We are sort of softly reforming the language here to more talk about financial rights and obligations in a more current way.

I think the idea of crediting partners with some things and charging them with other things is more consonant with that than the freestanding, "Oh, yes, you will get paid your" -- you can see 18 -- present law says: Yes, you will be repaid your contributions.

That's confusing. What if I paid 100 bucks contribution and the next couple of years I was allocated 200 bucks of losses? It is just misleading to say in the first instance: Yes, you have a right to be repaid your contribution. Again, a lot of places in this act, the act said one thing and then it later said: Well, we didn't really mean it.

What we are going to say is: If we don't really mean it, then let's not say it in the first place.

COMMISSIONER COGESHALL: It would seem to be a simple thing to say that, the partnership would maintain an account
which would be credited with the contributions and credited with shares of profits and charged with losses.

MR. WEIDNER: That’s a good point. It’s really related to, I guess, Sections 19 and 20, when we discuss partnership books and records. And at least up until now, the committee has decided that, yes, it will put in duties to share books and records with your fellow partners, but we did not want to mandate record keeping. We do not have a requirement in here -- perhaps we should -- that any books be kept at all. But if they be kept, we say something about how they be kept. But we don't say that they should be kept in the first place.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER COGGESHALL: Let me go on to just a question at the last two sentences on Page 57, the requirement of unanimous vote for expulsion.

There are a whole bunch of ways to expel partner in Section 31(2). Does this mean, for example, that you need a unanimous vote in order to bring a court action to expel a partner because he's been doing something fraudulent with respect to the partnership?

MR. WEIDNER: I think we have to look at that. At our last meeting, we expanded the expulsion category. Let us take a second look then at this reference now to that category.
COMMISSIONER COGGESHALL: You see that there are some there that would be inappropriate for unanimous approval.

MR. WEIDNER: Yes. I think that is right.

CHAIRMAN BARRETT: Additional comments on Section 18? Are, there any additional comments on Section 18.

We would ask Commissioner Buxton to then read Section 18X, which begins on Page 61.

Sorry. There is an additional comment.

COMMISSIONER BRADLEY J.B. TOKEN (Texas): On page 56 in Line 8, I have worked with this act quite a bit, and it has always bothered me, especially from an accountancy perspective. Why do we always say whether of capital or otherwise? Why don't we just say capital or operating losses?

COMMISSIONER H. LANE KNEEDLER (Virginia): I missed that. 56, Line 8? Is that what you said? 7 and 8?

COMMISSIONER TOBEN: Yes, sir.

MR. WEIDNER: We will take a look at that. A quick reaction is, it sounds like a good suggestion.

COMMISSIONER TOBEN: It seems like it brings it into conformity with modern accounting practice.

On that same page, I think on Line 19, where we are dealing with interest or payments or advances, I think we have to specify at what rate, even if it's a bracketed rate to be left to the enacting jurisdiction.
The same comment then on Line 22, where we are dealing with capital contributions and the interest to be paid.

MR. WEIDNER: Can I ask you a question?

COMMISSIONER TOBEN: Yes.

MR. WEIDNER: Do you think it's appropriate to talk about a, quote, liability to a partner in respect of distributions? You think that's appropriate to call that a liability? We don't do it here in Section 40.

COMMISSIONER TOBEN: I'm not troubled by it at all.

One last comment. I might note, we have, in that matter of interest repayment over on Page 123 in the dissolution sections, bracketed an interest rate, just to keep things uniform.

Then a question. On Page 23, where we are dealing with the return of capital contributions, in the absence of an agreement -- and I realize that this entire session is predicated on the possibility of an agreement otherwise. But just as things stand here, when is that date that is referred to here as the date when the return should be made?

COMMISSIONER KNEEDLER: Are you on Page 123?

COMMISSIONER TOBEN: Sorry. I'm on Page 56, Line 23. Obviously, there may be an agreement. Of course, if we were dealing with winding up, that would be the date -- I suppose the cessation of the partner’s involvement in the partnership that
triggered the winding up under 31Y would be the date. But otherwise, when is that date.

MR. DON WEIDNER: Is that the question, why repayment?

COMMISSIONER TOBEN: How do you pick the date that's referred to on Line 23.

MR. WEIDNER: Assuming that would be some date fixed between -- either a contribution for a fixed term. I. mean, the idea would be -- I assume the idea would be that like the services -- the services partner, sort of in the operating dimension, time of the partnership, that we will not assume a separate dollar right to be compensated for services because we assume that the profit share is compensation for the services.

I take this to mean that, so, too, with the service supplier, the service supplier has a profit share that compensates them for the use of capital and that this drops out when that was to drop out.

COMMISSIONER H. LANE KNEEDLER (Virginia): We will look at that.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): Wouldn't that date always be when a partner withdraws or otherwise ceases to be a partner -- expulsion? Because the partnership can go on. You can't date it from winding up, necessarily. This is his right to interest on his capital that you are talking about. He
is not entitled to a return of his capital until that time, is he? But he is entitled at that time.
Wouldn't that always fix the date.

COMMISSIONER CURTIS R. REITZ (Pennsylvania):
Commissioner Baggett, on a buyout, a partner who ceases to be a partner is not entitled to his capital. He is entitled to his equitable share of the value of the partnership, and there are the valuation provisions in the buyout sections that describe what that value is.

It turns on how successful, or unsuccessful the partnership has been. In buyouts, the value is set either as the book value or going business -- liquidation value or going business value with all of that language we read earlier.

In the winding up, where the partnership is being wound up, each partner is entitled to his or her share of the surplus.

COMMISSIONER BAGGETT: When you refer to a buyout, is there a statutory buyout in this default statute, or are you assuming the existence of a partnership agreement providing for buyout?

COMMISSIONER REITZ: These are the default buyout provisions in the draft.

CHAIRMAN BARRETT: Additional comments? Are there any additional comments.
Commissioner do you have a question? If you do, could you move to the microphone.

A COMMISSIONER: I think you got it. I just wanted to know where the winding up was.

....

COMMISSIONER JOSHUA M. MORSE (Florida): ... I do want to go back to the question of liabilities and distributions and winding up.

I'm not sure that I understood Mr. Weidner correctly, but did the committee decide to take out the phrase in Line 3 on Page 148, "liabilities owing to partners in respect to distributions" and simply say "distributions owing to partners"?

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: No. 1, I think it was said that we would look at it.

COMMISSIONER MORSE: I agree with Commissioner Reitz as to what the act ought to say, but I don't find in Section 40, the rules for distribution on winding up, that the partners are only entitled to the remnants that are left after preferred creditors are paid.

COMMISSIONER CURTIS REITZ (Pennsylvania): I think it is 31Z, paragraph (a).

COMMISSIONER MORSE: That's what I was looking for.

....
RIGHTS OF PARTNERS TO OBTAIN INFORMATION.

"(a) The partnership books and records, if any, shall 
be kept at the principal place of business of the partnership.

"(b) Partners and their agents and attorneys may have 
access to partnership books and records. Former partners may 
have access to books and records pertaining to the time when 
they were partners. A partnership must provide the opportunity 
to inspect and copy books and records during ordinary business 
hours. A partnership may impose a reasonable charge, covering 
the costs of labor and material, for copies of documents 
furnished to a partner.

"(c) Partners, and the legal representative of any 
deceased partner or partner under legal disability, shall have 
the right, to the extent just and reasonable, to true and full 
information concerning the partnership."

CHAIRMAN BARRETT: Is there any comment on Section 20? 
Any comments on Section 20?
Commissioner.

COMMISSIONER CARLYLE C. RING (Virginia): I'm a little 
puzzled on Line 18, the phrase "to the extent just and 
reasonable."

Why wouldn't a partner have a right to true and full 
information without the qualification?
MR. DON WEIDNER: I think that's a good question. It's a basic policy question. Let me make the question, if I could, just a little bit larger to flag what we have done.

Under this statute, we have said in Section 4X that unless specifically listed in 4X, a rule governing the relation of the partners among themselves in the statute is subject to a contrary agreement by the partners. The agreement is supreme unless otherwise noted.

Section 20 is not listed in 4X. So, putting it together, we are saying, I think, that if the first -- tacitly saying that if the agreement waives all right to access to partnership books, the agreement is enforceable.

And then, second, we do add this language, "to the extent just and reasonable."

They could be viewed as presenting a basic policy question.

COMMISSIONER RING: You have a general provision in this act that subjects everything to good faith. Good faith has a general standard, apparently, from the way you have described it, of fair dealing as well as honesty.

If you struck out that clause, you would still have the obligation of good faith. If a partner were trying to do something that was to get information contrary to his obligation
of good faith, you already have that built in. I don't think you need it, and it creates confusion.

COMMISSIONER THOMAS L. JONES (Alabama): Commissioner, we had a good faith test in here at one point, and we were requested to define what good faith meant. We draw this route, just and reasonable, to make it analogous to the right to inspect the books of the corporation, where the request and purpose for that request has to be reasonable as far as time is concerned and perhaps for a reasonable purpose.

COMMISSIONER ROBERT H. CORNELL (California): I believe one of the reasons the committee put this in was to limit the harassment or the undue burden of requests of a partnership to be furnishing information, or the amount of information. And the extent of good faith on the part of the requesting party would not necessarily go to the representatives. There may be another, more artful way of doing that, if anyone has a suggestion.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): Shouldn't there be a division between the duty -- Baggett of Oklahoma. Won't this be this solved by dividing the duty to furnish information and the right to inspect and copy.

There should be an unlimited right to inspect and copy during regular business hours. The duty to furnish information on the part of the continuing partnership or continuing partners
might be something that needs some words – the burdensomeness.
But as far as inspecting and copying during reasonable business
hours, what good reason could we give for refusing?

MR. DON WEIDNER: I believe the draft makes the
distinction you suggest. Isn't books and records under (b)--

COMMISSIONER BAGGETT: You don't say in (c) that this
is a furnishing obligation. You changed "duty" in the title to
"rights." You just haven't followed through down in subsection
(c) by referring to the duty to furnish information, and you've
changed it from a duty to furnish to a right to receive. But you
haven't made it clear that the just and reasonable limitation is
on the duty to furnish of the continuing partnership, not the
right to receive.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER EDWARD I. CUTLER (Florida): I can think
of one instance where it would be perhaps unreasonable for a
withdrawing partner to get all of the information -- as, for
example, he is going into competition with his former partners.
We need some limitations there. It may be that just and.
Reasonable is an appropriate limitation. Good faith too. But I'm
not sure good faith would be enough. I think you should make the
restriction at least as strong as you have made it.

....

FIDUCIARY DUTIES OF A PARTNER. partner's only fiduciary duties are the duty of good faith and fair dealing and the duty of loyalty [and the duty of care] set out in this section.

"(a) A partner has a duty of good faith and fair dealing towards the partnership and the other partners in all matters related to the formation, conduct or liquidation of the partnership. This general duty of good faith and fair dealing may not be varied by agreement, but the parties by agreement may identify specific conduct that does not violate the general duty of good faith and fair dealing. A partner shall not be considered to have violated the general duty of good faith and fair dealing merely because the partner's actions furthered that partner's individual interest.

"(b) A partner has a duty of loyalty to the partnership and the other partners that is limited to the following:

"(1) to account to the partnership and hold as trustee for it any profit or benefit derived by the partner without the informed consent of the other partners, from any transaction connected with the formation, conduct, or liquidation of the partnership or from any personal use of partnership property;
"(2) to refrain from dealing with the partnership as, or on behalf of, an adverse party without the informed consent of the partnership; and

"(3) to refrain from competing with a partnership without the informed consent of the partnership.

"This Section 21(b) does not preclude a partner from purchasing the assets of the partnership in a foreclosure sale or upon liquidation of the partnership.

"(c) [a duty of care rule is under study ]

"(d) This Section 21 applies also to the personal representative of a deceased partner or the legal representative of any other partner engaged in the liquidation of the affairs of the partnership as the legal representatives of the last surviving partner."

CHAIRMAN BARRETT: Comments on Section 21? Commissioner.

COMMISSIONER RICHARD L. MORNINGSTAR (Massachusetts): I was somewhat concerned by the comments about the duty of care standard. It seems to me, if courts are moving towards a duty of care standard with respect to closed corporations, it is even more justified with respect to partnerships.

A gross negligence standard, which was suggested in the comments, just doesn't do it. I would really hope that the committee would consider a less restrictive standard, possibly
with a harder, stricter burden of proof, like clear and convincing evidence, or something. I think it needs a lot more consideration.

COMMISSIONER WILLIAM C. GARDNER (District of Columbia): "SECTION 22. REMEDIES OF PARTNERS. A partner may bring an action for legal or equitable relief, including an accounting as to partnership affairs, to:

"(1) enforce a right of a partner specified in Section 18;

"(2) enforce the right to obtain the fair market value of a partner's interest in the partnership as provided in Section 32(a);

"(3) compel a winding up of the partnership business as provided in Section 31Y.

"(4) to enforce a right of a partner under the partnership agreement; and

"(5) to otherwise protect the rights and interests of a partner."

CHAIRMAN BARRETT: Are there any comments with respect to Section 22? Seeing none, Commissioner Gardner, if you could read Section 23, please, beginning on. Page 79.

COMMISSIONER GARDNER: "SECTION 23. CONTINUATION OF PARTNERSHIP BEYOND FIXED TERM."
"(a) If a partnership for a fixed term or particular undertaking is continued after the termination of the term or particular Undertaking without an express agreement, the rights and duties of the partners remain the same as they were at the termination, so far as is consistent with the partnership at will.

"(b) 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."

CHAIRMAN BARRETT: Any comments with respect to Section 23? Any comments with respect to Section 23?

If not, Section 24 has been deleted. We will turn now to Section 25 commencing on Page 80, and ask Commissioner Hershman to read that section.

COMMISSIONER MENDES HERSHMAN (New York): "SECTION 25. PROPERTY BECOMES PARTNERSHIP PROPERTY.

"(a) Property transferred to or otherwise acquired by a partnership becomes property of the partnership rather than of the partners individually.

"(b) A partner, subject to the provisions of this [Act], has an equal right with other partners to possess
partnership property for partnership purposes but no right to possess the property for any other purposes.

"(c) A partner has no right in partnership property that can be transferred, either directly or by attachment or execution. If partnership property is attached for a partnership debt, the partners, or any of them, or the personal representatives of a deceased partner, may not claim a right under homestead or exemption laws. Partnership property is not subject to exemption or allowances or spousal rights on the death of a partner.

"(d) The right to possess partnership property vests in the legal representative of the last surviving partner. A surviving partner, or the legal representative of the last surviving partner, has no right to possess the partnership property for other than a partnership purpose."

CHAIRMAN BARRETT: Comments. Yes, Commissioner.

COMMISSIONER BRADLEY J.B. TOBEN (Texas): Looking at Page 81, Line 14. Can we replace the word "directly" with "voluntarily"? I think that is what's intended.

CHAIRMAN BARRETT: Could you repeat that.

COMMISSIONER TOBEN: I'm proposing that the word "directly" be replaced with the word "voluntarily," since that's what is intended. It's all juxtaposed against involuntary transfers.
MR. DON WEIDNER: It sounds good to me, a good suggestion.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): Shouldn't it be continued and make it read either voluntarily and involuntarily, and take out the attachment and execution language, since that’s really the juxtaposition that you mean.

CHAIRMAN BARRETT: Additional comments?

COMMISSIONER TOBEN: I agree, if I may, with Commissioner Baggett on that. It's much more generic, and it's always dangerous to restrict yourself in regard to creditor remedies to mention merely attachment or execution, because there are other like processes in various jurisdictions that would be uncomfortable with the restriction of the language to attachment or execution.

I think "voluntarily or involuntarily" would be the best generic language to use there.

MR. DON WEIDNER: The committee seems to be responding very favorably to both changes.

CHAIRMAN BARRETT: Additional comments.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): Is it intended that subsection (c), Page 81, Lines 12 through 22, is one of those sections that cannot be varied by agreement under 4X because it relates - it might deprive third parties of rights...
they have under this act, i.e., creditors who are going to attach?

Is it your intention that this not be subject to -- because I think one of the first things a partnership agreement would do would be to bury this and say that Partner Jones is still going to own Blackacre even though his house is on it and he is going to claim homestead. But since you have got that thing about the third-party rights, which presumably includes creditors back in 4X(b), that might be thought to be one that can't be varied.

CHAIRMAN BARRETT: Any comments from committee members?

MR. DON WEIDNER: I would guess setting that aside would be a little bit like saying they could cause a winding up at will, wouldn't it? This is really designed, this whole provision is to state directly in more plain English the consequences of the old tenancy and partnership, and, again, to provide stability to the partnership so that the separate creditors of individual partners couldn't swoop down on the partnership and pick up its individual assets.

COMMISSIONER BAGGETT: May I pose my question --

MR. DON WEIDNER: It's really protective of the separate creditors.

COMMISSIONER BAGGETT: May I pose my question as a hypothetical? If Farmer Jones, with 160 acres that's his
homestead and exempt from execution of creditors, offers to contribute to a partnership to raise pigs on the south 40 or something, are you saying they couldn't have a partnership agreement to keep his homestead protection as to that property as part of the partnership agreement? Would 4X preclude it?

MR. DON WEIDNER: That would be a matter of the homestead law, wouldn't it? Can you just draft yourself out of it? Is that your question?

COMMISSIONER BAGGETT: You here are taking away the homestead rights. You're saying that a partner can't claim the homestead right.

What I want to know is, can I, by partnership agreement, get out of the provision of 4(c) so it can be claimed? You haven't made it very clear over here on Page 12 when you said a partnership agreement may not deprive third parties of rights they have under this act.

CHAIRMAN BARRETT: Commissioner Cornell.

COMMISSIONER ROBERT H. CORNELL (California): I think we ought to take a look at that. I know there are a lot of family equity partnerships in which parents help the children acquire a home, and I see no reason why you could not have a partnership and still have homestead rights in that property. I think we ought to take a second look at it -- although I would be willing to hear anything to the contrary.
COMMISSIONER EDWARD I. CUTLER (Florida): I would like to raise a question. Can you have homestead rights in property you don't own? According to this, we are dealing only with partnership property. It's been transferred to the partnership. I don't think you can claim individual rights to homestead in partnership property. If you are talking about some division of the property, that's a different question, maybe even of estates in the property.

The way this reads, it's simply that in partnership property, you can't claim homestead or exemption. That means the property of the partnership, not the property of the partner.

MR. WEIDNER: I would just like to confirm the point, confirm what Commissioner Cutler said. What we are trying to do is make even more clear the present rule that cuts the individual partner off from rights in the partnership property itself. For this purpose, we have got a corporate model. The property becomes partnership property, it becomes vested in the partnership, and the only right the individual partner has is his right to distributions.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): But you're answering my question in a circle. Admitting that the default agreement that you have drawn for me in this section says that that my property becomes a partnership property -- my question is, can I draft out of it, or does 4X prohibit it? Can I draft
out of it so that Farmer Jones continues to have title to the
land in his own name and he contributes only the use of 40 acres
of it to the partnership and he doesn't transfer title? My
question is, can I draft out of it, or have you barred it?

CHAIRMAN BARRETT: Commissioner Jones.

COMMISSIONER THOMAS L. JONES (Alabama): That is the
question we are going to look at. I think Commissioner Cutler is
right. You can waive your homestead, but what you're asking is,
can you draft around that or get back out of this so you can
reclaim it as a homestead.

COMMISSIONER BAGGETT: His title laws in Florida may so
provide, but there are other states where if you are in
possession of it, your lack of record title is irrelevant. Your
possession is sufficient.

....

NATURE OF PARTNER'S ASSIGNABLE INTEREST IN THE PARTNERSHIP. A
partner’s assignable interest in the partnership is the
partner's share of the distributions. The interest is personal
property."

CHAIRMAN BARRETT: Are there any comments on Section
26? Yes, commissioner.
COMMISSIONER BRUCE A. COGGESHALL (Maine): I would just rise to say, again, I think that there ought to be a definition of the term "distributions."

....

COMMISSIONER H. LANE KNEEDLER (Virginia): "SECTION 27. ASSIGNMENT OF PARTNER'S INTEREST.

"(a) The assignment of a partner's interest in the partnership:

"(1) is permissible, in whole or in part;

"(2) does not of itself cause a winding up of the partnership business;

"(3) does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to participate in the management or conduct of the partnership business or affairs, to require access to any information or an account of partnership transactions, or to inspect the partnership books; but

"(4) the assignee is entitled to receive, in accordance with the assignment, the distributions to which the assignor would otherwise be entitled; and

"(5) upon assignment, the assignor retains all the rights and obligations of a partner other than the interest in distributions.
"(b) In an event causes the winding up of the partnership business under Section 31Y, the assignee is entitled to receive, in accordance with the assignment, the net amount otherwise distributable to the assignor. The assignee may require an account only from the date of the last account agreed to by all of the partners.

"(c) Upon receipt of notice of an assignment, the partnership shall implement the assignee's rights under this section."

CHAIRMAN BARRETT: Are there any comments with respect to Section 27? Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): A couple of minor things. In Line 24 on Page 84 and on Line 4 on 85, I would suggest that we change the language "in accordance with" to "to the extent provided in." I think that's what's intended.

CHAIRMAN BARRETT: Comments from the committee? It seems to be considering it.

COMMISSIONER COGGESHALL: My more substantive comment is, in subparagraph (a)(3), why is it that an assignee has no right to obtain any information whatsoever?

Suppose I am a bank that's taken an assignment for collateral. Why aren't I entitled to go to the partnership and say, "When is the next distribution going to be made," or, "Why don't I have the right to sufficient information to determine
that the distribution that was made to me was the correct amount?"

CHAIRMAN BARRETT: Mr. Weidner.

MR. DON WEIDNER: I think that is an excellent policy question. The Texas statute provides that assignees do have inspection rights. There was discussion in the committee about whether the lack of information rights was too traditional.

I'm the wrong person to defend that rule. The sense was that the assignee could be very intrusive as to partnership affairs which are --

COMMISSIONER COGGE SHALL: I can see a difference between precluding the assignee from interfering with management affairs, between that and not giving them any information.

COMMISSIONER FRANCIS J. PAVETTI (Connecticut): I think in that session, what we gave consideration -- the assignment is not consented to by the other partners. It can be done, that -- the total volition of the assignor or partner. Therefore, the assignee, if he wants that information, should have that as part of his contract with the borrower to furnish that information. That partner still has those rights to get information, even though he has assigned his interest. So, it would be incumbent upon the bank to make that a requirement of its borrower to furnish that information.
COMMISSIONER COGGESHALL: That's well and good. You might put it in the agreement between the partner and the bank. But the partner may be long gone. I may be the bank to collect my money. That's my source of recovery. How do I get that information?

COMMISSIONER PAVETTI: You get it as of the last account.

COMMISSIONER COGGESHALL: Thanks. I really don't think that's adequate.

MR. HARRY HAYNSWORTH: Would you be willing to accept limitations on the right to the information? In other words, that it has to be for a purpose relating to the assignment.

COMMISSIONER COGGESHALL: Sure.

MR. HAYNSWORTH: And not just not getting information as a partner could get information.

COMMISSIONER COGGESHALL: Sure. That's the whole point of my remark.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Mr. Chairman, it may be useful here to keep in mind what Article 9 of the UCC says on getting information in a secured transaction. The information is only available by law from the borrower, not from the third party.

CHAIRMAN BARRETT: Additional comments.
COMMISSIONER BRADLEY J.B. TOBEN (Texas): Mr. Chairman, I fully support the comments of the commissioner from Maine. The reason I came to the mike was because I am from Texas, and in Texas we do provide for a right of inspection by the assignee. It has never, to my knowledge, caused any type of difficulty at all. It would be very burdensome to tell the assignee to go back to the assignor to get the information. The assignor may not even care or have any reason to get that information. That's not a very easily judicially enforceable right of the assignee.

If I can share our Texas experience, I will simply say that it causes no difficulty. It seems almost patently unreasonable to deprive the assignee of the basic information needed to monitor the assignee's interest.

I have one other comment, though, in addition to that. On Page 85, Line 7, I think the words "are made under Section 22" should be added, because you could be looking at a situation where there was an account by agreement several years ago and there has since been a Section 22 account.

Certainly in that case, I don't think that the assignee -- go to the other side now -- should be able to look for an account going all the way back to the time of the agreed account when there has been an intervening Section 22 account.
CHAIRMAN BARRETT: Any comments from the committee? We will look at that.

....

COMMISSIONER LEON M. McCORKLE, JR. (Ohio): Thank you. With respect to Lines 20 and 21, Page 84, I argue in support of the position which the committee has taken. The special nature of a partnership, it seems to me, ought to have some limitations on the amount to which a partner acting alone can bring a third party into the records of the partnership.

And the only example I have heard given to you is one of a creditor who happens to be an assignee. It would seem to me that creditor can make contractual provision for the information it desires.

Again, I think the position which the committee has taken is the one I would urge you to continue to take with respect to this particular section.

CHAIRMAN BARRETT: Thank you. Commissioner.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): On the same subject, I think the committee could serve the issues that are being raised here well by dividing up access to information about financial matters to which the creditor, who the assignee is most likely to be -- and it may be an involuntary rather than a voluntary creditor, or an involuntary assignment -- as distinguished from other matters of the partnership.
If the FDIC takes over my law partner’s partnership interest, I don't mind telling them about the accounting, but I don't want to tell them about the professional affairs of my law partnership.

Could you not divide up -- what they are entitled to access and information of, but not all, about the partnership?

COMMISSIONER H. LANE KNEEDLER (Virginia): "SECTION 28. PARTNER'S INTEREST SUBJECT TO CHARGING ORDER.

"(a) On application to a court by any judgment creditor of a partner or partner’s assignee, the court that entered the judgment, or any other partner or assignee with payment of the unsatisfied amount of the judgment debt with interest thereon; and may then or later appoint a receiver of the debtor's share of the distributions due or to fall due to the debtor in respect of the partnership, and make all other orders, directions, accounts and inquiries the debtor might have made or which the circumstances of the case may require.

"(b) The charging order constitutes a lien on the judgment debtor's assignable 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."
"(c) The interest charged may be redeemed at any time before foreclosure by the judgment debtor or:

"(1) with separate property, by any one or more of the partners, or

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

"(d) This [Act) does not deprive a partner of any right under the exemption laws, with respect to the partner's interest in the partnership.

"(e) This section provides an exclusive remedy by which a judgment creditor of a partner or a partner's assignee may satisfy a judgment out of the judgment debtor's assignable interest in the partnership."

CHAIRMAN BARRETT: Are there any comments with respect to Section 28? Commissioner.

COMMISSIONER BRUCE A. COGESHALL (Maine): In the redemption provisions, was any thought given to any ordering of priority on the redemption? Does the judgment debtor have first call on the partnership interest, and then, after he doesn't redeem, then one of the partners can redeem? In other words, is everybody entitled to rush at it, and whoever gets there first gets to buy that partnership interest?
CHAIRMAN BARRETT: Response from the committee.

Commissioner Macey.

COMMISSIONER MORRIS W. MACEY (Georgia): Are you asking about a system of priority in the event of the insolvency of the partnership and a system of distribution?

COMMISSIONER COGGESHALL: No. We are talking about when a partnership interest is subject to a charging order and there is an order of foreclosure, the statute says that it may be redeemed either by the judgment debtor --

COMMISSIONER MACEY: May be redeemed by the partnership interest?


COMMISSIONER MACEY: Go ahead.

COMMISSIONER COGGESHALL: My question is, is there any priority in the right to redeem or can it be redeemed by whoever gets there first?

You have three categories of people here that can redeem -- the judgment debtor himself, any one of the other partners, or the partnership.

MR. HARRY HAYNSWORTH: I was going to say that I would have thought that the way that it's listed would give you the order of priority. But we did not address that --
COMMISSIONER COGGESHALL: I don't think it necessarily follows that the order of listing gives you the priority. I think if it is intended, it ought to be spelled out.

MR. HAYNSWORTH: I think we should spell it out, yes.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER BRADLEY J.B. TOBEN (Texas): The charging order constitutes a lien on the partner’s interest. Was any thought given by the committee to any method of perfection of that lien? Because, of course, it would not be apparent to a later party dealing with a partner as a potential assignee. I have, if I am an assignee, no way of knowing that this thing is subjected to this type of lien. There should be at least, it would seem, some rudimentary perfection method provided.

CHAIRMAN BARRETT: Response from the committee.

MR. DON WEIDNER: I think it’s a good question. There are cases that have said that serving the order on the partnership fixes priority. I don't know ultimately how you should work out a UCC -- I think we haven't really discussed out the relationship between the UCC filing and the charging order remedy and the exclusivity rule here.

There are also cases that allow you, to establish a security interest in a partnership interest through a UCC filing. I think that's something we need to talk a little bit more about.
COMMISSIONER TOBEN: Very fine. I have a comment. For my own edification, on the same page, Line 26, we speak of a foreclosure of a charging order. In Texas, we call the charging order a turnover order. It means that the distributions have to be forwarded to the judgment creditor until the judgment is satisfied.

What do you mean, by foreclosure of this interest? I can't think how this interest can be foreclosed upon. The distributions simply go to the receiver.

MR. WEIDNER: The idea is that when you get the charging order, you get the assignable interests in the partnership. That is the right to distributions. If the partnership at the extreme has a lot of capital and isn't making distributions, then at some point you say: Well, the charging order is not effective unless it's foreclosed on. It's like a receivership. You can have a receivership to collect rents from a property pending foreclosure and ultimately have the asset foreclosed on to have it generate some cash. That's what we anticipated, that the charging order remedy wouldn't be a complete assignment, but it could result in an assignment of the partnership interest itself. And to recollect a provision we went over earlier today, if the partnership is an at-will partnership, then the foreclosure of the charging order affects
an assignment to the creditor, and under 31Y the creditor has a right to cause a winding up of the partnership.

That's the rule in present law. A lot of people don't know that you can really get in and force a liquidation of the partnership by getting the charging order remedy.

COMMISSIONER TOBEN: I'm not sure if I understand that. But if I am holding a charging order in Texas, I am either going to hold it until I get satisfaction, or if I'm not getting any distributions on account of it, I will sell my judgment and the order that I got underneath of it. I'm not going to foreclose upon it. I am just going to sell it.

MR. WEIDNER: You you might be missing an opportunity.

COMMISSIONER TOBEN: Well, I can't imagine anybody who would buy this type of interest at foreclosure or why a judgment creditor would want to foreclose upon it. Why not just sell it like you would any other judgment --

MR. WEIDNER: You would get the charging order and could wind up with a conveyance of the interest, then apply to the court for a winding up of the partnership, the liquidation of its assets, so you would be paid, either you or the person you would sell your judgment to.

COMMISSIONER FRANK F. JESTRAB (North Dakota): I'm not sure how this works, and I would like to inquire. If you say you are going to foreclose, for example, on a law partnership, if
you don't get a distribution -- would a law partnership be covered by this act? No question about that, right? You get a charging order on the partner's share

MR. DON WEIDNER: There may be some question about the extent to which you can sell interests in law partnerships to non-partners. I would not assume that the same rules would apply to a law partnership.

COMMISSIONER JESTRAB: That is whether there would be any difference. You can't sell it. I mean, who would by it? If you foreclose on it, all you are going to get is some furniture and maybe some receivables.

Is that the way that's going to work?

MR. WEIDNER: I would think yes, that, in effect, can professional -- notions inherent in the legal profession would preclude the sale of part of the assets.

COMMISSIONER JESTRAB: The assets? Are you talking about the capital?

MR. WEIDNER: Work in progress.

COMMISSIONER JESTRAB: But not receivables.

MR. WEIDNER: Right.

COMMISSIONER JESTRAB: Am I right about that? I don't know.

MR DON WEIDNER: That's my understanding.

CHAIRMAN BARRETT: Commissioner Macey.
COMMISSIONER MORRIS W. MACEY (Georgia): You get an interest in the accounts receivable -

COMMISSIONER JESTRAB: And the furniture.

COMMISSIONER MACEY: And the furniture. I suppose of the partner's interest, of the partner's draw. If you got an assignment of the partner’s interest, you got an assignment of everything he had. If he gets a draw every month, you get his draw.

COMMISSIONER JESTRAB: Plus his share of whatever, the office bank account.

COMMISSIONER MACEY: You wouldn't have any rights to participate in the partnership. You get his interest.

...

COMMISSIONER H. LANE KNEEDLER (Virginia): Thank you, Mr. Chairman. We were handed a note from a member of the Style Committee who reminded me that two of the miscellaneous provisions at the back of the act, beginning on Page 162, are really not boilerplate and should be read.

So I'm going to ask you to look at Section 43Z on Page 162, the severability clause. Part (a) really is boilerplate, but part (b) is not, so let me read them both.

"(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."

Just by way of comment, if you look at the comment 
quickly, that came from UCC Section 1-104.

CHAIRMAN BARRETT: Commissioner.

COMMISSIONER JAMES C. McKAY, JR. (District of 
Columbia): I really think you ought to seriously consider 
deleting (b), because, No. 1, it is not a severability clause. 
It doesn't belong in the severability section. It's a rule of 
statutory construction. And our Rule 23 says what the 
severability clause should be, and that’s (a).

If you want to make it another section, rule of 
statutory construction, I would really make it clear that it 
really adds nothing to the act. I think you ought to take it 
out.

....

Commissioner Kneedler, if you would proceed to read 
Section 46.
COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I believe this is the final section.

"SECTION 46. APPLICATION TO EXISTING RELATIONSHIPS. 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."

CHAIRMAN BARRETT: Are there any comments with respect to Section 46?

Seeing no comments, Commissioner Kneedler.

COMMISSIONER KNEEDLER: Mr. Chairman, I would just like to take a moment and thank those members of the conference who came here this evening to help us work through this final first reading of the act. We very much appreciate it. Thank you.

CHAIRMAN BARRETT: Mr. Chairman, the Committee of the Whole rises and reports that it has had under consideration the Uniform Partnership Act, has made progress, and asks leave to sit again.

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February 22, 1990

Harry J. Haynsworth, IV
University of South Carolina
School of Law
Columbia, SC 29208

Re: Proposed RUPA Changes in Area of Dissolution of Partnerships

Dear Harry:

As you are aware John Small has appointed a Subcommittee of the Partnership Committee to review and comment upon the draft RUPA. The hope is that we can avoid some of the problems that existed when RULPA was proposed by the Commissioners without sufficient input from the practicing bar. John has asked me to chair that Subcommittee.

When we originally discussed this matter we assumed we had a full year to comment on the draft, we plan to have a workshop at the April meeting in Boston. However, we understand there is a meeting of the NCCUSL drafting committee on February 23-24, and felt we should get you preliminary comments concerning the proposed draft's changes dealing with partnership dissolutions.

The principal concern of the Subcommittee with regard to the draft RUPA provisions dealing with the changes in partner relationships has to do with the attempt to abandon traditional language. It is our feeling that abandoning the well worked terminology -- dissolution/winding-up/termination -- will generate untold amounts of confusion, litigation and unexpected results. In the short period of time available to us if we are to be useful for your considerations on February 23-24, we did not have the opportunity to write a scholarly work on the subject. Instead, set forth below in outline form are our thoughts on why the traditional terminology should be retained, assuming modifications are made to the UPA provisions along the lines suggested in the ABA White Paper published two years ago. With apologies for our brevity and probable omissions of several other important points, our comments are as follows:
A. The concepts involving the notion of dissolution are well understood by practitioners and are the basis for countless agreements and court decisions. For example, enclosed is a copy of a recent bankruptcy case out of Texas -- In Re: Stanley-Southwest Investments, Inc. which contains a very cogent discussion of the three stages of a partnership's end phase.

B. The term "dissolution" is perfectly consistent with the notion of a partnership as an entity. For example, Delaware Corporation Law Section 278 contemplates dissolution of a corporation followed by a winding-up phase. The Model Business Corporations Act, Sections 82 et seq., also contemplate dissolution of a corporation. Article 8 of RULPA provides for dissolution of limited partnerships. Certainly we all agree corporations and limited partnerships are entities.

C. The continued use of the word dissolution is not inconsistent with providing some continuity of life for the partnership, even though an event of dissolution occurs. RULPA Article 8 contemplates "avoiding dissolution" by taking action subsequent to an event of dissolution to keep the partnership alive. Delaware's RULPA, Sections 17-801; 17-803; and 17-203, provide an even sharper statement of the partnership's continued existence after dissolution. Delaware Corporations Code Section 311 has a similar concept of "undoing" a dissolution at any time during a period of three years after voluntary dissolution. California Corporations Code, Section 2000 et seq., also provides a mechanism whereby 50% or more of the shareholders desiring to continue a corporation's existence can undo a dissolution. This approach is more consistent with our understanding of what business people expect to happen if there is a change in the composition of the general partners of a partnership.

D. The vast majority of instances where the general partners would not desire a partnership to end as a result of a withdrawal, or admission of a new partner, can more easily be handled by following the California format in its UPA as follows:

Section 15031: "Dissolution is caused: ... (7) By withdrawal of a partner or admission of a new partner unless otherwise provided in an agreement in writing signed by all of the partners, including any such withdrawing partner or any such newly admitted partner, before such withdrawal or admission; provided that in the case of a newly admitted partner
he or she may become a party to such preexisting agreement by signing the same upon such admission."

This was the approach suggested in the UPA White Paper, except that in the White Paper it was also suggested that dissolution could be avoided if the remaining partners agreed within 90 days after dissolution to continue the business of the partnership and the purchase of the withdrawing partner's interest. This follows the Delaware and California corporate law models referred to in "C" above.

E. The notion of "dissolution" of a commercial entity applies across the board to partnerships, limited partnerships and corporations. It is unthinkable that states are likely to consider changing their corporate and recently-enacted limited partnership laws to embrace the notion posed in the Draft RUPA. Thus, the general partnership entity would have unique terminology for this common experience. Most importantly, RULPA and RUPA would be to some extent integrated as laws, but employ different terminology for the same concept.

F. In a partnership it is not possible to ignore the fact that any change in the composition of the general partners creates a "new partnership" in the minds of the new group. Serious concerns, such as the viability of an enterprise dependant upon one particular partner's involvement, the creditworthiness of an enterprise depending on the net worth of one or more partners, and the exposure of each individual to the risks of the business, cause a fundamental reexamination in almost every change in the composition of the general partner group. The fact is that business people understand the concept that a new partner is only responsible for new debts, old partners are responsible for the old debts, but the entity itself is responsible for all debts. This approach is consistent with the notion of dissolution unless all of the partners agree to avoid the dissolution (which is what happens in an ongoing business when the partners reconstitute, usually without any noticeable change in the business or the "new partnership" conducting the continuing business). The word "dissolution" has come to mean only the change in the relationship of the partners; but it is well accepted in both the practice and in court decisions that the business often continues with a new set of persons secondarily responsible for the liabilities of the entity.

G. Any attempt to abandon accepted terminology should only be made if the existing situation is either chaotic or incapable
of being improved by tinkering with the existing law. We do not believe the existing law is at all chaotic; we do believe that improvements can be made with the types of changes suggested in the UPA White Paper. The principle reasons for adopting the approach of improving the existing product are as follows:

1. There are surely hundreds of thousands of partnership agreements based on the existing terminology. Most of these would continue through the adoption of a RUPA and would thereby become inconsistent with the new law. It is not uncommon to find partnership agreements going back many years. We can assume that this problem would continue for decades into the future as lawyers and judges attempt to deal with the coordination of agreements drafted under UPA being interpreted and enforced under a RUPA with totally inconsistent terminology;

2. Related to the above, there are thousands of court decisions which give us guidance and a relatively high degree of certainty as to how a myriad of fact situations under the existing law will be interpreted. Throwing out existing law in favor of a "new improved version", will cause all of those decisions to become useless as precedent. At the very least, thousands of fact situations will be relitigated in the hope that the new law will provide a different result.

3. The radical departure suggested by the Draft RUPA is highly unlikely to be adopted by all states. Indeed, we believe a majority of the major commercial states would have serious problems with the proposal. As a consequence, its promulgation by the Commissioners may be futile, or, worse yet, may lead to a variety of non-uniform partnership acts (NUPA's).

For the reasons set forth above we hope you will be able to convince the drafting committee to go back to the drawing boards and use the UPA provisions currently in existence with modifications along the lines suggested in the White Paper as the basis for RUPA. While the approach taken by the drafting committee to date may have merit if we were sailing out into uncharted waters, as practitioners we believe that truly monumental
transitional problems we foresee do not merit abandonment of the generally workable existing law and terminology.

Very truly yours,

Gerald V. Niesar for Ad Hoc Subcommittee on RUPA

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quently appeals and possible imposition of stays, would postpone confirmation of a debtor's plan of arrangement, thus impeding the debtor's rehabilitation and return to the marketplace.

Id. at 857. The court thus concludes that it may extend the deadline imposed by August 4, 1988 order, and that Section 365(d)(2) does not bar such an extension.

IV. POST-CONFIRMATION/REJECTION STATUS OF THE LICENSING AGREEMENT

[D] Carbon correctly argues that the license agreement survives confirmation if rejection is delayed beyond confirmation. In re Marrero, 7 B.R. 596 (D. Puerto Rico 1980) the district court found "as long as rejection is not ordered, [an executory] contract continues in existence." Id. at 596. (citations omitted). Thus, Carlson is obligated to perform its obligations under the license agreement 60 days after the confirmation hearing. However, Carlson may not proceed with enforcement actions against Debtor in the interim. "In the Court's view, an executory contract under Chapter 11 is not enforceable against the debtor party, but is enforceable against the nondebtor party prior to the debtor's assumption or rejection of the contract." In re Feghini Presents, Inc., 81 B.R. 623, 626 (Bankr. D. Colo. 1988).

The Supreme Court's Biddiso decision mandates that the Court in Biddiso held that "from the filing of a petition in bankruptcy until formal acceptance," a collective bargaining contract is not an enforceable contract. N.L.R.B. v. Biddiso & Biddiso, 465 U.S. 513, 104 S.Ct. 1188, 1193, 1200, 79 L.Ed.2d 492 (1984). Douglas W. Bordewick's seminal article on executory contracts sheds light as to Biddiso's ramifications. Bordewick, The Postpetition, Pre-Rejection, Pre-Assumption Status of an Executory Contract, 69 American Bankruptcy Law Journal 191 (Summer, 1989). Bordewick notes that "the Court spoke in general terms; it did not limit its discussion to the particular executory contract." Id. at 199. The Biddiso analysis applies to all executory contracts, including the license agreement in this case. Until the court acts to approve acceptance of the license, Carlson cannot enforce the license against the post-confirmation estate.

Carlson's rights prior to court-ordered rejection or assumption are not Debtor's equivalent. Bordewick correctly points out that:

During the period from the date of filing until the date on which the DIP [debtor-in-possession] rejects or assumes an executory contract, the non-debtor is bound to perform while the DIP temporarily is not bound to perform ... [T]he non-debtor party to an executory contract cannot require the DIP to adhere to the terms of the contract, for that contract is "unenforceable" against the DIP unless and until it is assumed. Dordewick, supra. Similarly, the Biddiso Court concluded that the DIP is not in fact bound by the provisions of an executory contract unless the DIP subsequently assumes the contract.

Bordewick, 59 Amer.Bankr.L.J. at 290

Other courts have barred nondebtors' enforcement actions against debtors prior to assumption or rejection. "An executory contract is unenforceable against a Debtor-in-Possession who has not yet assumed the contract." In re Wilson, 69 B.R. 960, 965 (Bankr.D. Tex. 1987). "We hold that a formal assumption of an executory contract by a debtor is required to render an executory contract enforceable against a debtor." In re Meta Transp. Co., 87 B.R. 338, 339 (Bankr.E.D. Pa. 1987). "In the Court's view, an executory contract under Chapter 11 is not enforceable against the debtor party, but is enforceable against the nondebtor party prior to the debtor's assumption or rejection of the contract." In re Feghini Presents, Inc., 81 B.R. 623, 626 (Bankr. D. Colo. 1988). "[A]n unexpired lease, otherwise not assumed or rejected by the trustee, does not give rise to a provable claim against the debtor." In re O.M.P. Leasing Services, Inc., 79 B.R. 161, 164 (S.D.N.Y. 1988). "The analysis that the trustee [debtor-in-possession] is vested with the contract but that the contract is unenforceable against him unless and until assumed is the better approach." In re T.H.W. Enterprises, Inc., 89 B.R. 351, 354 (Bankr.D. N.Y. 1988).

This court orders that the motion to reconfirm the plan be denied, but further extends the deadline for seeking rejection for 60 days past the effective date of confirmation. Carlson's motion to compel Debtor to reject the license prior to the confirmation hearing is therefore denied. This court is not ordering rejection at this time, but rather is ordering assumption. Furthermore, the license agreement will not be "assumed" by operation of law, because assumption of an executory contract requires an express court order. There cannot be assumption by implication. In re A.H. Robinson Co., Inc., 68 B.R. 705, 709 (Bankr. E. D. Va 1986); In re Memorial Hospital of Iowa County, Inc., 82 B.R. 478, 483-484 (W.D.Iowa 1988); In re Marrero, 7 B.R. 596, 598 (D. Puerto Rico 1980); In re Gamma Fishing Co., 79 B.R. 949, 952 (Bankr. S.D. Cal. 1987). Gamma concluded that the "requirement of court approval furthers the Bankruptcy Code's policy of maximizing the value of the estate for the benefit of all creditors, while preserving certain rights of parties to contract with the debtor." Id. at 952.

By thus immunizing the Debtor from enforcement actions until rejection of the executory contract, the Debtor should be able to consummate a new license agreement and proceed with its plan of reorganization. This protection is afforded the Debtor, not by virtue of the automatic stay (which expires upon confirmation), but by virtue of Section 365(d)(2). "The rights of a party to an executory contract with the debtor are not "stayed" by section 362; those rights are rendered temporarily unenforceable by section 365." Bordewick, 59 Am. Bankr.J. at 214.

An extension of the deadline for assumption or rejection of the lease, for the confirmation hearing should be granted only rarely. In re J.M. Fields, 26 B.R. 852 (Bankr.S.D.N.Y. 1983) wisely points out that a bankruptcy court's [P]er confirmation authority is restricted to only those matters pending at the time of confirmation. This grant is not one which keeps the debtor corporation in "perpetual tutelage" to the Court, subject to Court supervision and control over all aspects of corporate conduct.

This court finds that the motion to confirm the plan is denied, but extends the deadline for seeking rejection 60 days past the effective date of confirmation.

V. ORDER OF THE COURT

In accordance with analysis above this court

1. DENIES Debtor's Motion To Extend Effective Date of Rejection, and with it, Debtor's Motion To Reject The Licensing Agreement on or prior to confirmation.

2. DENIES Carlson's Motion To Compel Debtor To Assume or Reject The Licensing Agreement on or prior to confirmation.

3. ENLARGES said extension to the court-ordered deadline for the Debtor to reject or assume the Carlson license.

4. RETAINS exclusive jurisdiction over all matters relating to the license agreement.

So ORDERED.

In re STANLEY-SOUTHWEST INVESTMENTS, INC. d/b/a Stanley Travel, Debtor.

STANLEY-SOUTHWEST INVESTMENTS, INC. d/b/a Stanley Travel, Plaintiff.

v.

COLONIAL FROST BANK, N.A., Defendant.

Bankruptcy No. 5-86-60391.

Adv. No. 5-86-0216.

United States Bankruptcy Court,

W.D. Texas, San Antonio Division.


Corporate debtor, which had been partner in partnership and was successor to
partnership after its termination, sought to avoid prepetition and postpetition transfers to bank which had made loan to partnership. The Bankruptcy Court, Leif M. Clark, J., held that: (1) corporation did not lack standing to recover transfers from bank on theory loan had been made to partnership rather than to corporation; (2) transfers made by partnership prior to its dissolution could not be avoided by corporation, as such transfers represented transfers of partnership property, but (3) transfers made after termination of partnership and made postpetition were avoidable.

Ordered accordingly.

1. Bankruptcy 762721
Bank could not evade corporate debtor's attempt to recover transfers as preferential on theory bank had made loan to partnership in which corporation was partner rather than to corporation and was allegedly deceived by assumed name certificate into thinking that corporation had nothing to do with partnership and bankruptcy court had no jurisdiction over prepetition actions by corporate debtor, under Texas law, bank continued to enjoy its claim against partnership's assets, regardless of whether those assets were the assets of partnership or of corporation which was successor to terminated partnership.

2. Bankruptcy 762721
The only affirmative defenses available to preference suit were those set out in statute. Bankr.Code, 11 U.S.C.A. § 547(c).

3. Partnership 762722
Under Texas law, partnership terminated at the moment of its dissolution, when copartner corporation bought out copartner individual, and need for winding up was obviated by individual's receipt of $29,000 for his interest in partnership and waiver of further rights to accounting upon that assignment.

4. Partnership 77, 277
Transfers prior to dissolution and termination of partnership were transfers of partnership property, while transfers after that time were of corporate partner successor's interest in property, under Texas law.

5. Bankruptcy 7542561
Corporate debtor which had been partner in partnership and was successor to partnership could not avoid as preferential transfers made by partnership prior to its dissolution, as such transfers represented transfers of partnership property.

6. Bankruptcy 7542561
Even if funds advanced by corporate partner to partnership were used to pay bank, partnership's predissolution transfer to bank could not be avoided as preferential by corporate partner which filed for bankruptcy and was successor to partnership, as the advances to partnership were not preferences directly to bank as initial transferee, and bank fell within exception carved out for subsequent transferees who took for value, in good faith, and without knowledge of insolvency of transferor, as bank did not know that corporation was partner in partnership. Bankr.Code, 11 U.S.C.A. § 550.

7. Bankruptcy 7542561
Termination of partnership changed character of funds from partnership assets to assets of corporate partner which was successor to partnership, and transfer from partnership checking account to corporation was accordingly transfer of corporation's interest in property that could be avoided as preferential transfer in bankruptcy case filed by corporation. Bankr.Code, 11 U.S.C.A. § 547(b).

8. Bankruptcy 7542588
Postpetition payments made to bank, which had made loan to partnership, by corporate partner, which was successor to partnership, after partnership's dissolution were avoidable as unauthorized transfers of property of the estate in the corporation's bankruptcy case. Bankr.Code, 11 U.S.C.A. § 549.

Gavin Stryker, San Antonio, Tex., for debtor.

IN RE STANLEY-SOUTHWEST INVESTMENTS, INC.

Patrick Pape, San Antonio, Tex., for defendant.

JUDGMENT AND ORDER

LEIF M. CLARK, Bankruptcy Judge.

At San Antonio, Texas, came on for trial the foregoing cause. Upon consideration of the evidence and the arguments of counsel, the court enters this judgment and order. The following represents this court's findings and conclusions with respect thereunto.

On May 15, 1984, Larry J. Stanley ("Stanley") and his closely held company, Stanley-Southwest Investments, Inc. ("Stanley-Southwest"), formed a general partnership known as "Stanley Travel." On June 6, 1984, Stanley filed an assumed name certificate for Stanley Travel, indicating that the entity was a general partnership. Although not reflecting who the partners were, the certificate did correctly reflect the partnership's address. On December 26, 1984, Stanley Travel borrowed $25,000 from First Trust & Savings Bank ("the Bank").

On March 1, 1986, Stanley retired from the partnership by causing his company, Stanley-Southwest, which then owned 30% of the partnership, to "purchase" his 10% interest in the partnership for $20,000.

Two weeks later, on March 14, 1986, Stanley-Southwest, d/b/a Stanley Travel, filed this bankruptcy.

Both prior to and following the bankruptcy filing, Stanley Travel continued to make its regular monthly note payments of $1,085.19 to Colonial Frost. Those payments totaling $3,495.57 were paid prior to

1. Not at issue in this proceeding is the propriety of this transaction under any other provisions of the Bankruptcy Code.

2. The theory of the Bank is that it reasonably relied on the appearance that Stanley Travel was and continued to be a partnership and that only a partnership can avoid the payments it received. The entity that filed bankruptcy was not the partnership but one of the partners, Stanley-Southwest. Therefore, the argument, the debtor, by holding itself out as a partnership, is somehow exempted from avoiding the transfers of its personal property.

3. Standing, in this case, is literally a threshold question for entry into a federal court, limiting the exercise of its jurisdiction, and the court must consider the standing of any party even if the issue has not been raised by the parties to the action citing Audion v. Van, 430 U.S. 327, 97 S.Ct. 1211, 1215, 51 L.Ed.2d 376 (1977) and In re Gmez, 339 U.S. 440, 441, 99 S.Ct. 1484, 23 L.Ed.2d 404 (1969).
("... the trustee may avoid any transfer of an interest of the debtor in property"). Recoveries under Section 546 are limited to transfers of property of the estate. 11 U.S.C. § 546(a) ("the trustee may avoid a transfer of property of the estate that occurs after the commencement of the case..."). The question here is whether the transfers in question came from the partnership, Stanley Travel, or from the debtor, doing business as Stanley Travel. In re Candy Custom Builders, Inc., 31 B.R. 6, 8-9 (Bankr.D.S.C.1983) (a transfer of partnership property cannot be avoided by the trustee of a partner).

If the property transferred to the Bank was that of the partnership, the plaintiff's case falls for failure to prove a transfer either of the debtor's (i.e., Stanley-Southwest) interest in property of or property of the estate (i.e., Stanley-Southwest, debtor-in-possession). Id. If the property transferred is that of the debtor doing business as Stanley Travel, however, the transfer may be avoidable under Section 546(b) or 546.

Stanley Travel was undeniably a partnership at least until March 1, 1986. When the debtor, Stanley-Southwest, bought out Stanley's 10% interest in Stanley Travel, it was left as the only remaining "partner." The minimum requirement for a partnership is that it be composed of at least two partners. TUPA, § 601; State v. Houston Lighting & Power Co., 609 S.W.2d 265, 267 (Tex. 1981). The "buyout" thus should have worked a dissolution of the partnership. Tex.Rev.Civ.Stats.Ann., art. 6132b, § 29 (West pamphl. ed. 1988) (hereinafter "Texas Uniform Partnership Act" or "TUPA"). ("Dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to associate in the carrying on as distinguished from the winding up of the business"); Kelly v. Kelly, 411 S.W.2d 953, (Tex.Civ.App.-Houston [1st Dist.] 1967, writ ref'd n.r.e.) (generally sale of partnership interest by one of two partners and that partner's withdrawal from participation in the business dissolves the partnership).

The partnership agreement permits the continuation of the partnership despite the retirement of one partner. Plaintiff's Exhibit 1. Under Texas law, the "partnership" could conceivably have continued its existence even after Larry Stanley's retirement without a dissolution being effected as a matter of law. See Park Cities Corp. v. Byrd, 534 S.W.2d 668, 672 (Tex. 1976) (partnership agreement controls over Uniform Partnership Act; TUPA, § 1, Comment 1; cf. Gensinger v. Macintosh Constr. Co. of Oklahoma, 420 S.W.2d 486 (Tex.Civ.App.-Fl.1967), rev'd on other grounds, 449 S.W.2d 958 (1969) (pre-TUPA, a single individual could not own a partnership). Here, though, the parties intended to terminate the partnership, as evidenced by (1) the final partnership tax return, closing the tax year on February 28, 1986 (Plaintiff's Exhibit 39) and (2) the debtor's Schedule B-2, which fail to reflect any continuing interest in Stanley Travel as a partnership (Plaintiff's Exhibit 6). The voluntary desire of a partner to dissolve a partnership is a ground for dissolution under the Uniform Partnership Act. TUPA, § 310(b).

Dissolution does not automatically terminate a partnership. TUPA, § 30. To the contrary, there are three distinct stages in the process of discontinuing a partnership's existence—dissolution, the winding up of partnership affairs, and termination. Badger v. Cox, 711 S.W.2d 617, 681 (Tex.App.-Dallas 1985, writ ref'd n.r.e.). During the period of dissolution, the partnership's internal and external relations are governed by Sections 33-43 of TUPA. According to Section 40(a) of TUPA, the assets of the partnership available for satisfaction of partnership obligations upon the conclusion of the winding up process are (I) the partnership property and (II) the contributions of partners necessary for the payment of all the liabilities of the partnership (specified in subsection (b) of Section 40). TUPA, § 40(a). Partnership property, in turn, is defined in Section 8 of TUPA as "all property originally belonging to the partnership stock or subsequently acquired by purchase or otherwise on account of the partnership..." TUPA, § 81. Further, unless a contrary intention appears, "property acquired with partnership funds is partnership property." TUPA, § 829.01.

Texas is emphatically an "owner's theory" state when it comes to partnerships. Jacob v. Cobb, 659 S.W.2d 743, 745 (Tex.App.-Tyler 1983, no writ) (TUPA, § 1, Comment 1). The continuation of the "entity" after dissolution serves to facilitate the winding up process. See TUPA, § 30 ("an dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed"). The winding up process is conducted primarily for the benefit of the partnership's creditors but of its respective partners.

In light of the winding up process, it is not unusual for creditors to be paid in full, with the remaining assets of the partnership being turned over to the remaining partners. See, e.g., Byrd v. Lending Associates, Inc., 516 S.W.2d 485, 498 (Tex.Civ.App.— Houston [1st Dist.] 1974, writ ref'd n.r.e.) (see TUPA, § 15). The Bank here continues to enjoy its claim against Stanley Travel's estate, but the assets of the partnership or the assets of the successor, Stanley-Southwest, Bankruptcy preference law does not alter these rights.

Instead, it focuses on the role of a trustee acting on behalf of the estate of a given debtor to achieve a redistribution of estate property that will hopefully yield a more equitable sharing of losses suffered by all the estate's creditors. M. Biondo, Bankruptcy Reorganization, p. 245 (PLI, 1987). Theories of waiver, estoppel, and detrimental reliance are simply inapposite.

121 Such theories are invalid defenses against a preference action anyway. The only affirmative defenses available to preference suits are those set out in Section 547(c). 11 U.S.C. § 547(c); see In re Day (1975) noted to the rights of the partnership entity as owner of the property.

2 Creditors' Rights. Partnership creditors are given priority in partnership assets, and individual creditors in individual assets (§§ 40(b)(1), 36(4)).

It is pointless, therefore, to entertain the Bank's arguments that it relied on the existence of the partnership when it accepted payments from Stanley Travel. Those cases which protect a creditor that does business with what it thinks is a partnership do so to preserve the creditor's claim against the partnership's assets and the partners themselves. See, e.g., Byrd v. Lending Associates, Inc., 516 S.W.2d 485, 498 (Tex.Civ.App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (see TUPA, § 15).

The Bank here continues to enjoy its claim against Stanley Travel's estate, but the assets of the partnership or the assets of the successor, Stanley-Southwest, Bankruptcy preference law does not alter these rights. Instead, it focuses on the role of a trustee acting on behalf of the estate of a given debtor to achieve a redistribution of estate property that will hopefully yield a more equitable sharing of losses suffered by all the estate's creditors. M. Biondo, Bankruptcy Reorganization, p. 245 (PI], 1987). Theories of waiver, estoppel, and detrimental reliance are simply inapposite.

The contributions of partners necessary for the payment of all the liabilities of the partnership (specified in subsection (b) of Section 40). TUPA, § 40(a).

Partnership property, in turn, is defined in Section 8 of TUPA as "all property originally belonging to the partnership stock or subsequently acquired by purchase or otherwise on account of the partnership..." TUPA, § 81. Further, unless a contrary intention appears, "property acquired with partnership funds is partnership property." TUPA, § 829.01.
Communications, Inc., 70 B.R. 904, 910 (Bankr.E.D.N.C.1987). None of these defenses were asserted by the Bank in this action, so it is pointless to evaluate whether any of those defenses might have been available. See In re Fasano/Harrisa Pix Co., 71 B.R. 287 (Bankr.W.D.Mich.1987).\(^4\)

It is true that Section 40(a)(II) of TUPA includes as a partnership asset the capital contributions owed by partners needed to pay off the partnership's obligations. TUPA, § 40(a)(II). The section sets out the rules for settling accounts “between the partners after dissolution.” Once accounts have been settled, and winding up has been completed, the partnership is terminated. See TUPA, § 30. Sections 15 and 41, not Section 40, control the relationship of partners and creditors after termination. To the extent a partner pays a partnership claim after termination of the partnership, it is paying off a personal liability created by Section 15 of TUPA. TUPA, § 15 (“All partners are liable jointly and severally for all debts and obligations of the partnership...”). It is no longer satisfying a partnership capital account obligation. Cf. TUPA, §§ 18(a), 40(d). What is transferred after termination, then, is not partnership property but capital contributions under Section 40(a)(II), but partner property (i.e., satisfaction of joint and several liability under Section 15).\(^5\)

\(^5\) In this case, Larry Stanley retired from the partnership by having his company, Stanley-Southwest, buy him out. The Bank at that point enjoyed a claim against the assets of Stanley-Southwest, and for the partnership in which Stanley-Southwest was interested. Meanwhile, the need for winding up was obviated by Larry Stanley's receipt of $20,000 for his 10% interest in the partnership from Stanley-Southwest. He waived any further right to accounts or the like upon that assignment. Kelly v. Kelly, 411 S.W.2d 983, 995 (Tex.Civ.App—Houston 1st Dist.) 1967, writ ref'd n.r.e. There was thus no further winding up to be done.

remaining partner had assumed all the assets and liabilities of the entity, without further obligation to Larry Stanley. The partnership was thus effectively terminated at the same time as it was dissolved, with the three stages collapsed into an instantaneous moment. In this case, therefore, March 1, 1986, the moment of dissolution, was also the moment of termination of the partnership.

\[4, 5\] Following this analysis, transfers prior to the dissolution (and termination) of the Stanley Travel partnership are transfers of partnership property, while transfers after that point in time are transfers of partnership property. See In re Candy Custom Builders, Inc., 31 B.R. at 9.

\[6\] It is not necessary to determine from what source Stanley Travel or its partners acquired the funds with which to pay the Bank. Even though Stanley-Southwest made advances to the partnership within ninety days of the filing, those advances are not preferences directly to the Bank as the initial transferee. It is true that, as a general principle, such preferences could be recovered from the Bank to the extent that the Bank is shown to be a direct or indirect transferee of the initial transfer, the partnership. 11 U.S.C. § 549(a)(2). Here, though, all the evidence indicates that the Bank falls within the exception carved out in Section 550 for those subsequent transferees who take for value (including the payment of an antecedent debt), in good faith, and without knowledge of the voidability of the transfer. 11 U.S.C. § 550(b)(1), (2). The Bank certainly did not know that Stanley-Southwest was a partner in Stanley Travel prior to the bankruptcy filing. The payment checks were written on an account simply styled “Stanley Travel” and court action against Larry Stanley. See Boyd v. Leasing Associates, Inc., supra, TUPA, § 15. The 1986 payment of $1165.19 under Section 547(b) is not a matter of the Bank's record and the assumed name certificate did not reflect Stanley-Southwest as a partner. The Bank's failure to conduct a searching inquiry into the composition of the partnership does not defeat its good faith in receiving the payments. Thus, the December and January payments cannot be avoided even though made using funds received from Stanley-Southwest within the preference period. 11 U.S.C. § 550(b)(2).

\[7\] The last Stanley-Southwest advance made postpetition was the Stanley Travel checking account, to which the receipts of the partnership (including advances by its partner, Stanley-Southwest) were deposited. The termination (as opposed to the mere dissolution) of the partnership changed the character of these funds from partnership assets to assets of Stanley-Southwest, d/b/a Stanley Travel. The March 3, 1986 payment was thus a transfer of the debtor's interest in property. Thus, qualifying it for avoidance under Section 547(b)\(^6\).

\[8\] The same analysis confirms that the postpetition payments were made by Stanley-Southwest, d/b/a Stanley Travel. Therefore, these transfers are transfers of property of the estate available under Section 549.\(^7\)

CONCLUSION

In view of the foregoing, judgment is entered in favor of Plaintiff pursuant to Sections 549(b) and 549(a) for those funds transferred postpetition, in the total amount of $4,660.76, and for the March 3, 1986 payment of $1165.19 under Section 547(b)\(^6\).

\[7\] There is no dispute between the parties that the transfers in question satisfy the remaining elements of Section 547(b) and in any event, the evidence supports such a finding.

8. Section 549 provides in pertinent part as follows—

(a) ... the trustee may avoid a transfer of property of the estate—

1. Bankruptcy 0-2104

So long as reasonable possibility of successful reorganization has been established, stay should remain in place, though there is no dispute that the remaining prepetition transfers are concern consumed, judgment is denied.

So ORDERED.

Debtor applied to sell two of six office buildings comprising its commercial complex free and clear of liens. The Bankruptcy Court, Leif M. Clark, J., held that debtor would be allowed to sell off individual buildings free of liens while sale price for each building exceeded its value, sales would eliminate one secured creditor and substantially reduce claim of another, and sales would aid process of orderly liquidation contemplated by debtor's plan.

Sale allowed.
October 29, 1990

BY FEDERAL EXPRESS

Mr. H. Lane Kneedler
Office of Attorney General
101 North Eighth Street
Richmond, Virginia 23219

Re: Revised Uniform Partnership Act - Comments

Dear Mr. Kneedler:

Enclosed is a comment letter on the first eighteen sections of the Revised Uniform Partnership Act. As discussed in the letter, it was prepared by members of the Committee on Partnerships and Unincorporated Business Organizations of the ABA's Section of Business Law. We have been operating under the assumption that the Drafting Committee would be addressing the first eighteen sections of RUPA at this weekend's meeting in Chicago. Don Weidner has recently informed us that the Drafting Committee in fact intends to cover the first twenty-one sections of RUPA.

We apologize for our misunderstanding. Our Ad hoc Subcommittee will be meeting in Washington, D.C. late next week for the purpose of reviewing and commenting on RUPA Sections 19-46. We expect to have comments on Sections 20 and 21 (Section 21 has been of particular interest to members of our subcommittee) and will provide you with them prior to the next meeting of the Drafting Committee. We hope that our thoughts on these sections will still be useful to you at that time.

Thank you.

Respectfully,

James L. Jerue

JLJ:pls:012/571-2/99000/rho
Enclosure

cc: Allan G. Donn
    Harry J. Haynsworth IV
    Edward S. Merrill
    Donald J. Weidner

Gregory P.L. Pierce
John H. Small
Ad hoc Subcommittee on RUPA
October 29, 1990

Mr. H. Lane Kneedler
Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219

Re: Revised Uniform Partnership Act - Comments on July 1990 Draft - Sections 1-18

Dear Mr. Kneedler:

This letter is submitted to provide comments on Sections 1-18 of the July 1990 draft of the Revised Uniform Partnership Act ("RUPA") presented to the National Conference of Commissioners on Uniform State Laws ("NCCUSL") at its July 1990 meeting. These comments have been prepared by members of the Committee on Partnerships and Unincorporated Business Organizations of the Section of Business Law of the American Bar Association. At that Committee's most recent meeting, an ad hoc subcommittee was formed for the purpose of reviewing and commenting on RUPA. A draft of this letter was circulated for comment among the members of that subcommittee and has received the general agreement of a majority of its members. However, this letter is not proffered on behalf of and does not represent the official view of the ABA, the Section or the Committee, nor does it necessarily reflect the views of each member who has reviewed it.

The ad hoc subcommittee intends to provide you with comments on the entirety of RUPA. In light of the Drafting Committee's upcoming meeting to discuss the first portion of RUPA, we have expedited our review and comment process with respect to RUPA's first eighteen sections. We expect to have comments on the remaining portions of the Act in advance of the Drafting Committee's next meetings.

We believe RUPA is a substantial improvement on the existing Uniform Partnership Act ("UPA"). We have not mentioned specifically many of the RUPA provisions with which we agree. "RULPA" refers to the Revised Uniform Limited Partnership Act (1976) with 1985 Amendments as approved by NCCUSL in August of 1985.
1. Section 2X - Applicability to Limited Partnerships.

Section 2X implies that RUPA is the primary statute governing limited partnerships, applying to limited partnerships except to the extent that RUPA is "inconsistent" with RULPA. This presents some conflict with RULPA Section 1105, which reads as follows:

"In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern."

In effect, both statutes purport to be the primary statute governing limited partnerships. We believe that RULPA Section 1105 states the law (and the understanding of most practitioners) more accurately, and suggest that Section 2X be revised to read as follows:

"This [Act] shall govern limited partnerships in any case not provided for in [state limited partnership statute]."

2. Section 4X - Effect of Partnership Agreement. We agree with the general approach of Section 4X. However, we believe that partners' duties of good faith and fair dealing should be variable by agreement. (Although comments on Section 21 are beyond the scope of this letter, we note that the second sentence of Section 21(a) states that the general duty of good faith and fair dealing may not be "varied," but then permits what we would understand to be "variances" of that duty within the plain meaning of the word.) If partners agree as to what will not constitute "unfair dealing" (for example, permitting an affiliate of a partner to provide services to the partnership at a greater-than-market rate), this agreement should not constitute an unpermitted "variance" from standards of "fair dealing" under Section 4X(a).

We suggest that Section 4X(a)(1) be deleted. If this position is not accepted, we suggest that the word "varied" be changed to the word "eliminated" as to subsection (1).

Again recognizing that comments on RUPA sections other than Sections 1-18 are beyond the scope of this letter, we question whether Section 4X(a)(2) should provide that winding up is required upon an event described in Section 31Y(5). Presumably the assignee of the partner's interest is interested exclusively in being paid. Sections 27 and 28 (which are referred to in Section 31Y) apply only to the economic incidents of ownership of a partnership interest. Giving the assignee only the right to receive the economic value of the partnership interest (as is the case for a partner to be bought out under Section 32(a)) would
appear to address its only concern while allowing the remaining partners to continue the existing partnership in their discretion. If this position is not accepted, we suggest that (i) the statute should make clear that the assignee may give up his right to precipitate a winding up by so agreeing and (ii) the requirement of a winding up should be limited to situations where the assignee did not know of a provision to the contrary in the partnership agreement before accepting the assignment.

3. Section 7 - Definition of a General Partnership.

a. Profit Motivation. We agree that the basic definition of a partnership should include a profit motive since this definition will be applied to relationships which do not expressly state whether they are intended to constitute partnerships. However, the institution of the statement of partnership authority offers an opportunity to permit any unincorporated relationship to opt to be governed by RUPA. This will also allow for greater certainty in transactions where the presence of a pure "profit" motive may be questionable (for example, arrangements to hold title to real estate or, should they ever revive, tax-oriented transactions).

We suggest that Section 7(a) be revised to read as follows:

"(a) A partnership is an entity resulting from the association of two or more persons (1) to carry on as co-owners a business for profit or (2) who execute and file a statement of partnership authority in substantial compliance with the requirements of Section 10X."

b. Joint Ventures. We agree with the deletion of the statement that a joint venture is a partnership. Many business people refer to "joint ventures" that are constituted as corporations, limited partnerships or contractual relationships and not general partnerships. In fact, "joint venture" is really more a business term than a legal term. Any implication that one cannot carry on a business "joint venture" except through a general partnership is not and should not be the case.

c. Presumption of Partnership Status. We suggest that the phase "co-ownership of a business" be deleted in Section 7(d) and replaced with the word "partnership," as in the UPA. In the situations described in Section 7(d), all elements necessary to be a partnership other than "co-ownership of a business" are met. Therefore, the change from the UPA reflected in RUPA is not
substantive. We suggest that RUPA should avoid mere changes in form where possible to avoid any implication that a change in substance was intended.

We do not believe that Section 7(d)(3) provides appropriate guidance as to the presence of a general partnership. We do not understand the legal weight of the "indication" of partnership described in Section 7(d)(3) and its relationship to the presumption of partnership status described in the introductory language of Section 7(d). The subsection appears to assume that "co-ownership" necessarily gives rise to shared control; section 7(d)(1) recognizes implicitly that this is not the case. We also note that Section 7(d)(3), in effect, uses a term to define that term, using the word "co-ownership" in attempting to describe when the presumption of "co-ownership" does not apply.

We suggest that Section 7(d)(3) be deleted. If you do not accept our position that the concept "substantially greater control than what would exist absent co-ownership" is not helpful in establishing the presence of a partnership, we suggest that Section 7(d)(3) be rewritten for clarity and moved to another subsection of Section 7.

d. Sharing of Profits. We agree with the first sentence of Section 7(e). However, the intended legal effect of the "inference" referred to in the second sentence of this section is unclear.

We suggest that the introductory language to this second sentence be revised to read as follows:

"A partnership shall not exist if a profit share is more properly characterized:"

4. Section 9(a) - Partners' Agency. We suggest that the words "actually or" be added to the fifth line of subsection (a) after the word "for" and before the word "apparently" to clarify that a partner's actual authority is not derived from perceptions of a third party.

5. Section 10X - Statement of Partnership Authority.

a. Mandatory or Voluntary? We agree that filing of a statement of partnership should be optional. To do otherwise would effect a fundamental change in existing law; it is well
settled that active, co-owned businesses which make no filing to establish a different type of legal entity will be treated as a general partnership.

b. **State or County Filing?** We believe that a statement of partnership should be filed at the state level. This will simplify searches for these filings. If a given state wishes to add a requirement of county-level recording of a state-filed statement (as was sometimes the case with state variations of RULPA), they are free to do so.

c. **Actual Knowledge of Limitation on Authority.** We believe that Section 10X(d) is consistent with Section 9 and support its inclusion.

d. **Foreign Partnerships.** We see no need for a foreign partnership qualification provision. Because each partner will have general liability to persons with whom the partnership does business outside of its state of formation, we do not believe that such persons are prejudiced by any lack of qualification. A qualification requirement would be inconsistent with a determination that a filing of a statement of partnership authority by a domestic partnership is optional. If it is determined that foreign qualification provisions are appropriate, we note that minor modifications to Section 10X would allow the filing of a statement of partnership authority to serve this purpose.

In addition, we support inclusion of a provision along the lines of RULPA Section 901(i), which would establish that the laws that govern a general partnership's internal affairs are not affected if it does business outside of its state of formation.

This could be established in a new Section 7A that would read as follows:

"Subject to the Constitution of this State, the laws of the state under which a general partnership not formed under the laws of this state is organized shall govern its organization and internal affairs."

6. **Liability of Partners.** We believe that Section 15 is an intelligent approach to the liability of partners, appropriately reflects the expectations of business people and is consistent with the entity theory of partnership reflected in most of RUPA. We support its inclusion. We do have a few technical comments.
With respect to Section 15(a), we suggest that the word "creditor" be replaced by the word "claimant" and that the phrase "and claims against" be added before the words "the partnership" for consistency with the remainder of the section.

With respect to Section 15(c)(1), we suggest that the phrase "a proceeding under the involuntary provisions of" be replaced by the phrase "an involuntary case under", that the word "filed" be replaced by the word "commenced" and that the phrase "(which case has not been dismissed)" be added at the end of Section 15(c)(1). These changes would provide for greater consistency with terms used in the Bankruptcy Code and provide that the voluntary case under Title 11 must continue to be pending for the claimant to proceed against a partner.

Finally, with respect to Section 15(c)(3), we note that the circumstances it refers to may not be an exhaustive list of situations in which a judge may wish to permit a claimant to proceed against a partner based on equitable considerations. Such circumstances might include dissipation of partners' assets or a threat that the partner will leave the jurisdiction. Consideration should be given to expanding Section 15(c)(3) to permit a claimant to proceed directly against a partner where equity so requires.

7. Apparent Partners. We believe that RUPA provides an opportunity to clarify the law that applies to apparent partners. However, a number of issues that were open in the UPA remain open in Section 16. Because it is not clear to us how the current draft of Section 16 addresses most of these problems, most of our comments are questions rather than suggestions.

a. Partnership Liability. Sections 16(a)(1) and 16(a)(2) provide that the nature of an apparent partner's liability will vary depending on whether a partnership liability results. The last sentence of Section 16(b) provides that the partnership will be liable if all partners consent to the representation by the apparent partner. Is this intended to be the only circumstance where partnership liability results? We do not believe this should be the case. If the partnership accepts and enjoys the benefits of the credit extended as a result of the apparent partner's representation, it appears that, at a minimum, the partnership should share liability with the apparent partner. Section 16(a) does not address this issue clearly, if it does so at all.
b. Relationship to Section 15. Section 16(a)(1) provides that, if a partnership liability results from an apparent partner’s conduct, the apparent partner is liable "as though the apparent partner were an actual member of the partnership." In these circumstances, does the Section 15 requirement that the creditor proceed first against partnership assets apply? Should this depend on whether the partnership in fact received the credit?

c. Sharing of Liability. If one or more partners and/or the apparent partner pay all or a portion of a liability that results from an apparent partner’s conduct, it is not clear whether contribution would be available and, if so, how it would be measured. Compare Section 18(b). This could be addressed by allowing for contribution in appropriate circumstances.

8. Other Provisions. While this comment is not intended to be an exhaustive list of provisions that RUPA might contain but does not, we note that RUPA does not yet contain transition rules and does not contain merger provisions or provisions for conversion of a general partnership to a limited partnership. Examples of merger provisions may be found in a number of state versions of RULPA; a conversion provision can be found in Virginia law. We have not proposed language for these provisions, but support their inclusion and would be happy to recommend language at your request.

We hope that these comments will be helpful to the Drafting Committee. Please contact the undersigned at 312-902-5293, the two other principal draftsmen of this letter (George C. Hook at 312-715-5734 and Paul McCarthy at 312-861-2858) or Gerald V. Niesar, Chairman of the ad hoc subcommittee, at 415-243-9100, if you would like clarification of the matters covered in this letter.

Respectfully,

James L. Jerue
on behalf of the
Ad hoc Subcommittee on RUPA

cc: Allan G. Donn
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TO: Distribution List
FROM: Gerald V. Niesar
DATE: November 2, 1990
RE: Meeting November 8-9

1. Enclosed is a draft of Comments by Sub-Sub Committee on Dissolution.

2. Please bring above and your copy of RUPA to the meeting. Note that current RUPA draft is in materials from August 7, 1990 program in Chicago.

3. Larry Ribstein has requested that he attend our meeting; I have invited him to attend and participate.

See you Thursday.
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October 30, 1990

BY FACSIMILE

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Dear Jerry:

As we discussed, I enclose a draft memorandum regarding RUPA dissolution issues, your significant item list no. V. I am providing copies to Alan Kailer and Robert Keatinge per your request, and am requesting their comments to the enclosed. Should we agree to any changes to the memo, I will submit a revised copy to you prior to the meeting and, if you would like, to the other members of the Subcommittee.

Please note that the enclosed represents my comments based upon the general discussions held by the Subcommittee and the Subcommittee on General Partnerships, and upon my review and analysis of the UPA, the current draft of RUPA, the 1987 ABA Report and related articles and materials. I believe that further discussion and debate within the Subcommittee is appropriate in order to reach some consensus on these issues, if possible.
Please telephone me if you have any comments or questions.

See you in Washington.

Sincerely,

Lauris G. L. Rall

cc: W. Alan Kailer
    Robert Keatinge

Enclosure
To: Gerald V. Niesar, Chairman  
Ad Hoc Subcommittee on RUPA  
ABA Partnership Committee

From: Lauris G.L. Rall

Date: October 29, 1990

Re: Commentary on the Revised Uniform Partnership Act ("RUPA") "Dissolution" Issues, Including Proposed Sections 31, 31X, 31Y, 31Z and 32

You have asked for the comments of members of the RUPA Subcommittee on the above-referenced sections of the July 1990 draft of RUPA presented to the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). I understand that you may convey some or all of these comments to Professor Harry J. Haynsworth, who is the ABA's liaison to the NCCUSL drafting committee.

The analysis of the above-referenced dissolution provisions should begin with at least a brief discussion of and commentary on the introductory dissolution provisions in Sections 29, 29X and 30.

Section 29 has a tortured history in the NCCUSL drafting process. The initial approach eliminated the term "dissolution" and only the most recent draft has reinstated it. However, the current draft changes the concept of "dissolution" from current law in both the Uniform Partnership Act ("UPA") and the Revised Uniform Limited Partnership Act ("RULPA") and does not adopt all of the recommendations of the Partnership Committee in the
Dissolution as proposed by NCCUSL in RUPA Section 29 will never occur unless a partnership's business is wound up and terminated. Thus a general partnership of 40 members whose numbers are halved may not dissolve if 20 of those members agree to continue the business of the partnership, while 20 employ themselves elsewhere.

I do not have the breadth of experience or the depth of feeling to determine whether such a change in the term "dissolution" is acceptable or desirable or would, in fact, be followed by the various state legislators and courts who would, if RUPA is proposed and then subsequently adopted in at least some jurisdictions, address that issue. But I do note, and discuss further below in this memorandum, that the concept of narrowing the circumstances under which the partnership is dissolved (a) has been previously endorsed in the ABA Report and (b) is reflected in the RULPA dissolution provisions.

New proposed section 29X, concerning the "relationship" between a former partner and a partnership continuing without him, is neither helpful or necessary to the practice of partnership law. It is unclear what legal "relationship" is envisioned by the new law between the former partner and the partnership. The former partner is not a partner any longer. The NCCUSL comment states that the purpose of the section is to describe the relationship. That is not done. The reference to the purpose of the relationship being the completion of "business undertaken while he [or she] was a member of the partnership" would not begin to instruct the practitioner how to advise his client, whether the partner or the partnership, of the nature and extent of the legal rights and obligations involved. Upon withdrawal or removal of a partner, the departing partner, unless varied expressly by agreement, has no role in the partnership's business following the departure date. If partner B in the ABC medical partnership departs on January 1, patient X may continue with A or C as a customer of that partnership, or X may choose to continue treatment by B, in which case B would be solely liable to perform services for, and be the beneficiary of any fees for those services paid by X. Section 29X would imply that further treatment of X would be ABC's business, but how the liability and compensation for that treatment would be allocated is unclear. Without Section 29X, the partnership and the departing partner will need to agree how to handle any continuing business in which the departing partner desires to remain involved. Without agreement the parties may litigate the issue (and perhaps lose the business as a result). It is difficult to understand what Section 29X would contribute to this situation.

The revisions proposed for Section 30 do not appear to change current law. Although it is troublesome to state the same principal of law using more words, the new language probably does not...
improve clarity and may be more understandable to the practitioner who only occasionally is required to advise on partnership law.

The following discussion of RUPA Section 31 and its progeny (X, Y and Z) and Section 12 is first based on a comparison with current law and the ABA Report. It is also instructive to refer to RULPA, particularly Sections 602, 604 and 801.

Dissolution of a general partnership under current law is the inevitable first step caused by any number of events either specified in UPA § 31 or which may trigger judicial dissolution under UPA § 32. The next step, winding up the partnership affairs, may be avoided in some cases under UPA § 38 or § 41 by a business continuation agreement among the remaining partners. However, if a partner does not wrongfully cause dissolution and was not expelled in accordance with a right under the partnership agreement, he may force a winding up and liquidation of the partnership's assets. It should be noted that both UPA § 37 and § 38 contain the language "unless otherwise agreed", which has been interpreted to mean that the partnership agreement may prevent a partner from forcing liquidation. Of course, it also may be possible for the remaining partners to purchase partnership assets, if they are unable to negotiate a buyout of the departing partner's interest, and if the partnership agreement does not restrict the departing partner's right to cause a winding up.

Under the UPA Section 38(2), a partner who has caused the dissolution of a partnership wrongfully is entitled to have the value of his partnership interest as at dissolution paid to him, less any damages caused by such wrongful dissolution.

The ABA Report made several recommended changes to the dissolution provisions: The definition is eliminated and replaced by a statement that dissolution is caused in accordance with Section 31 and 32. The Report also suggests adding a provision of the effect that a partnership is not dissolved by the events specified in Sections 31 and 32 if there is either a prior or contemporaneous continuation agreement. The Report recommends some technical changes to the list of events causing dissolution, including a provision permitting the remaining partners to avoid dissolution on a partner's death and deleting bankruptcy as a dissolution event. To the list of events causing judicial dissolution in Section 32, the Report also recommends certain technical changes, but also suggests deleting operation at a loss as a dissolution ground and deleting the right of a purchaser of a partner's interest to apply for judicial dissolution. The Report would not make any substantive changes in the requirement that a partner's interest be purchased if the remaining partners elect to continue the business, except as to the form of payment and the exclusion of goodwill from valuation.

RULPA provisions applicable to the withdrawal of a general partner of a limited partnership are also instructive: Section 602 permits the general partner to withdraw, even if in
contravention of the partnership agreement. Under Section 601, dissolution is not caused by the general partner's withdrawal if within 90 days thereof the remaining partners agree to continue the business. Under § 604, the withdrawing partner is entitled to receive the fair value of his partnership interest as of the date of withdrawal.

Against this background, the RUPA provisions have been drafted. Section 31 specifies the events causing cessation of partner status. Section 31(1) continues the rule that any partner may cease being a partner at any time by giving notice to another partner of his intention to withdraw. The provision as drafted permits the withdrawing partner to build in a future resignation date in his farewell letter. Consideration should be given to limiting this lame duck time period, perhaps to 30 days, or permitting the remaining partners to cause the withdrawal immediately if a future date is proposed. Who wants a partner acting on your behalf if he is leaving?

Section 31(2) specifies the circumstances under which a partner may be expelled. Do the words "bona fide" add anything to 31(2)(i)? I realize they are part of the existing UPA provision.) Section 31(2)(ii) does not seem to vary the rights to dissolve the partnership by a judicial determination under UPA Section 32(1)(c) or (d), except of course that RUPA would not require dissolution to rid the partnership of the offending partner. RUPA Section 31(2)(iii) seems an appropriate allocation of part of the rights to dissolve under UPA Section 31(3). If only one partner causes the partnership's business to be "unlawful" it should not be necessary to dissolve the partnership if he can be removed.

Sections 31(2)(iv) and (vi) permit expulsion if a corporate or partnership partner "dies". Should these provisions not operate like the RULPA provisions applicable to general partners and cause the cessation of partner status directly? Should not the wording of these provisions, and RUPA Sections 31(3), (4), (5) and (6) be precisely the same as the RULPA provisions?

Section 31(3) provides for the withdrawal of a "bankrupt" partner. The RUPA provision is not consistent with RULPA, which language was rejected by the NCCUSL drafting committee as "too long and not necessary". Yet the RULPA language is precise and understandable, while the RUPA language is unsatisfactory. For example, under RULPA, one of the bankruptcy events occurs when a partner consents to the appointment of a liquidator for its properties. This would not appear to be included in the proposed RUPA definition of a partner "debtor in bankruptcy". Thus, it is possible that the liquidation of a partner which is a federal thrift institution would not be a "debtor in bankruptcy".

LGLR005/ABA.MEM
Section 31X is a new RUPA section entitled "Wrongful Cessation of Partner Status". The section appears generally to conform to current law. Suggested language changes would be to replace "by" with "in" in the first line and to add the words "the completion of the" before the word "undertaking" in the twelfth line.

Section 31Y lists the events under RUPA which will cause a dissolution and winding up. However, under Section 4X, only Sections 31Y(5), (6) and (9) cannot be varied by the partnership agreement. Section 31Y is a troublesome provision. Section 31Y(1) appears to prohibit the remaining partners, without the agreement of the withdrawing partner, to continue the partnership business. In addition, there appears to be no time limit on when the partners can agree to continue the business following withdrawal of the departing partner. Section 31Y(2) and (3) seem to permit any remaining partner, after a partner has left for the reasons described therein, to cause the winding up of the partnership at any time within the 90 days following departure, even if all of the remaining partners agreed to continue the business at some earlier point in the 90 day period. It would seem better to have a provision similar to RULPA, and as recommended by the ABA Report, wherein at any time during the 90 days following an event causing a person to cease being a partner, the remaining partners can agree to continue the business, thereby avoiding dissolution (under RUPA) and winding up. Apparently the NCCUSL committee proposed these provisions instead of a requirement for unanimous agreement among the remaining partners. But if each partner has a veto, why is that different? Furthermore, the ABA Report recommends that if a partner withdraws prior to expiration of the partnership's term, the other partners should be deemed to have agreed to continue the partnership, and should not have a right to withdraw following the departing partner's early withdrawal. However, a remaining partner may believe it is unwise to carry on the business without the withdrawing partner. The Subcommittee should discuss this further.

Section 31Y(6) provides for winding up if it becomes unlawful for the partnership's business to be continued. The proviso should be rewritten for sake of understandability: "provided that during the ninety days after such event should the business of the partnership be modified or should another event occur so that it is lawful to continue the business of the partnership, the business shall not be wound up".

Section 31Y(9) suggests that a partner can apply to "an appropriate forum" for dissolution and winding up. Should this not be a "judicial determination"? The NCCUSL committee apparently anticipates that a state legislature could endorse arbitration as a forum for seeking dissolution. But what kind of arbitration and what rules?
Section 312 is another new RUPA provision, but draws heavily on current law as contained in UPA Section 38. Should the cross-reference in Section 312(b) in the second line be to Section 312(9)(ii)? Should it not also be a reference to Section 31Y(2)?

The last new RUPA provision to be discussed in this memorandum is Section 32, now known as the "buyout" provision. Section 32(a) provides for the payment to the person who ceases to be a partner (and the remaining partners elect to continue) the "fair market value" of that partner's interest in the partnership. This would not generally appear to represent a departure from current law under UPA Section 38, but makes clear that departure for any reason results in a buyout. The NCCUSL committee believes that by making this a mandatory obligation of the partnership, which may be fulfilled by the continuing partners (under RUPA Section 32(d)), it does represent a significant change in the law.

There is no time frame which would generally be applicable to the buyout (RUPA Section 32(c) would require an agreement to purchase within 90 days after demand for payment under most but not all cases of a person ceasing to be a partner). Although interest until payment is required by RUPA Section 32(b), it would seem that some requirement to make prompt payment would be appropriate, in order to obtain a valuation with relatively current information. Perhaps a requirement should be included that payment be made as soon as reasonably practicable but in no event later than 180 days following the later of (1) the date the person ceases to be a partner or (2) demand for payment by or through such person. Furthermore, consideration should be given to adding the following sentence to RUPA Section 32(a): "If all of the remaining partners consent, the interest of the person who ceases to be a partner may be purchased for its fair (market) value by one or more of the remaining partners or by another person.

RUPA Section 32(b) attempts to lay the ground rules for determining "fair market value". It is generally believed that the UPA concept of "value of [a partner's] interest in the partnership" (Section 38) and the RULPA concept of "fair value" (Section 604) do not differ from the "fair market value" of the partnership interest. RUPA Section 32(b) also retains the concept of valuation as at the time a partner ceases to be a partner. It is difficult to determine how the principles enunciated in the second, third and fourth sentences of Section 32(b) would be applied to professional service partnerships. Should a departing partner in a small law firm be paid as if the firm was being wound up, there would be an estimation of future receipts to be collected based on the receivables (and perhaps uncollected time which could be immediately converted to a receivable, or for which there would be a strong likelihood of recovery) and a computation of existing liabilities. Presumably, the departing partner's share of the net amount therefrom would be paid to him.

This calculation would seem to unaffected by the first part of the third sentence of Section 32(b), that is, the assets (principally the receivables) would be liquidated. However,
determining the value based on sale of the business as a going concern without the departing partner could be extremely difficult. Case law is split as to whether "goodwill" should be taken into account in valuation of a law firm. In any case, the application of the fourth sentence of Section 38(b) would not seem at all appropriate: a law firm can not be bought and sold. Can it? This provision may be an example of a statute which uses too many words in an effort to clarify a concept the application of which must by necessity be dependent upon the facts and circumstances of each case.

If the RUPA language for 38(b) is to remain, it may be appropriate to add the words "if reasonably capable of determination" prior to subsection (ii). In addition, consideration should be given to substituting the word "material" for "relevant" in the fourth sentence. No buyer can be charged with knowledge of all facts that would be "relevant". Finally, it is difficult to accept the workability of the last two sentences of 39(b). There is no standard established for distinguishing those partnerships in which "capital is a material income producing factor". Is a service partnership ever in this category? It would seem better to require a relatively quick buyout, thereby giving incentive to the parties to settle the financial obligations to the departing partner or his successor in interest. If this paternalistic rule is intended for surviving spouses as the NCCUSL committee so explains it, then it should be narrowed significantly if it is not eliminated. Of course, this is a provision which could be altered by the partnership agreement.

The first sentence of RUPA Section 32(c) seems to be repetitive of the sections to which it refers and should be eliminated. The second sentence could be combined with Section 32(d), but, if the suggestion to include a time period for the buyout is added to 32(a), should be reworked to coordinate with that subsection. Finally, Section 32(f) needs revision. I am unsure what the first sentence adds to RUPA Section 31X and 31Z(b) or what its need is here. The second sentence should be improved, first by adding the words "completion of the" prior to the word "undertaking" which occurs twice therein. Secondly, consideration should be given to either eliminating the proviso in the sentence to the effect that the partner who departs prior to the end of the term should be paid under some circumstances prior to the end of the term, or including a basis for a court to decide in favor of earlier payment. It is difficult to predict what that basis would be. Undue hardship? The remaining partners' ability to pay? The liquidity of the partnership's assets? The need to retain capital? Also, should a partner who has been expelled for misconduct pursuant to RUPA Section 31(2)(ii) from a partnership with an unexpired term be paid before the expiration of the term? The last sentence of RUPA Section 32(f) suggests that deferred buyout payments are to be secured. Consideration should be given
to specifying the nature and extent of security required. And while deferred payments are to bear interest, should interest be paid, at least annually? Are interest payments, if not paid, also to be secured?

In conclusion, after comparison with the ABA Report and RULPA, the RUPA dissolution provisions do not seem, on the whole, to constitute radical change or to be totally unacceptable, now that the concept of dissolution has been reinstated (albeit changed). However, even if the structure of the provisions is acceptable, there are numerous changes in the operative provisions which should be considered. Following discussion within the Subcommittee, it may be advisable to deliver to Professor Haynesworth a marked copy of Sections 29 through 32, together with our brief commentary, in order to assist the NCCUSL drafting committee in the preparation of the next RUPA draft.
A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act

By Larry E. Ribstein*
A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act

By Larry E. Ribstein*

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*Professor of Law, George Mason University School of Law. Member, Illinois bar.

Editor's Note: This Article reviews a pending revision project undertaken by the National Conference of Commissioners on Uniform State Laws (with the help of the Section of Business Law) to draft a new Uniform Partnership Act. Professor Ribstein is a prolific writer in this area and his views as a knowledgeable observer of the revision process are published to help focus attention on this important project of the Commissioners and to engender further study and commentary as the drafting process continues. This article was reviewed by Alan G. Donn, Professor Robert W. Hillman, Gerald V. Niesar, Dean Harry J. Haynesworth, IV, and John H. Small. The reviewers, some of whom are advisors to the National Conference of Commissioners on Uniform State Laws Committee that is drafting the Revised Uniform Partnership Act, do not necessarily agree with the positions taken by the author.

A copy of the draft Revised Uniform Partnership Act can be obtained from the National Conference of Commissioners on Uniform State Laws, Chicago, Illinois.
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A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act

By Larry E. Ribstein

After more than 75 years, the Uniform Partnership Act ("UPA") is being changed. Following a recommendation by an American Bar Association subcommittee, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") has undertaken the project of drafting a Revised Uniform Partnership Act ("RUPA"). A final version of RUPA is expected to be adopted next year. The UPA revision project deserves careful attention because if a new partnership law is adopted by the Conference it may influence partnership law for many years. Because the revised act has taken shape but has not yet hardened, this is an appropriate time to take a careful look at the work that has emerged from the drafting committee.

The following is a critique of the Draft of the revised act that, as of this writing, is scheduled for presentation at the annual meeting of the NCCUSL in Milwaukee in July, 1990. Following a discussion of some general considerations, this analysis is organized according to the principal subjects covered by the Draft—formation of the partnership, partnership property, powers of partners, rights and duties among the partners, and partner dissociation.

I. GENERAL DRAFTING OBJECTIVES

Before discussing the specifics of the Draft, it is important to step back and consider the objectives the drafters should have in mind in preparing a uniform partnership statute.

A partnership statute serves as a "standard form contract" that supplies terms where the parties have not drafted customized terms. These default rules should approximate what the parties would have drafted if they could bargain for and draft all of the rules that govern their relationship without cost. An appropriate

1. The Uniform Partnership Act, 6 U.L.A. 3 (Master ed. 1969) was approved by the National Conference of Commissioners on Uniform State Laws in 1914.
3. Drafts are prepared by the Drafting Committee to Revise the Uniform Partnership Act under the direction of Chairman H. Lane Kneedler and Reporter Donald J. Weidner. For some insight into the Reporter's views see Weidner, A Perspective to Reconsider Partnership Law, 16 Fla. St. U.L. Rev. 1 (1988).
5. For a discussion of some of these general drafting considerations see Ribstein, A Statutory Approach to Partner Dissociation, 65 Wash. U.L.Q. 357, 360-64 (1987).
set of default rules minimizes the costs and maximizes the benefits of doing business as a partnership, and reduces the parties' need to draft customized terms.

In determining the appropriate standard form rules, the drafters should first consider the sort of business for which they are drafting. The "standard" general partnership is a relatively small, very closely-held firm. Second, the drafters of the standard form should ensure that the standard form rules work well with each other. For example, rules governing management and dissolution should accommodate the partners' personal liability for partnership debts. Also, the statute should recognize the existence of a partnership only when the relationship is appropriate for the standard form rules the statute applies to it.

It follows from these drafting considerations that borrowing rules from other contexts, such as tax, corporate law, and limited partnership law, is usually inappropriate. Tax law is not intended to provide a standard form contract. Corporate and limited partnership rules are intended to be applied to firms that differ from general partnerships, and to fit with terms that differ from those in the general partnership statute.

Finally, the drafters should consider carefully both the costs and benefits of changing the law. Certainty of the law helps the parties know whether and how to draft around it, encourages the parties to settle rather than litigate disputes, and decreases the costs of resolving legal issues in court. Because the Uniform Partnership Act has been in existence for 76 years and has been adopted in all but one of the states, a considerable body of national case law is in place interpreting the statute's provisions. While many of the UPA's provisions could be improved, the benefits of such improvement should be weighed carefully against the costs of unsettling the law with new statutory provisions.

I believe that many of the problems with the NCCUSL draft stem from the fact that the Drafting Committee has adequately failed to take into account these general drafting considerations.

II. NATURE AND FORMATION OF THE PARTNERSHIP

Draft section 7 defines and provides rules for determining whether a partnership relationship has been formed. The definition of the partnership as an "entity" is discussed in section (A) while the existence of partnership is discussed in section (B).

6. See Draft, Prefatory Note at (i). While there are many large, professional general partnerships, these firms have relatively little need for a statutory standard form because they involve enough money that there are scale economies in drafting customized terms.

7. For a further discussion of problems of applying tax law in drafting the partnership statute see infra text accompanying notes 29-32. By contrast to the approach advocated in the text, Professor Weidner, the Reporter to the RUPA project, has advocated borrowing from corporate and limited partnership rules in drafting the partnership statute and has suggested that differences among the standard forms are primarily important in giving substance to tax distinctions. See Weidner, supra note 3, at 20, 27-32, 33, 37, 39.

A. PARTNERSHIP AS AN ENTITY

Draft section 7(a) defines the partnership in terms identical to those used in UPA section 6 except that section 7(a) explicitly provides that "a partnership is an entity." Thus, the Draft purports to settle the long-standing debate over whether the partnership is an aggregation of the partners or, like a corporation, an entity separate from the partners. Clear statutory recognition that the partnership has a legal existence separate from that of the partners would eliminate much confusion in partnership law. For example, it would clarify that partnership property is owned by the partnership rather than by the partners.

But clear statutory adoption of the entity theory also can lead to bad results. For example, in Braswell v. United States, the Supreme Court denied the sole shareholder of a corporation a fifth amendment privilege from being forced to incriminate himself by producing business documents. The Court distinguished an earlier case holding that an unincorporated sole proprietor was protected from self-incrimination resulting from the act of document production. The distinction makes no sense in terms of the rationale underlying the fifth amendment. The problem would only be exacerbated by extending the reasoning of Braswell to partnerships organized under the revised UPA.

The aggregate/entity distinction results from the courts' using these terms not only to characterize features of business associations that exist for pragmatic reasons but also to justify results that have no pragmatic basis. A partnership is accurately characterized as an entity to the extent that the law endows it, for example, with a separate right to sue; it should not be given such a right because to some extent it "is" an entity.

The most extreme and important example of the misuse of the aggregate/entity distinction is the tax distinction between partnerships and corporations. Corporations are separate tax units for no better reason than that they "are" somehow fundamentally "entities." The tax distinction should be based on tax policy, not legal conceptualism.

Thus, just as the aggregate characterization has caused the partners to be denied the practical advantages of doing business as a collective, so adoption of

9. For a discussion of this debate, see I A. Bromberg & L. Ribstein, Bromberg and Ribstein on Partnership ("1 Bromberg & Ribstein"), § 1.03(b) (1988).

10. See infra text, § III(B). For an example of the confusion caused by the failure to clearly recognize the separate existence of the partnership, see State v. Birch, 36 Wash. App. 405, 675 P.2d 246 (1984) (upholding dismissal of embezzlement prosecution against partner on the ground that the partner did not "take the property ... of another" as required by the statute).


the entity theory may cause partners to be wrongly treated as a collective. The best way to avoid this problem would be for the statute to define the partnership as an entity or an aggregate as the context may require. In this way, legal results will control the characterization rather than vice versa.

B. THE EXISTENCE OF PARTNERSHIP

The partnership statute should include a set of rules that state when it is appropriate to apply the standard form contract terms set forth in the partnership statute to the parties' relationship. These rules are necessary, first, because partnership is an informal relationship and the parties often do not articulate the nature of their relationship. Second, statutory rules prevent parties to a formal relationship from deliberately avoiding third-party consequences of their relationship (such as the personal liability of partners). The task of formulating rules is complicated by the fact that partnership is almost infinitely variable rather than a single, easily recognizable set of terms. The statute should be specific enough to provide notice and uniformity, but sufficiently general to permit the courts to deal flexibly with a wide variety of fact situations.

UPA section 6 defines partnership as "an association of two or more persons to carry on as co-owners of a business for profit." UPA section 7 then sets forth some specific rules for determining the existence of partnership. While these rules are in some respects ambiguous, they generally make appropriate distinctions, and generations of case law have resolved many of the ambiguities.

Draft section 7 carries over the UPA definition of partnership (except for the entity characterization discussed above) as well as the general outline of UPA section 7. While the Draft helpfully clarifies a few points, in several respects it is misguided. The important changes are discussed separately below.

1. Facts That Support Partnership

UPA section 7(4) provides that evidence that a person shares profits is "prima facie evidence that he is a partner." Thus, a showing or allegation of profit-sharing avoids dismissal on the pleadings, directed verdict, or nonsuit on the partnership issue in the absence of other facts bearing on partnership. The economic basis of this rule is that a profit-sharer is likely to be a "monitor" of the business, that is, an entrepreneur or manager who observes the behavior of those working in the firm and has the power to adjust or terminate their contracts.14

The Draft changes this rule in several respects. Profit-sharing is no longer prima facie evidence of partnership. The Draft Comment explains only that the Committee "felt [the language] to be inconsistent with present statements of the law of evidence." In place of the old language, the Draft substitutes without

comment several rules regarding evidence of partnership. Draft section 7(d) provides that a presumption of "co-ownership of a business" is created not by profit-sharing alone, but by "[t]he sharing of profits, losses and control ...." Section 7(d)(3) says that control-sharing "indicates partnership if such control is substantially greater than what would exist absent co-ownership." Draft section 7(e) provides that partnership "may be inferred" from profit-sharing subject to a showing of one of the relationships described in subsections 7(e)(1)-(6) and is "a stronger indication of partnership" than sharing of gross receipts.

These changes create a number of problems. First, the Draft confusingly uses several different and ambiguous terms describing the strength of various items of evidence: control-sharing "indicates" partnership, partnership "may be inferred" from profit-sharing, and profit-sharing is "a stronger indication" of partnership than gross-sharing. Is an "indication" intended to be stronger or weaker than an "inference"? Any evidence giving rise to a permissible "inference" is by definition an "indication," and any "indication" gives rise to an "inference." Yet the Draft seems to intend different things by these words. Moreover, neither "indication" nor "inference" adds anything. Courts need guidance as to the weight of control and profit-sharing evidence, not as to whether these facts are relevant.

Second, requiring a showing of profits, losses, and control in order to establish a presumption of partnership is particularly troublesome. The facts necessary to create the "presumption" would include virtually all of the elements of partnership. This eliminates the profit-sharing rule as a simple and economically sound rule-of-thumb. It also makes the "presumption" meaningless: even after the proponent of partnership establishes virtually all of the elements of partnership, she has only a "presumption" although there is little left to rebut the presumption. Most importantly, it implies that all three

15. The Draft awkwardly states this rule in a series of subsections under the basic "presumption" rule in § 7(d), introduced by "but." This drafting implies that the subsections qualify the presumption, but none of the subsections in terms qualify this presumption. The first two subsections state facts that do not independently show partnership, while the third subsection states the effect of control alone. The confusion is exacerbated by the fact that the effect of profit-sharing alone is stated in a separate § 7(e) rather than as an ostensible qualification to the "presumption" of § 7(d).

16. See infra text, § II(B)(3).

17. This indication exists under Draft § 7(d)(3) only if the control "is substantially greater than what would exist absent co-ownership." Thus, control indicates partnership only if it is substantially greater than control that does not indicate partnership. Does this mean that control must be "substantial"? If so, what does that mean?

18. Stating that profit-sharing is "a stronger indication" of partnership than gross-sharing is particularly unhelpful in light of the fact that nothing in the section states the weight of gross-sharing evidence. Draft § 7(d)(2) states only what such evidence does not weigh (it does not alone establish co-ownership).

19. The only elements of partnership identified in the cases that are not included are contribution and co-ownership of property. See I Bromberg & Ribstein, supra note 9, § 2.07(b)-(e).
elements are necessary conditions of partnership. It has long been clear that the partners can waive profit-sharing, loss-sharing, and management rights.  

Finally, the Draft variously states that facts support “co-ownership of a business” and that they support “partnership.” It is not clear whether these are intended to mean the same thing, since co-ownership of a business is only part of the definition of partnership.

2. Facts Not Sufficient for Partnership

UPA section 7 states two types of facts that do not alone establish partnership: ownership of property (section 7(2) and sharing of gross returns (section 7(3)). Draft section 7(d)(1) changes the first of these nonpartnership facts by stating that “mere passive co-ownership” does not of itself establish “co-ownership of a business.”

In order to evaluate fully the change made by the Draft, it is important to understand the scope and function of UPA section 7(2). The definition of partnership identifies relationships for which the standard-form rules set forth in the UPA are appropriate. These rules are designed for a business relationship, and therefore provide for exercise of ownership rights collectively by the partners. Without collective ownership, any partner could decide to sacrifice the value of the business by forcing partition and sale of the property contrary to the parties’ agreement. Consistent with these principles, the partnership is

20. See lead-in to U.P.A. § 18 which provides for these rights. Thus, for example, one may delegate active control to managers and yet still be a partner. See, e.g., West v. Kerr-McGee Corp., 586 F. Supp. 493 (E.D. La. 1984), rev’d on other grounds, 765 F.2d 526 (5th Cir. 1985); Parks v. Riverside Ins. Co. of Am., 308 F.2d 175 (10th Cir. 1962) (Okla. law); Brand v. Elledge, 101 Ariz. 352, 419 P.2d 531 (1966); Milberg Factors, Inc. v. Hurwitz-Nordlicht Joint Venture, 676 S.W.2d 613 (Tex. Civ. App. 1984). One who is in a position to revoke a delegation of management power may be said to have a passive sort of “control.” But it is not clear that this is “control” as that term is used in Draft section 7. Moreover, this passive power may not be explicit, and indeed its existence may turn on whether the relationship is characterized as a partnership.

An agreement to share losses is clearly unnecessary for partnership. Partners often do not expect losses and so do not provide for them one way or the other. If the parties are partners, they nevertheless share the risks of the business by virtue of their personal liability to creditors. Accordingly, many courts have held in favor of partnership without evidence of an agreement to share losses. See Minute Maid Corp. v. United Foods, Inc., 291 F.2d 577 (5th Cir. 1961), cert. denied, 368 U.S. 928 (1961) (Tex. law); Anderson v. National Producing Co., 253 F.2d 834 (2d Cir. 1958), cert. denied, 357 U.S. 906 (1958) (N.Y. law); Endsley v. Game-Show Placements, Ltd., 401 N.E.2d 768 (Ind. App. 1980).

21. See Draft § 7(d). Draft §§ 7(d)(1)–(2) create an analogous problem by stating certain facts that do not indicate “co-ownership of a business.”

22. See Draft § 7(d)(3), 7(e).

23. Draft §§ 7(d)(1)–(2) also differ from the U.P.A. in that, rather than standing alone, they qualify the presumption of partnership set forth in § 7(d). For the difficulties this drafting creates, see supra note 15.

24. See UPA § 25; infra text, § III(B).

25. UPA § 31 gives any partner the power to dissolve the firm, but UPA § 38 provides that a partner who dissolves in contravention of the agreement, i.e., prior to the termination of an agreed term or undertaking, cannot compel liquidation of the partnership. See generally infra text, § VI(B).
defined as a “business,” and the effect of UPA section 7(2) is to clarify that housemates or others in nonbusiness relationships are not partners simply because they hold joint title and agree to split any profit on resale of the property. But collective rights are necessary for property held for investment purposes in order to ensure that the property will be sold only as justified by the parties’ assessment of business considerations, such as market conditions, and not on the whim of any individual partner. Accordingly, it has been held under the UPA that a partnership relationship exists even in cases of passive investment. 26

While the “mere passive co-ownership” language in the Draft appears to continue the intent of UPA section 7(2), the Draft changes the UPA by implying that passive investment companies are not partnerships. First, the addition of the “mere passive co-ownership” language excludes from evidence supporting partnership not only the mere holding of title, but also doing so “passively,” that is, for investment. Indeed, this language ironically would support characterizing as a partnership the “housemate” situation, which is not a “mere passive” holding of title. Second, the Draft provides that “passive” ownership does not support “co-ownership of a business.” 27 Because the language seems to be directed at the “co-ownership” element, a court might find that evidence of “passive co-ownership” does not support partnership even if there is clearly an investment-type business. This is contrary to case law under the UPA holding that joint ownership indicates the parties’ subjective intent to co-own a business. 28

The Draft Comment justifies the change by citing a Treasury regulation relating to the tax definition of partnership. Even if the particular tax analogy is appropriate, using tax law as a basis for partnership law creates a dangerous precedent because of the very different functions of the two legal regimes. Tax law is regulatory while the partnership statute attempts to anticipate the contract terms that the parties would agree to in the absence of transaction costs. There is no reason to assume, from the fact that tax law does not deem parties to be partners, that the parties would not intend partnership consequences for other purposes. The Internal Revenue Code includes its own definitions of partnership and corporation 29 and identifies characteristics that are deemed to be “corporate” for tax purposes 30 whether or not the parties have formed a partnership for partnership law purposes. These provisions are based on the

27. UPA § 7(2) provides that mere holding of title does not support “a partnership.”
29. See I.R.C. §§ 7701(a)(2) and 7701(a)(3) (1989) (defining partnership and corporation); See also id. § 7704 (defining the separate class of publicly traded partnerships).
highly artificial aggregate-entity distinction—31—a distinction that the RUPA drafters have rejected.32

3. Protected Relationships

UPA section 7(4) provides that profit-sharing is not prima facie evidence of partnership if the profits were received in certain ways defined in subsections 7(4)(a)-(e), including as interest on a loan, repayment of debt, wages, and rent. These relationships can be viewed as “protected” from an inference of partnership. The specification of these situations in which profit-sharing alone does not support a partnership determination reflects the fact that often parties, such as employees, share profits without having a significant role in the business.

The Draft changes the UPA in several ways. First, it states that there is no partnership inference only if the profit share “is more properly characterized” as one of the protected types of payment. Thus, the Draft provides that one may share profits either as a partner or in one of the specified relationships. This is inconsistent with cases holding that one can be both a partner and in one of the protected relationships.33 The Draft’s approach defeats the purpose of clarifying through specification of protected relationships when profit-sharing should provide a strong inference of partnership. The Draft, in effect, requires the opponent to establish the nonexistence of partnership in order to defeat the inference of partnership status. In other words, the inference of partnership from profit-sharing may stand even in the face of evidence that the profit-sharing does not support the inference if this evidence is not strong enough to defeat the existence of partnership.

The Draft also changes the UPA by broadening and modernizing the protected relationships. For example, the wages category (section 7(e)(2)) is extended to include payments to independent contractors and other compensation. While these changes are mostly salutary, there are some trouble spots. Section 7(e)(4) extends the annuity category to include payment of a “health benefit,” and section 7(e)(5) extends the interest-payment category to include “a direct or indirect present or future ownership interest in the collateral” of a loan. By implying that these payments are profit-sharing (and therefore must be protected from the inference of partnership), the Draft may unintentionally expand the concept of “profits.” Profits include only payments that indicate that the recipient is a residual claimant, and therefore an owner of the business.34

31. See Ribstein, supra note 13, at 872–73.
32. See supra text, § I(A).
34. See supra text accompanying note 14.
The partnership inference clearly is not supported by the receipt of fixed payments from the partnership, such as health benefits.\textsuperscript{35}

4. Conclusion and Recommendation

Most of the changes the Draft makes in section 7 are questionable. The Draft's changes are not only contrary to policy, but would render the law far less certain and predictable by unsettling the large body of helpful case law that interprets the UPA.

I recommend a statutory clarification of the rules on the existence of partnership that would include five subsections covering, in order, the following elements:

(i) A general definition of partnership along the lines of UPA section 6.

(ii) A specification of evidence that is relevant to the existence of partnership, including the sharing of profits, losses, control, and ownership of property.

(iii) A specification of the weight of particular items of evidence. The current rule that profit-sharing is prima facie evidence is not particularly useful because the proponent of partnership rarely relies solely on profit-sharing evidence. The statute should single out profit-sharing evidence, subject to a showing of a protected relationship, as particularly strong evidence of partnership. The parties rarely agree to share losses in informal relationships. Control-sharing is a vague concept that is an unreliable indicator of partnership. It is present in many sole proprietorships with hired managers, but absent in, for example, law and other professional partnerships.

(iv) A definition of the role of protected relationships. These relationships are established in the case law and are useful because they define situations in which both third parties and profit-sharers should not assume the existence of partnership.\textsuperscript{36} The statute should, however, clarify the precise role of this evidence. In particular, the statute should eliminate confusion about the relationship between the showing of a protected relationship and the showing of the nonexistence of partnership.\textsuperscript{37} The statute might provide that, on a showing of a protected relationship, profit-

\textsuperscript{35} See Pinnacle Port Community Ass'n v. Orenstein, 872 F.2d 1536 (11th Cir. 1989) (finding no partnership between lender and developer based on testimony that developer received all revenues after lender's principal and interest payments, despite other testimony that lender got 94% of total returns); In re Matis, 74 Bankr. 363 (Bankr. N.D.N.Y. 1987); Hull v. Comptroller of the Treasury, Income Tax Division, 312 Md. 77, 537 A.2d 1188 (1988) (retired pilots receiving guaranteed payments from an association were not partners); Coon v. Schoeneman, 476 S.W.2d 439 (Tex. Civ. App. 1972) (plaintiff received all profits from sale of houses after paying fixed amount to owner). However, partnership may be supported by evidence other than the mode of payment. See Bernstein, Bernstein, Wile & Gordon v. Ross, 22 Mich. App. 117, 177 N.W. 2d 193 (1970) (partnership although attorney received fixed salary).

\textsuperscript{36} See Ribstein, Limited Liability and Theories of the Corporation (Draft, 1990). \textsuperscript{37} See supra text accompanying note 33.
sharing is not strong evidence of partnership, but the proponent of partnership may show by other evidence that the parties intended to be partners notwithstanding the existence of the protected relationship.

(v) Identification of evidence that does not establish partnership, including sharing of gross returns and joint ownership of property. In particular, the statute should clarify that passive investment may constitute partnership.

III. PARTNERSHIP PROPERTY

The UPA includes provisions that specify (i) what property is owned by the partnership; (ii) the partners' rights in this property; (iii) how this property is transferred by the partnership; and (iv) how the property is divided on dissolution. The first two categories of provisions are discussed in this part. The third is an aspect of the agency power of partners and is accordingly dealt with in part IV. The fourth is discussed in part VI in connection with the partners' rights on dissolution.

A. WHAT PROPERTY DOES THE PARTNERSHIP OWN?

The informality of the partnership relationship creates problems when it is time to disentangle what is owned by the firm and what is owned by individual partners. UPA section 8 is little help, providing only that the partnership owns property that is "brought into" or "acquired by" the partnership and that property purchased with partnership funds is presumed to be partnership property. The case law is often contradictory. For example, while the partnership funds presumption is often held to operate in favor of record title, this is not always the case. Thus, this is an area in which a new statutory provision is sorely needed.

Draft section 8 does provide valuable guidance as to what property is owned by the partnership. It provides that property is deemed to be owned by the partnership if it is acquired in partnership name and presumed to be owned by the partnership if it is purchased with partnership funds except that property is not partnership property against third parties if record title is other than in the partnership name. Property is presumed to be owned by the individual partners if it is acquired in the name of an individual partner without partnership

38. See, e.g., Cyrus v. Cyrus, 242 Minn. 180, 64 N.W.2d 538 (1954); In re Estate of Schaefer, 72 Wis. 2d 600, 241 N.W.2d 607 (1976).
funds.\textsuperscript{41} In general, therefore, the written record takes precedence except where property is acquired with partnership funds and is not titled in the names of individual partners.

Making record title controlling in favor of third parties without contrary knowledge is clearly salutary because third parties' costs of learning whether title accurately reflects ownership are higher than the partnership's cost of monitoring title.\textsuperscript{42}

It is less clear that the partnership statute should create a presumption in favor of individual ownership of property held in the partners' names where the property is used in the partnership business but was not purchased with partnership funds. Because of the informality of partnership, use by the partnership may be at least as reliable an indicator of ownership as individual title. Moreover, declaring a partner to be the owner of property that is important to the firm may permit that partner to appropriate value that belongs to the partnership or to extract concessions from the other partners.\textsuperscript{43}

Despite these considerations, the presumption based on title in the partners' names is justified on the ground that it provides certainty that will minimize litigation costs. While the Draft may disappoint some partners by causing outcomes that are inconsistent with the parties' intent, all of the partners would favor a rule that minimized the total costs of conducting the business. Even apart from the preferences of the partners themselves, clear rules are appropriate because much litigation cost is borne by taxpayers generally, so that partners lack adequate incentives to avoid litigation by proper planning. Finally, the risk of disappointing partners' expectations is minimized by the fact that the Draft's presumptions can be offset by evidence of the parties' actual intent.

While the Draft moves in the correct direction, some refinements would be appropriate. First, the partnership statute should provide for determination of ownership of property consistent with representations to justifiably-relying third parties. In other words, third parties who rely, for example, on credit applications should be treated like those who rely on record title. The statute might create a category of apparent ownership analogous to apparent partnership, or "partnership by estoppel."\textsuperscript{44}

Second, the statute should clarify that the "partnership funds" presumption applies when property is purchased on partnership credit, with repayments to be made with partnership funds.\textsuperscript{45}

\textsuperscript{41} Record title in individual names constitutes absolute proof of individual ownership rather than merely a presumption.

\textsuperscript{42} See I Bromberg & Ribstein, supra note 9, at 3:21.

\textsuperscript{43} See, e.g., Pav-Saver Corp. v. Vasso Corp., 143 Ill. App. 3d 1013, 493 N.E.2d 423 (1986) (wrongfully dissolving partner precluded from withdrawing patent or its value from partnership where such withdrawal would have prevented the innocent partner from carrying on the business); I Bromberg & Ribstein, supra note 9, at 3:6–3:7.

\textsuperscript{44} See UPA § 16.

\textsuperscript{45} See I Bromberg & Ribstein, supra note 9, at 3:8–3:9.
B. PARTNERS’ INTERESTS IN PARTNERSHIP PROPERTY

The rules regarding the partners’ interests in the partnership and in partnership property comprise one of the most confusing areas of partnership law and are among those most needing clarification. UPA section 25(1) ostensibly makes each partner a co-owner of specific partnership property but if this principle were applied to its logical extent, partnership would not be a suitable mechanism for operating a business. The need for continuity of the firm means that the partners’ rights in partnership property should be collective rather than individual. Accordingly, UPA section 25(2) defines the partners’ rights as “tenants in partnership” so as to systematically negate all incidents of individual ownership. The net result of these provisions is that partnership property is, in effect, owned by the partnership, but the language of the UPA provides an opportunity for the courts to go astray.46

The Draft eliminates this troublesome confusion by making it clear that property is owned by the partnership. Draft section 25(a) clarifies that property “acquired by a partnership becomes property of the partnership rather than of the partners individually.”47 This is confirmed by subsections 25(b)-(d), which provide that the partner neither can possess for individual purposes, nor transfer, specific partnership property.

C. PARTNER’S INTERESTS IN THE PARTNERSHIP

Although partners, like corporate shareholders, have no individual interests in partnership property, they do have interests in the partnership as a whole. The UPA defines this interest and states rules regarding assignment of and creditors’ rights in the partner’s interest. These three topics are covered in separate subsections below.

1. Definition of the Partner’s Interest

UPA section 26 defines the partner’s interest in the partnership as “his share of the profits and surplus.” It is not clear whether this refers only to the partner’s share in distributions of the firm, or whether it refers to other financial48 attributes of partnership, including the partners’ rights to indemnification and repayment of capital contributions and loans, and the partners’ obligation to contribute to the firm’s losses.49

Draft section 26 does not eliminate this ambiguity. It states only that “[a] partner’s assignable interest in the partnership is the partner’s share of the

46. For an example concerning partners as potential embezzlers of partnership property, see supra note 10.
47. Consistent with this principle, UPA § 24, which stated that the partner’s property rights included “rights in specific partnership property,” has been deleted.
48. By distinguishing the partner’s interest in the partnership from the right to participate in management, UPA § 24 clarifies that § 26 refers only to financial rights.
49. See I Bromberg & Ribstein, supra note 9, at 3:44–3:45; Rosin, supra note 12.
distributions." Since "distribution" is nowhere defined, the Draft does not state whether the interest includes the entire distribution to a partner on dissolution, including the partner’s capital contribution, indemnification by the partnership, and contributions by the other partners, or whether it includes only the partner’s share of "profits," that is, the residual after all other claims, including other forms of debts to partners, are paid. The Comment explains only that profits and losses were not listed because they “must both be kept account of to determine the distributions to which a partner is entitled.” This implies but does not state clearly that "distribution" is intended to be an inclusive term. Nothing in the Draft or Comment explains whether the partner’s interest includes her contribution obligation.

The appropriate definition of the partner’s interest in the partnership should not be considered in the abstract, but rather in light of the definition’s consequences of determining what is comprised within a voluntary assignment or available to a partner’s creditors. The definition should anticipate what financial rights the parties would expect to be assigned or available to creditors in the absence of a contrary agreement. Thus, the statute should either dispense with a separate definition or explicitly define the partner’s interest in the partnership as what the statute says is assigned or available to creditors. This is discussed in the following subsections.

2. Assignment of a Partner’s Interest

UPA section 27 provides that an assignee is entitled to receive "profits" to which the assignor would be entitled and, on dissolution, the assignor’s interest; that the assignment does not dissolve the partnership; and that the assignee has no management or information rights.

Draft section 27 clarifies that a partner may assign her partnership interest “in whole or in part” and that the partnership’s obligations to the assignee are triggered by its receipt of a notice of assignment. It also rephrases the financial rights of the assignee.

Although the Draft improves on the UPA, it is deficient in some respects in defining the assignee’s and assignor’s rights.

a. The Assignee’s Rights

The Draft provides that the assignee receives “distributions to which the assignor would otherwise be entitled” (section 27(a)(4)) and, on dissolution, “the net amount otherwise distributable to the assignor” (section 27(b)). The Draft fails to clarify whether the assignee is entitled only to the assignor’s profit share or to the complete bundle of the assignor’s financial rights. The “net amount otherwise distributable” might be an inclusive term, but “net” might also exclude the assignor’s right to repayment of loans, indemnification, and repayment of capital.

The statute should be drafted so as to anticipate the probable expectations of general partners and their assignees. An assignee would probably expect to
receive, in the absence of contrary agreement, a financial interest analogous to that received by the transferee of corporate stock. This includes the partner’s capital contribution and residual claim to the assets of the partnership after all fixed claims, including debts to partners, have been paid. It does not include rights the partner has other than on account of her capital investment, such as repayment of loans, indemnification, and accrued salaries.

The Draft carries over the UPA rules denying assignees both management and information rights. While these rules comport with the idea that the assignee is not a partner and cannot become so without the other partners’ consent, denying the assignee information rights is questionable. The assignee has a strong need for information for federal tax purposes and in order to protect herself from unfair dealing by the other partners. At the same time, the costs to the partnership of providing information to assignees are relatively low. Because the lack of information rights substantially hinders assignability while conferring only a small benefit on the partnership, a fully-specified partnership agreement would probably give assignees information rights. The standard form should therefore give information rights to assignees in the absence of contrary agreement.50

b. The Assignor’s Status

Draft section 27(a)(5) provides that “the assignor retains all the rights and obligations of a partner other than the interest in distributions.” While this is the likely result under the UPA,51 it is the wrong result. A partner’s assignment of her entire financial interest leaves her with a power of control but without a profit share. Because of the importance of profit-sharing to the determination of partnership,52 the assignor is probably not a partner. The copartners probably would draft for this result in the absence of transaction costs because of the risk that an assignor would lack adequate incentives to exercise control for the benefit of the firm. Accordingly, the statute should adopt this approach as a standard term, subject to the parties’ contrary agreement.53

3. Rights of Partners’ Creditors

UPA section 28 gives partners’ creditors the remedy of a “charging order” to permit them to reach the partner’s interest in the firm without the disruptive effects of attaching specific partnership property. Section 28 provides that a

52. See supra text accompanying note 14.
53. Note that Draft § 31(2)(v) does provide for expulsion of the assignor partner. This is at least preferable to giving the assignor the right to remain in the partnership over the objection of the other partners.
court may "charge the interest of the debtor partner" and may enter other orders permitting the creditor to collect amounts due the debtor partner. It also allows the other partners to redeem the charged interest.

Draft section 28 makes several changes in the UPA, including the following:

(i) an assignee's interest may be charged;
(ii) a charging order "constitutes a lien" on the charged interest;
(iii) a court may foreclose the charged interest;
(iv) the purchaser of a foreclosed interest has the rights of an assignee;
(v) the charged interest may be redeemed by the debtor partner;
(vi) the charging order is the creditor's exclusive remedy; and
(vii) the charging order can reach distributions of all kinds, and not only "money" due the debtor.

Most of these changes improve on the UPA, but several raise some questions that need to be resolved.

The provision that a charging order is a lien on the charged interest should be clarified. As it stands, it erroneously implies that the charging order alone confers priority on the charging creditor. 54

Empowering the court to foreclose on the charged interest apparently is consistent with prior law. 55 However, because a purchaser of a foreclosed interest is an assignee, with at least the power to compel judicial dissolution of a partnership at will, 56 the statute should permit foreclosure only when the creditor otherwise is not likely to be paid within a reasonable time. 57

Making the charging order an exclusive remedy is probably a good idea and is amply supported by authority, 58 although, as noted in the Draft Comment, there are dissenting views. The justification for exclusivity is that the charging order, unlike other remedies such as garnishment, is specifically designed to accommodate the interests of both partners and creditors. Exclusivity is unwise only to the extent that the charging order unduly limits the rights of partners' creditors. This may be the case with respect to the limitation to judgment creditors. Perhaps the Draft should include procedures permitting nonjudgment creditors to reach partnership interests.

54. See Princeton Bank & Trust Co. v. Berley, 57 A.D.2d 348, 394 N.Y.S.2d 714 (1977) (levying creditor of an individual partner had priority over an earlier charging creditor of the partner who had not obtained ancillary order); 1 Bromberg & Ribstein, supra note 9, at 3:71. But see City of Arkansas City v. Anderson, 242 Kan. 875, 752 P.2d 673 (1988) (charging order created lien on partnership interest that was superior to security interest entered into prior to charging order but perfected afterward).


56. See UPA § 32(2); Draft § 31Y(5).


58. See 1 Bromberg & Ribstein, supra note 9, at 3:70, n.89.
IV. PARTNERS’ POWER TO BIND PARTNERSHIP

An important function of the partnership statute is to define the agency power of partners to bind the partners and the partnership in transactions with third parties. The following sections discuss authority of partners generally, the partners’ power to convey real property, the partnership’s liability for partners’ wrongful acts, admissions by and notice to partners, and the nature of the partners’ liability.

A. PARTNERS’ GENERAL AGENCY POWER

UPA section 9(1) provides that “[e]very partner is an agent of the partnership.” It then describes the scope of the implied, apparent, or inherent authority every partner has by virtue of her status as a partner. Specifically, a partner’s act binds the partnership if it is “for the purpose of its business” and is “for apparently carrying on in the usual way the business of the partnership.” This can be called the partner’s “partner authority.” If the partner acts within “partner authority,” sections 9(1) and (4) provide that the act binds the partnership unless the partner is actually unauthorized and the third party knows this. Section 9(2) provides that if a partner acts outside this “apparently . . . usual” area of binding power, the acts are not binding unless they are actually authorized, and section 9(3) lists certain acts that are not binding unless authorized.

From a policy standpoint, UPA section 9 balances the interests of partners and third parties. If a partner is acting within “partner authority,” the third party is justified in relying without further investigation, and the burden is on the partnership to control its agent. However, if the partner is engaging in acts the third party should know do not usually bind the partnership, the third party should not proceed without further investigation.

Draft section 9 generally is consistent with the UPA but makes four significant changes. First, the Draft clarifies that a partner has binding power not only to carry on the business of the particular partnership, but also to carry on “business of the kind carried on by the partnership.” This is a helpful clarification that is consistent with prior case law.59

Second, Draft section 9 omits UPA section 9(3)’s list of acts that are not in the presumptively-binding category. This change is supported by the fact that some of the acts in the UPA list were not helpful. For example, it was not clear what acts could be considered to “dispose of the good will of the business” within the meaning of section 9(3)(c).60 and it made little sense in light of modern practice to say that partners had no partner authority to contract to submit partnership claims to arbitration as provided by section 9(3)(e).61 Nevertheless, the list should have been revised and not completely omitted because the statute can usefully provide guidance in this area.

59. See id. at 4:9–4:10, n.11.
60. See id. at 4:39–4:40.
61. See id. at 4:44–4:46.
Third, the Draft would change the law regarding when a third party “knows” acts within a partner’s “partner authority” are actually unauthorized. UPA section 3(1) defines “knowledge” to include knowledge of facts that would show “bad faith.” This definition helpfully clarifies that proof of knowledge does not depend on establishing subjective awareness. For example, a partnership escaped being bound by an issuance of title that a third party knew related to the partner’s personal loan even without proving that the third party was subjectively aware that the issuance was unauthorized. Draft section 3(a) could change this salutary result by requiring the partnership to prove that the third party is “aware” of the lack of authority.

Fourth, Draft section 9 would change the law by cross-referencing the “statement of partnership” provided for in section 10x. This important change is discussed in section III (C).

B. TRANSFERS OF RECORD TITLE

If ownership of property is recorded, even clearly unauthorized transfers should bind the partnership as against grantees who justifiably relied on record title. UPA section 10 makes transfers in the chain of title (i.e., in the name of the title-holders) binding against the partnership unless the transfer was unauthorized or unless the property has been transferred to a bona fide purchaser without knowledge of the lack of authority. Authorized transfers outside the chain of title transfer only the partnership’s equitable interest.

Draft section 10 carries over the general thrust of UPA section 10 but makes several helpful changes. The Draft sensibly applies to all transfers of titled property and not merely real property. Also, the Draft cross-references section 9 generally as to proof of authority rather than only the “apparently . . . usual” portion of section 9 as in UPA section 10. Third, the Draft eliminates troublesome UPA section 10(2) which provided for the passage of the partnership’s “equitable interest” even where property titled in the partnership name was conveyed in the name of an individual partner.

The only debatable change in Draft section 10(a) is providing that the partnership must prove lack of authority in order to escape the effect of transfers in the partnership name. The third party arguably should have to prove authority here just as with respect to other partner acts. Perhaps by titling property in the partnership name, the partners intend to induce third parties to rely on the partners’ power to transfer title. But the partners can accomplish this objective through the statement of partnership discussed in the next section.

63. See I Bromberg & Ribstein, supra note 9, at 4:58 (suggesting that even a transfer that was not “apparently . . . usual” should bind the partnership “if it was otherwise actually or apparently authorized”).
64. See id. at 4:59 (suggesting that this provision should be either eliminated or changed “to clarify that the holder in this situation has no rights against those other than the partnership”).
C. THE STATEMENT OF PARTNERSHIP

Draft sections 10X-10Y would add new provisions that impact determination of partners' authority. Section 10X lets the partnership file with the Secretary of State a Statement of Partnership that includes, among other things, the names of partners required to sign transfers of real property held in the partnership name and, at the partnership's option, the partners' authority or restrictions on their authority to enter into partnership transactions. The filing creates a conclusive presumption that the partners have the stated authority but limits partners' authority only as to third parties who know of the limitation. Section 10Y permits a person named in a statement to file a notice of denial of partner status. Section 10Z requires amendments to correct factual inaccuracies and provides for liability to the partnership of partners whose filings damage the partnership.

The Statement of Partnership is, as far as it goes, mostly a helpful addition to the statutory law of partnership. Since the statement is optional, it does not impose troublesome formalities on what is essentially an informal relationship.

The chief problem created by the filing provisions is that they impose unnecessary requirements on partnerships that choose to make the filing. Section 10X requires identification not only of the partnership, and of the partners authorized to transfer property, but also of all of the partners, or of an agent who maintains a list of all of the partners. And, section 10X requires verification of the statement by all the partners (up to a maximum of 10), and of any amendment by at least two partners. Lastly, section 10Z mandates the filing of amendments within 30 days after the statement becomes inaccurate. These requirements are superfluous since information in the statement is binding against the partnership. Moreover, the effect of all of the requirements is unclear since the statute fails to prescribe penalties for violating them. For example, does misrepresentation, nondisclosure, or lack of verification nullify the effect of the statement?

In general, these requirements seem to be a blind application of analogous limited partnership rules. Even if such rules are justified for limited liability entities (and there is a strong argument that they are not) they clearly have no place in a general partnership statute.

Another criticism of the statement of partnership provisions is that they do not go far enough. In particular, the partnership should be able to conclusively restrict authority against third parties in connection with transactions in property the ownership of which is customarily recorded. As long as statements of

67. Draft § 9 provides that that section is subject to the “partnership authority provisions of § 10x.”
68. Curiously, Draft § 10X(a)(4) mandates disclosure of the partners required to sign real property transfers, while § 10X(a)(5) permits disclosure of other matters relating to partners' authority. There is no apparent reason why the partnership should not be allowed to choose what authority-related matters it discloses in the statement.
69. See Ribstein, supra note 13, at 877-80.
70. This is provided in the Georgia statement of partnership provision, Ga. Code Ann. § 14-8-10A(g) (Harrison Supp. 1987).
partnership are adequately cross-referenced with title, this would impose little additional burden on third parties who must check the record in all events.

D. PARTNER ADMISSIONS

UPA section 11 provides that a partner's admission concerning affairs within the scope of the partner's authority is evidence against the partnership. The Draft omits this provision. The omission makes sense since the effect of partner admissions necessarily follows from the partner's general authority to bind the partnership. Perhaps the Draft could eliminate any possible ambiguity by providing in section 9(a) that "the act or statement of every partner ... binds the partnership."

E. NOTICE TO THE PARTNERSHIP

It follows, from the fact that each partner is a general agent for the partnership, that notice to or knowledge of a partner usually should be sufficient to constitute notice or knowledge of the partnership. Consistent with this general principle, UPA section 12 provides that a partner's knowledge or notice is imputed to the partnership unless: (i) the partner neither was acting in the matter to which the notice related nor "reasonably could and should have communicated it to the acting partner"; or (ii) the partner with knowledge or notice committed or consented to the commission of fraud on the partnership.

The Draft replaces UPA section 12 with section 3(d)-(e). Section 3(d) provides that notice or knowledge "received by a partnership" is effective when brought to the attention of [the] individual conducting the transaction or would have been brought to her attention if the partnership had exercised "due diligence." The partnership is deemed to exercise "due diligence" if it maintains and ensures compliance with reasonable communication routines. There is no failure of due diligence if communication was not part of the individual's regular duties and the individual had no "reason to know of the transaction and that the transaction would be materially affected by the information." Section 3(e) provides that notice to or knowledge of a partner is imputed to the partnership to the same extent as notice to or knowledge of a nonpartner agent.

These provisions are seriously misguided. The Draft Comment explains that section 3 implements the suggestion in the ABA Report that the partnership statute draw heavily from the definition of "notice" and "knowledge" in the Uniform Commercial Code ("U.C.C."). But blind borrowing from the U.C.C. ignores the special considerations relating to partners and partnerships. First, Draft section 3(d) assumes that the notice or knowledge has been "received by a partnership." Yet this is one of the questions the statute should be answering. The statute seems to contemplate the situation in which information has clearly

71. The ABA Report did not, in fact, recommend that the U.C.C. provisions be adopted to define how a partner's notice or knowledge is imputed to the partnership. See ABA Report, supra note 2, at 141-42.
been received by a large firm through its clerk, but should not necessarily be charged with knowledge or notice. In the partnership situation, on the other hand, the partnership may not have “received” information that has been communicated to a partner, as where the partner receives the information in a nonpartner capacity.

More importantly, the partnership should not necessarily be deemed to have received notice or knowledge if the information was known by or communicated to a partner who was committing fraud on the partnership. The defrauding partner is not acting for the firm and cannot be relied on to communicate the information to acting partners.72

Section 3(d)-(e) also ignores the fact that partners have much broader power than other agents. A third party normally can assume that, once information is known by a partner, it is in the hands of someone who can act on it on behalf of the firm or who at least is sufficiently familiar with partnership affairs that she will communicate it to the acting partner. The evidence burden imposed on third parties by the U.C.C.-based “due diligence” rule is appropriate only for communications to nonmanager employees, not partners.

Although UPA section 12 should not have been replaced by borrowing inappropriately from another statute, a few matters do need clarification. First, when does an informed non acting partner have a duty to communicate knowledge to the acting partner? Second, what sort of “fraud” should be deemed to prevent imputation of notice or knowledge to the partnership?

F. PARTNERS’ WRONGFUL ACTS

UPA sections 13 and 14 state the partnership’s liability for wrongful acts of partners. Once again, these provisions follow from the general agency power of partners. Under section 13, the partnership is bound by a partner’s wrongful act if the partner acted “in the ordinary course of the business of the partnership or with the authority of his co-partners.” Under UPA section 14, the partnership is liable for misapplication of a third party’s funds even if the misapplication was not in the ordinary course of business as long as the funds were misapplied (i) while the funds were in the partnership’s custody if the partnership received the funds in the course of its business (section 14(b)); or (ii) by a partner whether or not the funds were in the partnership’s custody if the partner received them while acting within her apparent authority (section 14(a)).

Draft section 13(a), which is intended to combine UPA sections 13 and 14(a), provides that the partnership is liable for the “actionable conduct or omission” of a partner “acting in the partnership business” or with actual or apparent authority. Section 13(b), concerning misapplication of funds in the partnership’s custody, duplicates UPA section 14(b).

The Draft makes two helpful changes. By deleting UPA section 13’s “not being a partner” language, it eliminates the outmoded bar to tort suits by

72. See I Bromberg & Ribstein, supra note 9, at 4:74. However, a third party should not necessarily be deemed to know of the partner’s fraud. See id.
partners. Also, by referring to "actionable" instead of "wrongful" conduct, the Draft clarifies its application to strict liability claims.

Other changes made by the Draft are questionable. First, by providing for liability for a partner's act "in the partnership business," rather than the "ordinary course of the business" as provided in UPA section 13, the Draft opens the door to liability for extraordinary conduct such as crimes and intentional torts.

Second, the Draft unjustifiably narrows the partnership's liability because Draft section 13(a) does not fully replace the now deleted UPA section 14(a). In particular, Draft section 13 may not support liability of a partner who receives client funds while acting within her apparent authority and then misapplies the funds while acting on her own behalf. In order to recover under Draft section 13, the third party must show that the funds were in the "custody of the partnership," which they arguably are not if a partner solicits and then immediately absconds with the funds. This problem results from "simplification" of the UPA without sufficient attention to the careful drafting and deliberate policy choices of the original act.

The Draft also fails to make a badly-needed change. The language in section 13(a) holding the partnership liable "to the same extent as the partner so acting or omitting to act" has been interpreted to mean that the partnership has the benefit of the immunities of the acting partner, contrary to the general rule that a principal is not entitled to its agent's immunities. The Draft should explicitly adopt the agency rule, consistent with the more recent cases.

G. NATURE OF PARTNER'S LIABILITY

UPA section 15 provides that partners are liable jointly and severally for the wrongful acts covered in UPA sections 13 and 14, but jointly for other partnership debts (such as contract debts).

Draft section 15 makes two needed changes. First, it provides that the partners' liability is joint and several for all claims. As explained in the Comment, this lets third parties collect from the partners without having served all of the partners.

Second, the Draft provides that a third party may pursue a partner's individual assets only after first attempting to recover against the partnership.

73. See Draft Comment to § 13.
74. See I Bromberg & Ribstein, supra note 9, at 4:87-4:88.
77. Restatement (Second) Agency § 217(b) (1957).
79. Draft § 5(b) clarifies that a partner cannot be held personally liable without being served.
80. Id. Draft § 5(a) clarifies that a partnership may be sued in its name alone.
unless the partnership is insolvent, the creditor and the partner have agreed otherwise, or the creditor has a claim against the partner independent of her partner status. This is consistent with the Draft’s entity approach to partnership: the liability belongs to the partnership entity, with the partners’ being liable as guarantors.

V. RIGHTS AND DUTIES AMONG PARTNERS

UPA sections 18–22 provide rules for determining the partners’ financial, management, and information rights, fiduciary duties, and remedies. The Draft’s revisions of these rules are discussed in the following sections.

A. FINANCIAL RIGHTS

UPA section 18 provides that partners have the following financial rights: repayment of capital contributions (18(a)) with interest from the date when repayment should be made (18(e)); equal sharing of profits (18(a)); sharing of losses in proportion to profit shares (18(a)); indemnification for payments made in conducting the business (18(b)); interest on advances (18(d)); and compensation for services of surviving partners in winding up the business (18(g)). The lead-in to section 18 makes all of these rules subject to contrary agreement.

The Draft adopts most of these rules and, by section 4X, provides that its rules are subject to contrary agreement. The following subsections discuss the principal issues raised by the Draft.

1. Capital Contributions and Profit-Sharing

While UPA section 18(a) provides that partners shall be “repaid” capital contributions and “share” in profits and surplus, Draft sections 18(a) and 18(b) provide that partners shall be “credited” with the value of contributions and with profits. It is not clear what this term means or whether the drafters intended to change the law. Although the term appears to refer to book entries, the drafters cannot have intended the act to be irrelevant to very informal partnerships that do not keep books.

While adding an ambiguity, the Draft does nothing to eliminate the ambiguity inherent in the term “profits.” “Profits” can refer to any combination of going-concern earnings, distributions by the going concern, distributions on liquidation, earnings from operations, or capital gains realized on asset sales. While capital gains are more readily associated with the term “surplus,” which is used in UPA section 18(a) to refer to the amount remaining after repayment of all liabilities, UPA section 40 also uses “profits” in this broader sense. Moreover, the Draft’s elimination of the term “surplus” could be interpreted to mean that “profits” now embraces the broader term.

81. See supra text § II (A).
The statute could eliminate this ambiguity by referring more precisely to partners' specific financial rights to (i) share equally in such distributions as are made by the going concern; and to (ii) share equally in distributions other than return of capital made on liquidation. Note that since the partners have no right to possess undistributed profits other than pursuant to the partnership agreement, the partnership statute need not deal with rights to undistributed profits. While partners' undistributed profit shares may have tax consequences, these should be dealt with under tax law and in the parties' agreement and not in the partnership statute.

2. Loss-Sharing

The Draft retains the UPA rule that partners share in capital and other losses in proportion to their share of profits. As a result, the Draft misses an opportunity to clarify what constitutes loss "sharing." The Draft should provide that the loss-sharing obligation arises only on dissolution and does not require the partners to make contributions to a going firm. Any such going-concern obligation should be dealt with by capital-call provisions in the partnership agreement.

The revised statute also should clarify that the statutory loss-sharing rule is not varied merely by an agreement to reflect deficits in the partners' capital accounts. In the absence of contrary agreement, these deficits can be assumed to reflect the parties' intentions regarding only the tax consequences of partnership and not the duty actually to make contributions to the partnership.

3. Compensation for Winding-Up Expenses

UPA section 18(f) provides that partners are not entitled to compensation except for winding-up services rendered by a surviving partner—that is, where the dissolution was caused by the death of a partner. Draft section 18(g) extends compensation to all winding-up partners. This is a mistake. The general no-compensation rule reflects the partners' expectations, in the absence of contrary agreement, that all partners will make a variety of capital, labor, and credit contributions to the firm and that these contributions will be compensated through the partners' profit shares. There is no reason to assume that these expectations change when the partners' participation in the firm changes from

83. See id. at 6:13.
84. As to the drafters' decision to retain the rule requiring sharing of capital losses, see the Draft Comment to § 18.
85. This issue has engendered some confusion in the cases. In Park Cities Corp. v. Byrd, 534 S.W.2d 668 (Tex. 1976) the court required a general partner in a limited partnership to repay on dissolution a deficit in her account resulting from depreciation charges. On the other hand, in Lamborn v. Dittmer, 873 F.2d 522 (2d Cir. 1989), the court held that an agreement requiring losses to be reflected in the partners' capital accounts did not compel the partners to make capital contributions.
86. See II Bromberg & Ribstein, supra note 82, at 6:9-6:10.
conducting the business to winding it up, unless a partner’s death forces a greater workload on the survivors.\textsuperscript{87}

These considerations hold even when the winding up involves arduous completion of law cases or other professional work. Moreover, additional considerations justify the no-compensation rule in this situation including the fact that it is difficult to value each partner’s contribution to the result.\textsuperscript{88} Of course there are counterarguments. Forcing withdrawing partners to finish cases without extra compensation can lock them into the firm, and partners who must work for no extra fee may lack adequate incentives to do the work properly. But the partners, viewed from the perspective of drawing up the partners’ agreement, might favor a rule that encourages stability of the firm, and professionals have reputational incentives to work hard even without a fee that accurately reflects their contribution.\textsuperscript{89} Thus, the issue is sufficiently close that the benefits of reversing the no-compensation rule do not justify the cost of unsettling the law in this area.\textsuperscript{90}

\textbf{B. MANAGEMENT RIGHTS}

UPA section 18(e) provides for equal participation of partners in management, that is, one-partner-one-vote. Section 18(h) specifies voting rules in the event of disagreement: majority rule as to “ordinary” matters and unanimity for acts “in contravention of the agreement.” Section 18(g) provides for unanimity specifically regarding admission of a partner.

The UPA left a gap by failing to provide a voting rule for matters that were neither “ordinary” nor in violation of the agreement. Draft section 18(i) fills this gap by clarifying that acts “outside the ordinary course of partnership business” and amendments require unanimity. This is consistent with the case law\textsuperscript{91} and the likely intention of the parties.

\textbf{C. INFORMATION RIGHTS}

UPA section 19 provides that the partnership books shall be kept at the partnership’s principal place of business and that the partners are entitled to access to the books. Section 20 requires partners to render, on demand, true and

\textsuperscript{87} See id. at 7:80.

\textsuperscript{88} See id. at 7:84.

\textsuperscript{89} See id. at 7:84–7:85.

\textsuperscript{90} Among other things, as the Draft Comment to § 18 points out, there would be a question whether the partners are entitled to extra compensation for administering a buyout of a partner in connection with a technical dissolution of a continuing partnership.

full information of matters affecting the partnership to partners or legal representatives of deceased or incompetent partners. Only the place of keeping books is explicitly subject to contrary agreement.

The Draft combines these rules in section 20 and makes a few relatively minor and sensible changes. Section 20(b) grants former partners access to books pertaining to when they were partners, a necessary right in view of former partners’ need for tax-related information. Access to books is only during ordinary business hours and the partnership may charge for copying materials. The partners’ right to information under section 20(c) is only “to the extent just and reasonable,” and not “on demand” as provided in UPA section 20.92

Perhaps the most significant change made by the Draft is that these rights are all subject to contrary agreement under Draft section 4X. This is an important endorsement of private ordering in the firm. While partners normally insist on a right to information, particularly in view of their personal liability for debts of the firm, the information right is not free. The partners may choose to clarify the right by agreement in order to avoid the costs that might be inflicted by obstreperous or litigious partners. The danger that the opt-out right will unfairly frustrate the partners’ expectations is minimized by the courts’ power to interpret the scope of the opt-out.93

D. FIDUCIARY DUTIES

UPA section 21 requires partners to account for unauthorized benefits from transactions connected with the partnership. The Draft carries over this provision as part of the “duty of loyalty” in section 21(b)(1). In addition, Draft section 21(a) provides for a duty of “good faith and fair dealing,” sections 21(b)(2)–(3) further articulate the duty of loyalty, and section 21(c) states that “a duty of care rule is under study.” These additional provisions are discussed separately below.

1. Good Faith and Fair Dealing

Draft section 21(a) states that partners have “a duty of good faith and fair dealing towards the partnership and the other partners.” This is a questionable provision because it introduces new and troubling uncertainty.

As an example of how this vague provision might change the prior law, consider its effect on agreements providing for expulsion of partners. Under current law, the power to expel is enforced even without proof that it was exercised in good faith or for good cause,94 and no particular procedures are

93. For example, in Marsh v. Gentry, 642 S.W.2d 574 (Ky. 1982) a court refused to hold that the mere fact of plaintiff’s awareness of the practice of secret bidding by co-owners of horses (which in any event was not established) would negate his copartner’s general disclosure duty.
required. This rule makes sense since the purpose of summary expulsion provisions in the partnership agreement is to facilitate smooth functioning of the partnership without costly litigation. At the time of drafting the partnership agreement, before the partners know who will be affected by an expulsion clause, the partners sensibly may choose to minimize the total costs of the relationship by drafting a clear-cut expulsion provision. Adding a statutory good faith rule might compel adoption of the English rule which is more wary of the partners’ agreement.

The vagueness of the “good faith” rule is exacerbated by the difficulty of interrelating the good faith duty with the rest of the statute. Other sections of the Draft specify that partners have rights to equal participation in management, access to information, and full disclosure. Section 21 adds a fully specified duty of loyalty. What is left for the good faith duty?

Worst of all, the partners cannot escape these problems by opting-out, since the duty cannot be “varied by agreement.” Thus, the good faith duty is an open invitation to litigate even the most specific agreements. The statute compounds this problem by providing that the duty can be qualified by a statement of conduct that does not violate the duty. Thus, the statute encourages litigation both by partners who stand to gain from the agreement and by those who stand to lose.

The provision seems to be based on the misguided idea that the statute should specify some nonwaivable core duty. Waivers in the partnership context are normally negotiated by knowledgeable parties at arms’ length. This is hardly a situation in which mandatory rules are necessary to protect unwary parties. Moreover, different duties are appropriate for different partnerships. For example, the partners may wish to let copartners pursue outside opportunities in order to avoid the greater expense of compensating the partners to forego these opportunities and the cost of litigating partnership opportunity questions. Under UPA section 21, such agreements are clearly permissible, but Draft
section 21(a) invites litigation over whether these agreements breach a fundamental “good faith” duty.

Nor is a nonwaivable statutory duty necessary to protect parties from unfair or unexpected applications of waivers. The courts have shown, even under the waivable UPA provision, that they can interpret the literal language of partnership agreements so as to effectuate the parties’ underlying expectations. A statutory provision is an unnecessary “wild card” that encourages nonenforcement of agreements even if this is contrary to the parties’ expectations.

In short, Draft section 21(a) should be stricken as vague, confusing, and unnecessary.

2. The Duty of Loyalty

Draft section 21(b) defines the partners’ “duty of loyalty.” Subsection (1) is essentially the same as UPA section 21; subsection (2) prohibits partners’ dealings with the partnership “as, or on behalf of, an adverse party”; and subsection (3) prohibits partner competition with the partnership, although the last sentence of subsection 21(b) provides that 21(b) does not preclude a partner from buying partnership assets on foreclosure or liquidation. All three subsections permit partners to engage in the activities with the “informed consent” of the other partners, and they are subject to contrary provision in the partnership agreement under Draft section 4X.

Although section 21(b) is basically noncontroversial, it is not clear how subsections (2) and (3) interrelate with subsection (1), which is the continuation of UPA section 21. Consistent with the broad language of that provision, all forms of partner breach of fiduciary duty have been remedied under the UPA, including self-dealing, usurping partnership opportunities, and competition. Adding subsections (2) and (3) might be interpreted as limiting the scope of subsection (1) so that, for example, usurping partnership opportunities is no longer deemed covered. This ambiguity should be eliminated by clarifying that subsections (2) and (3) are only nonexclusive examples of conduct covered under subsection (1).


102. See generally, II Bromberg & Ribstein, supra note 82, § 6.07(b)-(e).
3. Duty of Care

Draft section 21(c) says that "a duty of care rule is under study" and the Draft Comments indicate that the Committee is seriously considering adding a statutory duty of care. Adding such a duty would be a serious mistake. Indeed, the drafters would perform a significant service by clarifying in the statute that, in the absence of contrary agreement, the partners owe no duty of care.

The duty of care issue is a good example of the dangers of blindly borrowing partnership rules from standard forms applying to other business associations. Whether a duty of care is justified depends on a careful evaluation of the costs and benefits of the duty in each particular context in which it is applied. A duty of care is arguably justified regarding paid agents\(^{103}\) and corporate directors because people in these positions lack other market and contractual incentives to act consistently with the interests of their principals. The argument for the duty of care is not a strong one, even in these contexts. The interests of even public corporation directors are significantly aligned with those of the shareholders through such mechanisms as the market for control, the employment market, shareholder monitoring, and incentive compensation.\(^{104}\) A fiduciary duty of care may not be justified to fill any remaining incentive "gaps" because of the substantial costs of such duties. These include litigation costs and the decision-making costs added by rigid proceduralism. The argument for a duty of care for close corporation directors is still weaker.\(^{105}\)

In the typical informal, very closely-held business for which the partnership standard form should be designed, the duty of care becomes wholly unnecessary. The partners have ample incentives to monitor their copartners because of their liability for partnership debts and their equal contributions to the firm. The partnership statute accordingly assumes that the partners will participate equally in management rather than delegating management responsibilities.\(^{106}\)

Consistent with these differences between general partnerships and other business associations, it has been held that partners are not subject to a duty of ordinary care in the management of the business.\(^{107}\) While there is authority analogizing general partners to corporate directors,\(^{108}\) this is in the limited partnership context. Limited partnerships are closely analogous to corporations

\(^{103}\) See Restatement (Second) Agency § 379, 400-02 (1957).

\(^{104}\) For a review of these mechanisms and citations to the extensive literature, see Butler & Ribstein, supra note 99, at 18-32.

\(^{105}\) H. O'Neal & R. Thompson, 2 Oppression of Minority Shareholders § 10.04 (2d ed. 1986), quoted in the Draft Comment to § 21, argue that a duty may be justified in this context because business decisions are simpler and therefore easier to second guess and because there is less danger of strike suits. This analysis ignores the importance of the reduced benefit of the duty here because of a stronger alignment of director and shareholder interests. It also unduly minimizes the litigation and decisionmaking costs.

\(^{106}\) See UPA § 18(e); Draft § 18(f).


because of the passivity of limited partners and the common practice of incorporated general partners.109

While a partner duty of care is inappropriate for the firms for which the standard-form provisions should be designed, larger partnerships that separate ownership and control as in standard-form corporations and limited partnerships may wish to provide by agreement for a duty of care. Some of the cases holding partners liable for mismanagement are actually based on specific provisions in the partnership agreement rather than on a standard-form fiduciary duty.110 To ensure preservation of this case law, the statute should provide for enforcement of agreed duties, particularly if the statute affirmatively provides against a duty of care.

E. REMEDIES

UPA section 22 gives partners the right to a formal account both before and after dissolution under several broadly-described circumstances. The accounting can be a complex and lengthy proceeding because it involves resolution and final set-off of all open transactions.111 Thus, the most important aspect of the law relating to the accounting remedy is the rule that accounting is an exclusive remedy.112 The exclusivity rule originally was based on the aggregate nature of partnership, which raised the specter of partners suing “themselves.”113 The equitable nature of accounting skirted this technical problem. This justification does not survive the merger of law and equity and the modern recognition of the entity nature of partnership114 and the Draft’s adoption of joint and several liability of partners.115

A more modern reason for the rule is that partners frequently have claims against each other arising out of related facts which for reasons of judicial economy should be dealt with in a single proceeding.116 But this reason is entitled to little weight now that parties have greater flexibility to plead related

109. Managers of a corporate general partner operate under incentives very similar to those of the manager of a corporation. See Ribstein, supra note 13, at 869. Because of these differences between limited and general partnerships, perhaps the limited and general partnership statutes should differ as to the duties of general partners.

110. See Roper v. Thomas, 60 N.C. App. 64, 298 S.E.2d 424 (1982), review denied, 308 N.C. 191, 302 S.E.2d 244 (1983) (general partner in limited partnership liable for limited partner losses that resulted from starting partnership project without securing permanent financing as required by partnership agreement); Shinn v. Thrust IV, Inc., 56 Wash. App. 827, 786 P.2d 285 (1990) (general partner in limited partnership liable for failure to exercise due care where agreement required partner to act “in the best interest of the partnership” and to use “its best efforts to complete the development . . . in a timely and workmanlike manner”).

111. See II Bromberg & Ribstein, supra note 82, § 6.08(d).


114. See supra text § I(A).

115. See Draft § 15.

claims and join necessary parties, and law courts have broad “equitable” powers to deal with complex litigation.

Thus, there is little reason today for a court to dismiss a claim simply because the plaintiff has not invoked the accounting procedure. Judicial recognition of this can be seen in the proliferation of exceptions that now riddle the exclusivity rule. One important recent case took the final step by explicitly abolishing the exclusivity rule. The Draft should modernize the law by adopting the approach of this case.

At the same time, the statute should also ensure that elimination of the exclusivity rule does not invite piecemeal litigation. The statute should require the court, where just and reasonable, to resolve all related claims in a single proceeding. Courts may now be ignoring the underlying problems that engendered the exclusivity rule when they refuse to apply the rule and dismiss the action.

The Draft also should clarify, as does one state’s version of the UPA, that the statutory remedies are in addition to any provided for in the partnership agreement. This would, among other things, ensure enforceability of arbitration clauses in partnership agreements.

VI. PARTNER DISSOCIATION

The UPA provisions prescribing the consequences of partner dissociation from the partnership are almost certainly the ones most in need of revision, and would themselves justify a revised act. Indeed, the success of the UPA revision project can be measured largely in terms of how well the revised act deals with this difficult area. Unfortunately, while the Draft includes many improvements on the UPA, it fails to remedy the chief defect of the original act by providing that the partnership normally dissolves and must be liquidated when a partner dies or leaves.

A. THE CENTRAL ISSUE: THE COSTS AND BENEFITS OF LIQUIDITY

Evaluation of the Draft’s dissociation provisions requires consideration at the outset of the extent to which the partnership statute should facilitate partner exit from the partnership.

Partner dissociation entails at least some reimbursement of the dissociating partner’s financial contribution to the firm as well as termination of the partner’s service obligation and of her liability for postdissociation partnership

120. This term means the same thing as “cessation of partner status,” the term used in the Draft, but is more concise. It embraces voluntary withdrawal, expulsion, and death.
121. For a more extensive discussion that is the basis of this part of the Article, see Ribstein, supra note 5.
debts, subject to notification of third-party creditors. Unless partners have some way to dissociate, they may be at the mercy of the majority or of managing partners, or may be unable to move their human and financial capital to higher-valued uses.\textsuperscript{122} Also, lock-in may exact a heavy emotional toll.

The problem of partner dissociation is complicated by the fact that, in light of the very closely-held nature of the "standard form" partnership and the personal liability of its members, a partner seldom can dissociate simply by selling her interest to a third party.\textsuperscript{123} A partnership interest is inherently an unattractive investment because of the high cost of obtaining information about a very closely-held firm\textsuperscript{124} that is often an idiosyncratic relationship among particular people. The interest is even less attractive if the purchaser lacks management powers with which to protect her investment, particularly if the assignee takes on liability for partnership debts. Yet because of the closely-held nature of the partnership, the nonselling partners would insist on the right to veto the admission of a fully participating member.

The UPA provides that a partner can sell only her financial interest without the consent of the other partners.\textsuperscript{125} This is an uneasy compromise. As just discussed, an assignee is in a poor position without management rights. Also, an assignment even without management rights can inconvenience the nonselling partners because the assignee can compel judicial dissolution of a partnership at will\textsuperscript{126} and because the assignment separates control and financial interest.

Thus, a meaningful dissociation right necessitates some form of either buyout of the leaving partner by the copartners or liquidation of the firm. However, this right also can entail significant costs.\textsuperscript{127} Partners who have financial or human capital advantages can use their dissociation right to take over the entire firm from the weaker partners. This is so even if these advantages were created to some extent with the partners' joint resources. For example, a copartner's capital or behind-the-scenes management may have contributed to the development of going-concern value that could be appropriated by a more visible or active partner. A classic example of this problem is Page v. Page,\textsuperscript{128} in which a managing partner was apparently able to force his brother out of a linen supply

\textsuperscript{122} See id. at 380-83.

\textsuperscript{123} In all events, such a sale does not help to protect against exploitation by majority or managing partners because the buyer would be subject to the same problem and would pay a price that reflected the exploitation. See Carney, The Theory of the Firm: Investor Coordination Costs, Control Premiums and Capital Structure, 65 Wash. U.L.Q. 1, 19 (1987). By contrast, the threat of sale by individual shareholders of a publicly-held firm can check mismanagement where these shareholders can transfer control.

\textsuperscript{124} Since partnership interests are not publicly traded, information about their value is not communicated by an efficient market price and there are no independent third-party providers of information about the value of particular partnerships comparable to the financial analysts who study publicly-traded securities.

\textsuperscript{125} See UPA § 27(1). Assignment of the partner's interest and relevant policy considerations are discussed in supra text III (B)(2).

\textsuperscript{126} See UPA § 32(2); Draft § 31V(5).

\textsuperscript{127} See Ribstein, supra note 5, at 384-89.

\textsuperscript{128} 55 Cal. 2d 192, 10 Cal. Rptr. 643, 349 P.2d 41 (1961).
firm just as the firm was about to benefit from a new military base. The weaker partners can suffer in the takeover because neither judicial valuation nor an auction of the firm's assets ensures that the partners will receive the full value of their investments.

The dissociation right can be costly even if it does not cause a takeover of the firm. Among other things, exercise of the right might force continuing partners to sell important assets in order to pay off the departing partner. Also, partnership creditors may increase their charges to offset the increased credit risks of loaning to an unstable firm.

Indeed, the dissociation right can be costly even if it is never used because the existence of the right discourages partners from contributing human and financial capital that might be appropriated through dissociation by copartners. And a partner can threaten use of the dissociation right to force the other partners to agree to changes in the agreement.

Both the benefits and costs of partner dissociation depend on precisely what the right to dissociation entails. If the dissociating partner is entitled only to buyout for a judicially-determined price, inherent problems of determining fair market value can limit the extent to which the dissociation right protects the partner from the negative effects of being locked into the partnership. At the same time, these very limitations can prevent partners from using the dissociation right to take over the business. Conversely, a dissociating partner who can compel liquidation of the firm and discharge of liabilities has both maximum protection from lock-in and maximum opportunity to inflict damage on the other partners.

In general, the drafters of the statutory standard form should assume that, in the absence of transaction costs, the partners would reach an agreement on dissociation that minimizes total costs and maximizes total benefits. The parties to the sort of very closely-held firm that is the model for the partnership act would probably want some sort of dissociation right. First, the partners, at the time of drafting the agreement, would probably be more concerned about the risk of lock-in than about the risk that a copartner will use her dissociation right to effect a takeover of the firm. That is because lock-in can have a significant effect on each partner while the cost of takeover is likely to be spread among the partners. Second, the partners can more easily draft a customized agreement that opts-out of dissociation or avoids the costs of dissociation than they can draft around a statute that does not provide for dissociation.

But balancing these costs and benefits requires finely-tuning the dissociating partner's rights to the circumstances of the dissociation. Thus, the standard form should provide a liquidation right only in circumstances where there is a relatively low risk that such a right will facilitate takeover of a going concern by the dissociating partner.

129. See Ribstein, supra note 5, at 389-91.
130. Id. at 395-99.
B. AN OVERVIEW OF THE UPA PROVISIONS

The following is a very brief review and analysis of the UPA dissolution provisions. These provisions will be covered in more detail by comparison with the Draft in section C.

The basic philosophy underlying the UPA dissociation provisions is that the partnership is an aggregate of individual members rather than a legal person separate from the partners. Accordingly, UPA sections 29 and 31 provide that the departure of any member for any reason effects a dissolution of the partnership relationship. Under section 38(1), on dissolution any partner may compel liquidation of the partnership assets and discharge of its liabilities. The only statutory exceptions to the liquidation right are that under section 38(1) the liquidation right is subject to contrary agreement and there is no liquidation right in the event of partner expulsion; and, under section 38(2) a wrongfully dissolving partner may not compel liquidation (although any other partner may do so in the event of a wrongful dissolution). On liquidation, the assets are distributed and debts paid under section 40. If the partnership continues, the leaving partners have a right to the value of their interests plus postdissolution compensation under section 42.

This statutory scheme, by giving partners a broad liquidation right that is insensitive to the costs of liquidation, fails adequately to balance the costs and benefits of partner dissociation discussed in section A. Thus, the UPA forces partners to draft customized agreements and frustrates the objectives of many parties who form a partnership without a customized agreement. This conclusion is supported by the case law, which in many situations has qualified the statutory liquidation right.131

The UPA's defects as a standard form are compounded by the fact that its provisions are, to some extent, mandatory even among the partners. In particular, every partner has an absolute right to dissociate and the partnership necessarily dissolves on dissociation notwithstanding even the most explicit contract to the contrary. Although the partners can avoid many of the consequences of dissolution, the fact of dissolution can be unsettling. For example, even a technical dissolution may disrupt contracts among the partners and with third parties.132

131. See Nicholes v. Hunt, 273 Or. 255, 541 P.2d 820 (1975) (ordering buyout rather than liquidation in order to permit founder of business to continue firm over objection of other partner); Flynn v. Haddad, 25 Mass. App. 496, 520 N.E.2d 169 (1988) (refusing to order sale in the face of depressed market conditions); II Bromberg & Ribstein, supra note 82, at 7:106-7:107; Ribstein, supra note 5, at 374-75; infra notes 150, 159.

132. See Burger, Kurzman, Kaplan & Studin v. Kurzman, 139 A.D.2d 422, 527 N.Y.S.2d 15 (1988) (partnership continued after dissolution held to be terminable at will despite continuation provision in original partnership agreement).

C. THE DRAFT'S DISSOCIATION PROVISIONS

Because of the UPA's inadequacies regarding partner dissociation, the Draft could have performed a significant service by overhauling and modernizing these provisions. The Draft does resolve many ambiguities under the UPA and correct a few of its mistakes. However, the Draft has kept intact many of the UPA's basic flaws.

In general, the Draft makes "cessation of partner status," defined in section 31, a central concept. Unlike the UPA, these "cessation" events do not automatically dissolve the partnership. However, most empower individual partners to dissolve and compel winding up. The following discussion of the Draft's more important features is organized in terms of the Draft's focus on events of dissociation. It therefore ignores the Draft's order of coverage, which retains the UPA's organization despite the Draft's change in focus.

1. Definition of Partner Dissociation

Draft section 31 identifies the events that cause cessation of partner status. This section significantly improves on the UPA by clarifying how dissociation occurs.\(^\text{[134]}\) UPA section 29 only implicitly recognizes that partner withdrawal causes dissolution without ever stating how withdrawal occurs, and section 31(4) states that death causes dissolution without clarifying what constitutes "death" of nonhuman partners such as corporations and trusts.

Draft section 31 also improves on the UPA by identifying events, including withdrawal by express will,\(^\text{[135]}\) expulsion for partner misconduct, or otherwise,\(^\text{[136]}\) and partner death and incapacity\(^\text{[137]}\) that cause only cessation of partner status and not necessarily dissolution and winding up.\(^\text{[138]}\)

There are, however, a few problems with the Draft's definition of partner dissociation. First, the Draft misses an opportunity for improvement and clarification by not requiring written notice for an effective voluntary withdrawal as in the Uniform Limited Partnership Act.\(^\text{[139]}\) Without a notice requirement there is considerable uncertainty about whether the partner has withdrawn\(^\text{[140]}\) which invites costly litigation. Also, a notice requirement coupled with delaying the effective date of withdrawal gives the nonwithdrawing partners

134. The Draft Comment says that § 31 is based on § 402 of the Uniform Limited Partnership Act ("ULPA"), 6 U.L.A. 323 (1985). It also incorporates several of the provisions recommended and discussed in Ribstein, supra note 5, at 417–20.
135. Draft § 31(1).
136. Id. § 31(2).
137. Id. § 31(4).
138. However, Draft § 29X adds confusion by implying, contrary to the language of Draft § 31Y, that cessation of partner status can itself cause dissolution and winding up.
140. For example, in Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968), the court held that a partnership was dissolved either when defendant told plaintiff to "get out of here" or when plaintiff left as instructed. For numerous other cases illustrating the uncertainty, see II Bromberg & Ribstein, supra note 82, at 7:21–7:22, 7:23.
time to find a replacement. For these reasons, notice of dissolution or withdrawal is a common feature of partnership agreements.

Second, the Draft confuses the definition of cessation of partner status by providing in section 29X that, notwithstanding the cessation, the partner has “a continuing relationship with the remaining partners for the limited purpose of completing business undertaken while he [or she] was a member of the partnership.” This provision states the “purpose” of the “continuing relationship,” but neither the black letter nor the Draft Comment explain its nature. Most importantly, does a partner remain such notwithstanding her withdrawal until all business begun while she was a partner is completed? If the section’s purpose is merely to provide that the withdrawing partner is entitled to income from work in process, it should say so. If the section’s purpose is to provide for continuing liability for prewithdrawal debts, it is unnecessary in light of Draft section 36.

Third, and most importantly, Draft section 4X(a)(4) provides that a partner’s power to withdraw by express will under section 31(1) is not subject to contrary agreement. This wholly-unjustified restriction on private ordering continues as one of the most troublesome aspects of the UPA. Of course, the largely-unforeseeable risks created by personal liability and illiquidity of investment will deter most partners from agreeing to waive the power to withdraw by express will. Nevertheless, there may be good reasons for such agreements where the costs of lock-in are relatively low, as for a partnership engaged in buying and holding raw land, or the costs of takeover by a dissociating partner are particularly high, as where only one of the partners has the expertise to run the company. A rule that forbids waivers of the exit right forces the parties to adopt cumbersome second-best contract provisions that penalize withdrawal or to adopt the corporate form even if this form imposes costs on the parties in other respects.

141. See Ribstein, supra note 5, at 420.
142. For arguments supporting enforceability of this sort of agreement, see II Bromberg & Ribstein, supra note 82, at 7:33-7:34; Hillman, Indissoluble Partnerships, 37 U. Fla. L. Rev. 690 (1985); Ribstein, supra note 5, at 410-16. For a case supporting enforceability even under the UPA, see Infusaid Corp. v. Intermedics Infusaid, 739 F.2d 661 (1st Cir. 1984) (Mass. law).
143. See Pav-Saver Corp. v. Vasso Corp., 143 Ill. App. 3d 1013, 493 N.E.2d 423 (1986), in which the parties had sought to protect against the risk of takeover by the expert partner by providing for liquidated damages for premature withdrawal, but these damages were inadequate protection because they were to be paid without interest over a 10-year period. The court in effect precluded withdrawal by stretching both the contract and the UPA to prevent the expert partner from withdrawing either his patents or the value of the patents.
144. See supra note 143.
145. The corporate form is designed for firms that separate management and control. Even special close corporation legislation adds procedural barriers that discourage rather than encourage use of the corporate form by closely-held firms. Indeed, it has been argued that closely-held firms should be discouraged from adopting the corporate form. See Fessler, The Fate of Closely-Held Business Associations: The Debatable Wisdom of “Incorporation,” 13 U. Cal. Davis 473 (1980); Mitchell, Close Corporations Reconsidered, 63 Tul. L. Rev. 1143 (1989); Rosenberry, Traditional
The principal policy argument against permitting waivers of the right to exit is that unanticipated problems can result in these agreements' being applied contrary to the parties' expectations. But this can be dealt with by flexible judicial interpretation, aided by statutory rules that guide interpretation. For example, the statute could provide for a judicial "escape valve" that permits buyout or liquidation in the event a partner's reasonable expectations are frustrated by oppressive conduct by copartners. A rule that wholly forbids opt-outs goes much further than is necessary to protect contracting parties.

2. Right to Wind Up

Draft section 31Y identifies the events that cause dissolution of the partnership and winding up of its business. This is one of the most questionable provisions in the Draft. By providing for winding up in the event of partner dissociation by express will of a single nonwrongful partner, the Draft carries forward the outmoded UPA emphasis on dissolution and liquidation. Thus, section 31Y largely forfeits the advantages of the separation of dissociation and dissolution in section 31.

Section 31Y does, in the following principal respects, provide for slightly greater continuity than UPA:

(i) The Draft provides that partner dissociation does not itself dissolve the partnership. Thus, the partners can agree in some situations not only to continue the business, as under the UPA, but also to avoid dissolution of the partnership entity.

(ii) The Draft provides that on partner dissociation the partnership continues unless within 90 days a partner elects to have the partnership wound up. By contrast, UPA section 38 provides that unless the partners opt for continuation, the partnership must be wound up. There is little difference in effect because under each statute a single partner can compel winding up on dissociation of a partner. But the Draft's approach limits the period of uncertainty between dissociation and the partners' decision whether to continue the firm.
(iii) On death of a partner, the partnership can be wound up only by the express will of a partner rather than the estate.¹⁵⁰

(iv) A single partner cannot compel the winding up of the partnership on the bankruptcy either of a partner or of the partnership. This makes sense because winding up of the entire firm is not justified either by the financial condition of a single partner or by the fact that the partnership is reorganizing under the bankruptcy laws.¹⁵¹ On the other hand, bankruptcy of a partner should trigger dissociation of that partner, since it terminates the partner's credit contribution to the firm.¹⁵²

(v) An event that makes it unlawful to carry on the partnership does not justify winding up if the partners can cure the illegality within 90 days of the event.¹⁵³

On the other hand, in at least one important respect, the Draft offers even less continuity than the UPA. Draft section 31Y(2) provides that on partner expulsion any partner can have the partnership wound up. By contrast, UPA section 38(1) denies the partners a liquidation right in this situation.

In short, the Draft perpetuates and compounds the UPA's error of providing for a standard-form liquidation right even where the costs of this right are likely to exceed the benefits. Under the Draft as under the UPA a partner can, at will, use the liquidation right to effect a takeover of the firm if the parties have not drafted a customized agreement. A partner can do this even if the partnership is for an unexpired term or uncompleted undertaking—so that liquidation is likely to be particularly costly—as long as some other partner has acted wrongfully.

The statute should be redrafted so that it provides for a liquidation right only where the costs of this right are likely to be minimal. Specifically, a liquidation right is appropriate only if the partnership is no longer viable, as where the business is unlawful, the partners are deadlocked, or at least a majority of

¹⁵⁰. This may be more a clarification than a change. UPA § 38(1) gives the liquidation right only to "each partner" rather than to legal representatives, although UPA § 41(3) implies that the estate must consent to any continuation of the partnership. See II Bromberg & Ribstein, supra note 82, at 7:100; Comment, Right of a Surviving Partner to Purchase Deceased Partner's Interest Under the Uniform Partnership Act, 62 Mich. L. Rev. 106 (1963). Some courts have given surviving partners the right to buy out the estate. See Chapman v. Dunnegan, 665 S.W.2D 643 (Mo. App. 1984); Balaban v. Bank of Nevada, 86 Nev. 862, 477 P.2d 860 (1970); Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 144 A.2d 207 (1958); Georgen v. Nebrich, 12 Misc. 2d 1011, 174 N.Y.S.2d 366 (1958). This is an example of the courts' tendency to lean toward greater continuity of the partnership in interpreting the UPA. See supra note 131.

¹⁵¹. A court reached this result even under the UPA, reasoning that UPA § 31(5) antedated the reorganization provisions of the Bankruptcy Code. In re Safren, 65 Bankr. 566 (Bankr. C.D. Cal. 1986).

¹⁵². See Draft § 31(3); II Bromberg & Ribstein, supra note 82, at 7:53. Note that partner bankruptcy is the only dissociation cause under Draft § 31 that does not trigger a winding-up right under Draft § 31Y. It is not clear why the drafters did not apply the same logic to other dissociation causes.

¹⁵³. Id. § 31(6). One form of cure is expulsion under Draft § 31(2)(iii) of a partner whose participation makes it unlawful to carry on the partnership. See Ribstein, supra note 5, at 397, n.137 (recommending severing the "unlawful" partner rather than winding up in this situation).
partners no longer wish to continue. The right is not justified merely because a partner has withdrawn or grounds exist for a partner’s expulsion.

Moreover, the statute should not provide for dissolution of the partnership even where the business has been liquidated if after the liquidation the partnership continues to be carried on by one or more of the preliquidation partners. In this situation there is sufficient continuity of the firm that providing that the partnership entity has dissolved would frustrate the expectations of both the partners and third parties.

3. Winding Up and Dissolution

On winding up, the partners’ powers change to those appropriate for winding up, the partnership’s debts are paid and its property is distributed, and the partnership’s unpaid predissolution liabilities continue to be outstanding against the partners and, in some circumstances, the postdissolution partnership. The following subsections summarize some important changes in the Draft dealing with these matters.

a. Powers of Winding-Up Partners

After the partnership goes into a “winding-up” mode, the partners should no longer have the power to bind the partnership for acts appropriate to the carrying on of the usual partnership business, but rather should now have the

154. For a suggested statutory provision embodying this recommendation, see Ribstein, supra note 5, at 422–23.

155. One troublesome situation concerns partner misconduct. Draft § 31(2)(ii) rightly permits expulsion of a misbehaving partner, but § 31 Y (9)(iii) provides for winding up on virtually the same sort of showing that justifies expulsion under § 31(2)(ii). This reaches basically the same result as the UPA, which provides for dissolution on the basis of a partner’s wrongful conduct (§ 32(1)(c)–(d)) but arguably permits continuation by agreement of all of the nonwrongful partners (§ 38(2)). (For a discussion of the application of UPA § 38(2) to this situation, see II Bromberg & Ribstein, supra note 82, at 7:38–7:39.) The statute should specify that partner misconduct does not justify dissolution either by judicial decree or by the express will of a nonwrongful partner where the partnership can be carried on by expulsion of the misbehaving partner.

156. See Ribstein, supra note 5, at 400–03, 425; infra text accompanying notes 167–68. However, the statute should identify when the entity dissolves because the point when the partnership ceases to exist affects relations among the partners and between the partners and third parties. Thus, the Draft should not attempt to resolve the continuity problem by wholly eliminating reference to “dissolution.”

Preserving the concept of dissolution at will is not justified on the ground that it avoids “entity” treatment of partnerships for tax purposes. The very closely-held “standard form” partnership will clearly be a “partnership” for tax purposes even if it does not dissolve at will because it will have other “partnership” features—personal liability of partners, no free transferability of shares, and decentralized management. See I.R.C., supra note 29; Treas. Reg., supra note 30 (identifying features that distinguish partnerships and corporations). See also Weidner, supra note 3, at 36 (noting the importance of personal liability to the tax definition of partnership). Larger, more “entity-like” partnerships can draft for greater dissolvability. (The fact that it is the “entity-like” partnerships, for which greater dissolvability is most costly, that must draft for this feature is a good example of the perversity of tax law in this area.)
power only to wind up the business. UPA section 35(1)(a) provides for such power as to creditors who were aware or notified of the dissolution,\(^{157}\) and UPA section 37 provides generally that nonwrongful, nonbankrupt partners have "the right to wind up the partnership affairs."\(^{156}\)

Draft sections 35(a)(1) and 37 adopt this basic concept. Section 37 attempts to clarify the extent of the partners' right to wind up by specifying certain acts that winding-up partners can engage in. This list is generally noncontroversial but is unlikely to be very helpful in identifying the specific acts in these general categories that are appropriate for winding up. Moreover, the power to "preservethe partnership business or property as a going concern for a reasonable time" probably does more to confuse than to clarify. While the language is arguably intended only to authorize an orderly winding up rather than a hasty sale, it could also be interpreted to permit the partners to avoid winding up for some unspecified "reasonable" time.\(^{159}\)

A more important problem with the Draft is that, like the UPA, it fails to clarify the extent to which a single partner or a majority of the partners can exercise winding-up powers. While the nature of the partners' power should change when the partnership enters into the winding-up phase, there is little reason to assume that the extent of the partners' power should change. Thus, some courts have held that less than a majority of the partners have postdissolution authority only to conduct ordinary partnership business.\(^{160}\) But it has also been held that less than all of the partners can sell all of the partnership's property in connection with dissolution.\(^{161}\) This result would seem to frustrate the partners' expectation to participate in significant decisions of the firm.

b. Distribution of Property and Payment of Debts

UPA sections 40(b)-(c) provide that on dissolution the partnership assets should be applied in the following order: repayment of debts to nonpartner

157. UPA § 35 also provides for a continuation of predissolution powers as to certain creditors who lacked knowledge or notice of the dissolution. Draft § 35 continues these rules with some minor changes.

158. UPA § 37 essentially specifies the scope of the partners' actual authority, while UPA § 35(1)(a) includes the partners' apparent authority.

159. For cases in which the courts have permitted continuation rather than winding up where continuation was necessary to preserve asset value, see Dow v. Beals, 149 Misc. 631, 268 N.Y.S. 425 (1933); Gregg v. Bernards, 250 Or. 458, 443 P.2d 166 (1968).

160. See Paciaroni v. Crane, 408 A.2d 946 (Del. Ch. 1979) (two of three partners permitted to race the partnership's horse over the objection of the third); Simmons v. Quick-Stop Food Mart, 307 N.C. 33, 296 S.E.2d 275 (1982) (conveyance of partnership property in connection with dissolution not in usual scope of business but was authorized or ratified by copartner).

161. See Cunningham & Co. v. Consolidated Realty Management, 803 F.2d 840 (5th Cir. 1986). See also Froemming v. Gate City Fed. Sav. & Loan Assn., 822 F.2d 723 (8th Cir. 1987) (N.D. law) (jury issue whether dissolution provisions of partnership agreement required liquidation, and so excepted sale of assets on dissolution from provision requiring two-thirds vote for extraordinary transactions); Goldstick v. Kusmiersky, 593 F. Supp. 639 (N.D. Ill. 1984) (one partner allowed to sue on partnership claim despite refusal of other partner to join, relying on UPA § 35(1)(a)).
creditors, repayment of debts to partners, return of partners’ capital contributions, and payment of partners’ profit shares. Section 40(a) defines the partnership’s assets to include the partners’ contributions necessary to make the required payments.

This scheme, although perhaps somewhat awkwardly expressed, is reasonably clear and sensible. Nevertheless, Draft section 40 makes a significant change: section 40(c) provides that, after payment of third-party debts, the partners are paid first liabilities owed “other than for distributions” and then, liabilities “in respect of distributions.” These references to partner “distributions” replace the UPA’s references to capital and profits.

This change is troublesome because “distributions” is undefined. If the term refers to amounts distributed by the going firm, it does not explain how other liabilities to partners should be handled. Moreover, a small, informal partnership rarely has regularly scheduled distributions that might be declared but unpaid on dissolution. If the term refers to amounts paid on winding up it is, of course, circular since this is the amount section 40 is supposed to determine.

The Draft Comment explains that capital contributions and profit shares determine the right to distributions. This is true but unhelpful since section 40 is supposed to specify the priority of each component. Nor is the Draft Comment’s reference to section 804 of the Revised Uniform Limited Partnership Act (“RULPA”) instructive. Unlike Draft section 40, RULPA does specify that capital contributions are entitled to priority.

If Draft section 40 were to make any change in current law regarding distribution of assets and payment of debts, it should change the rule that partners must contribute in proportion to their loss shares to make up any difference between partnership assets and liabilities to partners in respect of their capital contributions. Service partners in an informal partnership are arguably surprised when they find, on dissolution, that they must not only receive no contribution for their service contributions but also must make whole their capital-contributing copartners. The partners presumably expected that all contributions would be treated alike. Despite the need for this change, however, the Draft has explicitly retained the rule requiring sharing of capital losses.

The Draft does make one much-needed change in section 40 by eliminating the so-called “dual priority” rule that gives partnership creditors priority.

162. By contrast, limited partnerships do normally make regular distributions. Accordingly, as discussed in the Draft Comment, ULPA § 804 (1985) provides for repayment of any such distributions that are owed at dissolution. Specifically, liability in respect of these distributions takes priority over other liabilities owed to partners.

163. See II Bromberg & Ribstein, supra note 82, at 6:17.

164. See Draft § 18(b) and Comment to Draft § 18.
against partnership property and individual creditors priority against the property of individual partners. This change aligns partnership law with bankruptcy law,165 which in all events controls in most insolvency situations.

c. Disposition of Liabilities to Predissolution Creditors

In a liquidation of the partnership business, UPA section 38(1) provides that the liabilities must be discharged. However, if the partnership business is continued or if the business is sold as a going concern, even if there is technically a winding up, the liabilities may not be discharged. UPA section 36 provides that without an agreement by the creditors, the mere fact of dissolution does not affect the partners’ liability for predissolution debts. UPA section 41 provides that any new partnership succeeding to the dissolved partnership’s business is liable for these debts either by expressly assuming them or if one or more of the predissolution partners continues the business as of right (as on a wrongful dissolution) or with the consent of the departing partner.

Draft section 31Z embodies the UPA rule that on winding up the partners can compel discharge of liabilities.166 Draft section 36 continues the UPA rule that dissolution alone does not affect the partners’ liability.

The Draft’s major change in this area concerns the liability of successor partnerships. Draft section 41 eliminates the rule that successor partnerships that include one or more partners in the predissolution partnership automatically assume predissolution debts if they succeed by right or by consent of the departing partner. The Draft “black letter” now provides only that if the new partnership consists solely of “third persons” who were not partners in the predecessor firm, it takes on predissolution liabilities only by a “promise” to pay these debts. The Draft Comment, which presumably reflects the intention of the Drafting Committee, states the rule that there is no automatic assumption where a new partnership consisting of one or more “original” partners takes over the business.

Under the Draft, if the firm dissolves and winds up through a going-concern sale without discharging debts, predissolution creditors can collect their debts only by pursuing the departing partners. This frustrates creditors’ expectations, since if there is a continuity of membership and continuation of the business the creditors would assume that the firm is unchanged.167 The creditors would have these expectations even if only one partner continued, because in the very small firm for which the partnership act is designed, each partner is important to the firm. This frustration of expectations is, of course, a problem for partnerships as much as for creditors, since creditors will charge an interest rate that reflects the

166. This duty to discharge emphasizes the discontinuity entailed in the liquidation right, since the partners’ power to insist on discharge can prevent sale of the partnership as a going concern.
insecurity of their debt. Pre-UPA courts respected creditors' expectations by
straining to find an assumption of liabilities by the postdissolution firm.166

The Draft should be changed in one of two ways. The first alternative would
be to define "dissolution" to occur only where the firm is completely liquidated
or where it is carried on by wholly new members.169 This approach eliminates
the problem of the carryover of liabilities since there is no "new" firm. If, on the
other hand, the Draft continues to provide for dissolution where the underlying
business is actually continued, it should not only reinstate the UPA's automatic
assumption, but also expand this assumption to include situations where the
partnership is continued wrongfully and without the consent of the departing
partner.170 There is no reason to require consent because assumption of liabili­
ties by the new partnership actually helps the departing partner by decreasing
her exposure to predissolution liabilities.

4. Buyout and Continuation of Firm

UPA section 38 provides that the partnership business may be continued after
a wrongful dissolution or partner expulsion, or by agreement of the parties.
UPA section 42 provides, subject to contrary agreement, for a buyout of the
departing partner or estate in this situation by the payment of the "value" of the
departing partner's interest. Section 38 modifies this right in the case of a
partner who wrongfully dissolved the firm: the partner must pay damages, loses
the right to share in the goodwill of the firm, and is entitled to indemnification
against liabilities. Departing partners continue to be liable for predissolution
debts under section 36 and can be bound for postdissolution debts to the extent
provided for under section 35.

The following subsections discuss the more important changes the Draft
makes in the rights of departing partners.171

a. Valuation of Partner's Interest

Draft section 32 specifies the method of determining the value of the depart­
ing partner's interest: it is the greater of liquidation or going-concern value, in
either case on the basis of what an informed and willing buyer would pay a

169. See Ribstein, supra note 5, at 425. The Draft Comment points out that this approach is
"awkward and confusing" because the partnership does not dissolve even if it has been terminated.
This apparently refers to id. at 424, which provides for termination on completion of winding up.
This problem can be resolved by eliminating the concept of termination (see Draft § 30) and
providing that the partnership continues until it is dissolved as specified in the statute.
170. See II Bromberg & Ribstein, supra note 82, at 7:180-7:181. This change was adopted in
171. While other relevant provisions are largely unchanged in substance, the fact that the Draft
now provides for partner buyout without there necessarily being a dissolution of the firm has
necessitated recasting of some of the UPA provisions to provide for rights of partners withdrawing
from nondissolving partnerships. For example, Draft § 35X now specifies the partners' power to
bind after a partner withdrawal that does not cause dissolution.
willing seller. This articulation adds little. "Liquidation" means, simply, sale. What productive assets can be sold for necessarily depends on how they are to be used—that is, their "going-concern" value. Thus, the Draft's attempted distinction between these terms undoubtedly will confuse the courts. Unless the Draft can offer more helpful language, it would be better to maintain continuity with the cases interpreting "value" under UPA section 42.

**b. Postdissolution Compensation**

UPA section 42 gives the departing interest the right to choose between a share of profits or interest for the period between dissolution and final settlement. Draft section 32(b) provides that the departing partner or estate is entitled to interest at a specified rate and, where "capital is a material income-producing factor," to "regularly scheduled distributions" which are credited to the amount due the former partner.

This provision greatly reduces the rights of the departing partner. Because the "regularly scheduled distributions" are credited to what is in any event owed the departing partner, the Draft essentially gives the departing interest only a statutory rate of interest as postdissolution compensation. By contrast, UPA section 42 lets the withdrawing partner elect between profits and interest after waiting to see which is more. This is intended both to hasten settlement and to compensate the former partner for use of her assets by the firm and continued exposure to postdissolution liabilities between the time of dissolution and the time of payment. The profits-or-interest election differs from fixing an interest prospectively to reflect the risk-adjusted time value of money. It obviously differs vastly from a fixed statutory rate of interest. Since the UPA rule is backed by sound policy, the Draft Comment should at least explain why the rights of departing partners are being so drastically reduced.

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172. The cases have adopted the hypothetical sale approach. See Chapman v. Dunnegan, 665 S.W.2d 643 (Mo. App. 1984); In re Brown, 242 N.Y.1, 150 N.E. 581 (1926).

173. This confusion is evident in the corporate appraisal rights cases that require the "net asset value" component of "fair value" to be determined on the basis of what a third party would pay for the assets on liquidation (see Bell v. Kirby Lumber Corp., 413 A.2d 137 (Del. 1980); Poole v. N.V. Deli Maatschappij, 243 A.2d 67 (Del. 1968)); yet exclude consideration of the investment value of the assets even if this is an important determinant of what the third party would pay (see Francis I. DuPont & Co. v. Universal City Studios, 312 A.2d 344 (Del. Ch. 1973), aff'd, 334 A.2d 216 (1975)).

174. Draft § 4(b) defines "interest" as the statutory rate.

175. The Draft does not define "regularly scheduled." It draws the "capital is a material income-producing factor" from tax law. For a criticism of the use of tax terms in the partnership statute, see supra text accompanying notes 29–32.

176. See Moseley v. Moseley, 196 F.2d 663 (9th Cir. 1952); Casida v. Roberts, 51 Cal. 2d 583, 337 P.2d 829 (1959); Wikstrom v. Davis, 211 Or. 254, 315 P.2d 597 (1957). This follows from the fact that no time for the election is specified in the statute.

177. See II Bromberg & Ribstein, supra note 9, at 7:135.
c. Indemnification

Draft section 32(e) clarifies the right of the withdrawing partner to be indemnified against partnership liabilities. Specifically, the partner is indemnified against only those liabilities that reduced the amount paid for her interest. This improves on the muddled indemnification provisions in UPA section 38. These provided no indemnification for rightfully withdrawing partners, provided for a "discharge" of unspecified scope for expelled partners, indemnified wrongfully withdrawing partners "against all present or future liabilities" and "released" these partners from "existing liabilities."178

d. Payments to Wrongfully Dissociating Partners

The only important change the Draft makes in the rights of partners who wrongfully dissociate is that, unlike UPA section 38(2), Draft section 32(f) does not deny these partners a share in the partnership's goodwill. The UPA rule should have been retained. The goodwill denial supplements the deterrent effect of damages for wrongful withdrawal, which are very difficult to determine, and gives the benefit of the doubt to the nonwrongful partners as to the more speculative elements of the value of the partnership.179

VII. CONCLUSION

In general, the Draft includes many improvements over the original law. But this conclusion must be qualified in two critical respects. First, the Draft makes several changes, such as those regarding the existence of partnership, that are not improvements and that are likely to cause costly confusion. In light of these changes, it is not clear that the benefits of the Draft exceed its costs. Second, the drafters must be criticized for not having made long overdue changes in the UPA. In particular, the drafters have missed a critical opportunity to eliminate the concept of dissolution at will. In short, while much work has been done, there is much left to do.

178. See id. at 7:130-7:133. Ribstein, supra note 5, at 421, recommends more comprehensive indemnification. The more limited indemnification provided for in the Draft is advocated in Hillman, Law Firms and Their Partners: The Law & Ethics of Grabbing and Leaving, 67 Tex. L. Rev. 1, 55, n.277 (1988).

179. See II Bromberg & Ribstein, supra note 82, at 7:123. These considerations are not adequately taken into account in Hillman, supra note 101, at 552-55 (the source quoted in the Draft Comment).
Mr. Lane Kneedler  
Office of Attorney General  
101 N. Eighth Street  
Richmond, Virginia 23219  

Re: Revised Uniform Partnership Act --  
Section 21 (Partner Accountable as Fiduciary)  

Dear Mr. Kneedler:  

I am the Chair of an Ad Hoc Committee (the  
"Subcommittee") of the ABA Partnership Committee (Section of  
Business Law) whose responsibility is to review and comment on  
the various drafts of the Revised Uniform Partnership Act. We  
recently completed two days of meeting and discussion in  
Washington, D.C. Our focus during those two days was on two  
principal parts of the RUPA: (1) Section 21 dealing with  
fiduciary responsibilities; and (2) the "break-up" provisions.  
The purpose of this letter is to summarize the discussions and  
recommendations concerning Section 21. We have scheduled another  
meeting in early January at which time we will continue, and  
hopefully conclude, discussion of the break-up provisions. We  
intend to provide you a detailed and complete report of those  
discussions prior to the February meeting of the Drafting  
Committee.  

Our Subcommittee is composed of members of the  
Partnership Committee who are practicing attorneys specializing  
or devoting a substantial part of their work to partnership  
transactions, as well as professors who teach in the area. The  
attorneys participating on this Subcommittee are from a number of  
states all across the country, and they have all been involved in  
numerous partnership transactions. Thus, we feel the consensus  
recommendations that are adopted are probably a good indication  
of what the business people who are actually in partnerships  
xpect and desire as rules governing their internal  
relationships. The constant reference point in our discussions  
is what we believe business people would expect to be the  
"default" rules in the absence of an agreement to the contrary,  
as opposed to an attempt to prescribe "protection" rules.
Our approach to evaluating the draft RUPA is particularly appropriate, we believe, when analyzing a section as sensitive as Section 21, having to do with "fiduciary duties" of the partners. We conducted our discussions against the background of a growing number of cases containing very broad, generalized statements which can be read to equate a general partner's fiduciary responsibilities with those of a trustee. Since there are questions as to whether fiduciary duties can ever be waived, practicing attorneys find themselves in the frustrating position of being unable to advise sophisticated businesses on basic issues. For example, may a general partner who has made a mortgage-backed loan to the partnership foreclose in the event of a default? May a majority of the general partners elect to dissolve a partnership (assuming no agreement to the contrary) if their purpose is to rid themselves of a partner who is no longer desirable in the business? We believe that the present state of case law in the area of partner fiduciary duties leaves these and many other questions unanswerable, at least with the degree of certainty business people expect.

An issue that was presented at our discussions in Washington was whether the same standards of fiduciary duties would apply to general partners in a general partnership as should apply to the general partners of a limited partnership. Convincing arguments can be made that in a general partnership the duties should be higher because, for example, the partners have the ability to create liabilities for each other. Likewise, convincing arguments can be made that the fiduciary duties of a general partner in a limited partnership should be higher than in a general partnership because, for example, the limited partners who are excluded from management have no effective way to protect themselves. Because of time limitations, and because we believe the issue has not received sufficient consideration by the Drafting Committee, we conducted our discussions on the assumption that the rules we would propose would be those applicable to general partners vis-a-vis each other in a general partnership. Thus, our comments below may not apply, and may not represent a consensus of our Subcommittee, if Section 21 would also apply in the limited partnership context.

The issue discussed in the preceding paragraph led to some discussion of the question whether it is appropriate to "de-link" RUPA and RULPA. Again, because of time limitations, and because none of our members was willing to formulate a position on the subject, our only recommendation is that the Drafting
Committee carefully study whether the two acts should be de-linked and, if so, what changes to RULPA should be recommended at the time RUPA is promulgated to the states. However, having raised this issue, we feel we now have a responsibility to study it further and we do intend to provide the Drafting Committee with our analysis at a later date.

Enclosed with this letter is a proposal for Section 21 as finally agreed to by our Subcommittee. There are two principal concepts that bear discussion and comparison with the current RUPA draft. These are: (i) recommended deletion of paragraph (a) in the draft RUPA concerning a duty of good faith and fair dealing; and (ii) a suggestion for a "standard of care."

Based upon considerable discussion, we concluded that a duty of "good faith and fair dealing" would be misplaced in Section 21. We were convinced that this is not a "fiduciary duty." It is a duty which is found in basic contract law, as well as the law of principal and agent. Some states, such as California, imply a very strong duty of good faith and fair dealing in all contractual relationships; other states, such as Delaware, clearly distinguish a contract duty of good faith and fair dealing from fiduciary duties. The trend to confuse or combine these two concepts has led to the difficulties lawyers have advising clients who have problems such as those described in the examples on page two. If a duty of good faith and fair dealing is a fiduciary duty, can one ever exercise a foreclosure right against his or her partner? Perhaps the Drafting Committee will ultimately decide to include the concept of a duty of good faith and fair dealing somewhere in RUPA. However, we believe it would be misplaced and mislabeled if it were to be part of Section 21. The consensus of our Subcommittee was that it should continue to be implied from other areas of common law as in the past, and not made a specific part of RUPA.

The proposed "standard of care" may, at first, appear controversial. However, we went around the table and found all but universal acceptance of the proposed standard when applied to ourselves as partners in a business. That is, "I get the benefit of my partners' above-standard performance, and I share the downside of below-standard performance -- so long as it is not grossly negligent or wilful misbehavior." Moreover, we all agreed that we would strongly recommend such a standard of care for our clients -- presumably knowledgeable business people for the most part. (One participant in our discussions qualified his
support by reserving judgment concerning his son who may be a partner in a musical performance group.)

In support of the "gross negligence" standard of care was our agreement that none of us would expect our respective partnerships to have the right to require an individual partner who causes a loss by "missing a statute of limitation" (clearly negligence) to reimburse the partnership for its malpractice loss. Likewise, when John and Joan operate a store together, Joan leaves a soaped up floor to help a customer, another slips and falls -- both John and Joan should bear the negligence loss as partners. Moreover, if the reason there was an economic loss was because John forgot to renew the insurance, this is also a mistake borne by the partnership -- not John. Of course, if Joan had reminded John (once? twice? several times?) and John still did not renew the insurance, at some time John's behavior would cross over to gross negligence and provide Joan a remedy.

One final item warrants some explanation. While we agree in the main with the current draft RUPA that old UPA 21(a) should be retained virtually intact, we believe the duty of loyalty should not apply to the formation stage of the partnership. Thus, in our suggested formulation we have deleted that word from our proposed Section 21(b).

During formation of a partnership the parties are not partners; in fact, they are negotiating what should be an arms-length contract. Their relationship at this stage would more properly be characterized as adversarial; each is trying to strike the best deal for himself or herself for what is presumed will be a long-term contractual relationship. At this stage "puffing," stress on positives, and avoidance of mentioning or dwelling upon weak points, should be expected. It is characteristic of all arms-length negotiations. We recognize that the information exchange could cross over reasonable bounds permissible in contract negotiations (e.g., failure to disclose a material fact concerning one's ability to participate as a partner; failure to disclose one had just purchased at a much lower price a property to be contributed to the partnership, etc.). However, these bounds should be tested by a fraud standard. There is no more justification in implying a "fiduciary duty of loyalty" to these negotiations than there would be in negotiations for a long-term supply contract.

We trust you and the Drafting Committee will find these comments useful and a sufficient explanation of how we arrived at...
Mr. Lane Kneedler
December 7, 1990
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our proposed version of Section 21. If there are questions or you would like us to expand on any of the above, please feel free to contact the undersigned either personally or through any of the Drafting Committee members.

Very truly yours,

Gerald V. Niesar
Chairsman, Ad Hoc Subcommittee on RUPA

Enclosures: Proposed Draft Section 21 Distribution List
Section 21 (PARTNER FIDUCIARY DUTIES)

(a) A partner's fiduciary duties are the duty of loyalty and the duty of care set out in this section.

(b) A partner has a duty of loyalty to the partnership and other partners that is limited to the following:

1. To account to the partnership; and hold as trustee for it any profit or benefit derived by the partner without the informed consent of the other partners, from any transaction connected with [the formation], conduct or winding up of the partnership or from any personal use of partnership property;

2. To refrain from dealing with the partnership as, or on behalf of, an adverse party without the informed consent of the partnership; and

3. To refrain from competing with the partnership without the informed consent of the partnership.

This Section 21(b) does not preclude a partner from purchasing the assets of the partnership in a foreclosure sale or upon liquidation of the partnership.

(c) A partner has a duty of care to the partnership and the other partners which is satisfied unless the partner's conduct constitutes gross negligence or intentional misconduct.

(d) A partner shall not be deemed to have violated the duty of loyalty or the duty of care solely because the partner's conduct was in furtherance of the partner's individual interest.

(e) This Section 21 applies to the personal representatives of a deceased partner and the legal representative of any other partner acting in the winding up of the affairs of the partnership as the legal representatives of the last surviving partner.
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Memorandum

To: RUPA Drafting Committee
   Advisors, Interested Persons
From: Don Weidner
Re: Possible Reorganization of RUPA
Dated: December 11, 1990

Part A of this memorandum is a redlined version of my memorandum of October 31, discussing the reorganization of the breakup rules. Part B contains a redraft of the first portion of § 31Y.

Part A

We need to reorganize and renumber RUPA. The breakup rules have been rewritten more than any other portion of the statute and clearly need to be put in a different sequence. They involve Article VI of the UPA, entitled "Dissolution and Winding Up," which includes UPA §§ 29-43. Consider the possible organization suggested below. [Although the exact statutory language is not used, certain changes to statutory language are suggested in brackets. Changes Redlined in reflect a shift from "cessation of partner status" to "dissociation."]

ARTICLE VI

CESSION-OF PARTNER DISSOCIATION STATUS

§ 31. Events Causing the Dissociation Cessation of a Partner Status

A person-ceases-to-be-a partner dissociates from a partnership upon any of the listed events.

§ 31X. Wrongful Dissociation Cessation-of-Partner Status

One-who-causes-a-wrongful-cessation A partner who dissociates wrongfully must pay damages, whether the dissociation cessation leads to a buyout or to a business windup.

§ 36. Effect of Dissociation Cessation-of-Partner Status on Partner's Existing Liability

Existing liabilities continue, whether there is a buyout or a business windup.

§ 39. Rights Upon Rescission of Partnership Agreement for Fraud or Misrepresentation
One induced into the partnership by fraud may rescind her membership.

§ 41(b), (d) and (e). Liability of Persons Continuing Business in Certain Cases

§ 41(b)--if all partners assign their interests to third persons who promise to pay the debts and who continue the business of the partnership, creditors of the partnership are creditors of the third persons continuing the business.

§ 41(d)--the right of creditors to attack fraudulent transfers is unimpaired.

§ 41(e)--the use of the name of a deceased partner does not of itself make the individual property of the deceased partner liable for any subsequent debts.

ARTICLE VII
BUYOUTS

§ 29X. Dissociation Evasion that Does Not Cause A Winding Up-of-Partnership-Business

If a cessation the dissociation of a partner does not cause a dissolution and winding up of the partnership business under § 31Y, the departing the partner who dissociates shall have a continuing relationship for the purpose of completing business undertaken while she was a member of the partnership with third parties and with the remaining partners as provided in Sections 31X, 36 and -- to --[the remaining sections of this Article].

§ 32. Buyout of Person Who Dissociates Ceases-to-Be-Partner When Partnership Business is Not Wound Up

If a person-ceases-to-be-a partner dissociates under § 31 but there is no § 31Y winding up, the partnership shall purchase the interest of the departing partner for its fair market value.

§ 35X. Power to Bind Partnership and Liability to Third Persons After Dissociation Evasion-of-Partner-Status

[If a person-ceases-to-be-a partner dissociates under § 31 but there is no § 31Y business windup],
the departing person is not liable for debts incurred after the cessation_dissociation. Nor does she have power to bind the partnership after the cessation_dissociation. There are limited exceptions for transactions that would have bound the partnership before the cessation_dissociation.

§ 41(a) and (c). Liability of Persons Continuing Business in Certain Cases

§ 41(a)--unless otherwise agreed, relations between a partnership and its creditors are unaffected by a dissociation_dissociation or a new admission.

§ 41(c)--partnership creditors have priority over partner being bought out.

ARTICLE VIII
BUSINESS WINDUPS

§ 29. [No]_Dissolution Defined [Unless Business Windup]

A partnership is dissolved only when a dissociation causes a business windup under § 31Y.

§ 31Y. Events Dissociations Causing Winding Up of Partnership Business

A partnership is dissolved and its business shall be wound up on the occurrence of any of the listed events_dissociations.

§ 30. Partnership-Continues-until Dissociation that Causes a Winding Up Completed

If the dissociation of a partner causes a winding up of the business under Section 31Y, the partner who dissociates shall have a continuing relationship with third parties and the other partners as provided in Sections 31X, 36 and -- to --[the remaining sections in this Article]. When there is a §-31Y-dissolution-and-commencement-of-winding-up-the-partnership-continues-for-the-purpose-of-winding-up-its-business--Until-termination-the-partners-are-associated-in-the-winding-up-of-the-partnership-business.

§ 31Z. Winding Up Partnership Business
§ 31Z(a) -- assets must be applied to discharge liabilities and any surplus used to pay in cash the net amount distributable to the partners.

§ 31Z(b) -- damages may be recovered from a partner whose wrongful conduct causes a winding up.

§ 33. Limitation on Authority of Partner After Event Causes Winding Up of Partnership Business

Except as necessary to wind up partnership affairs or complete unfinished transactions, an event causing a winding up under § 31Y terminates all authority to act for the partnership, (1) as among the partners, as provided in § 34, and (2) with respect to nonpartners, as provided in § 35.

[Is this short switchboard section necessary?]

§ 34. Liability of Partners to Co-Partners After Event Causes Winding Up of Business

§ 34(a) -- Each partner is liable for her share of any liability created by any partner acting for the partnership, after a winding up has been caused under § 31Y, if (1) the act is appropriate to wind up or complete unfinished transactions [or] (2) [the partnership is bound under § 35 by an act that would have bound the partnership if] a winding up had not been caused.

§ 34(b) -- [Provided, however,] that no partner is liable to another partner who [inappropriately binds the partnership] with knowledge that a winding up has been caused.

§ 35. Power of Partner to Bind Partnership to Third Persons After Event Causes Winding Up of Business

§ 35(a) -- in general, after a winding up is caused under § 31Y, a partner can bind the partnership (1) by any act appropriate for winding up partnership affairs or completing unfinished transactions, (2) to certain persons with no notice that a winding up had been caused, by any transaction that would bind the partnership if no winding up had been caused.

§ 35(b) -- the § 35(a)(2) liability of a silent partner is nonrecourse.

§ 35(c) -- there are certain exceptions to the § 35(a) general rules for the creation of partnership
liabilities. [In particular, do we want to con-
tinue the § 35(c)(2) rule that the partnership is
never bound if the partner becomes a debtor in
bankruptcy?]

§ 35(d)—the § 16 rules on persons held out as
partners apply even after a winding up is caused.

§ 37. Right to Wind Up

§ 37(a)—persons who have not wrongfully caused the
winding up under § 31Y may wind up.

§ 37(b)—steps that may be taken by persons winding
up.

§ 40. Rules for Distribution Upon Winding Up

Upon a winding up, partnership assets must be ap-
pied to discharge partnership liabilities in the
prescribed order.

§ 43. Accrual of Actions

The right to an account of a partnership interest
shall accrue as against the winding up partners or
the surviving partners or person or partnership
continuing the business, at the date of cessation
de-partner-status dissociation. This right to ac-
count on cessation dissociation is independent of
any right to account under § 22.

The intent of the above is to describe in a relatively complete
yet brief way the basic architecture of the breakup rules.

Part B

The beginning of Section 31Y could provide as follows:

SECTION 31Y. DISSOCIATIONS CAUSING WINDING UP
OF PARTNERSHIP BUSINESS.

A partnership is dissolved and its business
shall be wound up on the occurrence of any of the
following dissociations:

(1) on the giving of notice by one partner to
the partnership of that partner's express will to
withdraw as a partner, unless the partners, includ-
ing the withdrawing partner, have agreed that the
partnership is to continue for a definite term or
undertaking;
(2) notwithstanding Subsection (1) of this Section, if a partner dissociates in violation of the partnership agreement or as a result of other wrongful conduct or expulsion, if any other partner gives to the partnership, within 90 days of the dissociation, notice of that partner's express will that the partnership business be wound up;

* * *

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

(a) Subject to Section 35(c), after an event causing a winding up of the partnership business under Section 31 Y, a partner can bind the partnership except as provided in Section 35(e):

[This follows the "subject to . . . " formula used elsewhere in the Act.]

[The wording throughout this section would be smoother if we referred to "an event of dissolution" instead of "an event causing a winding up of the partnership business."]

(1) by any act appropriate for winding up the partnership affairs or business, including any act appropriate for completing transactions unfinished when the event causing winding up is caused occurs;

[It is the partnership business, not its affairs, that are to be wound up under the Act. Completing pending transactions is a part of the winding up process.]

(2) by the act of entering into any transaction that would bind the partnership if that act would have bound the partnership in the transaction if the winding up had not been caused, provided the other party to the transaction:

[The changes made here are to deal with the fact that a partner does not bind his partnership "by a transaction" but by entering into a transaction on behalf of the partnership -- as by signing an agreement. This would, of course, read better if we used the d-word, so that it read as follows:

"by the act of entering into any transaction if that act would have bound the partnership in the transaction if the dissolution had not occurred, provided the other party to the transaction:"

[What is a "transaction"? I assume it is not a tort but rather something entered into consensually, but wouldn't it be useful to define it that way? I propose the following:

"Transaction' means a contract or other arrangement involving the consent of two or more persons."

[If, however, a "transaction" is not a tort, what is the status of a person who is injured by a partner driving a partnership]
truck in the scope of the partnership's business, whether or not in connection with the winding up of that business? Presumably he should have a remedy against the partnership, whether or not he knew of the existence of the partnership. Accordingly, I propose the following for a complete revision of this prefatory language to clause (2):

"by any act that would bind the partnership if that act would have bound the partnership if the winding up had not been caused, provided that, if the act in question is that of entering into a transaction, then the partnership shall be bound in the transaction only if the other party to the transaction:"

(i) had extended credit to the partnership within two years before the event causing the winding up and had no notice that a winding up had been caused; or

(ii) had not so extended credit but nevertheless had known of the partnership before the event causing the winding up and had no notice of the winding up, the fact of the winding up having not been advertised in a newspaper of general circulation in the place (or in each place if more than one) where the partnership business was regularly carried on.

(b) The liability of a partner under Section 35(a)(2) must be satisfied out of partnership assets alone when the partner. Notwithstanding Section 15(c), a claimant under Section 35(a)(2) may not proceed against the assets of a partner if, before the event causing the winding up, such partner had been:

[This change follows the format of Section 15(b) and solves the problem inherent in the existing language that there is no antecedent in Section 35(a)(2) to the phrase "liability under Section 35(a)(2)." The rewording here should also make it clearer that this provision covers any partner in the dissolved partnership, not just the one acting under Section 35(a) (indeed, the one acting is likely not to be protected because he would not meet the qualifications stated below).]

[If the idea expressed under clause (a)(2) above is accepted -- that we should divide the clause into two pieces, one dealing with transactions and the other dealing with torts and other non-transactional claims -- then this prefatory language to clause (b) should read as follows:

"Notwithstanding Section 15(c), a claimant claiming under Section 35(a)(2) with respect to a transaction may not proceed against the assets of any partner if, before the event causing the winding up, that partner had been:"]
unknown to the claimant as a partner to the person with whom the contract is made; and

so far unknown and inactive in the partnership affairs—business that the business reputation of the partnership could not be said to have been in any degree due to the partner's connection with it.

A partnership is in no case shall not be bound by an the act of a partner after an event causing a winding up of the partnership business:

[If we split this section into a transactional and a non-transactional component as suggested above, then this prefatory language would read as follows:

"A partnership shall not be bound by a partner's act of entering into a transaction after an event causing a winding up of the partnership business:"

[For instance, with respect to clause (c)(1), below, I see no reason why a person damaged by a tort committed by a partner doing an act that would otherwise bind his partners should be without a remedy against the partnership simply because the business pursued by the partnership is illegal.]

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

[If we were more willing to use the term "dissolution," this section would read more easily as:

"if the dissolution occurred pursuant to Section 31Y(6)."

if the partner has become was a debtor in bankruptcy at the time of the act; or

[There needs to be some temporal relationship between the act in question and the status of bankruptcy. This version assumes that the partnership should be bound by a partner's act that would bind the partnership under Section 35(a), even if thereafter the partner becomes bankrupt.]

[If this clause includes torts as well as "transactions," why should a person injured by a partner's tort lose a remedy against the partnership just because the partner is bankrupt?]
(3) if the partner has no actual authority to wind up the partnership affairs, except by business, unless the act was that of entering into a transaction with one who:

[The qualifier "actual" is necessary, because the partner will always have apparent authority to do acts within the scope of the partnership business with respect to those who do not know of any limitations on his authority.]

(i) had extended credit to had entered into a transaction with the partnership within two years before the event causing the winding up and had no notice that the winding up had been caused; or

(ii) had not so extended credit, entered into a transaction with the partnership within two years before the event causing the winding up but nevertheless had known of the partnership before the such event causing the winding up and, having and had no notice of winding up that the winding up had been caused, the fact of the winding up had not having been advertised in the manner provided in Section 35(a)(2)(ii) for advertising the fact of winding up in Section 35(a)(2)(ii).

(d) This Section does not affect the liability under Section 16 of a person who after an event causing 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 incurred pursuant to Section 16.

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

(a) A person who ceases to be a partner under Section 31 may neither shall not be personally liable as a partner for any partnership debt obligation incurred, nor have the power to bind the partnership in any transaction, after the cessation of partner status, unless the transaction is one that would bind the partnership before such cessation and either the other party to the transaction:

[The addition of the phrase "in any transaction" should be made whether or not Section 35 is split as suggested above to handle "transactions" and torts, because the phrase "unless the transaction" in the last clause otherwise has no antecedent.]

(1) the obligee or the other party to the transaction, as the case may be, creditor of was a party to a transaction with the partnership within two years before such time cessation and in either case, had no notice of the person's ceasing to be a partner; or
(2) though—although the obligee or the other party to the transaction, as the case may be, had not so extended credit, not been a party to a transaction with the partnership within two years before such cessation, such obligee or party had nevertheless known, before the such cessation of partner status, that the person was a partner and having had no notice of the cessation, the fact of cessation had not not having been advertised in a newspaper of general circulation in the place (or in each place if more than one) where the partnership business was regularly carried on.

(b) The liability of a partner under this Section must be satisfied out of partnership assets alone when a claimant under Section 35X(a)(2) may not proceed against the assets of any partner if such the partner, before the cessation of partner status, had been:

(1) unknown as a partner to the person with whom the contract is made had not been known to the claimant to be a partner; and

(2) had been so far unknown and inactive in the partnership affairs business that the business reputation of the partnership could not be said to have been in any degree due to the partner’s connection with it.

* * * * * * *

SECTION 41. LIABILITY OF PERSONS CONTINUING THE BUSINESS IN CERTAIN CASES.

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

(b) If all of the partners or their respective legal representatives assign their interests in the a winding-up partnership to one or more third—persons who promise to pay the debts—obligations of the winding-up partnership and who continue the business of the winding-up partnership, creditors—obligations of the winding-up partnership are also creditors of obligations of the person or partnership persons continuing the business and, if such persons continue such business in partnership, are obligations of that partnership.

[The term "winding-up partnership" is not used anywhere else in the Act. Surely this is a case for use of the phrase "dissolved partnership."]

(c) If the business of a partnership is continued by one or more persons after a person ceases to be a partner therein, the creditors—claimants against the partnership, as against the separate creditors the retiring or deceased partner or the representative of the deceased partner claimants of the person ceasing to be a partner, have a prior right to any claim of the retired partner or the representative of the deceased partner such person against the person or partnership persons continuing the business, on account of the retired or deceased partner’s interest that the person ceasing...
to be a partner had in the partnership or on account of any consideration promised for that interest.

[Where does the concept of "retirement" or death come from? The phrase is "cessation of partner status."]

(d) This Section does not modify any right of creditors—claimants to set aside any assignment on the ground of fraud.

(e) The use, by the any person or partnership—persons continuing the business of a partnership after the death of a partner, of the partnership name—or the name of a deceased partner as part thereof, does not of itself make the individual property of the deceased partner liable for any debts contracted by—obligations of such person or—partnership or persons.
MEMORANDUM

TO: Gerald V. Niesar
FROM: Martin I. Lubaroff
RE: Outline of Possible Areas of Linkage between Delaware Revised Uniform Limited Partnership Act ("DRULPA") and Delaware Uniform Partnership Law ("DUPL")
DATE: January 7, 1991

I. Direct Statutory Linkage - The following provisions in the DRULPA expressly refer back to the DUPL:

A) §17-106 - Nature of business permitted

1) DUPL provisions linked to §17-106:
   a) §1502(2) - Definition of "business"
   b) §1506(a) - Definition of "partnership" as a for-profit association

B) §17-403 - General powers and liabilities of a general partner

1) DUPL provisions linked to §17-403(a) (rights, powers and restrictions):
   a) §1509 - Partner agent of partnership as to partnership business
   b) §1510 - Conveyance of real property of the partnership
   c) §1518 - Rules determining rights of partners
      i) §1518(1) - "Each partner shall be repaid his contributions, whether by
way of capital or advances to the partnership property ...."

(ii) §1518(5) - "All partners have equal rights in the management and conduct of the partnership business."

d) §1521(a) - Partner accountable as a fiduciary

e) §1522 - Right to an account

f) §1539 - Rights where partnership is dissolved for fraud or misrepresentation

g) §1540(6) - Rules for distribution

h) §1543 - Accrual of actions

2) DUPL provisions linked to §17-403(b) (liability):

a) §1515 - Nature of partner's liability

b) §1517 - Liability of incoming partner

c) §1518 - Rules determining duties of partners

(i) §1518(1) - "Each partner ... must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."

d) §1534 - Right of partner to contribution from copartners after dissolution
e) §1536 - Effect of dissolution on partner's existing liability
f) §1540(4), (7) and (9) - Rules for distribution

C) §17-1105 - Cases not provided for in this chapter
1) DUPL provisions that fill in gaps in DRULPA:
   a) §1523 - Continuation of partnership beyond fixed term
   b) §1539 - Rights where partnership is dissolved for fraud or misrepresentation
   c) §1540(1), (8) and (9) - Rules for distribution
   d) §1541 - Liability of persons continuing the business in certain cases
   e) §1542 - Rights of retiring partner or estate of deceased partner when the business is continued

II. Inferential Statutory Linkage - The following provisions in the DUPL add gloss to or fill gaps in the DRULPA:
A) §1502 - Definitions
   1) §1502(1) - Definition of "bankrupt"
   2) §1502(3) - Definition of "conveyance"
   3) §1502(5) - Definition of "real property"
B) §1503 - Interpretation of knowledge and notice
C) §1504 - Rules of construction
   1) §1504(2) - "The law of estoppel shall apply."
2) §1504(3) - "The law of agency shall apply."

D) §1506 - Definition of partnership

1) §1506(b) - "[T]his chapter shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith."

E) §1507 - Rules determining the existence of a partnership

1) §1507(4) - "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business ..."

F) §1508 - Partnership property

G) §1509 - Partner agent of partnership as to partnership business

H) §1511 - Partnership bound by admission of partner

I) §1512 - Partnership charged with knowledge of or notice to partner

J) §1513 - Partnership bound by partner's wrongful act

K) §1514 - Partnership bound by partner's breach of trust

L) §1518 - Rules determining rights and duties of partners

1) §1518(2) - Indemnification - "The partnership must indemnify every partner in respect of payments made and personal liabilities
reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property."

M) §1521 - Partner accountable as a fiduciary
N) §1522 - Right to an account
O) §1532 - Dissolution by decree of court

III. Linkage Occurring in Case Law - The following judicial decisions discuss linkage between the DUPL and the DRULPA:

B) PC Tower Center, Inc. v. Tower Center Development Associates Limited Partnership, C.A. No. 10788 (Del. Ch. June 8, 1989) - §17-802 and §1532
C) Boxer v. Husky Oil Co., 429 A.2d 995 (Del. Ch. 1981) - §1709 and §1521
D) Others
January 25, 1991

Mr. Lane Kneedler
Office of Attorney General
101 N. Eighth Street
Richmond, Virginia 23219

Re: Revised Uniform Partnership Act
Sections 29-32
(Dissolution and Disassociation)

Dear Mr. Kneedler:

This letter will serve as the report of the meeting on January 11 and 12, 1991 of the Ad Hoc Committee (the "Subcommittee") of the ABA Committee on Partnerships and Unincorporated Business Organizations (Section of Business Law) which is reviewing the draft of the Revised Uniform Partnership Act. In accordance with the Schedule I outlined in my letter to you dated December 7, 1990, the Subcommittee spent considerable time at this most recent meeting, as it had in previous meetings, analyzing and discussing the "break-up" provisions for general partnerships which are contained in the July 1990 RUPA Draft. This report is devoted solely to Sections 29 through 32 of the Draft RUPA.

As we communicated to you previously, we are aware that the NCCUSL Drafting Committee has proposed that RUPA be primarily a default statute, so that, except for a very few provisions, the rules contained in RUPA can be varied by agreement among the partners. Thus, as always, our recommendations are based upon what we believe business people (a broad range of whom have been clients of members of the Subcommittee) would expect to be the rules absent an agreement to the contrary. A very helpful reference point for this analysis has been informal surveys of how informed business partners most often resolve these issues in partnership agreements drafted with the assistance of counsel.

We are generally agreed that the RUPA Draft break-up rules represent a significant step in the right direction by eliminating the requirement that a dissolution always occur when a partner leaves a partnership. As I advised Harry Haynsworth, who as you know is the ABA's liaison to
your Committee, by letter dated February 22, 1990, we also agree that it is useful and meaningful to retain the term "dissolution" in the "break-up" provisions. The new meaning ascribed by Draft Section 29 seems appropriate. A partnership dissolves only when an event under Section 31Y requires the winding up of the partnership. Thus, the traditional and familiar usage is retained: an event causes dissolution of the partnership, and upon dissolution, the partnership commences a winding-up phase which results in the liquidation of the partnership (which may include sale of the business as a going concern). The change from prior law is that the partnership may continue notwithstanding certain partner disassociations.

As you may have noticed, we disagree with the choice of the term "dissociation" to describe a partner's withdrawal, removal or other departure from a partnership. The Subcommittee believes that the more commonly used term is "disassociation," since a partnership is formed by the association of persons.

We also believe that the term dissolution, since it is being retained, should be used, where appropriate, throughout the break-up provisions. For example, Section 29X could be entitled "Disassociation That Does Not Cause A Dissolution" and the statute could more simply read: "If the disassociation of a partner does not cause a dissolution of the partnership under Section 31Y, the relationship between the partner who disassociates with the remaining partners and with third parties shall be as provided in Sections ______." This represents only minor modifications to the redraft of this Section as proposed in Don Weidner's memo to your Committee dated December 11, 1990 (the "Weidner Memo"). Similarly, our only comment to Draft Section 30 as proposed in the Weidner Memo is that the term "dissolution" be reinserted wherever appropriate.

Substantially all of the Subcommittee's attention to the break-up provisions to date has been on Draft Sections 31Y and 32. The most important of these issues, determining when the disassociation of a partner should cause the dissolution of the partnership, will be discussed first.
The Subcommittee believes that following a partner disassociation either by "rightful" withdrawal (31Y(1)), or in violation of the partnership agreement or as a result of expulsion (31Y(2)), or when a partner "dies" (including entity "death") (31Y(3)), the default rule should be that the partnership should continue unless a majority of the remaining partners agree within 90 days after the partner disassociation to dissolve the partnership. If the partners do not decide to dissolve, then the sole right of the disassociating partner is to a buyout under section 32. If the partners do decide to dissolve, the dissolution is effective as of the date of partner disassociation, and the only right of the disassociating partner is to share in the distributions, if any, in dissolution and winding up.

The reason the Subcommittee believes that the default rule should be continuation rather than dissolution is that the remaining partners should be given the option to pay off the departing partner and continue the business together. The consensus view of the Subcommittee members is that business people will generally elect to continue the enterprise as the most likely course to realize the income necessary to discharge the partnership's liabilities. If the partners do not believe that the partnership can succeed without the departed partner, they can elect to dissolve.

We unanimously agreed that a partnership should continue to have the right to recover damages from a wrongfully disassociating partner. As a corollary to the proposed new rule allowing the partnership to continue after a disassociation, the Subcommittee recommends that any of the remaining partners, during the 90-day period following a partner disassociation as described in Sections 31Y(2) or (3), should be permitted to withdraw from the partnership, without being liable for any damages caused by their withdrawal. Thus, if partner A leaves ABCDEF Partnership on January 1 in violation of the partnership agreement because the departure is prior to the specific term for its existence, partners B and C have until the end of March to withdraw, without being liable for damages, even though their withdrawal without A's first withdrawal would be actionable. This example assumes that D, E and F want to continue the partnership. The Subcommittee's
reasoning is that since under existing law A's disassociation would cause a dissolution, B and C should have the right to disassociate without incurring damages. We also concluded that a business person would normally expect the right to leave a partnership following the departure of a person whom he or she may regard as a key partner.

The Subcommittee would not change the rule that the unanimous consent of the partners is required to dissolve a partnership before the end of a specific term or completion of an undertaking (31Y(4)), except when there is a disassociation by a partner. The Subcommittee believes that most business people would want the majority of remaining partners to have the right to dissolve the partnership following a wrongful disassociation, since the partner causing the disassociation, and thus the proximate cause for dissolution prior to the end of a specific term, is liable for damages to the remaining partners. Using the example from the previous paragraph, we believe that any three of B, C, D, E and F should be able to vote to dissolve the partnership following A's wrongful withdrawal. Similarly, a partner's death should also permit a majority of the partners to choose to dissolve, since the deceased partner's participation may have been viewed by a majority as crucial to the partnership's business. However, disassociation resulting from death of a natural person should not give rise to a partnership right to recover damages, even if the partnership is for a specified term.

The other section to which the Subcommittee devoted significant time during its most recent meetings was Draft Section 32, the "buyout" Section. The first comment is that the Subcommittee is strongly in favor of retaining the concept of "fair value" of a partner's interest in a partnership as opposed to the lengthy description of "fair market value" contained in Draft Section 32(a) and (b). The Subcommittee found the proposed language somewhat confusing and contradictory, and difficult to apply to several fact situations which were discussed. The consensus was that case history has illustrated a wide variety of approaches to valuation depending upon the partnership's business and the facts of the particular case. The formula included in the current draft of RUPA is
complicated, yet its application to specific situations is uncertain. Therefore, its inclusion would only restrict the ability of courts to determine an appropriate value without reducing litigation, and would increase the possibility of unfair results. The Subcommittee did conclude that the fair value of the partner's interest in the partnership should mean "in the partnership without the disassociating partner."

Secondly, the Subcommittee discussed and recommends for your consideration a somewhat modified procedure for payment under Draft Section 32(c) to the disassociating partner: we suggest that the partnership be required to make payment of fair value within 120 days after, together with statutory interest from, the date of disassociation. The disassociating partner can then accept payment without prejudice to his right to contest the determination of fair value. We would propose that the disassociating partner have 120 days from such payment date to commence an action to have a court adjudicate fair value. This mechanism, we believe, would provide at least some early payment to the disassociating partner and would also encourage a rapid resolution of the financial ambiguities affecting the partnership as a result of the disassociation. Finally, we would permit the court to award attorneys' fees and all litigation costs (including experts) to either party, solely in the court's discretion. Our reasoning here is that the risk of paying double attorneys' fees will encourage both sides to adopt reasonable negotiated settlement positions. As a corollary to this new rule, the Subcommittee was in favor of not requiring distributions to the disassociating partner from the partnership, as anticipated in some circumstances by Draft section 32(b). We believe there is a significant likelihood that whether a partnership was one "in which capital [was] a material income producing factor" could be subject to extensive debate, so that the clause would merely generate litigation with little offsetting benefit.

The third issue related to buyout discussed by the Subcommittee was indemnification under Draft Section 32(e). The Subcommittee believes that the disassociating partner should be indemnified against all liabilities. Under existing law, in a "rightful" disassociation, the
partnership would be dissolved and all liabilities would be discharged. In a wrongful disassociation, under UPA §38, if the partners want to continue the business they are required to indemnify the departing partner against "all present and future liabilities." The Subcommittee also was unsure how to evidence the "liabilities that have been taken into account." It seemed the better approach to require the continuing partners to take into account all liabilities, including the possibility of unknown or contingent liabilities, in determining fair value of the departing partner's interest. If they were unwilling to run that risk, they should elect to dissolve the partnership rather than continue it.

The final buyout issue relates to payment to a wrongfully disassociating partner under Draft Section 32(f). The Subcommittee strongly believes that payment should not be deferred and that the remedy of the remaining partners to seek damages against the departing partner is sufficient. The Subcommittee does suggest that the Commentary to the statute provide that, in determining damages to the partnership arising from a wrongful disassociation, it may be appropriate for the court to consider the cost of financing the buyout and any consequential damages, and that the court may award attorneys' fees and litigation costs (including experts) to either party in the court's sole discretion.

Our final comment for this report concerns Draft Section 31, which the Subcommittee has discussed, but not yet in detail. Certain of the members have proposed language and other technical changes, which may be reported to your Committee at a later date. However, the Subcommittee does concur in the recommendation of Professor Larry Ribstein with respect to Draft Section 31(1) to the effect that voluntary withdrawal by a partner should be by written notice. As Professor Ribstein notes in his recent article reviewing the Draft RUPA, written notice will eliminate the uncertainty as to whether and when a partner has withdrawn. And since the Subcommittee's proposals regarding continuation and buyout include a number of time periods triggered by withdrawal, it is essential that the partnership eliminate that uncertainty.
We sincerely hope you and your Committee will find these proposals helpful. If there are any questions or if you would like us to expand on any of the above, please feel free to contact the undersigned, or either of the two Subcommittee members who prepared the initial draft of this report, Alan Kailer (214-855-4361) or Lauris Rail (212-912-7439). As you are aware, the ABA liaison, Harry Haynsworth, attended our most recent meetings and should be able to provide further explanation of our reasoning and conclusions at your next meeting.

We understand from Dean Haynsworth that the Drafting Committee will have another meeting in late March. The Subcommittee will be meeting again on February 22-23 and I expect we will have a report on those discussions available prior to your March meeting.

Very truly yours,

Gerald V. Niesar
Chairman, Ad Hoc Subcommittee on RUPA
RUPA AD HOC COMMITTEE MEETING
January 11-12, 1991

SUMMARY OF RECOMMENDATION ON BREAK-UP PROVISION
(Votes indicated in cases where GVN had notes)

I. Disassociation v. Association. (Unanimous.)

II. Three types of disassociation have same process - partnership continues unless action taken to dissolve.

III. Multiple disassociations - 90-day window. Relate back. [This is only necessary in wrongful situation; therefore, it is probably the same as VII.]

IV. Disassociation rightful - only right is buyout right and indemnification.

V. If one partner wrongfully disassociates each other, partner has right to disassociate without violation of agreement. [Same as III and VII?] (Unanimous.)

VI. At any time in a partnership, except one for a specific term or specific undertaking, a majority can vote for dissolution. (Needed because of departure from old rule that each partner can cause dissolution at any time.)

VII. Where wrongful disassociation, others can now disassociate and that subsequent disassociation is not wrongful, so long as made within 90 days of the wrongful disassociation. (Same as V.) (Unanimous.)

VIII. Where there is a wrongful disassociation, it does not give individual other partners the right to dissolve.

(8 yes; 3 No (Keatinge, Beveridge, Duboff))

IX. Wrongful disassociation - even if partnership for term, etc. - majority can dissolve. (Unanimous.)

X. A wrongfully disassociating partner has right to get interest bought out less [expanded] damages, and the court having the discretion to award attorneys' fees and all costs. (Unanimous.)
XI. We do not agree with proposal that can hold payout for disassociating partner until the end of the partnership’s term.

XII. Death - even in partnership for a term or specific undertaking gives:

(A) Each partner right to "withdraw"
   10 yes No - Alan Kailer

(B) Majority right to dissolve
   9 yes; No - Rall; Abstain - Kailer

XIII. Any disassociation of a partner in violation of the agreement, except as a result of death of a natural person, shall give the right to the partnership to recover damages. (8 Yes; 2 No (Kailer, Keatinge))

[Do we still need to provide here, or in a comment, that a dissolution of a corporate g.p. (or other entity) is [may be] disassociation in violation of agreement?]

XIV. If a partner withdraws, not in violation of the agreement, the other partners shall have the right to elect to dissolve the partnership by majority vote of remaining partners, and if they do, for purposes of allocation among partners, the partnership will be deemed to have dissolved on date of withdrawal.
   (10 Yes; 1 No)

XV. Buyout Price: The fair value of the disassociated partner’s interest in the partnership, taking into account the fact that he/she has disassociated from the partnership. (Unanimous.)

[With comment that any further formulation will not be applicable to a general statute intended to apply to a large number of different types of partnerships.]

XVI. Harry has buy-out procedure recommendation.

Carried by 9 - Alan Kailer and Bob Keatinge abstained.

XVII. Indemnification - If buyout option is exercised, partnership must indemnify disassociating partner against all liabilities. (10 in favor?)

[Tradeoff for right to avoid dissolution and liquidation.]
Internal Governance

We unanimously agreed that attempting to insert "internal governance" provisions in RUPA would be a mistake.

Merger

We discussed mergers and noted that it may be desirable to have a merger mechanism. Harry Haynsworth said he will provide G. Niesar a copy of a survey he has done on various states' limited partnership merger provisions, and a copy of the list of issues he has identified for the NCCUSL drafting committee.